The Supreme Court of South Carolina

O R D E R

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who remain administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

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, 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.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 9, 2004

SUSPENSION
COMMISSION ON CLE & SPECIALIZATION
2003 REPORT OF COMPLIANCE
AS OF APRIL 1, 2004

Robert J. Cantrell
PO Box 2752
Anderson, SC 29622
(INTERIM SUSPENSION BY COURT)

Andrea F. DeBerry-Santos
2745 Suwanee Lakes Trail
Suwanee, GA 30024

Brigina Dicks-Woolridge
203 North 5th Avenue
Dillon, SC 29536
(INTERIM SUSPENSION BY COURT)

Rodney L. Foushee
PO Box 1599
Little River, SC 29566

Sam R. Haskell, Jr.
PO Box 2708
Sumter, SC 29154

Ronald W. Hazzard
618 Chestnut Rd., #106
Myrtle Beach, SC 29572
(INTERIM SUSPENSION BY COURT)

Jeffrey A. Keenan
603 N. Kings Highway
Myrtle Beach, SC 29577

Dirk J. Kitchel
943 Portabella Lane
Charleston, SC 29412
(INTERIM SUSPENSION BY COURT)

John P. Mann, Jr.
PO Box 10437
Greenville, SC 29603
(INTERIM SUSPENSION BY COURT)

Timothy V. Norton
PO Box 61255
North Charleston, SC 29419
(INTERIM SUSPENSION BY COURT)

Richard A. Veon
21 South 21st Street
Philadelphia, PA 19103

Suzanne Wells
203 Harry C. Raysor Dr., N
St. Matthews, SC 29135

M. Parker Vick
PO Box 2396
Spartanburg, SC 29304
(INTERIM SUSPENSION BY COURT)

Mitzi C. Williams
PO Box 1652
Savannah, GA 31402

ATTORNEYS SUSPENDED FOR NONPAYMENT OF 2004 LICENSE FEES AS OF APRIL 1, 2004

Annette E. Ball
150 Houston St.
Mobile, AL 36606-1432

Hans David Bengard
100 Wells St., Apt. 312
Hartford, CT 06103

James Leslie Bowman
P.O. Box 872
Gastonia, NC 28053-0872

Ava Latresha Boyd
719 Sixth St., SE., Apt A
Washington, DC 20003

Harry Philip Brody
Office of Capital Collateral Counsel
3801 Corporex Dr., #210
Tampa, FL 33619

Christopher Lynn Byerly
407 Iona St.
Fairmont, NC 28340

Christopher Stephen Danielsen
Diggs Danielsen, LLC
1700 Oak St., Ste. D
Myrtle Beach, SC 29577

Alexander Dawson
P.O. Box 1188
Graham, NC 27253

Robert George Fleischmann
P.O. Box 22797
Charleston, SC 29413

George A. Folsom
5207 Falmouth Rd.
Bethesda, MD 20816-2914

Rodney L. Foushee
P.O. Box 1599
Little River, SC 29566

Julia Ann Gold
Univ. of Washington School of Law
406 24th Ave., E.
Seattle, WA 98112

Miles L. Green, Jr.
878 Peachtree St., Unit 703
Atlanta, GA 30309

William C. Guida
10202 Amber Hue Lane
Las Vegas, NV 89144

Carter Durand Harrington
P.O. Box 61540
N. Charleston, SC 29419-1540

Frances Lyles Haseldon
2502 Longest Ave.
Louisville, KY 40204

Jeffrey Alan Keenan
Pavilack & Assoc., PA
P.O. Box 2740
Myrtle Beach, SC 29578

Angela Deese Marshall
P.O. Box 711
Sparta, NC 28675

James D. McKinney Jr.
17 Lander St.
Greenville, SC 29607-1621

Gerald Francis Meek
P. O. Box 2961
Fayetteville, NC 28302-2961

Kevin Louis Paul
Center for Capital Litigation
P. O. Box 11311
Columbia, SC 29211

Catherine W. Swearingen
RR1 Box 446
Pelham, TN 37366-9742

Suzanne Wells
Home Gold, Inc.
203 Harry C. Raysor Dr., N.
St. Matthews, SC 29135

John Burton West Jr.
Hull Towill Norman Barrett & Salley, PC
P.O. Box 1564
Augusta, GA 30901

Charles Peter Yezbak III
144 Second Ave. N, Ste. 200
Nashville, TN 37201

The Supreme Court of South Carolina

In the matter of William C. Guida, Respondent

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1978, William Craig Guida was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated January 23, 2004, Mr. Guida submitted his resignation from the South Carolina Bar. We accept Mr. Guida's resignation.

Mr. Guida shall, within fifteen (15) days of the issuance of this order, promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Guida shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of William C. Guida shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina
April 7, 2004

The Supreme Court of South Carolina

In the matter of John G. Roark, Respondent

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 5, 1976, John G. Roark was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated January 20, 2004. Mr. Roark submitted his resignation from the South Carolina Bar. We accept Mr. Roark's resignation.

Mr. Roark shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Roark shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of John G. Roark shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina
April 7, 2004

The Supreme Court of South Carolina

O R D E R

The attached certificate form is hereby approved for use with Rule 403, SCACR.

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

April 7, 2004
Columbia, South Carolina

The Supreme Court of South Carolina

CERTIFICATE

This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). The text of this Rule is printed on the back of this form. This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211, along with a filing fee of $25. Except for the signatures, all entries must be legibly printed or typed.

COURT OF COMMON PLEAS or FEDERAL DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

COURT OF GENERAL SESSIONS or U.S. DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

EQUITY TRIAL

Case Name:_____Date:_____ATTEST:_____
Name of Judge and Title:_____ Signature of Judge

FAMILY COURT

1.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

ADMINISTRATIVE HEARING

Case Name:_____Date:_____ATTEST:_____
Name of Presiding Officer and Title:_____ Signature of Presiding Officer

CERTIFICATION BY ATTORNEY

I, _____, hereby certify that I completed one-half of the credit hours needed for law school graduation prior to participating in and/or observing the trials or hearings listed on this form. I further certify that I have observed or participated in the above trials in accordance with the provisions of Rule 403, SCACR.

Signed this _____ day _____, 20_____. _____
SIGNATURE

Revised 4/7/2004

RULE 403
TRIAL EXPERIENCES

(a) General Rule. Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

(b) Trial Experiences Defined. A trial experience is defined as the:

(1) actual participation in an entire contested testimonial-type trial or hearing if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing or trial; or

(2) observation of an entire contested testimonial-type trial or hearing.

Should the trial or hearing conclude prior to a final decision by the trier of fact, it shall be sufficient if one party has completed the presentation of its case.

(c) Trial Experiences Required. An attorney must complete ten (10) trial experiences. The required trial experiences may be gained by any combination of (b)(1) or (b)(2) but must include the following:

(1) three (3) civil jury trials in a Court of Common Pleas, or two (2) civil jury trials in Common Pleas plus one (1) civil jury trial in the United States District Court for the District of South Carolina;

(2) three (3) criminal jury trials in General Sessions Court, or two (2) criminal jury trials in General Sessions plus one (1) criminal jury trial in the United States District Court for the District of South Carolina;

(3) one (1) trial in equity heard by a circuit judge, master-in-equity, or special referee in a case filed in the Court of Common Pleas;

(4) two (2) trials in the Family Court; and

(5) one (1) hearing before an Administrative Law Judge or administrative officer of this State or of the United States. The hearing must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

(d) When Trial Experiences May be Completed. Trial experiences may be completed any time after the completion of one-half (1/2) of the credit hours needed for law school graduation.

(e) Certificate to be Filed. The attorney shall file with the Supreme Court a Certificate showing that the trial experiences have been completed. This Certificate, which shall be on a form approved by the Supreme Court, shall state the names of the cases, the dates and the tribunals involved and shall be attested to by the respective judge, master, referee or administrative officer. A filing fee of $25 shall accompany the Certificate.

(f) Attorneys Admitted in Another State. An attorney who has been admitted to practice law in another state, territory or the District of Columbia for three (3) years at the time the attorney is admitted to practice law in South Carolina may satisfy the requirements of this rule by providing proof of equivalent experience in the other jurisdiction for each category of cases specified in (c) above. This proof of equivalent experience shall be made in the form of an affidavit which shall be filed with the Supreme Court. A filing fee of $25 shall accompany the affidavit.

(g) Circuit Court Law Clerks and Federal District Court Law Clerks. A person employed full time for nine (9) months as a law clerk for a South Carolina circuit court judge or as a law clerk for a Federal District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the family court trials.

(h) Appellate Court Law Clerks and Staff Attorneys. A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina or the South Carolina Court of Appeals may be certified as having completed the requirements of this rule by participating in or observing two (2) trials. Each trial must meet the requirements of (c)(1), (2) or (4) above, and only one (1) family court trial may be used. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see (c) above) must be submitted for the trials.

(i) Federal Bankruptcy Law Clerks. A person employed full time for nine (9) months as a law clerk for a Federal Bankruptcy Judge in South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) civil trials which meet the requirements of (c)(1) above, three (3) criminal trials which meet the requirements of (c)(2) above, and two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the trials.

(j) Approval or Disapproval. The Court will notify the attorney if the trial experiences submitted in the Certificate or affidavit have been approved or disapproved.

(k) Confidentiality. The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Clerk of the Supreme Court relating to the administration of this rule. The Clerk may, however, disclose whether an attorney's trial experiences have been approved and the date of that approval.

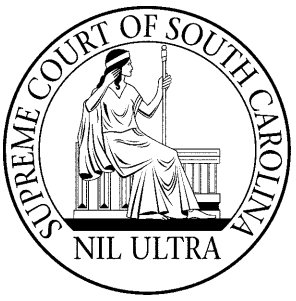
Notice of approval or disapproval of the trial experiences should be sent to:

NAME: _____

STREET OR P. O. BOX: _____

STATE and ZIP: _____

TELEPHONE NO. (Home)(_____)_____ (Work)(_____)_____



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 12, 2004

ADVANCE SHEET NO. 14

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3763-Fuller v. Blanchard	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3766-Craig v. Craig	Pending
3767-Hunt v. S.C. Forestry Comm'n	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2003-UP-736-State v. Ward	Pending
2004-UP-024-State v. Foster	Pending
2004-UP-086-State v. Rice	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-102-State v. Boan	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-111-Phillips v. Cassidy	Pending
2004-UP-114-State v. Bailey	Pending
2004-UP-118-State v. Watkins	Opinion Vacated 4/2/04

2004-UP-119-Williams v. Pioneer Machine	Pending
2004-UP-122-State v. Aiken	Pending
2004-UP-125-State v. Chronister	Pending
2004-UP-131-Ford v. Georgetown County	Pending
2004-UP-134-Herridge v. Herridge (Ginsberg)	Pending
2004-UP-135-Phillips v. Brown	Pending
2004-UP-137-State v. Drayton	Pending
2004-UP-138-State v. Ceasar	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-146-State v. Gainey	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v. Walters	Pending
2004-UP-186-State v. Randolph	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-211-State v. Anderson	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al.	Pending
3602-State v. Al-Amin	Pending
3606-Doe v. Baby Boy Roe	Pending

3607-State v. Parris	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending
3623-Fields v. Regional Medical Center	Pending
3627-Pendergast v. Pendergast	Pending
3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3640-State v. Adams	Pending
3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart Stores	Pending
3646-O'Neal v. Intermedical Hospital	Pending
3647-State v. Tufts	Pending
3649-State v. Chisolm	Pending
3650-Cole v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Pending
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3658-Swindler v. Swindler	Pending

3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
3671-White v. MUSC et al.	Pending
3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending

3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending

2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Bates v. Fender	Pending
2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-State v. Nellis	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending

2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending

2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending

2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Drusilla Kemp, Lenora Hickman, Cecil D. Rawlings, and William W. Rawlings, III, Respondents,

v.

Snoda Elizabeth A. Rawlings, and William L. Shipley, as Personal Representative of the Estate of William Wyatt Rawlings, Jr., Defendants,

Of whom Snoda Elizabeth A. Rawlings is, Appellant.

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

Opinion No. 25800
Heard March 4, 2004 - Filed April 5, 2004

REVERSED

Charles E. Carpenter, Jr., S. Elizabeth Brosnan, and Jeff Z. Brooker, III, all of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, for appellant.

Morris D. Rosen and Donald B. Clark, both of Rosen, Rosen & Hagood, LLC, of Charleston, for respondents.

JUSTICE MOORE: We are asked to determine whether the circuit court erred by affirming the probate court's decision finding appellant was not entitled to certain joint account funds following the death of her husband. We reverse.

FACTS

This case involves the construction of the will of Colonel William Rawlings (Col. Rawlings). Col. Rawlings' adult children (respondents) filed a complaint in probate court alleging constructive trust, accounting, and conversion, against appellant, who is Col. Rawlings' widow. William L. Shipley, the attorney who is the personal representative of Col. Rawlings' estate and who drafted the will, was named as a party to the action. Respondents sought to recover funds appellant withdrew from joint accounts she held with Col. Rawlings approximately a year before his death.

Appellant, who was 78 years old, and Col. Rawlings, who was 77 years old, were married in December 1988. Both Col. Rawlings and appellant had adult children from prior marriages. In 1990, Col. Rawlings executed his will with the assistance of Attorney Shipley. The pertinent portions of the will state:

> ITEM III: I have made adequate provisions for my beloved wife, SNODA ELIZABETH A. RAWLINGS, *as we have a joint or survivorship bank account or joint or survivorship savings account and she is entitled to and I give and bequeath all funds in said account* except for any Certificates of Deposit accounts which are not joint or survivorship accounts. . . .

(Emphasis added). Col. Rawlings left the residue of his property to respondents.

Attorney Shipley testified Col. Rawlings told him he had accounts solely in his name and joint accounts with appellant, none of which were identified by bank or by account number. Shipley testified Col. Rawlings stated his intent was to ensure appellant was well taken care of with all of his joint accounts if he predeceased her.

At the time the will was executed, Col. Rawlings and appellant had a joint checking and a joint savings account at C&S National Bank of South Carolina. When NationsBank acquired C&S Bank in 1991, those accounts were converted to NationsBank accounts. Subsequently, Col. Rawlings withdrew $80,000 from the NationsBank joint savings account and opened a joint brokerage account with appellant at First Union. In 1995, Col. Rawlings closed the First Union joint brokerage account and opened a new joint brokerage account with appellant at Wachovia. He also opened a joint checking account with appellant at Wachovia. He later closed the NationsBank accounts.

In 1997, Col. Rawlings, suffered a heart attack and was hospitalized. He was subsequently transferred to Roper Care Alliance and remained there for a month. When he returned home, he was cared for by appellant and paid sitters. A year later, when appellant could no longer care for Col. Rawlings at home, he was placed in the Charleston VA Hospital nursing facility. Appellant then instituted a guardianship/conservatorship action and, in February 1999, appellant was appointed to be Col. Rawlings' guardian and conservator.

Approximately two months before the petition was filed to declare Col. Rawlings incompetent, appellant, on the advice of counsel, withdrew over $130,000 from the Wachovia brokerage account she shared with him and deposited them into her individual Wachovia brokerage account. Thereafter, she placed $30,000 of those funds in Col. Rawlings' conservatorship account. Some of the funds were withdrawn as cash and have not been accounted for;

however, appellant indicated this money was spent on Col. Rawlings' medical care and home sitting care.

After a trial, the probate court found for respondents on the constructive trust and accounting claims, but declined to award any additional damages on the conversion claim. The probate court found Col. Rawlings bequeathed to appellant only the joint accounts existing at the time he executed the will and not the joint accounts existing at his death, that the bequest to appellant had adeemed, that the funds in the joint accounts opened after the execution of the will belonged to Col. Rawlings during his lifetime, and that appellant would be required to repay the funds she withdrew from those joint accounts to the estate.

The probate court imposed a constructive trust against appellant in the amount of $225,162.70. Attorney Shipley, as personal representative of the estate, was ordered to pay respondents' attorney's and accountant's fees out of the estate prior to appellant's exercising her right to an elective share pursuant to S.C. Code Ann. § 62-2-201 (Supp. 2003).[1] Appellant appealed to the circuit court, which affirmed the probate court.

ISSUE I

Did the probate court err by finding appellant was not entitled to the funds in the joint accounts under the will?

[1]Section 62-2-201 provides that if a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate.

DISCUSSION

Appellant argues the probate court erred by finding Col. Rawlings intended to leave only the joint accounts existing at the time he executed the will, *i.e.* the C&S Bank joint checking and savings accounts, to her.[2]

An action to construe a will is an action at law. Bob Jones Univ. v. Strandell, 344 S.C. 224, 543 S.E.2d 251 (Ct. App. 2001). When reviewing an action at law, on appeal of a case tried without a jury, our jurisdiction is limited to the correction of errors of law and this Court will not disturb the judge's findings of fact unless found to be without evidence that reasonably supports the judge's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

The cardinal rule of will construction is the determination of the testator's intent. Matter of Clark, 308 S.C. 328, 417 S.E.2d 856 (1992). A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction. *Id.* The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions. Allison v. Wilson, 306 S.C. 274, 411 S.E.2d 433 (1991). Every word or phrase in a will must be considered and, if practicable, effect must be given to them. *Id.* An interpretation that fits into the whole scheme or plan of the will is most apt to be the correct interpretation of the intent of the testator. Lemmon v. Wilson, 204 S.C. 50, 28 S.E.2d 792 (1944).

---

[2]Appellant makes a *res judicata* argument that the probate court had already ruled on the proper disposition of the proceeds of the accounts in its order in the guardianship/conservatorship action. However, the probate court did not in fact rule on how the funds should be distributed and specifically reserved ruling on that issue until a later date.

From the terms of the will, it appears the intent of Col. Rawlings in making the bequest to appellant was to make an adequate provision for her through their joint bank accounts. However, as the probate court found, extrinsic evidence is admissible to determine if there is a latent ambiguity in the will. If there is such an ambiguity, then the court may also consider extrinsic evidence to determine whether Col. Rawlings intended to leave appellant only the C&S Bank joint accounts they had at the time the will was executed or whether he intended to leave appellant the joint bank accounts that existed at the time of his death. *See* Bob Jones Univ., *supra* (court may admit extrinsic evidence to determine whether latent ambiguity exists; once the court finds latent ambiguity, extrinsic evidence is also permitted to determine testator's intent.). A latent ambiguity is one in which the uncertainty arises, not upon the words of the instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe. *Id.*

A latent ambiguity is present in Col. Rawlings' will. The words of the will bequeath the joint bank account or joint savings account appellant and Col. Rawlings have. When applying those words, especially the word "have," an ambiguity arises as to whether Col. Rawlings intended to leave only the C&S joint bank accounts to appellant because those were the accounts they had at the time the will was executed, or whether he intended to leave any joint bank account to appellant. Evidence of Col. Rawlings' intent can be found in the will and from Attorney Shipley's testimony.

The will provides that Col. Rawlings has "made adequate provisions for [his] beloved wife" through a joint bank account they "have." This indicates his intention that he desires his wife to be adequately provided for. Further, Attorney Shipley testified that, by his will, Col. Rawlings intended that appellant should be well taken care of with "all of his joint accounts" if he predeceased her.

At Col. Rawlings' death, the C&S Bank joint accounts were no longer in existence; however, Col. Rawlings transferred the funds in those accounts (after a series of transfers) to Wachovia in bank accounts held jointly with appellant. Given Col. Rawlings' intent and the fact that he is presumed to

know that a will speaks at death, the probate court erred by finding that, under the will, appellant was not entitled to the joint accounts she and Col. Rawlings held at the time of his death. *See* Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964) (will speaks at death); *In re* Estate of Holden, 343 S.C. 267, 539 S.E.2d 703 (2000) (everyone is presumed to have knowledge of the law). Further, the probate court erred by adding language to the terms of Col. Rawlings' will, *i.e.* by finding the joint account language referred only to joint accounts held at C&S Bank. There is no evidence to reasonably support the probate court's interpretation of the will. *See* Townes Assocs., Ltd., *supra* (judge's findings of fact will not be disturbed unless found to be without evidence which reasonably supports judge's findings).

Accordingly, under the will, appellant is entitled to the funds in those accounts.[3] Further, as will be discussed *infra*, appellant is not required to return the funds she withdrew from the joint accounts to the estate.

ISSUE II

Did appellant's withdrawal of funds from the joint accounts before Col. Rawlings' death cause the funds to become assets of the estate?

DISCUSSION

Appellant argues her withdrawal of funds from the joint accounts prior to Col. Rawlings' death did not cause the funds to become assets of the estate given he intended for her to have those funds.

---

[3]Given our conclusion that Col. Rawlings' intention in the will was to provide for appellant by giving her the funds in any joint accounts they may have, it is unnecessary to address appellant's argument that the probate court erred by finding the bequest of funds to appellant had adeemed. *See* Rikard v. Miller, 231 S.C. 98, 97 S.E.2d 257 (1957) (specific legacies are adeemed when thing bequeathed is, in testator's lifetime, lost, disposed of, or so substantially changed or altered as not to exist in kind when will takes effect).

Events similar to the instant case occurred in Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001), although there was not a will at issue. In Vaughn, the decedent held joint accounts, to which she was the sole contributor, with her nephew. A few days before her death, the nephew withdrew all of the funds from those accounts. Pursuant to S.C. Code Ann. §§ 62-6-103(a), 62-6-104(a), and 62-6-101(13) (1987),[4] we held the nephew was not entitled to the funds because the funds belonged to the decedent during her lifetime and did not belong to the nephew, such that he could withdraw the funds, prior to her death.

Because there was only $442 left in one of the joint accounts when Col. Rawlings died, the probate court correctly held appellant is entitled to the survivorship presumption as to that $442. However, as the probate court found, citing Vaughn, she is not entitled to the survivorship presumption as to the funds she withdrew. Appellant did not contribute any money to the joint accounts. Thus, under section 62-6-103(a), all of the funds from the Wachovia joint accounts belonged to Col. Rawlings during his lifetime because he was the sole contributor. Appellant had withdrawn almost all of the funds and deposited them into her own accounts. Therefore, she cannot claim ownership of the funds based on § 62-6-104(a), the right of survivorship provision.

However, under the will, appellant is entitled to the funds she withdrew prior to Col. Rawlings' death. In Vaughn, we stated that, "[w]hile the

---

[4]Section 62-6-103(a) provides, "A joint account belongs, *during the lifetime of all parties*, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (Emphasis added). Section 62-6-104(a) provides that any sums "remaining on deposit" at the time of the death of one of the parties to the account belong to the surviving party or parties as against the estate of the decedent. Finally, § 62-6-101(13) provides that the term "sums on deposit" specifically includes the balance payable on a multiple-party account and does not extend to withdrawn funds.

Decedent may well have intended for [the nephew]to receive the Joint Accounts' funds after her death, the nephew chose to rely solely on the statutory presumption and did not present other evidence of intent." *See also* § 62-6-103(a) (joint account belongs, during the lifetime of all parties, to parties in proportion to net contributions by each to sums on deposit, unless there is clear and convincing evidence of different intent). In the instant case, appellant has presented "other evidence of intent" that Col. Rawlings intended for appellant to receive the joint accounts' funds after his death. This "other evidence of intent" is in the form of Col. Rawlings' will wherein he gave and bequeathed to appellant the funds in their joint account. Given our conclusion that, under the will, Col. Rawlings intended to give appellant the funds in the joint accounts, this is evidence of Col. Rawlings' intent for appellant to receive those funds regardless of whether she withdrew them prior to his death.

Accordingly, the probate court erred by finding appellant was not entitled to the funds she had withdrawn from the joint accounts as against Col. Rawlings' estate.

ISSUE III

Did the probate court err by finding respondents are entitled to an award of attorney's fees and accountant's fees?

DISCUSSION

The probate court held respondents were entitled to have their attorney's fees and accountant's fees paid out of the estate since they were compelled to bring this action and the action benefited the common fund of Col. Rawlings' estate. However, because appellant is entitled to keep the funds she withdrew from the joint accounts she held with Col. Rawlings, the

probate court's ruling that respondents' attorney's fees and accountant's fees should be paid out of the estate is reversed.[5]

CONCLUSION

We find the circuit court erred by affirming the probate court's decision denying appellant her entitlement to the funds, some of which were previously withdrawn by her, from the joint accounts she held with her husband prior to his death. Accordingly, the circuit court's order is **REVERSED.**

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Roger M. Young, concur.

[5]Appellant is not entitled to have her attorney's fees paid out of the estate given she has not defended an action for the recovery, preservation, protection, or increase of a "common fund." *See* Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941) (court may make allowance of reasonable fee out of common fund created or preserved, for an attorney representing a party who, at own expense, has successfully maintained or defended an action for recovery, preservation, protection, or increase of common fund).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Minyard Lee Woody, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
Gary E. Clary, Circuit Court Judge

Opinion No. 25801
Heard February 4, 2004 - Filed April 5, 2004

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Melody J. Brown, all of Columbia; and Harold W. Gowdy, III, of Spartanburg, for Petitioner.

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State argues that the Court of Appeals erred when it held that Respondent's two prior convictions of armed robbery constituted one offense under S.C. Code Ann. § 17-25-50 (1985). We disagree and affirm the Court of Appeals' decision.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Minyard Woody ("Respondent") was convicted of second-degree burglary in July 1999. During trial, the State argued that S.C. Code Ann. § 17-25-45 (Supp. 2000) mandated a life sentence without the possibility of parole because Respondent had been convicted of two counts of armed robbery on January 21, 1981. The two previous armed robbery convictions stemmed from a single incident but involved two different victims: Respondent robbed a Fast Fare convenient store and was convicted of armed robbery of both the store's clerk and the store itself.

The trial judge sentenced Respondent to a life sentence without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45 (Supp. 2000).[1] The Court of Appeals reversed and held that Respondent's two prior convictions were the same offense under S.C. Code Ann. § 17-25-50 (1985), and therefore the "three strikes rule" of section 17-25-45 – requiring a life sentence without the possibility of parole when convicted of three "serious" crimes – does not apply. The State submits the following issue on appeal:

> **Did the Court of Appeals err in holding that Respondent's two prior convictions constituted one offense under section 17-25-50?**

LAW/ANALYSIS

In 2003, this Court published two opinions addressing issues similar to those in the present case. *State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105

[1] Section 17-25-45(B) is a recidivist statute that provides, in part, that a person convicted of a "serious offense" as defined within the statute must be sentenced to life in prison without the possibility of parole if that person has two or more prior convictions for "serious" or "most serious" offenses.

(2003); *State v. Benjamin*, 353 S.C. 441, 579 S.E.2d 289 (2003). The holdings of those cases are somewhat inconsistent, due to the contradictory language between sections 17-25-45 and 17-25-50.

Section 17-25-45(B) mandates that criminal defendants who are convicted of three "most serious" or "serious" crimes be sentenced to life imprisonment without parole.[2]

On the other hand, section 17-25-50, entitled "Considering closely connected offenses as one offense" states:

> [i]n determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

However, section 17-25-45(B) begins with the phrase: "[n]otwithstanding any other provision of law…," indicating that it should be interpreted and enforced in isolation of other applicable sections, such as section 17-25-50. Further, in July 2003, this Court held that section 17-25-50 is inapplicable in a "three strikes rule" analysis. *State v. Benjamin*, 353 S.C. 441, 579 S.E.2d 289 (2003). This Court opined:

> that the legislature intends that § 17-25-45 be construed independent of any other statute is reinforced by the introductory language of subsections (E) and (F), both of which begin "For purposes of determining a prior conviction under this section only…." It is no longer necessary or appropriate to harmonize or reconcile § 17-25-45 and § 17-25-50 in light of the General Assembly's unmistakable instruction that § 17-25-45 be applied without regard to any other provision of law.

[2] Armed robbery is listed as one of the "most serious offense[s]" according to § 17-25-45(C)(1).

353 S.C. 441, 445, 579 S.E.2d 289, 291 (2003).

However, in October 2003, after these parties submitted their briefs, this Court overturned *Benjamin* in *State v. Gordon*, 356 S.C. 143, 152, 588 S.E.2d 105, 109 (2003), holding that the two statutes must be construed together, otherwise section 17-25-50 is utterly useless.

In the present case, Respondent's prior criminal record included two convictions of armed robbery. Given this Court's recent ruling in *State v. Gordon*, and the fact that the offenses were committed at the same time, the two offenses constitute only one offense under section 17-25-50. Accordingly, Respondent has only two strikes against him, not three.

CONCLUSION

We affirm the Court of Appeals' decision, holding that Respondent's two prior convictions of armed robbery constitute one offense.

MOORE, J., and Acting Justices Daniel F. Pieper and Alexander S. Macaulay, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. I continue to adhere to my opinion in State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003), which was overruled by State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). In my opinion, Benjamin correctly analyzed the seeming tension between S.C. Code Ann. § 17-25-45 (Supp. 2000) and § 17-25-50 (1985). I would reverse the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Bonnie Nelson Brown, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Abbeville County
J. Ernest Kinard, Jr., Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25802
Heard March 3, 2004 - Filed April 12, 2004

REVERSED

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Charles H. Richardson,
Assistant Attorney General W. Rutledge Martin, all of Columbia; and William Townes Jones, of Greenwood, for Petitioner.

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

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' opinion in State v. Brown, 351 S.C. 522, 570 S.E.2d 559 (Ct. App. 2002). We reverse.

FACTS

Brown received a traffic citation on March 13, 1996, in Greenwood County, for Failure to Register a Vehicle and Operating an Uninsured Vehicle. A trial was held in Greenwood County by a magistrate on May 8, 1997. After Brown was convicted, he moved for a new trial. A new trial was granted by the magistrate.

At his second trial on July 16, 1997, Brown was found guilty by a Greenwood County jury, Magistrate Lasonia Williams' presiding. Judge Williams sentenced Brown to 40 days in jail, or payment of a fine. Since Brown could not pay the fine, he immediately went to jail. Brown served the full sentence.

On August 6, 1997, Judge Williams received a written notice of appeal from the second Greenwood County magistrate's trial, which was filed in the Clerk's office on August 27, 1997. On September 2, 1997, Judge Williams filed an Answer to the Appeal. On October 1, 1997, Brown's appeal came before Circuit Judge Johnson, who reversed the jury verdict and remanded the case for a new trial. The Order granting a new trial stated that while Brown had successfully moved for a change of venue, venue had not in fact been changed. [1] Judge Johnson also reversed on another ground, which is not at issue in this case.

---

[1] Actually, venue had already been changed. Greenwood County has a central magistrate court since it is only one district. S.C. Code Ann. § 22-2-190 (24) (1989). When a party wants to change venue in a magistrate court with one district, "the papers shall be turned over to the nearest magistrate not disqualified from hearing the cause in the county, who shall proceed to try the case as if he had issued the warrant or summons." S.C. Code Ann. § 22-3-920 (1989). Unlike circuit court, change of venue in a magistrate court

At this point in the proceedings, the Chief Magistrate of Greenwood County coordinated with the Abbeville County Chief Magistrate to comply with their mutual understanding of Judge Johnson's 1997 Order requiring a change of venue. After consultation, the charges were transferred to Abbeville County for trial.

A third trial was conducted by Abbeville Magistrate G.T. Ferguson, and Brown was again convicted. Although Brown had initially sought a change of venue to another county, he objected to being tried in Abbeville County prior to the proceedings there. Brown, again, appealed his conviction to Circuit Court and the conviction was affirmed on October 13, 2000. In his order, Judge Johnson stated:

> Venue was proper in Abbeville County since Defendant had previously requested a change of venue in Greenwood. Greenwood County has only one magistrate district. The only place to change venue was to an adjoining county…The verdict of the lower court is affirmed.

Brown appealed to the Court of Appeals.

During oral argument, the Court of Appeals sua sponte raised the issue whether the Circuit Court had subject matter jurisdiction to reverse the 1997 convictions from the second Greenwood County trial given the fact that Brown did not serve his notice of appeal on Judge Williams within 10 days of his convictions. The Court asked whether Brown had moved for a new trial since moving for a new trial extends one's deadline to appeal from

---

with only one district ordinarily means changing judges, not place of trial. In this case, the second Greenwood County case was originally in front of Judge Cantrell and Brown requested a change of venue. Accordingly, the case was properly transferred to Judge Williams, another magistrate within Greenwood County. Only one change of venue transfer of right is allowed to each party in a magistrate court. S.C. Code Ann. § 22-3-920 (1989).

magistrate's court. S.C. Code Ann. § 22-3-1000 (Supp. 1996).[2] The Court gave Brown "ten days within which to provide this Court with a copy of the motion for a new trial that he filed." Brown, 570 S.E.2d at 559 n. 2 (Judge Connor's dissent quoting from oral argument).

Brown, instead, filed two affidavits, his, and one from a third party who attended the second 1997 trial. The affidavits state that Brown moved for a new trial immediately following the announcement of the verdict. The State filed a Motion Objecting to Consideration of Affidavits. The Court of Appeals found that Brown made a timely motion for a new trial and thus the 1997 Greenwood County appeal had been properly before the circuit court. Further, it vacated the 2000 Abbeville convictions, holding that a criminal action must be brought before a magistrate with jurisdiction in the county where the alleged offense occurred. The Court of Appeals concluded that the Abbeville magistrate had no subject matter jurisdiction to try Brown on these Greenwood charges. The State petitioned for a writ of certiorari, which was granted.

ISSUES

A. Did the Court of Appeals err in concluding the 1997 appeal from Brown's second Greenwood County conviction was timely?

B. Did the Court of Appeals err in finding the Abbeville County Magistrate's Court lacked subject matter jurisdiction to try Brown?

ANALYSIS

A. Did the Court of Appeals err in concluding the appeal from Brown's second Greenwood County conviction was timely?

---

[2] Brown's convictions were in 1997. At that time the deadline to serve an appeal was twenty-five days after the magistrate's grant or denial of a motion for a new trial. S.C. Code Ann. § 22-3-1000 (Supp. 1996). The period was extended in 1999 to thirty days. See Annotation, S.C. Code Ann. § 22-3-1000 (Supp. 2001).

The Court of Appeals erred in concluding the appeal from Brown's second conviction was timely. The Court of Appeals considered two affidavits, which were not included in the record on appeal, in determining that Brown filed a timely notice of appeal. The Court stated it could consider these affidavits because: (1) "justice dictates that the resolution of issues pertaining to subject matter jurisdiction be a paramount concern for our courts"; (2) "issues concerning the existence of subject matter jurisdiction may be raised at any time and by any party or the court"; (3) "the affidavits were submitted pursuant to the Court's invitation and were necessary for the crucial determination of whether subject matter jurisdiction existed. The affidavits submitted by Brown are therefore deemed a part of the record." Brown, 570 S.E.2d at 562.

The Court of Appeals erred in considering these affidavits. First, there is no question of subject matter jurisdiction. In Great Games, Inc. v. South Carolina Dept. of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000), this Court addressed whether a circuit court lost "subject matter" jurisdiction over an appeal because the defendant failed to meet the requirement of posting a bond or paying a fine before appealing. In a footnote, this Court stated:

> [t]he circuit court erroneously characterized the jurisdictional defect as one relating to the court's subject matter jurisdiction. Subject matter jurisdiction refers to the court's "power to hear and determine cases of the general class to which the proceedings in question belong"… *The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of "appellate" jurisdiction over the case, but it does not affect the court's subject matter jurisdiction.* (emphasis supplied) (internal citations omitted). Great Games, 529 S.E.2d at 83 n.5.

As noted above, this Court has held the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction, not the circuit court's subject matter jurisdiction. The Court of Appeals erred in concluding that subject matter jurisdiction was implicated by the failure to timely appeal a conviction from magistrate's court. Circuit

court has the power to hear and determine this class of appeals. S.C. Code Ann. §14-5-340 (1976).

Further, in Judge Williams' Answer to an Appeal, she stated, "[t]his Court does recognize that Section 22-3-1000 of South Carolina Code of Laws does give the appellant an additional 25 days, *but only after the denial of a motion for a new trial. This Court never received such motion from the Defendant.* He has only filed an appeal for reversal of the jury verdict in which he was found guilty of Failing to register a vehicle and Operating an uninsured vehicle. *The Court feels this appeal was not timely filed* and that the jury verdict should not be reversed." (emphasis supplied).

This Court has held that it is error for the Court of Appeals to consider facts not included in the magistrate's return. State v. Osborne, 335 S.C. 172, 176 n. 6, 516 S.E.2d 201, 203 n. 6 (1999)(holding that it was error for the Court of Appeals to rely on the recitation of facts contained in an appellate order instead of restricting itself to the facts contained in the magistrate's return). See also State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984)(magistrate's return is the official record of trial proceedings); State v. Sarvis, 265 S.C. 144, 147, 217 S.E.2d 38, 39 (1975)("While the arguments indicate some disagreement as to the facts, we are bound by the Return of the magistrate before whom the respondent was tried").

Judge Williams clearly stated in her Return that Brown did not move for a new trial. The Court of Appeals was bound by this factual determination and erred in considering the two affidavits, which were outside the Record on Appeal.

CONCLUSION

The 1997 appeal from the Greenwood County Magistrate conviction was untimely. Accordingly, these convictions from the second Greenwood County trial stand, and the Abbeville case is a nullity. The decision of the Court of Appeals is REVERSED. We need not reach the issue whether a magistrate can effectuate an inter-county transfer on criminal charges, nor the

effect, if any, of the fact that Brown has already served his entire sentence on these charges.

TOAL, C.J., WALLER, J., and Acting Justices Alison R. Lee and G. Thomas Cooper, concur.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

In the Matter of Daniel F. Norfleet, Respondent.

Opinion No. 25803
Heard January 8, 2004 - Filed April 12, 2004

INDEFINITE SUSPENSION

Attorney general Henry Dargan McMaster and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Daniel F. Norfleet, of Summerville, pro se.

PER CURIAM: In this attorney disciplinary matter, formal charges were filed against Respondent four times between December 12, 2000 and June 13, 2001. On March 26, 2002, a hearing was held to address the various charges. The full panel of the Commission on Lawyer Conduct ("Commission") adopted the sub-panel's report, and recommended Daniel F. Norfleet ("Respondent") be suspended from the practice of law for a period of two years, with conditions. The Commission recommended Respondent be required to undergo instruction in law office management, with a particular emphasis on trust account management, along with counseling in civility and appropriate conduct toward clients and others. The Commission also recommended that Respondent be required to make restitution to Wayne Howard in the amount of $8,381.52 and to pay the costs of the Commission's proceedings, in the amount of $2,164.37. We find the gravity of Respondent's misconduct justifies harsher

sanctions. Therefore, we hereby impose an indefinite suspension, with conditions, effective as of the date of this opinion.

First Formal Charges

The Byron Matter (Charlotte Riley Complaint)

The Commission found Respondent made false statements, commingled funds, and mismanaged his trust account in connection with this matter.

Respondent was the closing attorney in a real estate transaction for Patrick Byron in February 2002. As a result of the closing, two loans with Carolina First Bank were to be satisfied. Respondent's first check, issued from his trust account satisfied the first mortgage. The second check, made payable to Carolina First Bank in the amount of $8,739.77, for satisfaction of the second mortgage, was returned for non-sufficient funds.[1] The second check was used to purchase two certified checks from Carolina First Bank in the amounts of $8,731.44 and $8.33.

Respondent's wife, who was serving as his bookkeeper, secretary, and office manager testified she used the second trust account check to purchase the two cashiers checks and was aware that the account may not have had sufficient funds to cover the trust account check. She testified she concealed her actions from her husband. The Commission found the requirements of Rule 417, SCACR, regarding use, balancing, and maintenance of a trust account were incumbent on Respondent, not his wife.

[1] The second trust account check was issued from the trust account of Wyckoff and Norfleet. Testimony at the hearing revealed Respondent was still operating the trust account, which had been held jointly by Respondent and his former law partner, Pete Wyckoff. The firm had been dissolved in 1995. Unknown to Mr. Wyckoff, Respondent had continued to operate the trust account under the name of Wyckoff and Norfleet.

During this same time period, Respondent represented Wayne Howard in a Workers Compensation case. The case settled and the attorney for the defendant's insurance carrier mailed Respondent a letter enclosing a draft payable jointly to Mr. Howard and Respondent in the amount of $8,381.51. The letter accompanying the draft instructed Respondent not to negotiate the insurance company's draft until he had completed and mailed to opposing counsel the Final Lump Sum Agreement and Release, with the endorsement of the Workers Compensation Commission. Respondent did not follow the instructions in the letter. The draft, drawn on the account of Huron Insurance Company, was endorsed by Respondent's wife and deposited in Respondent's trust account. With this deposit, sufficient funds were on deposit in Respondent's trust account to purchase another check, payable to Carolina First Bank in the amount of $8,739.77, which was used to pay off the Byron's second mortgage.

The Commission found Respondent made a false statement to Wayne Howard in a letter dated August 4, 2000, in which he stated the settlement check he had received was stale and must be reissued. The Commission concluded Respondent misrepresented to his client Respondent's receipt of the settlement check.

Vaughan Realty Matter

The Commission found Respondent commingled funds.

On January 7, 2000, Respondent closed a real estate transaction between Vaughan Homes and Rebecca Moore. Respondent issued a trust account check for $2,378.25, dated January 7, 2000, payable to Vaughan Realty, Inc., as commission. The check was returned for non-sufficient funds.

Matthew Neylon, an official with Vaughan Homes, Inc., telephoned Respondent's office several times. Neylon received a cashier's check from Respondent's office in satisfaction of the commission obligation.

The Commission concluded that since the Vaughan Realty check had been returned, monies used to replace it must have come from a source other than the Vaughan/Moore real estate closing.

Additional Trust Account Mismanagement

In connection with the following incidents, the Commission found Respondent failed to maintain control over his trust account.

Respondent wrote a check for $950 from the Wyckoff and Norfleet trust account to pay his office rent. Additionally, the Commission received evidence showing the trust account had a negative balance in December 1999, February 2000, and March 2000. Between December 1, 1999, and March 31, 2000, Respondent had six instances of overdraft fees and seven instances of NSF fees.

Failure to Respond to Disciplinary Charges

Respondent failed to reply to two letters from the Commission concerning the Byron real estate transaction. Additionally, Respondent did not reply to the Commission's Notice of Full Investigation, which was returned unclaimed by the postal service following three attempts of service.

Withholding Taxes

The Commission found Respondent failed to withhold from his employees certain taxes on behalf of the State of South Carolina, thereby breaching his fiduciary duty owed to the State of South Carolina. The Commission received into evidence a series of South Carolina Department of Revenue Warrants for Distraint filed against Respondent. Additionally, Respondent has not filed personal income tax returns since 1996.

Sub-panel's Findings

The sub-panel found Respondent had committed attorney misconduct, in violation of the *Rules of Professional Conduct*, Rule 407, SCACR, and Rule 7 of Rule 413, SCACR. The sub-panel found violations of numerous provisions of Rule 407, particularly Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.15 (safekeeping property); Rule 1.5 (fees); Rule 4.1 (truthfulness in statements to others); Rule 8.1(b)(knowingly failing to respond to a lawful demand for information from a disciplinary authority); and Rule 8.4 (misconduct), subsections (a) (violating a rule of professional conduct), (c) (conduct involving moral turpitude) and (d) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (e) (conduct prejudicial to the administration of justice).

From Rule 7 of Rule 413, *Rules for Lawyer Disciplinary Enforcement*, SCACR, the sub-panel found Respondent had violated Rule 7(a)(1) (violating a Rule of Professional Conduct;); Rule 7(a)(5) (conduct tending to pollute the administration of justice or bring the legal profession into disrepute or demonstrate an unfitness to practice law); Rule 7(a)(6) (violating the oath of office taken upon admission to practice in this State); and Rule 7(a)(3) (knowingly failing to respond to a demand from a disciplinary authority).

Second Formal Charges

Leroy Ferrell Matter

Respondent represented Leroy Ferrell in a post-conviction relief matter. Ferrell's case was dismissed. Ferrell testified that he requested Respondent appeal the order of dismissal, but Respondent failed to do so. Respondent testified he did not appeal the order because he believed it was not meritorious.

The Commission did not find clear and convincing evidence of attorney misconduct, finding "credence in Respondent's

contention that he believed further appeal on Mr. Ferrell's behalf would have been fruitless."

Failure to Respond to Disciplinary Charges

The Commission concluded Respondent failed to respond to a Notice of Full Investigation mailed to Respondent on or about November 2, 2000, in connection with the Leroy Ferrell matter. The notice was returned as unclaimed by the U.S. Postal Service.

Respondent stated he was living in Florida at the time of the November 2, 2000, mailing and that he advised the Commission of his whereabouts. Although the Commission found there was evidence that Respondent failed to respond, the Commission found Respondent's contention he was living in Florida to be a mitigating factor.

Sub-panel's Findings

The sub-panel found Respondent committed attorney misconduct, in violation of the *Rules of Professional Conduct*, Rule 407, SCACR, and Rule 7 of Rule 413, SCACR. The sub-panel concluded Respondent violated Rule 1.1 (competence), Rule 8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority), and Rule 8.4, subsections (a) (violating a Rule of Professional Conduct) and (e) (conduct prejudicial to the administration of justice).

Third Formal Charges

The Commission concluded Respondent committed two violations in connection with his representation of Jimmy Ray Stroud in litigation against Randy and Christina Read and Christina's parents Mr. and Mrs. Rickard. The litigation primarily involved visitation disputes concerning Mary Paige Stroud, a daughter born to Jimmy Ray Stroud and Christina Read during their marriage.

Unprofessional Conduct

Mary Paige Stroud was enrolled at Hilton Head Elementary School. Gretchen Keefner, a principal at the school, testified Respondent unexpectedly came to the school and requested to view Paige's school records and visit with her. Keefner testified Respondent did not present any identification and was dressed in casual attire. Keefner further testified Respondent became verbally abusive when she refused him access to her file. Specifically, Keefner testified Respondent threatened to sue her personally and have her fired if she did not turn over the file.

When Respondent became agitated, Keefner requested the presence of her supervisor, Henry Noble. Noble testified Respondent was dressed in "beach attire" and was very angry, loud, and threatening. Noble retrieved Paige's file for Respondent's review. Noble testified Respondent became "furious" when he found documents on which Paige had signed her name as "Paige Read" instead of "Paige Stroud."

Additionally, Sheryl B. Keating, a counselor at Coastal Empire Community Health Center on Hilton Head Island, testified that during two or three conversations with Respondent, he became angry and threatening when Keating refused to provide him with confidential information relating to her counseling sessions with Paige Stroud and her mother.

Despite Respondent's denial of these allegations, the sub-panel determined that clear and convincing evidence weighed in favor of Keefner, Noble, and Keating and that the allegations regarding Respondent's conduct toward them were proven.

Failure to Respond to Disciplinary Charges

Respondent failed to respond to a Notice of Full Investigation mailed to him on or about December 27, 2000. The

Commission found as a mitigating factor that Respondent was living in Florida.

Sub-panel's findings

The sub-panel concluded Respondent breached the *Rules of Professional Conduct*, Rule 407, SCACR. Specifically, Respondent violated Rule 1.1 (competence); Rule 4.4 (respect for the rights of third persons); Rule 8.4 (misconduct), subsections (a) (violating a rule of professional conduct, (c) (engaging in conduct involving moral turpitude), and (e) (conduct prejudicial to the administration of justice. From Rule 7 of Rule 413, *Rules for Lawyer Disciplinary Enforcement*, the sub-panel found Respondent violated Rule 7(a)(5) (conduct tending to pollute the administration of justice or bring the legal profession into disrepute or demonstrate an unfitness to practice law) and Rule 7(a)(6) (violating the oath of office taken upon admission to practice in this State).

Fourth Formal Charges

Respondent failed to pay a court reporter $182.90 for a transcript which he ordered involving a case filed in Dorchester County Family Court. The court reporter prepared the transcript, but never mailed the transcript to Respondent after three unsuccessful attempts to procure payment from Respondent. Ultimately, another attorney took over representation of Respondent's client in the case and paid for the transcript.

Sub-panel's findings

The sub-panel concluded Respondent breached the *Rules of Professional Conduct*, Rule 407, SCACR. Specifically, Respondent violated Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.15 (safekeeping property); Rule 1.5 (fees); Rule 4.1 (truthfulness in statements to others); Rule 8.4 (misconduct), subsections (a) (violating a rule of professional conduct), (c) (conduct involving moral turpitude), (d) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and (e) (conduct prejudicial to the administration of justice). From

Rule 7 of Rule 413, *Rules for Lawyer Disciplinary Enforcement*, the sub-panel found Respondent violated Rule 7(a)(5) (conduct tending to pollute the administration of justice or bring the legal profession into disrepute or demonstrate an unfitness to practice law) and Rule 7(a)(6) (violating the oath of office taken upon admission to practice in this State).

LAW/ANALYSIS

This Court may make its own findings of fact and conclusions of law, and is not bound by a panel's recommendation. In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The sanction of indefinite suspension has been imposed by this Court in similar cases involving multiple acts of misconduct. See e.g., In re Gaines, 348 S.C. 208, 559 S.E.2d 577 (2002) (indefinite suspension given attorney's prior history of bad conduct and for, *inter alia*, failing to properly maintain client escrow account and failure to make timely payment to court reporters); In re Devine, 345 S.C. 633, 550 S.E.2d 308 (2001) (indefinite suspension warranted for, *inter alia*, failing to respond to the Office of Disciplinary Counsel and misappropriation of client funds); In re Graab, 334 S.C. 633, 515 S.E.2d 93 (1999) (accepting Agreement for Discipline by Consent to indefinitely suspend attorney for, *inter alia*, failing to keep complete records of trust account funds, failure to provide competent representation, failure to make truthful statements to others, failure to respond to Office of Disciplinary Counsel, and failure to respect the rights of others).

Respondent's numerous incidences of misconduct, including his misappropriation of approximately $20,000 of trust account funds, his failure to honor his tax obligations, his repeated failure to respond to the disciplinary charges against him, and his unprofessional behavior, justify an indefinite suspension. Furthermore, we take exception to the sub-panel's finding that Respondent did not commit misconduct in failing to file a notice of appeal in the Leroy

Ferrell matter. Accordingly, we find a violation of the *Rules of Professional Conduct*, Rule 407, SCACR. The only appropriate course of action would have been to file an appeal on Mr. Ferrell's behalf. We hold Respondent acted incompetently in failing to file the notice of appeal in violation of Rule 1.1.

Additionally, we take note Respondent has previously received a public admonition from this Court, dated May 1, 2001. Respondent was admonished for his aggressive representation and unprofessional behavior, which caused avoidable conflicts.

CONCLUSION

The record is unclear of the total restitution owed to Wayne Howard. Respondent shall effectuate within sixty days of the date of this opinion an agreement with Disciplinary Counsel to implement a payment plan to ensure the timely and prompt payment of restitution to Wayne Howard and to any other parties to whom monies are owed. Upon reaching the agreement, the parties shall submit the plan to this Court, indicating all monies owed and to whom. With any application for reinstatement, Respondent must provide satisfactory evidence he has complied with the payment plan and paid the costs of the Commission's proceedings in the amount of $2,164.37. Additionally, Respondent must show he has received instruction in law office management, with emphasis on trust account management and received counseling in appropriate conduct towards clients and others. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing compliance with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

INDEFINITE SUSPENSION.

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice James R. Barber, III, concur.

The Supreme Court of South Carolina

RE: Amendments to South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, §4, of the South Carolina Constitution, the following amendments are made to the Appellate Court Rules:

(1) Rule 403(e), SCACR, is amended by adding the following to the end of that provision: "A filing fee of $25 shall accompany the Certificate."

(2) Rule 403(f), SCACR, is amended by adding the following to the end of that provision: "A filing fee of $25 shall accompany the affidavit."

(3) The phrase "fee of $100" in Rule 405(e), SCACR, is replaced with the phrase "fee of $400".

(4) The third sentence from the end of Rule 32 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, is amended to read: "The affidavit filed with the Supreme Court shall be

accompanied by proof of service showing service on disciplinary counsel, and a filing fee of $200."

(5) The phrase "fee of $100" in Rule 33(c) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, is replaced with the phrase "fee of $1,500".

(6) The second sentence of Rule 419(f), SCACR, is amended to read: "The petition for reinstatement shall comply with the requirements of Rule 32, RLDE, Rule 413, SCACR, to include a filing fee of $200."

(7) The following rule is added:

Rule 423
Certificates of Good Standing

> A certificate of good standing may be issued by the Clerk of the Supreme Court to a person admitted to practice law in this state or to a person who holds a limited certificate to practice law in this state if the person is a member in good standing with the South Carolina Bar and is not under suspension for any reason. A person admitted or holding a limited certificate may request a certificate of good standing by submitting a written request to the Clerk of the Supreme Court accompanied by a filing fee in the amount of $25. If multiple copies are requested, an additional fee of $5 shall be charged for the second or subsequent copy of the certificate.

These amendments shall be effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating.

Columbia, South Carolina
April 7, 2004