OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

November 17, 2003

ADVANCE SHEET NO. 41

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John C. Broome, Respondent.

Opinion No. 25748
Heard September 23, 2003 - Filed November 10, 2003

DEFINITE SUSPENSION

Attorney General Henry Dargan McMaster and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for The Office of Disciplinary Counsel.

Carol S. Broome, of Columbia, for Respondent.

PER CURIAM: In this attorney-disciplinary matter, the Sub Panel of the Commission on Lawyer Conduct found, and the Full Panel agreed, that John C. Broome ("Respondent") committed misconduct and recommended that he receive a public reprimand and pay proceeding costs. We find that the gravity of Respondent's misconduct justifies harsher sanctions. Therefore, we hereby suspend Respondent for 90 days, order him to pay proceeding costs, and require that he be re-examined by the Committee on Character and Fitness before he may re-activate his license to practice law.

FACTUAL/PROCEDURAL BACKGROUND

This attorney-disciplinary case arises from Respondent's conduct in three separate matters: (1) adoption-related proceedings; (2) a

custody dispute ("Sparks matter"); and (3) a divorce action ("Jones matter"). Respondent's conduct in the adoption-related proceedings is the most serious, most factually complex of the three matters.

A. ADOPTION-RELATED PROCEEDINGS

The same adoptive child is the subject of three distinct adoption-related proceedings. Mr. and Ms. Roe[1] filed the first action ("Adoption #1") as a married couple seeking to adopt the infant child. A few months later, alleging that Mr. Roe had abused the child, Ms. Roe moved out of the marital home, took the infant child with her, and then filed the second action ("Support Action"), seeking separate maintenance and support and temporary custody. Shortly thereafter, Ms. Roe filed the third action ("Adoption #2"), seeking to adopt the child as a single parent.

Respondent represented Ms. Roe in both the Support Action and Adoption #2. In short, Respondent initiated Adoption #2 while Adoption #1 was pending and did not notify the Adoption #1 parties that he had done so. Throughout, Respondent handled Adoption #2 as if it were an independent action, unrelated to Adoption #1, even though the very same child, birth parents, and prospective adoptive parents had a stake in each matter.

1. TIMELINE

The following timeline illustrates the interplay among the three adoption-related proceedings:

Apr. 23, 1998 — Adoption #1 (Case No. 1766) filed in County X[2] by Mr. and Ms. Roe to adopt infant child.

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[1] The name "Roe" is used to protect the parties' identities, given that the underlying action is an adoption proceeding. On May 21, 2003, this Court ordered that portions of the record referring to the adoption proceeding be sealed.

[2] "County X" is used to maintain confidentiality.

Aug. 12, 1998 — Ms. Roe filed Support Action (purportedly *pro se* but with documents prepared by Respondent) in County Y.[3]

Aug. 27, 1998 — Upon learning that the Roes had separated, the birth parents' attorney, Sam Crews, wrote a letter to Respondent and other counsel requesting that the child be returned to the birth mother for temporary placement with the birth mother's relatives. (A few days later, Respondent filed Adoption #2 in direct opposition to this request.)

Aug. 31, 1998 — Final hearing in Adoption #1 continued until November 1. (This continuance made it possible for Respondent to go forward with plans to file Adoption #2, contravening the birth mother's wishes as detailed in the August 27, 1998 letter from Sam Crews.)

Ms. Roe filed a Notice of Dismissal "as to [her]"(purportedly *pro se* but with documents prepared by Respondent) in Adoption #1 but did not serve the other parties until November 6, 1998.[4]

Ms. Roe signed the complaint for Adoption #2 with Respondent as counsel.

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[3] "County Y" is used to maintain confidentiality.

[4] Judge Brown deduced that the only reason Ms. Roe filed her notice of dismissal in Adoption #1 was so that she could proceed with having Adoption #2 filed, without her husband. And when asked whether he knew if Ms. Roe had served the notice at the time it was filed, Respondent said that he never inquired, and he assumed that she had served it.

Sept. 3, 1998	Complaint in Adoption #2 filed but not served on Mr. Roe, his counsel, the guardian *ad litem*, or the birth parents. Complaint fails to make any reference to pending Support Action and states that Adoption #1 was dismissed "as to [Ms. Roe]."
Sept. 8, 1998	Hearing held in Support Action. Respondent did not inform Judge Nuessle that Adoption #2 had been filed.
Sept. 24, 1998	Judge Nuessle granted Ms. Roe temporary child custody. Birth mother given 30 days to intervene in Support Action.
Oct. 16, 1998	Final hearing held in Adoption #2 before Judge Brown. While Ms. Roe was on the witness stand, Respondent asked her whether Adoption #1 "was dismissed by [her]" to which she answered, "Yes." Without knowledge that Adoption #1 and Support Action were pending, Judge Brown issued an order of adoption to Ms. Roe.
Nov. 6, 1998	Ms. Roe finally served parties with Notice of Dismissal *as to her* only in Adoption #1.
Nov. 9, 1998	Respondent filed a Notice of Representation in Adoption #1.
Nov. 13, 1998	Attorney for birth parents (Sam Crews) wrote letter to Judge Brown requesting that Adoption #2 be re-opened and an emergency hearing held. Hearing held before Judge Riddle in Adoption #1 in what should have been a final hearing in that case. But then Respondent announced that Ms. Roe already adopted the child in Adoption #2.

Nov. 17, 1998	Hearing held in Support Action before Judge Sawyer. Judge Sawyer held the proceeding in abeyance until Judge Brown had an opportunity to re-hear the matter.
Nov. 20, 1998	Hearing held before Judge Brown in Adoption #2 to re-hear order of adoption previously granted to Ms. Roe.
Nov. 23, 1998	Judge Riddle issued order continuing Adoption #1 once again and requiring that the contents of the Adoption #2 proceeding be unsealed to allow the guardian *ad litem* to review the case.
Dec. 10, 1998	Judge Brown vacated the order of adoption he issued in Adoption #2 finding (1) lack of notice to necessary parties; (2) Adoption #1 was still pending; and (3) lack of notice to court that Adoption #1 and Support Action were pending.

2. FAILURE TO INFORM THE COURT

This Court finds that on at least four different occasions in front of four different judges, Respondent engaged in deceitful conduct. The conduct in Adoption #2 is outlined first and most thoroughly, since it is the focus of the parties' briefs.

a. JUDGE BROWN, ADOPTION #2

The Office of Disciplinary Counsel ("ODC") and Respondent center their discussion of the adoption-related proceedings on Respondent's failure to inform the court in Adoption #2 that Adoption #1 and the Support Action were pending. Respondent had two opportunities to inform the Adoption #2 court: (1) in the complaint and (2) at the final hearing for adoption.

In the complaint, Respondent referred to Adoption #1 in two separate paragraphs. Paragraph 6 states, "[a]n action for adoption of the minor child was filed in [County X] as File No. 98-DR-40-1766. This plaintiff has had that action *as to her* dismissed as more fully set forth herein." (emphasis added). Also, Paragraph 16 states:

> A previous action for adoption was filed under File No. 98-DR-40-1766 on April 23, 1998, which was within 60 days of placement as required by statute, by this Plaintiff and her now estranged husband, however due to his abusive behavior toward the baby, the Plaintiff determined that for her safety and the safety of the child, and the impossibility of an adoption by both under the circumstances, that the action *as to her* should be dismissed and an [sic] new action begun with this plaintiff alone.

(emphasis added). Respondent argues that these references to Adoption #1 sufficiently informed the court that Adoption #1 remained viable. Further, he argues that the onus was on the court to determine the status of Adoption #1 and to inquire as to whether any other action concerning the child or parties was pending. But ODC argues that these references fall short of informing the court that Adoption #1 was pending as to other parties.

If there was any confusion concerning the status of Adoption #1 from language in the complaint, that confusion could have been clarified in Respondent's direct examination of Ms. Roe during the final hearing in Adoption #2. When Ms. Roe was on the witness stand, Respondent asked, "was [Adoption #1] dismissed by you?" to which Ms. Roe replied, "Yes, sir, it was." Judge Brown relied on this testimony and thus believed Adoption #1 had been dismissed in its entirety.

Respondent also failed to inform the court—both in the complaint and at the final hearing—that the Support Action was pending, even though Respondent was the attorney of record and had appeared in that case. He argues that he was not required by law to

disclose the action in the Adoption #2 complaint because the court in the Support Action had yet to issue an order affecting custody.[5] In addition, Respondent argues that he did not entirely fail to inform the court because the Adoption #2 complaint and its attached reports explained that Ms. Roe was estranged from her husband, suggesting a Support Action of sorts might exist.

Respondent also failed to inform the court in Adoption #2 (1) that a guardian *ad litem* had already been appointed for the child in Adoption #1; (2) that the natural parents had asserted an interest in the child; and (3) that Mr. Roe had not taken legal action to terminate his desire to adopt the child.

Based on the record and the testimony at the October 16, 1998 final adoption hearing in Adoption #2, Judge Brown issued an order of adoption to Ms. Roe as the sole adoptive parent. But shortly thereafter, Mr. Roe brought a motion to vacate, and upon rehearing the matter, Judge Brown vacated this order finding (1) that the court was misled as to Adoption #1's status, (2) that the court was not informed about the Support Action, and (3) that Mr. Roe, the birth parents, and the guardian *ad litem* appointed in Adoption #1 were necessary parties to Adoption #2. Judge Brown also declared that Respondent and his client had demonstrated "a willful and flagrant disregard for their statutory and ethical duties to [the] court." Finally, Judge Brown ordered Respondent and Ms. Roe to pay $5,000 in fees.

b. JUDGE NUESSLE, SUPPORT ACTION

On September 8, 1998, Respondent appeared at a hearing in the Support Action before Judge Nuessle. At the time he appeared, Respondent had already filed Adoption #2, but he did not inform Judge Nuessle of this fact. Not knowing that Adoption #2 existed, Judge Nuessle issued an order on September 24, 1998, granting temporary

[5] Throughout, Respondent supports his course of action by asserting that Adoption #1 and Adoption #2 were entirely separate matters, and he proceeded with Adoption #2 accordingly.

custody to Ms. Roe. Just two weeks after obtaining this order, Respondent appeared in the final hearing for Adoption #2 before Judge Brown. As outlined above, Respondent never mentioned the existence of the Support Action or the recently-obtained order to Judge Brown.

c. JUDGE RIDDLE, ADOPTION #1

On November 13, 1998, Respondent appeared before Judge Riddle at what was supposed to be the final hearing in Adoption #1. But as soon Judge Riddle learned that the child had already been adopted in Adoption #2, she spent much of the hearing trying to determine how this could have happened while Adoption #1 was pending. Respondent did little to clarify the confusion. Although he rightfully refused to reveal the facts of Adoption #2 (since the record was sealed), he told Judge Riddle that "an adoption was properly done." In addition to withholding the facts, he refused to provide the other attorneys with the Adoption #2 caption and case number, preventing them from knowing where and how to intervene.[6] Judge Riddle was forced to order Respondent into her chambers to gather the information necessary for her ruling.

d. JUDGE SAWYER, SUPPORT ACTION

On November 17, 1998, Respondent appeared at a hearing in the Support Action before Judge Sawyer. Just as he did with Judge Riddle, Respondent evaded Judge Sawyer's questions by stating that the Adoption #2 proceedings were sealed. Based on the record before him, Judge Sawyer stated that he was "concerned from an ethical, a legal, and criminal standpoint" about the issues before the court. He explicitly asked Respondent if Respondent informed Judge Brown that Adoption #1 was pending. Respondent answered, "Yes, your honor." In closing, Judge Sawyer stated, "this is a matter of grave concern

[6] Judge Riddle eventually ruled that the law did not permit her to require Respondent to disclose the caption and case number of Adoption #2. The parties would therefore have to file yet another motion just to learn the caption and case number.

certainly not only to the court, not only to [him], but also to the attorneys and litigants."

3. FAILURE TO NOTIFY INTERESTED PARTIES AND COUNSEL

In addition to failing to fully inform the various courts in the adoption-related proceedings, Respondent failed to inform interested, necessary parties that Adoption #2 had been filed. Such parties included Mr. Roe, the birth parents, the guardian *ad litem*, and the parties' counsel.

Respondent admitted that he did not provide these parties or their counsel with notice. He justified his course of action by arguing that Adoption #2 was an entirely separate matter than Adoption #1. Because they were not parties to Adoption #2, he argued, they were not entitled to notice. But given that all three actions involved the same parties, Adoption #2 can hardly be considered a "separate matter" to which these parties were not entitled notice.

4. FAILURE TO ABIDE BY THE BIRTH MOTHER'S WISHES[7]

Finally, Respondent directly contravened the birth mother's wishes to have the child adopted by a two-parent family—specifically Ms. and Mr. Roe—as designated in her consent and waiver. He attached the very same consent and waiver forms executed for Adoption #1, an adoption by a two-parent family, in Adoption #2, an adoption by a single parent. In addition, he claimed that he did not notify the birth parents that he filed Adoption #2 because they waived their rights to notice and to being named as parties in their consents. Once the birth parents (and particularly the birth mother) learned of the Roes' separation, they attempted to intervene in the Support Action.

[7] This issue is not a part of the Sub-Panel Report or the briefs but is included here in support of this Court's decision.

But because Adoption #2 ended before they knew it had begun, they were unable to intervene in that action.[8]

B. SPARKS MATTER

Respondent met with Joanne Sparks during the initial stages of a custody action. While Respondent dealt with Sparks, the time to respond to the summons and complaint in the custody action expired, and opposing counsel filed an affidavit of default. After Sparks went into default, Respondent attempted to back out of his relationship with Sparks, stating that he could "no longer provide any further services to Ms. Sparks until [he] received a written employment agreement." In addition, Respondent argues that Sparks never gave him the authority to prepare pleadings; rather, she consulted him solely for the purpose of investigating her options for settlement.

At the Sub-Panel hearing, Respondent claimed that Sparks was not his client at the time the response became due. He further testified that a note he penned to another attorney referring to Sparks as "my client" was written in error. Sparks never signed a retainer agreement and did not testify at the Sub-Panel hearing.

C. JONES MATTER

Respondent represented Charlotte Jones in a divorce matter. Over the course of two years, Respondent was unable to obtain a divorce or settlement agreement on Jones's behalf.

Respondent argues that the delays in this matter were due to Jones's difficulties with her husband and her uncertainties as to how she wanted to proceed. He argues that he did not secure court approval

[8] The birth parents eventually intervened in the Support Action, and on June 28, 1999, Judge Nuessle issued an order approving an agreement naming Mr. and Ms. Roe as the adoptive parents (in accordance with the birth parents' wishes). But due to the adoptive parents' separation, Ms. Roe was given custody and Mr. Roe was given visitation rights.

of the settlement agreement because the parties were unable to agree on final terms.

But at the Sub-Panel hearing, Jones testified (1) that she did not understand why her divorce action could not go forward, (2) that she did not hear from Respondent for months at a time, and (3) that Respondent's paralegal seemed to know more about the case than he did.

Based on the lack of results, Jones filed a claim with the Fee Disputes Board ("Board") alleging that Respondent overcharged her and that she "got no agreement and no divorce." The Board denied Jones's request for a refund of fees, even though the Board found that there was "a hiatus in file activity" for seven months.[9]

Respondent argues that the rehearing of these issues constitutes *res judicata*. But the Board and Commission on Lawyer Conduct investigations are separate matters. The Board conducted its investigation for the purpose of determining whether Respondent had overcharged Jones. Here, the issues are whether Respondent acted diligently, kept his client informed, and provided competent representation.

D. SUB-PANEL HEARING AND REPORT

The Sub Panel filed its report on April 30, 2002. On July 24, 2002, the Full Panel adopted the Sub-Panel report in its entirety, making changes only to protect the confidentiality of the parties in the adoption proceedings.

In its report, the Full Panel stated that it had "carefully reviewed [the Sub-Panel Report], the Objections to it filed by [Respondent], and the Return filed by counsel for Office of Disciplinary Counsel" before coming to a unanimous decision to adopt the Sub-Panel Report in full. (July 26, 2002 Full Panel Report incorrectly titled "Sub-Panel Report").

[9] Jones never appealed the Board's findings.

Because the Full Panel did not specify that it had also reviewed the "record" in making its findings, Respondent argues that the Full Panel therefore failed to review the hearing transcript, adopting the Sub-Panel Report without knowledge of the necessary facts, and thus violated Rule 26(c)(7) of *Lawyer Disciplinary Enforcement*, Rule 413, SCACR.

Rule 26(c)(7) provides, in part, that the Full Panel "shall review the [Sub-Panel's] report and record, and make its own report …." In response to Respondent's argument, ODC points out that simply because the Full Panel did not enumerate that it had reviewed the "report and record" does not necessarily mean that the Panel failed to review the hearing transcript. ODC also argues that Rule 26(c)(7) does not compel the Panel to read each and every page of the transcript; rather, a review of the "report and record" may be accomplished without reading each and every page of the transcript.

LAW/ANALYSIS

As to the adoption-related proceedings, the Sub Panel found, and the Full Panel agreed, that Respondent violated the following from the *Rules of Professional Conduct*, Rule 407, SCACR: (1) Rule 8.4(d) (engaged in conduct involving deceit and misrepresentation); (2) Rule 8.4(e) (engaged in conduct that is prejudicial to the administration of justice); and from *Lawyer Disciplinary Enforcement*, Rule 413, SCACR, (3) Rule 7(a)(5) (engaged in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute and engaged in conduct demonstrating unfitness to practice law). We agree.

In our opinion, Respondent proceeded with Adoption #2 in a manner that deceived the court and that prejudiced and polluted the administration of justice. We acknowledge that Respondent referenced Adoption #1 in the complaint, but he crafted the language in such a way that the court was misled as to the status of Adoption #1.

Paragraph 6 of the complaint stated that a previous action for adoption had been filed and that Ms. Roe "had that action as to her

dismissed as more fully set forth herein." Standing by itself, this paragraph did not explain the status of Adoption #1. Even if the reader caught the "as to her" language, he still would not know—unless he inferred it—that Adoption #1 remained viable as to other parties. Moreover, Paragraph 6 directed the reader to what was "more fully set forth herein" to learn the rest of the story.

The rest of the story appears ten paragraphs later in Paragraph 16. Paragraph 16—the second and final time Adoption #1 is referenced—stated once again that a previous action for adoption was filed. As in Paragraph 6, this language made it clear that another action was filed, but it did not clarify the status of that action. Also as in Paragraph 6, Respondent used the "as to her" language to support his contention that the court should have known that the Adoption #1 action remained viable. But what was remarkable here was that the "as to her" language followed language concerning child abuse, a mother's panic, and a sense of urgency. Respondent knew that no court would have allowed Adoption #2 to go forward without informing the parties to Adoption #1, and so it is inferable that he crafted the language accordingly and placed it at the end of an emotionally-charged paragraph.

Even if we accepted that Respondent informed the court in the complaint as to the status of Adoption #1, he directly misled the court at the hearing, asking his client whether Adoption #1 had been dismissed, not whether it had been dismissed "as to her." When Ms. Roe answered that it had, any confusion the court may have had from reading the complaint was clarified: Adoption #1 had been dismissed *in its entirety*. Although Respondent argues that he simply erred in omitting "as to her" during the direct examination, he cannot convincingly rely on the "as to her" language in one instance (in the complaint) and then overlook it in the next instance (at the hearing).

Finally, Respondent made no reference whatsoever—in the complaint or at the hearing—to the Support Action. Again, he knew that revealing such information would prevent Adoption #2 from going forward.

Throughout his representation of Ms. Roe in Adoption #2, Respondent had the opportunity and the ethical duty to clarify the status of Adoption #1 and the existence of the Support Action so that the court could make an informed decision. Respondent did neither. Finally, Respondent's failure to notify the interested parties that Ms. Roe was filing an action on her own to adopt the very same child at issue in Adoption #1 confirms his intent to proceed without interference from what he knew to be interested parties.

As to the Sparks matter, the Sub Panel found that Respondent violated the following from the *Rules of Professional Conduct*, Rule 407, SCACR: (1) Rule 1.3 (failed to act with reasonable diligence and promptness in representing a client); (2) Rule 1.1 (failed to represent a client competently); and (3) Rule 1.16 (terminated representation without taking steps to protect client interests). We agree.

That Respondent consulted with Sparks about her settlement options, communicated on her behalf on more than one occasion, and referred to her as "my client" on at least one occasion, is enough to create an attorney-client relationship. *See Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct. App. 1984) (finding that "[a] person attains the status of 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice"). Moreover, a signed retainer agreement is not essential to create such a relationship. *See* 7 Am. Jur. 2d *Attorneys at Law* § 136 (2003). Therefore, by allowing Sparks to go into default without taking action to protect her interest, we find that Respondent has violated Rules 1.3, 1.1, and 1.16 as enumerated in the Sub-Panel Report.

As to the Jones matter, the Sub Panel found that Respondent violated the following from the *Rules of Professional Conduct*, Rule 407, SCACR: (1) Rule 1.3 (failed to act with reasonable diligence and promptness in representing a client); (2) Rule 1.4(a) (failed to keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information); and (3) Rule 1.1 (failed to represent a client competently). We agree.

Given Jones's testimony and the fact that Respondent obtained no results for his client over a two-year period, we find that Respondent failed to act diligently and competently in this matter.

Finally, Respondent's contention that the Full Panel did not review the report and record before making its decision is without merit. This Court is not confined to the Sub-Panel or Full-Panel findings. *Burns v. Clayton*, 237 S.C. 316, 331, 112 S.E.2d 300, 307 (1960). Indeed, this Court is required to conduct *its own* thorough review of the record and then render an appropriate sanction. *Matter of Kirven*, 267 S.C. 669, 670, 230 S.E.2d 899, 900 (1976) (emphasis added). Moreover, this Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations" of the Full Panel. Rule 27(e)(2), *Lawyer Disciplinary Enforcement*, Rule 413, SCACR. Given its authority and given that this Court has reviewed the record in its entirety, we hold that Respondent's argument that the Full Panel failed to conduct a thorough review of the record before making its decision is unfounded.

SANCTIONS

Because of the seriousness of the misrepresentations in the adoption-related proceedings, the Full Panel recommended that Respondent be publicly reprimanded. The Full Panel also recommended that Respondent pay proceeding costs. In our opinion, these sanctions are appropriate *at a minimum*.

This Court has deemed public reprimand the appropriate sanction in cases involving deceit. *See Matter of Gregg Jones*, 344 S.C. 379, 544 S.E.2d 826 (2001) (attorney refrained from recording a series of deeds so that a husband would not learn that his wife had sold the property and did not tell subsequent buyers that the property carried an outstanding mortgage); *Matter of Celsor*, 330 S.C. 497, 499 S.E.2d 809 (1998) (attorney falsely notarized client's signature and submitted such falsified documents to the court); *Matter of Bruner*, 321 S.C. 465, 469 S.E.2d 55 (1996) (attorney's misrepresentations to title insurer

stemmed from lackadaisical and mismanaged office practices); *Matter of Blackmon*, 295 S.C. 333, 368 S.E.2d 465 (1988) (attorney inadvertently signed his name on judge's signature line on a motion, filed the motion, and then misrepresented the situation to the investigator at the Attorney General's office).

But unlike the cases outlined above, the present case involves multiple instances of deceit *before judges*. Because there is no South Carolina case on point, this Court has looked to cases from other states for guidance.

The Supreme Court of Arizona recently imposed a six-month suspension in a case where two attorneys (1) conducted a "sham" trial; (2) misled the judge by deliberately concealing the existence of an out-of-court agreement; (3) evaded the trial court judge's questions; and (4) deceived the trial judge with "answers that purposefully disguised the true situation when a 'lawyer of reasonable prudence and competence' would have known that the judge's inquiry required disclosure." *Matter of Alcorn*, 41 P.3d 600, 611 (Ariz. 2002).

The Supreme Court of Washington suspended an attorney for 60 days for misrepresenting facts to a court in *ex parte* proceedings. *Matter of Carmick*, 48 P.3d 311 (Wash. 2002). The Court noted that:

> An attorney's duty of candor is at it highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. Such a high level of candor is necessary to prevent judges from making decisions that differ from those they would reach in an adversarial proceeding.

Id. at 318.

Taking an even stricter stance than the Arizona and Washington courts, the Supreme Court of Georgia disbarred an attorney (1) for telling a client that he had re-filed a claim when he never had and (2) for presenting two falsified client letters and postal receipts to the

investigative panel to support his position. *Matter of Shehane IV*, 575 S.E.2d 503 (Ga. 2003). Disbarment was warranted even though this was the attorney's first instance of discipline. *Id.* at 504.

In the present case, Respondent evaded judges' questions and in some instances, directly misled the court. Respondent's duty of candor was at its highest in the Adoption #2 final hearing, and it was at this hearing that he most noticeably misled the court. This final hearing was much like an *ex parte* proceeding in that the adversarial parties were not present, and Judge Brown was left to depend on Respondent's representations alone. Respondent took advantage of this opportunity, successfully leading the court to issue an order that it would later vacate.

In addition, Respondent's misconduct in the Sparks and Jones matters, including lack of due diligence, failure to keep his clients informed, failure to take steps to protect a client's interests, and incompetence, justifies the sanctions imposed by this Court.

CONCLUSION

Given the gravity of Respondent's numerous incidents of misconduct, we hereby suspend Respondent for 90 days, order him to pay proceeding costs, and require that he be re-examined by this Court's Committee on Character and Fitness before re-activating his license to practice law.

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Leonard Brown, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25749
Heard November 5, 2003 - Filed November 10, 2003

DISMISSED AS IMPROVIDENTLY GRANTED

Teresa A. Knox, Deputy Director for Legal Services, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, all of S.C. Dept. of Probation, Parole & Pardon Services, of Columbia, for Petitioner.

Deputy Chief Attorney Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the decision of the Court of Appeals in State v. Brown, 349 S.C. 414, 563 S.E.2d 339 (Ct. App. 2002). After careful consideration of the Appendix and briefs, we dismiss certiorari as improvidently granted.

Certiorari Dismissed as Improvidently Granted.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David E. Belding, Respondent.

Opinion No. 25750
Heard September 25, 2003 - Filed November 10, 2003

DEFINITE SUSPENSION

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

John P. Freeman, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, we hold that David E. Belding ("Respondent") shall be definitely suspended from the practice of law for a period of one year.

FACTS

Rucker-Taylor Matter

Todd Hunnicutt ("Mr. Hunnicutt") and Elizabeth Hunnicutt ("Ms. Hunnicutt") were having marital problems. According to Respondent, in the late summer of 2000, Mr. Hunnicutt approached Respondent and told him that he and his wife were undergoing a "Gestalt" method of therapy. Mr. Hunnicutt asked Respondent to create a fictitious set of divorce documents to "shock" his wife as prescribed by the therapy. According to this method, Ms.

Hunnicutt would be "shocked" into mending the marriage upon seeing the fictitious documents.[1]

As requested, Respondent prepared the documents. He drafted a Summons and Complaint titled *Elizabeth Stenzel Hunnicutt v. A. Todd Hunnicutt*. The documents bore a ficticious docket number with the last three digits handwritten, a fictitious filing stamp for the Clerk of Court of Newberry County, and the signature of "Mark J. Taylor," as Respondent purported to be.

Respondent continued to draft documents that appeared authentic.[2] He drafted a fictitious Consent Order to Change Venue from Newberry to Lexington County. On the document, Respondent signed the names "Mark J. Taylor" and "Warren Powell."[3] He also signed "J. M. Rucker" in the block designated "presiding judge."

Respondent then drafted a letter on his own letterhead, which purported to be written to Taylor, indicating that he, Respondent, was now representing Mr. Hunnicutt in the divorce.

Respondent then prepared a false "Defendant's First Set of Interrogatories and First Request for Production." He signed his assistant's

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[1] Dr. Peter Kilman, the couple's marriage counselor, testified at the hearing that, under his direction, the couple never underwent "Gestalt" therapy.

[2] Respondent made mistakes in his efforts to make the documents appear authentic. He signed Mark Taylor's ("Taylor") name as "Mark J. Taylor" but Taylor signs his name "J. Mark Taylor." Respondent also misnamed Taylor's firm. In addition, Respondent signed Judge Rucker's name "J. M. Rucker" whereas Judge Rucker signs his name "John M. Rucker."

[3] Warren Powell ("Powell") has never represented Mr. or Ms. Hunnicutt. But Powell did represent Mr. Hunnicutt's first wife in her divorce with Mr. Hunnicutt.

name to the certificate of mailing, purporting proper service of the Interrogatories. He then drafted a fictitious Request for Hearing form, bearing "Mark J. Taylor" as counsel for Ms. Hunnicutt. Respondent then prepared a handwritten letter on his letterhead addressed to "Todd" and attached a fictitious settlement agreement bearing the false docket numbers.

The documents are entirely false and were never filed in any court. Respondent gave the documents to Mr. Hunnicutt. Ms. Hunnicutt found the documents in the trunk of Mr. Hunnicutt's car and was confused because she had not initiated the divorce action as suggested in the documents. She faxed the documents to a cousin in Missouri. The Missouri attorney confirmed that the documents appeared authentic and that a divorce action appeared to be underway.

The Missouri attorney contacted Taylor and Judge Rucker, neither of whom knew about the matter. In turn, Taylor and Judge Rucker contacted the Commission on Lawyer Conduct. The Attorney General's Office joined this matter with the Jennifer Carmen matter and issued formal charges accordingly.

Jennifer Carmen Matter

In 1997, Jennifer Carmen ("Ms. Carmen") hired Respondent in an action to increase child support payments from her former husband. Respondent brought the action in Lexington County Family Court. Ms. Carmen's former husband, Mark Carmen ("Mr. Carmen"), who was represented by Nancy M. Young ("Young"), counterclaimed for additional visitation with the couple's son.

Respondent told Ms. Carmen that a hearing would take place on June 29, 1998. The Lexington County docketing clerk sent Respondent a Notice of Hearing indicating that the hearing had been set for June 23, 1998. Respondent failed to send Ms. Carmen a copy of the Notice, and he did not inform her of the change. As a result, Ms. Carmen and Respondent were not present at the June 23 hearing.

After the June 23 hearing, Young called Respondent and offered to settle the case. Respondent was unaware that he had missed the hearing. Young presented Respondent with an offer that would increase visitation rights for Mr. Carmen and would increase child support for Ms. Carmen. Respondent told her that he would call Ms. Carmen to obtain her consent to settle the matter. He was unable to reach Ms. Carmen and obtain her approval. Nevertheless, he called Young and accepted the offer to settle.

On June 26, 1998, Mr. Carmen contacted Ms. Carmen to ask her when he could pick up their son. Ms. Carmen did not know about the June 23 hearing or the subsequent settlement agreement. She contacted Respondent to find out about the status of her case. Respondent assured her that he would call the court to find out the results of the hearing. He admitted to missing the hearing date and encouraged her to agree to the terms of the proposed settlement. He reiterated that the settlement terms were consistent with what a judge would order, but Ms. Carmen refused to consent to the proposed settlement.

In late July 1998, Ms. Carmen went to Respondent's office to retrieve her file. The file contained a copy of the settlement agreement that she never signed.

On July 29, 1998, Young filed a Motion to Compel Settlement. Respondent received a copy of this Motion and informed Ms. Carmen that a hearing on the Motion was set for September 4, 1998.

On August 4, 1998, Respondent filed a Motion to be Relieved as Counsel in the case. He did not notify Ms. Carmen that he had filed this Motion.

On September 4, 1998, Respondent and Ms. Carmen attended the scheduled hearing. The court was the first to inform Ms. Carmen of Respondent's Motion to be Relieved as Counsel. She agreed to find another counsel. Judge Sawyer issued an Order granting Young's Motion to Compel Settlement but ruled that the issues of reasonableness and fairness would be heard *de novo* on November 17, 1998.

After Respondent was relieved as counsel, Ms. Carmen hired Kenneth H. Lester ("Lester") to represent her at the November hearing. Lester also helped negotiate a settlement that was more advantageous to Ms. Carmen than the settlement that Respondent negotiated for her. Lester's fees totaled approximately $7,000.

LAW/ANALYSIS

We hold that Respondent's conduct constituted a violation of Rules 1.1 (competence), 1.2 (scope of representation), 1.4 (communication), 1.16 (terminating representation), 4.1 (truthfulness and statements to others), and 8.4 (a), (d), and (e) (misconduct) of the *Rules of Professional Conduct*, Rule 407, SCACR, and warrants discipline in accordance with Rule 7(a)(3) (definite suspension from the practice of law) of the *Rules for Lawyer Disciplinary Enforcement*, Rule 413, SCACR.

We hold that Respondent violated Rule 4.1, which states that a lawyer shall not knowingly, "[m]ake a false statement of material fact or law to a third person" or "[f]ail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

This Court has recently heard two cases involving lawyers who engaged in conduct similar to Respondent's conduct. In *In the Matter of Mozingo*, 330 S.C. 67, 497 S.E.2d 729 (1998), this Court disbarred an attorney for signing Chief Justice Toal's name on a falsified document. The attorney represented his client in an action to reduce or eliminate child support and alimony payments. To help the client appease his family, the attorney signed Justice Toal's name to a letter stating that the court had received the client's Motion and was in the process of eliminating the requirement that his wages be garnished.

In the Matter of Walker, 305 S.C. 482, 409 S.E.2d 412 (1991), a client hired an attorney to expunge the client's record. Two years later, the client saw his attorney at a party. The attorney told the client that he "was a free

man" when in fact the attorney had done nothing to expunge his client's record. To support his misrepresentation, the attorney signed a circuit court judge's name to a false order and gave it to the client. The client, concerned that the document did not appear to be properly filed, went to the Clerk of Court to file it. The Clerk rejected the order because the signature had been forged. The attorney argued that that the only reason that he signed the judge's name was so that client could see how the order would appear. The attorney was indefinitely suspended. Chief Justice Gregory dissented, stating that the attorney should have been disbarred.

In the present case, Respondent drafted false documents that included names of real lawyers and a judge. He argues that he never intended for the documents to be presented as if they were authentic, yet the record indicates that he made a conscious effort to make the documents appear authentic.

Respondent further argues that he has not violated Rule 4.1 because he lacked the intent to commit criminal forgery as defined by the Court of Appeals in *State v. Westcott*, 316 S.C. 473, 477, 450 S.E.2d 598, 601 (Ct. App. 1994). We disagree. Rule 4.1 does not require that criminal conduct be shown in order to justify a sanction. Whether Respondent committed criminal forgery is a collateral determination that is not dispositive of a determination of Respondent's misconduct under Rule 4.1.

This Court generally imposes severe sanctions for attorneys who sign another's name without authorization.[4] However, we elect to impose a less severe sanction for this violation because we find that the facts of *Mozingo* and *Walker* are distinguishable from the present case. In both *Mozingo* and

[4] *See Mozingo,* 330 S.C. 67, 497 S.E.2d 729 (1998) (disbarment for signing judge's name to a false letter); *Walker*, 305 S.C. 482, 409 S.E.2d 412 (1991) (indefinite suspension for signing circuit court judge's name to expungement order); *Cate v. Rivers*, 246 S.C. 35, 142 S.E.2d 369 (1965) (disbarment for signing judge's name to twelve adoption decrees); *State v. Belcher*, 249 S.C. 301, 153 S.E.2d 921 (1967) (disbarment for signing name of special referee and judge to divorce decree).

Walker, attorneys actively presented false documents as if the documents were authentic. In this case, the documents were never presented as authentic; rather, Ms. Hunnicutt found the documents in Mr. Hunnicutt's car.

The Attorney General's Office presented no direct evidence that Respondent used these documents to facilitate fraud upon the court. Nevertheless, the documents appear authentic and Respondent signed the names of real people, including a family court judge. This Court will impose substantial sanctions upon any attorney who signs the name of a judge, regardless of the use made of the document.

We hold that Respondent violated Rule 1.2(a), which provides that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement." This Court has frequently held that failing to receive a client's consent before entering into a contract is a violation of Rule 1.2. *See In the Matter of Edens* 344 S.C. 394, 544 S.E.2d 627 (2001) (attorney refinanced loan without client's consent); *In the Matter of Lewis*, 344 S.C. 1, 542 S.E.2d 713 (2001) (in approximately fifty-one instances, attorney signed settlement agreements without client's consent).

In this case, Respondent accepted Young's offer to settle without consulting Ms. Carmen and obtaining her consent. Respondent denies that he and Young entered into a binding settlement agreement. Nevertheless, Young prepared an agreement, and the court granted a Motion to Compel settlement. That Respondent attempted to reach Ms. Carmen when Young proposed the settlement demonstrates that he knew he needed his client's consent in order to proceed, yet he proceeded anyway.

We also hold that Respondent violated Rule 1.4 (a) and (b). Rule 1.4(a) states that "[a] lawyer shall keep a client reasonably informed about the status of a matter." Respondent admits that he failed to inform his client about the September 23, 2003 hearing.

Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Respondent failed to inform Ms. Carmen

about the settlement negotiations. He also failed to properly inform Ms. Carmen of her rights and options upon his Motion to be Relieved as Counsel.

We hold that Respondent violated Rule 1.16, which states that "[u]pon 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."

This Court has reiterated the policy considerations of proper notice upon intention to withdraw as counsel. In *Ex Parte Strom*, this Court held that "[s]trong policy considerations dictate that a client and the court must be unequivocally informed when an attorney intends to withdraw from representing a party, for whatever reason." 343 S.C. 257, 259, 539 S.E.2d 699, 701 (2000). Respondent's notice was less than "unequivocal." Ms. Carmen was entitled to notice that Respondent's Motion to be Relieved as Counsel had been filed.

Upon learning that he missed the September 23, 2003 hearing, Respondent engaged in a charade to conceal his mistakes. Rather than trying to mitigate the damage he caused to his client, Respondent orchestrated an unauthorized settlement. When his client would not consent to that settlement he attempted to be relieved as counsel. We believe that when an attorney attempts to cover up bad acts in lieu of continuing to remain an active advocate for his client, he subjects himself to substantial sanctions.

Consequently, we suspend Respondent for one year, effective as of the date of this opinion, and order him to pay the costs of the disciplinary proceedings. 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, of Rule 413, SCACR .

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Reginald I. Lloyd, concur.

The Supreme Court of South Carolina

In re: Amendments to Rule 416, SCACR,
Resolution of Fee Disputes Board.

O R D E R

The South Carolina Bar has proposed amending Rule 416 of the South Carolina Appellate Court Rules to improve the administration of the fee disputes process. The Bar seeks to amend Rule 2 of Rule 416 by defining "client" as "a person who has engaged the professional legal services of an attorney who is a member of the South Carolina Bar." The Bar also seeks to amend Rule 12(C) of Rule 416 to provide for additional options for reassigning a dispute when an assigned member is delinquent in investigating the dispute and making a recommendation. Finally, the Bar seeks to amend Rule 20(A) of Rule 416 to state that filing an appeal from a decision of the Board does not stay the issuance of a Certificate of Non-Compliance, and to amend Rule 20(C) to state that the parties and the circuit court shall provide the Board with notice of all proceedings and the final disposition. The Bar's proposed amendments are approved.

In addition, this Court, on its own motion, has amended Rule 20(A) of Rule 416, SCACR, to state that a decision of the Resolution of Fee Disputes Board can be vacated by the circuit court only when one of the five grounds set forth in Rule 20(A) has occurred.

Pursuant to Rule 22 of Rule 416, SCACR, and Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 416, SCACR, to reflect the changes set forth above. These amendments shall be effective immediately. The amended provisions are attached.

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

November 5, 2003

AMENDMENTS TO RULE 416
RESOLUTION OF FEE DISPUTES BOARD

RULE 2. JURISDICTION

The purpose of the Board is to establish procedures whereby a dispute concerning fees, costs or disbursements between a client and an attorney who is a member of the South Carolina Bar (the Bar) may be resolved expeditiously, fairly and professionally, thereby furthering the administration of justice, encouraging the highest standards of ethical and professional conduct, assisting in upholding the integrity and honor of the legal profession, and applying the knowledge, experience and ability of the legal profession to the promotion of the public good. As used in these Rules, "fee" is deemed to include a legal fee, costs of litigation and disbursements associated with a legal cause, claim or matter and "client" is defined as a person who has engaged the professional legal services of an attorney who is a member of the South Carolina Bar. The Board may decide fee disputes between two or more members of the South Carolina Bar when those disputes arise from a single case or fee share provided all parties consent in writing to the Board's jurisdiction.

Under no circumstances will the Board participate in: (1) a fee dispute involving an amount in dispute of $50,000 or more, (2) the dissolution of a law partnership, law practice or any other business relationship between attorneys, or (3) disputes over which, in the first instance, a court, commission, judge, or other tribunal has jurisdiction to fix the fee. When an allegation of attorney misconduct arises out of a fee dispute, the Board, in its discretion, may (1) address the alleged misconduct in its findings, or (2) refer the matter to the Commission on Lawyer Conduct. If the alleged misconduct does not arise out of a fee dispute, it shall be referred to the Commission on Lawyer Conduct.

No fee dispute may be filed with the Board more than three (3) years after the dispute arose.

Jurisdictional issues shall be determined by the circuit chair.

RULE 12. SCHEDULE OF PROCEEDINGS

(A) All fee disputes should be resolved within six (6) months. The assigned member's report should be completed within thirty (30) to ninety (90) days after being forwarded by the circuit chair. A fee dispute may not exceed six (6) months without the written consent of the circuit chair for good cause shown. Any extension of time granted by the circuit chair must be for a specified period of time which shall be the least amount of time deemed necessary to resolve the dispute.

(B) If an assigned member does not respond to reminders from the circuit chair, the Bar office may intervene upon request of the circuit chair.

(C) If a fee dispute has been assigned and is pending, without an extension approved by the circuit chair,

(1) more than ninety (90) days, then the circuit chair may, at his or her discretion:

(a) reassign the fee dispute; or

(b) if the amount exceeds $5,000, appoint a hearing panel, which shall schedule a hearing within thirty (30) days.

(2) more than six (6) months, then the circuit chair shall, with the concurrence of the Executive Council Chair:

(a) reassign the fee dispute;

(b) if the amount exceeds $5,000, appoint a hearing panel, which shall schedule a hearing within thirty (30) days; or

(c) as a last resort, return all investigative notes and application to a designated Bar staff member who is a member of the Bar for investigation as the assigned member.

In these events, the original assigned member shall immediately turn over notes and files to the circuit chair.

(D) If the circuit chair is delinquent, then the case may be reassigned to the Executive Council Chair or the Executive Council Chair's designee.

RULE 20. APPEALS

(A) A party may appeal the final decision of the Board to the circuit court in the county where the principal place of practice of the attorney is located, with written notice to the South Carolina Bar Resolution of Fee Disputes Board, Post Office Box 608, Columbia, S.C. 29202. The court shall only vacate a final decision of the Board where:

(1) the decision was procured by corruption, fraud or other undue means;

(2) there was evident partiality or corruption in an assigned member or hearing panel member, or misconduct prejudicing the rights of any party;

(3) the assigned member or hearing panel members exceeded their powers;

(4) the hearing panel members refused to postpone the hearing, if any, upon sufficient cause being shown therefore, or the assigned member or hearing panel members refused to hear evidence material to the controversy, or otherwise conducted the proceeding so as to substantially prejudice the rights of a party;

(5) the hearing panel chair did not provide notice of the hearing as required under Rule 15.

Filing an appeal does not stay the issuance of a Certificate of Non-Compliance.

(B) An appeal must be made within thirty (30) days after the mailing of a copy of the final decision by the appealing party, except that if based upon

corruption, fraud or other undue means, it shall be made within thirty (30) days after such grounds are known or should have been known.

(C) The Board shall supply to the circuit court the following material which shall constitute the record on appeal:

the application, the decision of the assigned member, the concurrence or non-concurrence of the circuit chair, and in disputes involving amounts greater than $5,000, the decision of the hearing panel. The parties and the circuit court shall provide the Board, at the above address, notice of all proceedings and the final disposition.

(D) In vacating the final decision, the court may order a reconsideration by a new assigned member appointed by the circuit chair, or if vacating the decision of a hearing panel, a rehearing before a new hearing panel appointed by the circuit chair. When a final decision of the Board is vacated, any judgment which may have been entered pursuant to that decision also is vacated.

The Supreme Court of South Carolina

In the Matter of Stephen M. Pstrak, Respondent.

ORDER

Respondent was suspended on January 13, 2003, for a period of eight months. In accordance with Opinion No. 25580, Ronald A. Hightower, Esquire, of Lexington, South Carolina, has agreed to serve as mentor for a period of one year. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted, Mr. Hightower is approved as the mentor and Respondent is hereby reinstated to the practice of law in this state.

s/ James E. Moore J.
For the Court

Columbia, South Carolina

November 7, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Evening Post Publishing Co., d/b/a The Post and Courier, and Ms. Parthinea Snowden, as Personal Representative of the Estate of Edward Snowden, Deceased,	Plaintiffs,
Of whom Evening Post Publishing Co., d/b/a The Post and Courier, is	Appellant,
v.	
City of North Charleston,	Respondent.

Appeal From Charleston County
Gerald C. Smoak, Circuit Court Judge

Opinion No. 3693
Heard ~~April 9,~~June 12, 2003 – Filed November 17, 2003

AFFIRMED

John J. Kerr, of Charleston, for Appellant.

Derk B. K. Van Raalte, IV and J. Brady Hair, both of North Charleston; and Richard W. Lingenfelter, of Charleston, for Respondent.

JEFFERSON, Acting J.: The Post and Courier filed a Freedom of Information Act request seeking access to 911 tapes the City of North Charleston had in its possession regarding the shooting death of Eric Snowden. The City refused the request because the tapes were to be used in an upcoming lynching trial. The Post and Courier filed a declaratory judgment action seeking access to the tapes and the trial court denied access, finding the Act exempted the tapes from premature disclosure because they were to be used in a prospective law enforcement action. The Post and Courier appeals, and we affirm.

FACTS

On October 21, 2000, four white men attacked a black man, Eric Snowden, in front of a video store in North Charleston. The store owner called 911 and police were dispatched to the video store. When the officers arrived, they found Snowden inside the store, armed with a handgun. The officers shot and killed Snowden. The video store owner remained on the phone with the 911 dispatcher throughout the entire incident, and the 911 call was audio taped. The tapes included conversations between the officers and the dispatcher and contained contemporaneous accounts of the events giving rise to the lynching charges.

The four men who attacked Snowden were arrested and charged with lynching. On June 21, 2001, after reviewing the transcript of the 911 call and listening to the taped recording, the solicitor decided not to press charges against the police officers who shot Snowden. On June 26, 2001, The Post and Courier filed a Freedom of Information Act request with the City asking for production of the audio taped 911 call. The solicitor informed The Post and Courier that he considered the tapes evidence in the upcoming lynching

trial of the four men. The solicitor denied the request to immediately produce the tapes**,** but offered to give the tapes to The Post and Courier after the trial. Based on the solicitor's evidentiary assessment and request for a delayed release, the City refused to turn over the tapes, stating they were exempt from production prior to the lynching trial by S.C. Code Ann. § 30-4-40(a)(3)(B) (Supp. 2002) of the Freedom of Information Act.

The Post and Courier filed a declaratory judgment action seeking the production of the 911 tapes. The estate of Eric Snowden intervened in the case also seeking the production of the tapes in a civil action it filed against the City. The trial court denied The Post and Courier's request for immediate production of the tapes, but allowed the production of the tapes to Eric Snowden's estate.[1] The trial court found the tapes fell under the exemption in section 30-4-40(a)(3)(B) and ruled the City did not have to produce the tapes until after the trial. On February 26, 2002, when the solicitor played the 911 tapes in court during the lynching trial, the City released the transcript of the 911 tapes to The Post and Courier. The Post and Courier appeals the denial of its declaratory judgment action.

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[1] Access to the 911 tapes was to be provided to Eric Snowden's Estate upon proper request pursuant to the discovery provisions of the South Carolina Rules of Civil Procedure. The criminal defendants in the lynching trial were provided transcripts of the 911 tapes pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure. The trial court expressly prohibited the attorneys or their clients from disclosing the tapes, copies of the tapes, transcripts, or any other summary or information related thereto, to the media. The court allowed the attorneys to disclose the information to their clients and agents for the limited purposes sanctioned by the applicable Rules of Procedure.

LAW/ANALYSIS

I. Mootness

The City argues that The Post and Courier's appeal is moot since the City released the tapes to The Post and Courier at the conclusion of the lynching trial. We disagree.

A matter becomes moot "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Curtis v. State, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (alteration in original) (quoting Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)), cert. denied, 535 U.S. 926 (2002). In civil cases, there are three exceptions to the mootness doctrine: (1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review, (2) an appellate court can decide cases of urgency to establish a rule for future conduct in matters of important public interest, and (3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction. Id. at 568, 549 S.E.2d at 596.

In Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996), a student challenged the school district's order which suspended him for ten days for coming onto campus after consuming alcohol. The court chose to hear the case because school suspensions are very brief and are usually completed before judicial review can take place. Id. at 432, 468 S.E.2d at 864. Similarly, although we can grant no further relief in the current appeal, we choose to address The Post and Courier's argument because the facts presented here are capable of repetition yet evading review.

II. Application of the Statute

The Post and Courier argues the trial court erred when it denied its request to compel the City to turn the tapes over to it pursuant to the Freedom of Information Act. We disagree.

The legislature exempted certain items from disclosure under the Freedom of Information Act as follows:

> Records of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime [are exempt from disclosure under the provisions of the Freedom of Information Act] if the disclosure of the information would harm the agency by:
>
> . . . the premature release of information to be used in a prospective law enforcement action.

S.C. Code Ann. § 30-4-40(a)(3)(B) (Supp. 2002).

In Turner v. North Charleston Police Department, 290 S.C. 511, 351 S.E.2d 583 (Ct. App. 1986), a husband and wife were involved in a series of violent altercations culminating in the shooting and serious injury of the wife. The wife claimed she made a series of calls to the police prior to the shooting. The wife made a request for access to the police department's tape recordings, written files, and daily activities sheets. The trial court denied her access to the tape recordings and the written files. The police department informed the city that the husband was about to be indicted and tried in the next few weeks for shooting his wife. The trial court found that the exception exempting disclosure of information to be used in criminal proceedings applied. The wife appealed, and we affirmed the trial court's ruling. Id. at 513, 351 S.E.2d at 584.

Additionally, in State v. Robinson, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991), the supreme court held that "[t]he specific exemption under § 30-4-40(a)(3)(B) for the 'premature release of information to be used in a prospective law enforcement action' *clearly exempts information regarding pending criminal investigations*. No specific showing of harm is required by the State if the request involves such material." [Emphasis added.]

We find that the facts of this case fall squarely within Turner. The 911 tapes were to be used as evidence in the forthcoming lynching trial and therefore fell within the exception listed in section 30-4-40(a)(3)(B).

AFFIRMED.

HOWARD and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Johnny Crawford and Joan Wilson,	Plaintiffs,
Of whom Johnny Crawford is	Appellant,
v.	
Janice Henderson,	Respondent.

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge
Donald W. Beatty, Circuit Court Judge
John C. Few, Circuit Court Judge

Opinion No. 3694
Heard April 9, 2003 – Filed November 17, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Samuel Darryl Harms, of Greenville, for Appellant.

Karl S. Brehmer and J. Austin Hood, both of Columbia, for Respondent.

CONNOR, J.: Johnny Crawford brought suit against Janice Henderson and his underinsured motorist carrier ("UIM"), Southern Heritage Insurance Company, seeking to recover damages from injuries suffered in an automobile accident. The jury awarded Crawford $1,099.38 in actual damages. On appeal, Crawford asserts the circuit court erred in quashing Crawford's subpoena to depose Henderson a second time. He contends the UIM carrier's attorney should not have been able to claim an attorney-client privilege to limit the first deposition based on the following reasons: (1) an attorney-client privilege did not exist between Henderson and the UIM carrier's attorney; and (2) any alleged attorney-client privilege was waived by counsel's failure to file a motion for a protective order pursuant to Rule 30(j)(3), SCRCP. Finally, Crawford contends the circuit court erred in permitting a nurse practitioner to give an opinion regarding the cause of Crawford's injuries. We affirm in part, reverse in part, and remand.

FACTS

This case arose out of an automobile accident between Janice Henderson and Johnny Crawford. While leaving a gas station, Henderson pulled out into traffic on Highway 290 in Duncan and was struck by Crawford. Henderson testified she did not immediately see Crawford's vehicle because a truck that was entering the gas station blocked her line of sight.

Crawford sued Henderson seeking to recover damages for injuries both he and his passenger, Joan Wilson, suffered in the accident. After Crawford and Wilson settled the liability limits of Henderson's policy and entered into a covenant not to execute any judgment against Henderson, they sought to recover damages from Southern Heritage Insurance Company ("Southern"), the UIM carrier.

Crawford attempted to take Henderson's deposition four times. Each time, Crawford served Southern's attorney, Karl Brehmer, with the notices of

the depositions. Henderson failed to appear. Ultimately, Crawford filed a motion in circuit court seeking an order to compel Henderson to appear for her deposition or be held in contempt.

At the hearing, Brehmer appeared and informed the court that he represented the UIM carrier and had no control over Henderson. Counsel claimed he had attempted to find Henderson in order to get her to appear for a deposition.

After hearing arguments, the circuit court found Brehmer represented Henderson in name only and, therefore, Crawford would have to personally serve Henderson with the notice of deposition. The court reasoned, "[Counsel] does represent [Henderson], . . . for purposes of litigating liability and damages. But for purposes of paying money, . . . it's very clear that he represents the insurance carrier and he made that clear."

Crawford served Henderson and she appeared for a deposition on February 21, 2001. During the deposition, Crawford's counsel asked Henderson if she had discussed the case with Brehmer prior to the deposition and asked her to relate the substance of the conversations. Brehmer instructed Henderson not to answer the question asserting the answer would violate the attorney-client privilege. Henderson did not answer the question and the deposition was concluded.

Crawford served Henderson with a second subpoena and notice of deposition scheduled for June 19, 2001. On June 4, 2001, Brehmer filed a motion for a protective order pursuant to Rules 26(c) and 30(a)(2) of the South Carolina Rules of Civil Procedure.[1] Counsel contended Crawford had

[1] Rule 26(c) of the South Carolina Rules of Civil Procedure provides in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be

already taken Henderson's deposition, the parties had not agreed to multiple depositions, and good cause did not exist to compel an additional deposition. In response, Crawford moved to quash the motion for a protective order on the following grounds: (1) Henderson had not been served with the motion; (2) Brehmer could not assert the attorney-client privilege because he had previously stated he was not Henderson's attorney; and (3) even if the attorney-client privilege existed, it was waived because the procedural requirements of Rule 30(j)(3) of the South Carolina Rules of Civil Procedure, which permit a witness not to answer a deposition question, had not been met.

The circuit court granted Brehmer's motion for a protective order. As a result, Henderson's deposition was never reconvened and the case proceeded to trial. The jury returned a verdict in favor of the plaintiffs and awarded $1,099.38 to Crawford and $30,413.61 to Wilson. Crawford appeals.[2]

> taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court . . ..

Rule 26(c), SCRCP.

Rule 30(a)(2) states in relevant part, "The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Rule 30(a)(2), SCRCP.

[2] Wilson is not a party to this appeal.

DISCUSSION

I. Existence of Attorney-Client Privilege

Crawford argues the circuit court erred when it granted Brehmer's motion for a protective order because, as a matter of law, an attorney-client relationship does not exist between a UIM carrier's attorney and an underinsured motorist, i.e., the named defendant. Even if this relationship can be established, Crawford contends the conversations between Henderson and Brehmer were not protected by the attorney-client privilege.

A.

Although this case presents several related issues, the threshold matter is to define the relationship created between a UIM carrier's attorney and the named defendant.

The attorney-client privilege protects against disclosure of confidential communications by a client to his or her attorney. State v. Owens, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "The privilege is strictly construed to protect only confidences disclosed within the relationship." Id. at 407, 424 S.E.2d at 477. To establish an attorney-client privilege, the person asserting the privilege must show that the relationship between the parties was that of attorney and client and that the communications were confidential in nature. Marshall v. Marshall, 282 S.C. 534, 538-39, 320 S.E.2d 44, 47 (Ct. App. 1984). In order to obtain the status of a client, the person must communicate in confidence with an attorney for the purpose of obtaining legal advice. Id. at 539, 320 S.E.2d at 47. The advice or assistance must be sought with a view to employing the attorney professionally whether or not actual employment occurs. Id.

Initially, we note there is no contractual relationship between the UIM carrier's attorney and the named defendant. As conceded by Southern, a contract did not exist between Henderson and Southern. Instead, Crawford through his premium payment directly contracted with Southern.

Significantly, our Supreme Court has held the rights of the UIM carrier and the named defendant are not synonymous, and, in fact, may be conflicting. Even though our Supreme Court has not directly addressed the issue in the instant case, we our guided by the analysis in Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995). In Broome, Carol and John Broome sued Watts for injuries sustained in an automobile accident. Nationwide Mutual Insurance Company (Nationwide) insured Watts for policy limits in the amount of $50,000/$100,000. The Broomes had underinsured motorist coverage with United Services Automobile Association (USAA). As required by section 38-77-160 of the South Carolina Code of Laws, the Broomes served USAA with the complaints.[3] USAA filed notices of appearance and motions for intervention in both cases. Shortly thereafter, the Broomes, Watts, and Nationwide entered into a settlement agreement in

[3] Section 38-77-160 provides in pertinent part:

> No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

S.C. Code Ann. § 38-77-160 (2002). Because there have been no substantive amendments made to this statute since the Broome decision, we cite to the most current version of the statute.

which Nationwide agreed to pay its $50,000 liability limits to the Broomes. Pursuant to the agreement, Watts waived her right to a jury trial and the Broomes agreed not to execute against Watts or Nationwide any judgment obtained against Watts. The Broomes, however, decided to proceed with an action to determine damages for purposes of UIM coverage. USAA was not a party to the agreement. USAA assumed the defense of the action under section 38-77-160, filed answers, and requested a jury trial. Over the Broomes' objections, the judge ordered a jury trial.

On appeal, the Broomes asserted USAA was bound by the settlement agreement. Because Watts is the named defendant, the Broomes contended the named defendant's waiver of a jury trial bound USAA even though it was not a party to the settlement agreement. Our Supreme Court rejected the Broomes' argument, finding that Watts could not give up USAA's right to a jury trial. Broome, 319 S.C. at 340, 461 S.E.2d at 48.

Citing section 38-77-160 and a case interpreting this statute, the Court found that a waiver by Watts was not "tantamount to a waiver by USAA, because it blurs the distinction between the named defendant (Watts) and the actual defendant (USAA) which must pay damages on behalf of the named defendant in the event of liability." Broome, 319 S.C. at 340, 461 S.E.2d at 48; see Williams v. Selective Ins. Co. of the Southeast, 315 S.C. 532, 534-35, 446 S.E.2d 402, 404 (1994) (holding that a UIM carrier is entitled to assume control of the defense on an action even if the insured chooses to settle with the at-fault driver's liability carrier). The Court concluded, "[a]lthough the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist." Broome, 319 S.C. at 340, 461 S.E.2d at 48; see also Ex parte Allstate Ins. Co., 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000) (holding in action to recover underinsured motorist benefits, the plaintiff was required to serve UIM carrier with action against underinsured motorist prior to trial; recognizing UIM carrier had rights that were separate and distinct from the underinsured motorist and was not in privity with underinsured motorist or his liability carrier).

Despite the Supreme Court's discussions in Broome, Southern[4] contends section 38-77-160 supports a "quasi attorney-client" relationship. Specifically, Southern claims the UIM carrier's attorney essentially becomes the attorney for the named defendant because he has stepped into the shoes of the defendant's original attorney who was retained by the liability insurance carrier. We disagree for several reasons. First, Southern has not cited nor have we found any authority that South Carolina recognizes a "quasi attorney-client relationship." Secondly, and most significantly, the Supreme Court established in Broome and Williams that the interests of a UIM carrier and a named defendant are separate and distinct. Clearly, once the named defendant has settled for his liability policy limits, he no longer has a stake in the outcome of the litigation. The UIM carrier, on the other hand, still has a viable, financial interest in the case. As a result, the attorney for the UIM carrier represents the carrier and not the named defendant. Even though the UIM carrier "steps into the shoes" of the named defendant, the procedure is not in totality but merely to the point of coverage. Thus, there is no direct relationship between the UIM carrier's attorney and the named defendant.

In addition to the lack of case law and statutory support for the creation of an attorney-client relationship in this situation, we find there are ethical considerations that would also prohibit it. These issues may be illustrated by comparing an established attorney-client relationship with the facts of the instant case.

First, if a relationship exists, the attorney has some degree of control over the client and the client, in turn, has some input in the outcome of the litigation. See Rule 1.2(a), RPC, Rule 407, SCACR ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."). Here, the UIM carrier's attorney has no control

[4] We note that although Henderson is the named Respondent, the Respondent's brief was filed on behalf of Southern's interests. Therefore, we refer to Southern and Brehmer, Southern's attorney, throughout our discussion.

over the named defendant because the attorney represents the insurance company and the named defendant no longer has an interest once a covenant not to execute is entered into with the defendant's liability carrier.

Secondly, under the normal situation, a plaintiff's attorney is not permitted to have direct contact with the defendant, but instead, must serve all pleadings and motions upon the defendant's attorney. See Rule 4.2, RPC, Rule 407, SCACR ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."). In the case at bar, the named defendant and the UIM carrier must both be served with the pleadings. See S.C. Code Ann. § 38-77-160 (2002) ("No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision."); Louden v. Moragne, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (holding named defendant in an action for benefits under a plaintiff's underinsured motorist policy must be properly served with summons and complaint).

Moreover, if an attorney-client relationship were permitted in this instance, there exists a problem with dual representation. Specifically, the question becomes whether the UIM carrier's attorney can simultaneously represent the insurance company and a named defendant who has no direct relationship with the UIM carrier and whose interests are separate and distinct. See McNair v. Rainsford, 330 S.C. 332, 344, 499 S.E.2d 488, 494 (Ct. App. 1998) ("An attorney who represents more than one client must be cognizant of the vicissitudes of dual representation. Dual representation is not *per se* unethical, but raises a spectre of a violation of Rules 1.7 and 2.2 of the South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR."); see Rule 1.7, RPC, Rule 407, SCACR (outlining rules prohibiting attorney from representing client where there exists a conflict of interest).

B.

Assuming arguendo that an attorney-client relationship can be created between a UIM carrier's attorney and the named defendant, Crawford asserts the attorney-client privilege could not be asserted under the facts of this case.

Brehmer specifically disclaimed the existence of an attorney-client relationship. He maintained Southern retained him to represent its interest pursuant to section 38-77-160. He also stated he had no right to control Henderson. Furthermore, other than Brehmer's appearance at Henderson's deposition and his claim that he conferred with Henderson prior to the deposition, there is no evidence that Brehmer acted as Henderson's legal advisor. From all indications, it seems that Brehmer appeared at the deposition in order to represent Southern's interests. Based on our review of the record, Brehmer has not demonstrated that Henderson was his client. See State v. Love, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) (stating burden of establishing attorney-client privilege is upon the person asserting it). Even viewing the situation from Henderson's perspective, as Brehmer urges this Court to do, we find no evidence that she had a reasonable belief or expectation that Brehmer directly represented her.

Based on the foregoing, we hold the circuit court erred in quashing Crawford's subpoena to reconvene Henderson's deposition. Because any communications between Brehmer and Henderson were not protected by the attorney-client privilege, Crawford should have been permitted to question her in this regard. Accordingly, we remand for Crawford to take Henderson's deposition and, as a result, remand for a new trial.

C.

Given our conclusion, we are cognizant of the policy concerns presented by Southern. Specifically, Southern asserts an attorney-client privilege should necessarily be created because there must be some level of confidentiality between an attorney for a UIM carrier and the named defendant. Without this protection, Southern claims a UIM carrier's attorney's ability to defend the case will be adversely affected.

As previously discussed, case law, statutes, and ethical rules compel our holding that an attorney-client relationship is not established between a UIM carrier's attorney and a named defendant. Moreover, to hold otherwise would effectively limit the benefits a plaintiff receives from purchasing UIM coverage.

To avoid the predicament alleged by Southern, it is incumbent upon a UIM carrier's attorney to inform the named defendant of the parameters of his or her representation. Specifically, the attorney should emphasize that he or she directly represents the carrier and treat the named defendant essentially as a witness. We note that this procedure does not leave the named defendant without direct representation. Contractually, the named defendant's liability carrier remains obligated to the insured even after the liability limits have been paid. See Cobb v. Benjamin, 325 S.C. 573, 584, 482 S.E.2d 589, 594 (Ct. App. 1997) (finding the language of section 38-77-160 "giving the UIM carrier the right to assume control of the defense for its own benefit is . . . consistent with the recognition that the liability carrier who has paid its limits no longer has the same stake in the outcome, even though the contractual obligation to its insured to defend is ongoing").

II. Waiver of Attorney-Client Privilege

Even assuming that Brehmer could assert the attorney-client privilege, Crawford argues it was waived because he failed to comply with the procedural requirements of Rule 30(j) of the South Carolina Rules of Civil Procedure.[5]

Rule 30(j), which governs the conduct of counsel during depositions, provides in relevant part:

[5] In light of our holding that an attorney-client relationship is not created, we need not address this argument. However, because Rule 30(j) is relatively new with limited application, we decide to analyze this issue. Moreover, it provides additional support for our conclusion that the circuit court erred in denying Crawford's right to thoroughly depose Henderson.

> Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP. In addition, counsel shall have an affirmative duty to inform a witness that, unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds **shall** move the court for a protective order under Rule 26(c), SCRCP, or 30(d), SCRCP, within five business days of the suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.

Rule 30(j)(3), SCRCP (emphasis added).

Neither Brehmer nor Henderson filed a motion for a protective order within five business days of the termination of the deposition. Because the language of Rule 30(j)(3) is mandatory, any assertion of the attorney-client privilege during the deposition was waived. See Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.").

Despite the requirements of Rule 30(j)(3), Brehmer argues and the circuit court agreed that Crawford failed to sustain his burden to obtain a second deposition under Rule 30(a)(2), which provides in relevant part, "The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Rule 30(a)(2), SCRCP. Additionally, Brehmer contends Rules 30(a)(2) and 30(j)(3) are in conflict, thus, Crawford still needed to comply with the requirements of Rule 30(a)(2).

However, according to the language of Rule 30(j)(3), Crawford was not required to subpoena the court for a second deposition but was instead permitted to reconvene the first deposition. Given the language of Rule 30(j)(3) allows for the reconvening of the first deposition, it does not conflict with the rules governing the procedure to obtain a second deposition as specified under Rule 30(a)(2).

Finally, Brehmer asserts Henderson's deposition should not be reconvened because Crawford allowed the first deposition to proceed after the objection and did not call the trial judge to obtain an immediate ruling. Crawford, however, was not required to do so. Rule 30(j)(3) requires the party asserting the privilege to file the motion for a protective order within five business days of either the suspension or termination of the deposition. The language of Rule 30(j)(3) specifying termination of the proceedings permits the deposition to be concluded after its normal course. Therefore, we find the circuit court erred when it denied Crawford the right to reconvene Henderson's deposition. Accordingly, we remand the case for a new trial after the conclusion of the deposition.

III. Expert Witness Testimony of Nurse Practitioner

Crawford argues the circuit court erred when it permitted a nurse practitioner who treated Crawford to testify regarding causation given Southern failed to establish the nurse was an expert for purposes of rendering medical diagnoses.[6]

At trial, the parties disputed whether Crawford's injuries were caused by the accident or if the injuries were pre-existing from an accident Crawford suffered at work. Crawford testified his right shoulder began to hurt approximately fifteen to twenty minutes after the accident on April 3, 1998.

[6] Based on our decision to reconvene Henderson's deposition, which will inevitably precipitate a new trial, we need not address Crawford's remaining issue. However, because this issue may arise during a second trial, we decide it for the benefit of the parties.

That night, Crawford went to the emergency room where he was given a prescription for pain medication and a muscle relaxant. Nine days later, Crawford sought treatment for his shoulder at an urgent care center. A few days later, Crawford went to an orthopedic specialist, Dr. Postma. Dr. Postma prescribed physical therapy for Crawford's shoulder. Shortly after his last physical therapy appointment, Dr. Postma performed a shoulder manipulation while Crawford was under anesthesia. After the procedure, Crawford went to a pain management center where Dr. Haasis gave Crawford cortisone shots. In his deposition, Dr. Haasis testified he believed Crawford's injuries were secondary to the automobile accident. Crawford submitted medical bills in the amount of $25,849.21.

During his testimony, Crawford relayed that on March 17, 1998, he was injured at work when his shirt got caught in a "mixer machine." As a result of the work-related accident, Crawford sustained injuries that included abrasion burns on his right arm. He testified he planned to return to work on Monday when the accident happened on the previous Friday.

In contrast, Henderson testified Crawford did not show any signs of injuries. She stated Crawford was upset and moving around after the accident.

Southern presented the testimony of Victoria Smith, a family nurse practitioner who treated Crawford. Smith testified she saw Crawford on July 29, 1997. On that day, Crawford complained of pain in his right shoulder. When questioned about the results of her physical examination of Crawford, Smith opined that Crawford suffered from bursitis in his right shoulder. Based on this assessment, Smith prescribed medication and physical therapy.

On April 6, 1998, three days after the automobile accident, Smith again saw Crawford. On that day, Crawford complained of pain in his right shoulder and upper arm. Smith testified Crawford also told her about the injuries he had sustained in the work-related accident. Counsel then asked Smith whether Crawford was suffering from bursitis that day. Crawford's counsel objected to the question on the grounds that Smith was not a medical doctor and, therefore, was not qualified to give a medical diagnosis. The

judge overruled the objection. Smith testified Crawford was not suffering from bursitis, thus, implying Crawford was still experiencing the effects of the work-related injury on that day.

"For a court to find a witness competent to testify as an expert, the witness must be better qualified than the jury to form an opinion on the particular subject of the testimony." Mizzell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002); see Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

Whether to qualify a witness as an expert and admit the expert's testimony is left to the discretion of the trial court and will not be overturned absent an abuse of that discretion. Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998). An abuse of discretion occurs when the trial court commits an error of law or makes a factual conclusion without evidentiary support. Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995).

In support of his argument, Crawford cites a case in which this Court held a physical therapist was not qualified to testify regarding causation of the plaintiff's injuries. Nelson v. Taylor, 347 S.C. 210, 553 S.E.2d 488 (Ct. App. 2001). Based on Nelson, Crawford argues that nurse practitioners are also not statutorily authorized to make medical diagnoses and should not be qualified as experts regarding medical diagnoses.

In Nelson, Pamela Nelson (Nelson) and her husband brought a negligence action against Taylor for personal injuries resulting from an automobile accident. As a result of the accident, Nelson complained of pain in her back, neck, head, and shoulder. Nelson was treated by her family physician, an orthopedic surgeon, a neurosurgeon, a shoulder specialist, a chiropractor, and a physical therapist. At trial, contradicting theories emerged concerning the cause of Nelson's injuries. The physical therapist concluded that Nelson's injuries stemmed from her use of a mouse at her computer workstation, resulting in rotator cuff tendonitis. The shoulder

specialist disagreed finding Nelson's injuries were caused by the automobile accident. He also ruled out rotator cuff tendonitis. In a deposition, the orthopedic surgeon found no evidence of shoulder impingement. The jury awarded Nelson significantly less than what she offered as her medical expenses.

On appeal, Nelson argued the trial judge erred in admitting the physical therapist's deposition concerning the medical cause of her injuries. Nelson, 347 S.C. at 213, 553 S.E.2d at 489. During the physical therapist's deposition, Nelson had objected to the physical therapist's diagnosis of her injuries because he was not a medical doctor and had not reviewed Nelson's medical records or diagnostic test results. This Court reversed the judge's decision to admit the testimony. Id. at 216-17, 553 S.E.2d at 491. In reaching this conclusion, we reviewed the statutory scheme created by the General Assembly to define and regulate the practice of physical therapy. Based on the controlling statutes, we determined that a physical therapist is limited in terms of methods of treatment and is not authorized to practice medicine, prescribe medications, or order medical laboratory tests. Id. at 215-16, 553 S.E.2d at 490-91. In view of these statutory restrictions, we held the physical therapist was not qualified to testify regarding causation. Id. at 216-17, 553 S.E.2d at 491.

Nelson is distinguishable from the instant case. First, as will be discussed, the statutory and regulatory provisions governing the practice of nursing are significantly different from those defining the parameters of physical therapy. Secondly, the statute that prohibits a physical therapist from practicing medicine specifically excludes nurse practitioners from this limitation. See S.C. Code Ann. § 40-45-310 (2001) ("Nothing in this chapter shall be construed to restrict, inhibit, or limit the practice of licensed nurse practitioners . . .").

Although the holding in Nelson is not dispositive, it is, nevertheless, instructive for our analysis of the issue presented in the instant case. As in Nelson, we must review the General Assembly's statutory scheme regulating nurse practitioners.

Section 40-33-10 defines several aspects of nursing. S.C. Code Ann. § 40-33-10 (2001 & Supp. 2002). Relevant to this case are subsections (f) and (g), which define the practice of nursing and the practice of professional nursing. As provided in these subsections, the process of nursing includes direct care and treatment services, which includes the implementation of a physician-prescribed regimen as well as the assessment and nursing diagnosis of health problems. S.C. Code Ann. § 40-33-10(f), (g) (2001). In addition to these responsibilities, a professional nurse "may perform additional acts in the extended role requiring special education and training which are agreed to jointly by both the Board of Nursing and the Board of Medical Examiners. Those additional acts agreed to by both boards must be promulgated by the Board of Nursing in its regulations." S.C. Code Ann. § 40-33-10 (g) (2001).[7]

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[7] Subsection (f) provides:

> "Practice of nursing" means the provision of services for compensation that assist individuals and groups to obtain or maintain optimal health. Nursing practice is commensurate with the educational preparation and demonstrated competencies of the individual who is accountable to the public for the quality of nursing care. Nursing practice includes the provision of direct care and treatment services including the implementation of a medical regimen as authorized and prescribed by a licensed physician, dentist, or other person authorized by law, teaching, counseling, administration, research, consultation, supervision, delegation, and evaluation of practice. Nursing process includes the assessment and nursing diagnosis of human responses to actual or potential health problems and the planning, intervention, and evaluation of care in the promotion and maintenance of health, the casefinding and nursing management of illness, injury, or infirmity, the restoration of optimum function, or the achievement of a dignified death.

S.C. Code Ann. § 40-33-10(f) (2001).

Subsection (g) provides:

Turning to the specifics of this case, the role of a nurse practitioner is described in the regulations governing the practice of nursing as follows:

> "Nurse Practitioner" means a registered nurse who has completed a post-basic or advanced formal education program acceptable to the Board, and who demonstrates advanced knowledge and skill in assessment and management of physical and psychosocial health-illness status of individuals, and/or families, and/or groups. Nurse practitioners who manage delegated medical aspects of care must have a supervising physician and operate within the "approved written protocols."

> "Practice of professional nursing" means the performance for compensation of any acts in the health care process involving the process of assessment, intervention, and evaluation. This process includes observation, care, and counsel of the ill, injured, infirm, the promotion and maintenance of health, the administration of medications, and treatments as authorized and prescribed by a licensed physician or a licensed dentist. The application of the nursing process requires substantial specialized independent judgment and skill and is based on knowledge and application of the principles of biophysical and social sciences. The practice of professional nursing includes the teaching and administration, supervision, delegation, and evaluation of nursing practice. A professional nurse may perform additional acts in the extended role requiring special education and training which are agreed to jointly by both the Board of Nursing and the Board of Medical Examiners. Those additional acts agreed to by both boards must be promulgated by the Board of Nursing in its regulations.

S.C. Code Ann. § 40-33-10 (g) (2001).

26 S.C. Code Ann. Regs. 91-2(d) (Supp. 2002); see 26 S.C. Code Ann. Regs. 91-6(h)(1) (Supp. 2002) ("A Nurse Practitioner or Clinical Nurse Specialist practicing in an extended role shall perform delegated medical acts pursuant to an approved written protocol between the nurse and the physician.").

The regulations define the terms "delegated medical acts" and "approved written protocols." "'Delegated Medical Acts' means those additional acts delegated by the physician that include formulating a medical diagnosis and initiating, continuing, and modifying therapies, including prescribing drug therapy, under approved written protocols." 26 S.C. Code Ann. Regs. 91-1(c) (Supp. 2002) (emphasis added); see 26 S.C. Code Ann. Regs. 91-6(h)(2)(b) (Supp. 2002) (outlining at minimum information that should be included as "delegated medical acts"). "'Approved Written Protocols' means specific statements developed collaboratively by the physician or the medical staff and the nurse that establish physician delegation for medical aspects of care, including the prescription of medications." 26 S.C. Code Ann. Regs. 91-2(g) (Supp. 2002).

Reading these statutory provisions and regulations together, we find the General Assembly has authorized a nurse practitioner to diagnose and treat medical conditions if a supervising physician has delegated those acts pursuant to an approved written protocol. Significantly, these provisions expand the role of a nurse practitioner to provide a medical diagnosis in addition to a nursing diagnosis. See S.C. Code Ann. § 40-33-10(n) (2001) (defining "nursing diagnosis" as "a clinical judgment about an individual, family, or community which is derived through a nursing assessment"); Flanagan v. Labe, 690 A.2d 183 (Pa. 1997) (recognizing distinction between a nursing diagnosis and medical diagnosis); Id. at 186 ("[A] nursing diagnosis identifies signs and symptoms to the extent necessary to carry out the nursing regime. It does not, however, make final conclusions about the identity and cause of the underlying disease."); cf. Newbern v. State, No. 02-C-01-9106-CR00143, 1992 WL 124459 at *3 (Tenn. Crim. App. June 10, 1992) (holding a nurse practitioner could testify as expert in rape trial given "a nurse practitioner, unlike the average nurse, can make diagnoses like a doctor and can prescribe non-narcotic medication").

Turning to the instant case, we must examine the record to see if there is any evidence supporting Smith's ability to conduct medical diagnoses of patients. Southern's attorney asked Smith to describe the duties of a nurse practitioner. She responded:

> Nurse practitioners are performing delegated medical acts, and that is a collaborative agreement between the physician and the nurse practitioner as to what she can perform, what she feels comfortable in doing, what she's been educated to do, and what [the physician] feels comfortable delegating to her. So, it varies from one practice to another what services nurse practitioners performs [sic].

In addition to this testimony, we note Smith had diagnosed Crawford prior to the accident as having bursitis in his shoulder. She treated him and prescribed medication and physical therapy. From this testimony, the judge could reasonably infer that a physician had delegated to Smith the power to diagnose.

Crawford, however, asserts that because the requisite "written protocol" was not offered into evidence by Southern it was error to permit Smith to testify regarding causation. We find this argument is not preserved for our review. First, it was not presented to the trial judge when Crawford objected to Smith's testimony. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); see also State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party may not argue one ground at trial and then an alternative ground on appeal). Secondly, Crawford raised this specific argument for the first time in his reply brief. See Glasscock, Inc. v. United States Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001), cert. denied (July 10, 2002) (finding that appellant could not raise additional arguments in reply brief because it was not addressed in initial brief); Lister v. NationsBank, 329 S.C. 133, 153,

494 S.E.2d 449, 460 (Ct. App. 1997) (stating a point raised for the first time in a reply brief will not be considered by appellate court). Accordingly, we find the judge did not abuse his discretion in permitting Smith to testify regarding her diagnosis of Crawford's injury.

In the future, we believe the party presenting a nurse practitioner as a witness should offer a copy of the "approved written protocol" into evidence in order to clarify the exact medical acts the physician delegated to the nurse practitioner.

CONCLUSION

An attorney-client relationship is not created between a UIM carrier's attorney and the named defendant. In the absence of this relationship, a UIM carrier's attorney may not assert the attorney-client privilege to protect communications between he and the named insured. Even if an attorney-client privilege could be asserted, this privilege may be waived if the attorney fails to file for a motion for a protective order pursuant to Rule 30(j)(3) of the South Carolina Rules of Civil Procedure. Finally, a nurse practitioner may testify regarding causation if a physician has delegated the requisite medical acts to the nurse practitioner in "approved written protocol."

Accordingly, we reverse the court's decision quashing Crawford's motion to reconvene Henderson's deposition and remand the case for a new trial. We affirm the decision of the court permitting the nurse practitioner to testify regarding the cause of Crawford's injuries.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stephen Hutto, Appellant.

Appeal From Clarendon County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 3695
Submitted October 10, 2003 – Filed November 17, 2003

AFFIRMED

Daniel W. Luginbill, of Bamberg, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Cecil Kelley Jackson, of Sumter, for Respondent.

STILWELL, J.: Stephen Hutto appeals the trial court's denial of his motion to reconsider sentencing. We affirm.[1]

FACTS

Hutto and another juvenile escaped from the Department of Juvenile Justice's Rimini Marine Institute, killing a supervisor on their work detail in the process. The pair then continued on a crime spree spanning multiple counties. Hutto entered into a plea agreement with the State, agreeing to plead guilty on numerous charges including murder. The agreement provided Hutto would receive maximum concurrent sentences on all charges except the murder charge, with sentencing on that charge left to the trial court's sound discretion. This arrangement allowed the defense to argue Hutto should receive thirty years for murder and for the State to argue he should receive life without parole.

The court accepted Hutto's pleas and postponed sentencing for thirty days to allow the defense time to prepare arguments regarding mitigation. When the court reconvened for sentencing it heard arguments and testimony from each side. The State submitted a statement from a jailhouse informant who advised police that Hutto admitted after the crimes that he planned the killing and escape two days before the plan was carried out. The informant's statement also described details of the murder.

The State also relayed interviews with two juveniles who were housed at Rimini with Hutto. The first discussed seeing Hutto and his co-defendant view a map and hearing them discuss locations in Bamberg and Greenville. This juvenile alleged Hutto's co-defendant challenged Hutto by taunting, "I don't believe you got the guts to do it."

The second juvenile corroborated the first juvenile's statement regarding the map. The second juvenile also stated Hutto and his co-

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

defendant had told the victim they could kill him, steal his truck, and escape the Institute. Hutto's co-defendant also testified concerning the crimes.

At the conclusion of the hearing the court sentenced Hutto to life without parole for murder. Pursuant to his plea agreement, Hutto received maximum concurrent sentences on the other charges.

DISCUSSION

I. Solicitor's Comment

Hutto asserts that prior to the beginning of the sentencing hearing one of the solicitors approached the van where Hutto was awaiting transport into the courtroom and told the guards, "don't be in a hurry because it's a sure thing he will be going back with you with a life sentence." Hutto asserts the statement deprived him of due process by intimidating him from assisting in his own defense.

Traditionally the relevant question to ask in "solicitor comment" cases is whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). We have been unable to find another court that has found a denial of due process where the solicitor's comments were uttered to third parties who were not on a jury, but the comments were overheard by a defendant.

Challenges alleging prosecutorial misconduct typically involve a prosecutor's improper efforts to collect evidence or unfair trial tactics. See, e.g., State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) (assistant solicitor viewed the surreptitious videotaping of privileged attorney-client communication); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997) (prosecutor discussed matters outside of the evidence during closing arguments); State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1994) (prosecutor improperly audiotaped telephone conversation with defendant, who was represented by counsel); State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (prosecutor allegedly used previously suppressed evidence

at trial); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (prosecutor allegedly obtained confidential medical records in violation of attorney-client privilege); State v. Pee Dee News Co., 286 S.C. 562, 336 S.E.2d 8 (1985) (prosecutor asked improper questions at trial); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976) (prosecutor's conduct at trial allegedly was calculated to arouse unfair prejudice against defendant).

Because Hutto's claim appears to be novel, counsel attempts to analogize the circumstances to the more typical case where a prosecutor makes improper statements before a jury. We do not accept the comparison. Our judicial system prohibits such comments because they urge the jury to base its verdict on something other than the evidence. Such a rationale is not warranted in the present case.

Even if the solicitor made the alleged comments, they did not abrogate Hutto's due process rights in the same manner as would comments to a jury. The comment was directed not to Hutto but to law enforcement. Because the solicitor had already stated in open court that he intended to seek life without parole, it is unclear how the statement could have hampered Hutto's efforts to seek the court's mercy in its sentence. Although Hutto's mother stated in her affidavit that she thought the solicitor's comment kept Hutto from testifying at the sentencing hearing, Hutto has offered no similar claim.

We reject Hutto's contention that the solicitor's statements denied him due process.[2]

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[2] Hutto's counsel alludes to a violation of the Rules of Professional Conduct when he suggests the solicitor's comments were directed towards a defendant represented by counsel out of counsel's presence. See Rule 407, SCACR, Rule 4.2, RPC ("[A] lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter . . . ."). Hutto's allegation is not that the solicitor attempted to converse with him about the case outside the presence of counsel. Instead, Hutto alleges he overheard a conversation between the solicitor and other law enforcement. We fail to see how even a liberal application of the rule would prohibit such comments.

II. Inadmissibility of Evidence During Sentencing

Hutto also argues the trial court should not have allowed the solicitor to introduce the out-of-court statements of the jailhouse informant and the two juvenile residents of the Rimini facility as the prejudicial impact of the statements outweighed any probative value. See Rule 403, SCRE.

We are not concerned with balancing prejudicial impact with probative value when reviewing evidence used in the sentencing phase of a non-capital crime because evidentiary rules are inapplicable in a sentencing proceeding. Rule 1101(d)(3), SCRE; State v. Gulledge, 326 S.C. 220, 228-29, 487 S.E.2d 590, 594 (1997); see also Williams v. New York, 337 U.S. 241 (1949). In sentencing a convicted defendant a trial court is only limited by constitutional provisions that require the evidence to be relevant, reliable and trustworthy. See Gulledge, supra.

The court stated in its order denying resentencing it took into account the statements were those of convicted criminals whose credibility was not wholly reliable. However, the court noted the statements were corroborated by both the physical facts of the crime and similar statements by Hutto's co-defendant. The court reasoned "[i]t would have been impossible for the jailhouse informant to fabricate the conversations which he had with [Hutto] so as to mirror almost exactly portions of the testimony given by [Hutto's co-defendant]."

In short, the trial court properly considered the challenged statements because they were corroborated. The statements were both relevant and reliable.

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Troy K. Goodwin and Fonda E. Goodwin,

Appellants,

v.

Martha E. Johnson and Ernie Johnson,

Respondents.

Appeal From Berkeley County
John B. Williams, Master-in-Equity

Opinion No. 3696
Heard November 4, 2003 – Filed November 17

AFFIRMED

Sean K. Trundy, of Charleston, for Appellants.

Steven L. Smith and Wm. Mark Koontz, both of Charleston, for Respondents.

ANDERSON, J.: Troy K. Goodwin and Fonda E. Goodwin (the Goodwins) appeal the master-in-equity's order relocating their easement by necessity. We affirm.

FACTS/PROCEDURAL BACKGROUND

The Goodwins originally brought this cause of action against Martha and Ernie Johnson (the Johnsons) on December 18, 1996, in an effort to establish an easement across the Johnsons' property. The disputed property consisted of a road that ran from a public highway through the Johnsons' property to the Goodwins' property. The Goodwins argued they were entitled to the easement under several theories, including: (1) an easement by a recorded document; (2) an easement by necessity; and (3) an easement by public dedication.

After hearing from the parties, the master granted the Goodwins an easement by necessity and an easement by prescription. The master found the location of the easement or road was as set forth in a plat recorded in the Recorder of Deeds Office in Berkeley County.

The Johnsons appealed the master's finding to the Court of Appeals. An opinion was issued on June 19, 2001. See Goodwin v. Johnson, Op. No. 2001-UP-323 (S.C. Ct. App. filed June 19, 2001). This Court affirmed the master's decision by finding there was evidence in the record to support his determination that an easement by necessity existed. Id. We declined to address further grounds.

Following our decision, the Johnsons moved to clarify the master's order and the Goodwins asked permission to execute on the judgment. The Johnsons desired to relocate the easement from its current location to another part of their property due to its proximity to their home and dangers it created for their children and pets. The Goodwins claimed that relocating the easement would make it both unsafe and unusable, as it would no longer link with a passable portion of their property.

In an order dated June 18, 2002, the master granted the Johnsons' request and ordered the construction of a new road along the side of the Johnsons' property.

ISSUE

Does a court of equity possess the plenary power
to relocate an existing easement by necessity?

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. Slear v. Hanna, 329 S.C. 407, 496 S.E.2d 633 (1998); Pittman v. Lowther, 355 S.C. 536, 586 S.E.2d 149 (Ct. App. 2003); Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996); Smith v. Commissioners of Pub. Works, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994); see also Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) (decision of trier of fact as to whether or not easement exists will be reviewed by Supreme Court as an action at law); Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003) (determination of existence of easement is action at law; establishing existence of easement is question of fact in law action). In an action at law tried without a jury, the judge's findings of fact will not be disturbed on appeal unless there is no evidence to support the judge's finding. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

The question of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Pub. Serv. Dist., 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003); Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998); Smith, 312 S.C. at 465, 441 S.E.2d at 334. "Thus, this Court may take its own view of the evidence." Tupper, 326 S.C. at 323, 487 S.E.2d at 190; see also Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001) (scope of easement is equitable matter in which reviewing court may take its own view of preponderance of evidence).

LAW/ANALYSIS

The Goodwins contend the master did not have the authority to move an existing easement, or alternatively, even if he did have the authority, the master erred in doing so under the facts of this particular case. We disagree.

The issue asseverated in this case is novel. Irrefutably, the question presented is of particular importance to trial courts.

The traditional rule concerning easements is that "the location of an easement once selected or fixed cannot be changed by either the landowner or the easement owner without the other's consent, which can be express or implied." 25 Am. Jur. 2d Easements and Licenses § 79 (1996) (footnotes omitted). Thus, "[a]fter a way has been located, it cannot be changed by either party without the consent of the other, even if the way so located becomes detrimental to the use and convenience of the servient estate." Id.; see also Samuelson v. Alvarado, 847 S.W.2d 319, 323 (Tex. Ct. App. 1993) ("Once established, the location of the easement cannot be changed by either the easement owner or the servient owner without the consent of both parties, even though the use of the easement where located becomes detrimental to the use of the servient estate."); 28A C.J.S. Easements § 157 (1996) ("As a general rule, in the absence of statutes to the contrary, the location of an easement cannot be changed by either party without the other's consent, after it has been once established either by the express terms of the grant or by the acts of the parties, except under the authority of an express or implied grant or reservation to this effect.") (footnotes omitted); F.M. English, Annotation, Relocation of Easements, 80 A.L.R. 2d 743 § 4 (1961) ("Language is frequently found in the cases to the general effect that an easement, once located, cannot be relocated without the consent of the parties thereto.").

Although South Carolina courts have yet to address this particular issue, the Goodwins cite several cases from other jurisdictions in support of the traditional rule regarding easements, including MacMeekin v. Low Income Hous. Inst., Inc., 45 P.3d 570 (Wash. Ct. App. 2002), and Soderberg v. Weisel, 687 A.2d 839 (Pa. Super. Ct. 1997). In MacMeekin, an action to quiet title to an easement, the Court of Appeals of Washington was confronted with the issue of whether a court had the power to relocate an

existing easement by prescription without the permission of the owner of the dominant estate. After reviewing cases from other jurisdictions, the court decided: "Washington adheres to the traditional rule that easements, however created, are property rights, and as such are not subject to relocation absent the consent of both parties." MacMeekin, 45 P.3d at 579 (emphasis added).

Soderberg, while acknowledging the general rule, ultimately adopted a position inconsistent with that championed by the Goodwins. See Soderberg, 687 A.2d at 842. In that case, the owners of the servient parcel brought an action against the owners of the dominant parcel seeking to quiet title or, in the alternative, to relocate an easement that was established by prescription. The easement in issue was a road in close proximity to the servient owner's home that posed dangers to their small children. Id. at 841. In contrast to MacMeekin, the Superior Court of Pennsylvania adopted the minority rule, holding "a court may compel relocation of an easement if that relocation would not substantially interfere with the easement holder's use and enjoyment of the right of way and it advances the interest of justice." Id. at 844.

Many of the cases adopting the traditional rule deal with express easements—not with easements created by necessity. We recognize that it should be more difficult to relocate an express easement, as it is akin to a contract and is bargained for by the parties. MacMeekin, cited by the Goodwins for the traditional approach, supports this position by acknowledging that most of the cases addressing the issue of whether a court can relocate an easement without the consent of both parties deal with express easements. MacMeekin, 45 P.3d at 575-76.

Before adopting the minority view, the Soderberg court explained:

> Prescriptive easements are . . . quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest.

Soderberg, 687 A.2d at 843 n.3 (citation omitted). The court further expounded that "alterations of easements expressly granted will be interpreted under contract law principles; permission to alter must be intended by words or meaning of grant." Id. (citation omitted). The court found prescriptive easements, because they are not fixed by agreement among the parties, should be handled differently than express easements. Id. We agree with this reasoning and conclude the same is true with easements created by necessity.

The approach adopted by the Soderberg court is consonant with the position adopted by the drafters of the Restatement (Third) of Property: Servitudes § 4.8 (2000), which provides that, in certain situations, the owner of the servient estate can relocate an easement unilaterally. Section 4.8 of the Restatement reads in pertinent part:

> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:
>
> . . . .
>
> (3) Unless expressly denied by the terms of an easement, . . . the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

Id.

Authority exists specifically supporting the power of a court sitting in equity to relocate easements created by necessity. See William B. Johnson, Annotation, Locating Easement of Way Created by Necessity, 36 A.L.R. 4th 764 § 2 (1985) (once an easement by necessity's location has been fixed, it cannot be changed except by agreement of the parties or by a court for equitable reasons). The Court of Appeals of Maryland addressed this issue in Hancock v. Henderson, 202 A.2d 599 (Md. 1964). In that case, current owners of a dominant estate brought an action to prevent the servient owners from obstructing a claimed right-of-way. Id. at 600. The court found the dominant owners were entitled to an easement by necessity for the purpose of ingress and egress to and from their land. Id. at 603. Although a road was located on the servient estate in the past for this purpose, the road had fallen into disrepair and there was evidence it had not been used for many years. Id. The court articulated: "We do not think this slight activity so long ago was sufficient to establish with exactitude the location of an easement claimed now by a remote grantee of the dominant tract." Id. Because the current location of the road was located in such a way as to be considerably inconvenient to the servient owner and the uses of the respective properties had changed over the years, the court remanded the case to the trial court for an equitable determination of where the easement should be located. Id. Although on remand the parties had the option of working out a location on their own, the appellate court stated that in the absence of agreement, the trial court "should exercise jurisdiction in locating an adequate right of way over the servient tenement in a manner so as to permit ingress and egress of vehicular traffic, but also in a manner least burdensome to the servient tenement." Id.

In Michael v. Needham, 384 A.2d 473 (Md. Ct. Spec. App. 1978), after determining that the dominant owner was entitled to an easement by necessity, the Court of Special Appeals of Maryland concluded that because the servient owner had expended a considerable amount of funds in making improvements to his property in the vicinity where the easement was claimed to lie, the case should be remanded to determine the best location for the easement. Id. at 479. As in Hancock, the court held that, in the absence of agreement among the parties, "it will be the responsibility of the chancellor to

take such testimony as might be required and to locate the right of way after due consideration of the equities of the matter." Id.

Significantly, the facts surrounding the current dispute are remarkably similar to those discussed in Hancock. Both concern easements created by necessity and relate to roads that were commonly used at one time but had since fallen into disrepair. Hancock, 202 A.2d at 603. In Hancock, the old road dissected the servient owner's property; whereas, in this case the old road comes within ten feet of the Johnsons' home. Id. Additionally, the Goodwins testified they have never used the old road to access their property. It is clear from the testimony presented at trial that the Goodwins were aware when they bought the property that there may be problems obtaining access. Finally, as in Hancock, the use to which the servient land was put has changed since the prior road was used as a way to access the property purchased by the Goodwins. In the past, the land was farmland. Currently, the land serves as the Johnson home.

The factors articulated by the drafters of the Restatement provide excellent guidance to courts of equity when faced with the task of relocating an easement created by necessity. A court using its equity powers may relocate an easement when the relocation will not "(a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created." Restatement (Third) of Property: Servitudes § 4.8.

Indubitably, a relocation of the easement in question will not significantly lessen its utility. The Goodwins have never used the old road. Although Mrs. Goodwin testified they planned on building a house on the land, they have yet to do so and it remains undeveloped property. Relocation of the easement could not increase the burden on the Goodwins because they have never used any easement through the Johnsons' property. Finally, relocation of the easement will not frustrate the purpose for which the easement was created. The easement was created so the Goodwins would have a way into and out of their property. The master's order establishing the new road mandated that it be constructed to South Carolina Department of Transportation standards completely at the Johnsons' expense.

The Goodwins maintain they will be burdened by the master's location of the new road. They allege the new road will not link up with a passable portion of their property and the new road meets the public highway in such a way that it is unsafe when entering and exiting. Frankly, there is no evidence in the record to support these assertions. While it may be true that relocation of the road will prevent it from linking with the old road on the Goodwins' property, because the property at this point is nothing more than an undeveloped lot, we fail to see how this significantly burdens the Goodwins. Because the master mandated that the new road meet requirements imposed by the South Carolina Department of Transportation, and there is no evidence in the record to support the Goodwins' contention that the entrance of the new road will be unsafe, we agree with the master's decision.

CONCLUSION

We align South Carolina with those jurisdictions providing that courts of equity have the power to relocate existing easements created by necessity. We adopt the minority rule that a court of equity possesses the plenary power to relocate an easement by necessity when the evidence supports such a move.

Accordingly, the master-in-equity's decision is

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.