THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

2006-UP-345-State of South Carolina v. ABC Bonding et. al
(Richland, Judge Reginald I. Lloyd)

2006-UP-346-Mary Ann B. Nash and Nancy B. Clifford v. Lynette B. Wight, individually and as Personal Representative of the Estate of R.B. Brunson, Deceased
(Darlington, Judge James E. Lockemy)

2006-UP-347-South Carolina Department of Social Services v. Roger B.
(Lexington, Judge Richard W. Chewning)

2006-UP-348-Dale Owen Shaffer v. Adam Bacot
(Greenwood, Judge J. Cordell Maddox. Jr.)

2006-UP-349-Roger D. and Brenda D. v. Susan C. and Ronnie B.
(Anderson, Judge Timothy M. Cain)

2006-UP-350-State v. Marquis Harrison
(Spartanburg, Judge Roger L. Couch)

2006-UP-351-Cathy T. Sanders v. Charles N. Sanders
(Charleston, Judge Paul W. Garfinkel)

2006-UP-352-State v. Michael Lee Staton
(Laurens, Judge William P. Keesley)

2006-UP-353-South Carolina Department of Social Services v. Intervenors: Dewayne N., Sandra N. and Gena N.
(Pickens, Judge Alvin D. Johnson)

2006-UP-354-Kim Morgan v. South Carolina Department of Social Services
(Greenville, Judge R. Kinard Johnson, Jr.)

2006-UP-355-J.W. Neal Construction, LLC v. Enon Missionary Baptist Church
(Sumter, Judge Howard P. King)

2006-UP-356-The Friends of McLeod, Inc. v. Historic Charleston Foundation
(Charleston, Judge Diane S. Goodstein)

2006-UP-357-Robert J. Tretola v, David Summer; Parker Poe Adams & Berstein, L.L.P.; David Miller; Daniel McKay; and Lancaster Hospital Corporation, d/b/a Springs Memorial Hospital
(Lancaster, Judge Kenneth G. Goode)

2006-UP-358-State v. Barry Lee Underwood
(Spartanburg, Judge Derham Cole)

2006-UP-359-Dale C. Pfeil, II, d/b/a DP Associates v. Steven Walker Homes Corporation et. al
(York, Master-In-Equity S. Jackson Kimball)

2006-UP-360-South Carolina Department of Transportation v. Ronald Paul
(Richland, Judge Reginald I. Lloyd)

2006-UP-361-Patricia W. Harsey v. Robert Mills Thomas
(Lexington, Judge Jocelyn B. Cate)

2006-UP-362-State v. Larry Smith
(Darlington, Judge John M. Milling)

2006-UP-363-State v. Dennis L. Snipes
(Lancaster, Judge James E. Lockemy)

2006-UP-364-State v. Leroy A. Matthews
(Anderson, Judge Reginald I. Lloyd)

2006-UP-365-Bertha J. Wilson, Personal Representative of the Estate of Albert Judge v. Primerica Life Insurance Company and Stephanie M. Graham
(Charleston, Special Circuit Court Judge Mikell R. Scarborough)

2006-UP-366-Donald E. Miles v. Merit Distribution Services, Inc., Employer, and American Home Assurance/AIG, Carrier
(Chesterfield, Judge John M. Milling)

2006-UP-367-Deborah Coon and Michael L. Coon v. Renaissance on Charleston Harbor, LLC
(Charleston, Master-In-Equity Mikell R. Scarborough)

2006-UP-368-Cynthia Johnston v. MeadWestvaco, Self Insured Employer

(Charleston, Judge R. Markley Dennis, Jr.)

2006-UP-369-Charleston County Department of Social Services v. Maranda L.
(Charleston, Judge Paul W. Garfinkle)

2006-UP-370-Jamal A. Demorcy v. State of South Carolina
(York, Judge Lee S. Alford and Post-Conviction Relief Judge D. Garrison Hill)

2006-UP-371-BB&T of South Carolina v. Jose & Karen Matos
(Berkeley, Judge R. Markley Dennis, Jr.)

2006-UP-372-State v. Bobby Gibson, Jr.
(Spartanburg, Judge Doyet A. Early, III)

2006-UP-373-S.W. Youngblood, W.M. & L.M. Loud, J.P. & T.J. Verkaik, A.E. & R.B. Wilson, C.J. & S.O. Anderson, and K.H. & L.W. Svendsen v. County of Charleston, a Political subdivision of the State of South Carolina
(Charleston, Master-In-Equity Mikell R. Scarborough)

2006-UP-374-James M. Tennant and Charles R. Richards v. The County of Georgetown et. al
(Georgetown, Judge James E. Lockemy)

PETITIONS FOR REHEARING

4150-E. Fuller v. W. Fuller	Denied 11/09/06
4156-State v. Rikard	Pending
4157-Sanders v. Meadwestavo	Pending
4162-Reed-Richards v. Clemson	Pending
4163-Walsh v. Woods	Pending
4165-Albertson v. Robinson et. al	Pending
4168-C.W. Huggins v. Sheriff J.R. Metts	Pending
4172-State v. Clinton Roberson	Pending
4173-O'Leary-Payne v. R.R. Hilton Head	Pending

2006-UP-301-State v. C. Keith	Pending
2006-UP-326-State v. K. Earnest	Pending
2006-UP-329-Washington Mutual v. Hiott	Pending
2006-UP-332-McCullar v. Est. of Campbell	Pending
2006-UP-333-Robinson v. Bon Secours	Pending
2006-UP-347-SCDSS v. Roger, B.	Pending
2006-UP-359-Dale Pfeil et. al v. Steven Walker et. al	Pending
2006-UP-360-SCDOT v. Buckles, K.	Pending
2006-UP-367-State v. Dana Rae Rikard	Pending
2006-UP-369-CCDAA v. Maranda L. et. al	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3917-State v. Hubner	Granted 11/15/06
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Granted 11/14/06
3978-State v. K. Roach	Pending
3982-LoPresti v. Burry	Pending

3983-State v. D. Young	Pending
3984-Martasin v. Hilton Head	Pending
3993-Thomas v. Lutch (Stevens)	Denied 11/14/06
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Denied 11/15/06
4006-State v. B. Pinkard	Pending
4011-State v. W. Nicholson	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4028-Armstrong v. Collins	Pending
4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending

4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending
4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4060-State v. Compton	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4065-Levine v. Spartanburg Regional	Withdrawn 11/15/06
4068-McDill v. Mark's Auto Sales	Pending
4069-State v. Patterson	Pending

4070-Tomlinson v. Mixon	Pending
4071-State v. K. Covert	Pending
4071-McDill v. Nationwide	Pending
4074-Schnellmann v. Roettger	Pending
4075-State v. Douglas	Pending
4078-Stokes v. Spartanburg Regional	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4082-State v. Elmore	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4089-S. Taylor v. SCDMV	Pending
4091-West v. Alliance Capital	Pending
4092-Cedar Cove v. DiPietro	Pending
4093-State v. J. Rogers	Pending
4095-Garnett v. WRP Enterprises	Pending
4096-Auto-Owners v. Hamin	Pending
4100-Menne v. Keowee Key	Pending
4102-Cody Discount Inc. v. Merritt	Pending
4104-Hambrick v. GMAC	Pending
4109-Thompson v. SC Steel Erector	Pending
4111-LandBank Fund VII v. Dickerson	Pending

4112-Douan v. Charleston County	Pending
4118-Richardson v. Donald Hawkins Const.	Pending
4119-Doe v. Roe	Pending
4120-Hancock v. Mid-South Mgmt.	Pending
4122-Grant v. Mount Vernon Mills	Pending
4127-State v. C. Santiago	Pending
4130-SCDSS v. Mangle	Pending
4136-Ardis v. Sessions	Pending
4140-Est. of J. Haley v. Brown	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2005-UP-139-Smith v. Dockside Association	Granted 11/15/06
2005-UP-163-State v. L. Staten	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-222-State v. E. Rieb	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Denied 11/02/06
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-305-State v. Boseman	Denied 11/02/06

2005-UP-319-Powers v. Graham	Denied 11/02/06
2005-UP-340-Hansson v. Scalise	Granted 10/19/06
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Denied 11/02/06
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Denied 11/14/06
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-556-Russell Corp. v. Gregg	Pending

2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending
2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-590-Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-006-Martin v. State	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-025-State v. K. Blackwell	Pending
2006-UP-027-Costenbader v. Costenbader	Pending

2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-038-Baldwin v. Peoples	Pending
2006-UP-043-State v. Hagood	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-051-S. Taylor v. SCDMV	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v. Ffrench	Pending
2006-UP-084-McKee v. Brown	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-115-Brunson v. Brunson	Pending
2006-UP-122-Young v. Greene	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending
2006-UP-151-Moyers v. SCDLLR	Pending

2006-UP-158-State v. R. Edmonds	Pending
2006-UP-172-State v. L. McKenzie	Pending
2006-UP-180-In the matter of Bennington	Pending
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex parte Van Osdell (Babb v. Graham)	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending
2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-243-Sun Trust Mortgage v. Gobbi	Pending
2006-UP-245-Gobbi v. People's	Pending
2006-UP-246-Gobbi v. Simerman	Pending
2006-UP-247-State v. Hastings	Pending
2006-UP-256-Fulmer v. Cain	Pending
2006-UP-262-Norton v. Wellman	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-286-SCDSS v. McKinley	Pending
2006-UP-287-Geiger v. Funderburk	Pending
2006-UP-299-Kelley v. Herman	Pending
2006-UP-304-Bethards v. Parex	Pending

2006-UP-309-Southard v. Pye	Pending
2006-UP-316-State v. Tyrelle Davis	Pending
2006-UP-317-Wells Fargo Home Mortgage v. Thomasena J. Holloway And Albert Holloway	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Madison, a fictitious name of a mentally disabled person, through her court-appointed guardian, Brenda Bryant, Appellant,

v.

Babcock Center, Inc., a South Carolina Corporation; South Carolina Department of Disabilities and Special Needs; and Michelle Batchelor, in her official and individual capacities, Respondents.

ORDER

Respondents (Babcock Center, Inc. and Michelle Batchelor) filed a petition for rehearing in which they asked the Court to reconsider its opinion holding that a private treatment center owes a duty of care to a mentally retarded person admitted to its facility and holding that a state agency which has a contract with the center owes a duty of care to the person.

We deny the petition for rehearing, withdraw the former opinion, and substitute the attached opinion.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ J. Derham Cole A.J.

I would grant and adhere to my previous concurrence

s/ Costa M. Pleicones J.

IT IS SO ORDERED.
Columbia, South Carolina

November 20, 2006

William H. Davidson, II and Andrew F. Lindemann, of Davidson, Morrison, and Lindemann, P.A., of Columbia, for Respondent South Carolina Department of Disabilities and Special Needs.

ACTING JUSTICE COLE: In this appeal, we are asked to decide the novel issue of whether a private treatment center owes a duty to exercise reasonable care in supervising a mentally retarded person admitted to its care; the novel issue of whether a state agency which has a contract with the center owes a duty of care to the person; and whether the mentally retarded person in this case, as a matter of law, proximately caused her own injuries.

FACTUAL AND PROCEDURAL BACKGROUND

It is undisputed that Madison[1] (Appellant), now thirty-two years old, is a mentally retarded woman with disabilities and special needs. Babcock Center, Inc. (Babcock Center), its employee Michelle Batchelor, and the South Carolina Department of Disabilities and Special Needs (Department) in their answers admit Appellant "has been diagnosed as mildly mentally retarded" and is a "person with disabilities and special needs."[2]

Appellant was voluntarily admitted as a client in 1994, when she was twenty years old, to a residential home managed by Babcock Center. Babcock Center is a private, non-profit corporation based in Columbia that provides housing and other services for people with autism, mental retardation, head or spinal injuries, or related disabilities. Department has

---

[1] Madison is a fictitious name. We will refer to her as Appellant for purposes of clarity even though the named plaintiff is her mother and guardian, Brenda Bryant.

[2] References to Babcock Center include the center and Batchelor, its employee. We will refer to the three defendants collectively as Respondents.

approved Babcock Center as a contractual provider of such services, and the program at issue in this case is the Community Training Home Program II. This residential program offers mentally retarded persons the opportunity to live in the community and receive individualized supervision and support services. Appellant alleges Department coordinates, directs, funds, and oversees the provision of services by contractual providers such as Babcock Center. Appellant further alleges Department, along with its county-based boards, is responsible for performing timely and adequate developmental evaluations of clients and assisting providers in determining the level of care and services required.

Appellant, although physically an adult, alleges she has the emotional and intellectual maturity of a seven- to ten-year-old child. She can read, write, and understand math at the level of a first- or second-grade child. Appellant alleges her mental disability means she is not able to live or work independently. She cannot, for example, cook, wash clothes, run bath water, use a toaster oven, put on her own makeup, or perform personal hygiene tasks without adult supervision. Appellant cannot tell time, understand a sequence of dates or use a calendar, make change for a dollar, or give or follow simple geographical directions. Appellant is not allowed to leave either her parent's home or the Babcock Center home without permission and adult supervision.

While living at Babcock Center, Appellant worked at an animal shelter and a dump site sorting recyclable materials. Babcock Center personnel took her to and from work, where she was supervised by a job coach. Appellant's "lack of perspective and judgment is so limited that she needs help with every significant decision she makes about even the smallest matters that require assessment of consequences, potential danger, or comparing alternative courses of action," according to Brenda Bryant, Appellant's mother and court-appointed guardian.

On August 30, 1995, Appellant, then twenty-one years old, placed her luggage on the front porch of the Babcock Center home and went to bed fully clothed. After everyone was asleep, she secretly slipped out of the house sometime after 1 a.m. and left in a car with two men who either lived or recently had lived in a home managed by Babcock Center. Another

woman already was in the car. Appellant believed the four of them planned to go to an unknown location and set up housekeeping on their own. Instead, the other woman was taken home a short while later after an argument.

Appellant and the two men went to a house, where she had sex with one or both of them. Appellant initially told police and her mother she was raped, but testified at a deposition in this case she was "talked into having sex." Appellant returned to her Babcock Center home the following morning. Appellant alleges she was a virgin when she was admitted to the Babcock Center home. She contracted herpes simplex type I, a sexually transmitted disease, after one or more sexual encounters with men while staying at the Babcock Center home.

A probate court judge in 1997 issued an order appointing Appellant's mother as her guardian and conservator. The judge found Appellant was mentally retarded and lacked the capacity to exercise good judgment with regard to her person, assets, and financial affairs.

Appellant's amended complaint alleges causes of action for negligence, gross negligence, and willful indifference against Respondents. Appellant alleges, among other things, that both Babcock Center and Department owed a duty of care to Appellant, which they breached by failing to exercise sufficient control and supervision over Appellant and other Babcock Center residents. Appellant alleges both entities failed to properly supervise facility staff, both failed to heed the previous warnings of Appellant's mother about inappropriate sexual contacts between Appellant and current or former male residents of Babcock Center, and both ignored the requests of her parents that she be released from Babcock Center. Appellant's mother testified that, prior to August 30, 1995, she personally made repeated complaints about the sexual contacts to staff at the Babcock Center home where Appellant lived, Babcock Center director Risley Linder, and James Hill, Department's general counsel.

The circuit court granted summary judgment to Respondents. The judge ruled in two separate orders that, as a matter of law, Respondents "had no legal duty to maintain a constant watch over the plaintiff so as to

prevent her surreptitious elopement." Furthermore, the proximate cause of any damages suffered by Appellant, as a matter of law, was Appellant's "own voluntary and intentional acts."

Appellant appealed. We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the circuit court err in granting summary judgment to Babcock Center on the ground it owes no legal duty of care to Appellant, a mentally retarded client voluntarily admitted to its care?

II. Did the circuit court err in granting summary judgment to Department on the ground it owes no legal duty of care to Appellant, a mentally retarded client voluntarily admitted to Babcock Center, a contractual provider of services?

III. Did the circuit court err in granting summary judgment to Respondents on the ground that, as a matter of law, the proximate cause of any injuries and damages suffered by Appellant were the result of her own voluntary and intentional acts?

IV. Did the circuit court err in ruling that certain allegations against Department are time-barred by the statute of limitations?

STANDARD OF REVIEW

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may

be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp. 2005)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same).

DISCUSSION

I. DUTY OF CARE OWED BY BABCOCK CENTER

Appellant argues the circuit court erred in granting summary judgment to Babcock Center on the ground it owes no legal duty of care to Appellant, a mentally retarded client voluntarily admitted to the center's care. Babcock Center has a duty to exercise reasonable care in supervising and providing care and treatment to clients in its custody. We agree.

We conclude the circuit court erred in accepting Respondents' argument that Babcock Center either had a "twenty-four-hour, eyes-on" duty

of supervision – i.e., an extremely high and rigorous duty – or no duty at all. The circuit court in its order repeatedly described the purported duty as one of maintaining "constant watch" over Appellant. Appellant at the summary judgment hearing contended the duty was one of reasonable supervision, but the circuit court and Respondents appeared overly focused on the "high duty" versus "no duty" positions.

Respondents' position results in a distorted view of the center's duty because, first, it assumes an all-or-nothing approach with regard to the existence of a duty. Cf. Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 493, 575 S.E.2d 549, 553 (2003) (disagreeing with Court of Appeals' conclusion that children's shelter had an enhanced or specific duty to protect child at all times, instead reasoning that under circumstances presented shelter had only a general duty to supervise a child in its care; thus, the defense of assumption of risk was applicable as law then existed). Second, Respondents' position confuses the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case, standards by which a fact finder may judge whether a duty was breached. Such standards are grounded in the common law, statutes, regulations, or policies and guidelines promulgated by Babcock Center or Department.

In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. Steinke v. S.C. Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977). The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law. Steinke 336 S.C. at 387, 520 S.E.2d at 149; Ellis v. Niles, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996).

Under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of

danger. We have recognized five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant. Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (listing cases and authority supporting each proposition). An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Jensen v. Anderson County Dept. of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991); Miller v. City of Camden, 317 S.C. 28, 33-34, 451 S.E.2d 401, 404 (Ct. App. 1994). Moreover, it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care. Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); Roundtree Villas Assn. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984); Miller, 317 S.C. at 33-34, 451 S.E.2d at 404.

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323 (1965). In addition, "[o]ne who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Restatement (Second) of Torts § 324 (1965).

The present case falls within the first, third, fourth, and fifth exceptions specified in Faile, as well as within the circumstances outlined in Restatement (Second) of Torts §§ 323-324.

Babcock Center had a special relationship with Appellant because she was a client with special needs and disabilities admitted for care and treatment at the center. Babcock Center voluntarily undertook the duty of supervising and caring for Appellant as provided in its contractual relationship with Department. Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her and allowing improper sexual contacts between Appellant and men. Furthermore, the center had a statutory duty to exercise reasonable care in supervising Appellant. See e.g. S.C. Code Ann. § 44-20-30(2), (11), and (17) (2002) (defining client, mental retardation, and residential programs); S.C. Code Ann. § 44-20-710 to -1000 (2002) (addressing licensing of facilities and programs for mentally disabled persons); S.C. Code Ann. § 44-26-10 to -220 (2002) (rights of mental retardation clients).[3] In short, Babcock Center undertook a duty, for consideration, to render services to Appellant which the center should have recognized as necessary for the protection of Appellant. Thus, Babcock Center had a duty to control Appellant's conduct to the extent necessary to prevent her from harming herself or to prevent others from harming her while staying at the center.

The fact Appellant was a voluntary admittee is irrelevant in deciding whether she is owed a duty of care. As long as Appellant was living as a client at a Babcock Center home – whether voluntarily or involuntarily – Babcock Center owed a duty of care to her. See e.g. S.C. Code Ann. § 44-20-460 (2002) ("person admitted or committed to the services of the

[3] Neither the record nor the briefs contain a thorough review or assessment of various statutes and regulations pertaining to the care of mentally disabled or retarded persons. Given the posture of this case and our primary conclusion that a duty exists under the common law to exercise reasonable care in supervising and providing care to such persons, we have not attempted to fully ascertain the impact of various statutes or regulations, or identify all statutes and regulations which may be relevant in establishing a duty or defining the appropriate standard of care. Such issues may be explored by the parties and court on remand of this case.

department remains a client and is eligible for services until discharged"); cf. Kolpak v. Bell, 619 F. Supp. 359, 377-79 (D. Ill. 1985) (finding much logic in cases that find voluntary and involuntary residents are entitled to the same constitutional rights to a safe environment in actions brought under 42 U.S.C. § 1983, and listing cases). "These cases recognize that for all practical purposes, many of the residents of state-run mental institutions are effectively admitted involuntarily: they may have been admitted upon the unilateral application of their parents or guardians; they may be incapable of expressing a desire to enter or to leave; they may be involuntarily committed when they apply for discharge; or their financial circumstances may be such that admission, voluntary or involuntary, is a foregone conclusion." Id. at 378-79.

Accordingly, we hold that, under the common law, a private person or business entity which accepts the responsibility of providing care, treatment, or services to a mentally retarded or disabled client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client. See Lee v. Dept. of Health and Rehabilitative Servs., 698 So.2d 1194, 1199 (Fla. 1997) (mentally retarded woman who became pregnant while in custody of state agency stated cause of action for negligence against agency employees who allegedly failed to follow agency's rules and carry out their assigned duties in supervising patients); Butler v. Circulus, Inc., 557 S.W.2d 469, 475 (Mo. App. 1977) (mentally retarded minor plaintiff who was resident and student at defendant's licensed institution stated cause of action for negligence against defendant for failing to supervise employees who allegedly physically and mentally abused plaintiff as part of a behavior modification program); Restatement (Second) of Torts §§ 323-324; cf. Rogers v. S.C. Dept. of Parole & Comm. Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995) (holding that common law duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual); Youngberg v. Romeo, 457 U.S. 307, 319, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982) (under substantive component of Fourteenth Amendment's Due Process Clause, state must provide involuntarily committed mental patients with services necessary to ensure their reasonable safety from themselves and others, as well as freedom from undue restraint); DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 201-02, 109 S.Ct. 998, 1006, 103

L.Ed.2d 249 (1989) (while substantive component of Fourteenth Amendment's Due Process Clause did not protect child beaten to death by his father after state agency failed to remove child from home, "it may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger").[4]

We further hold that, if Appellant proves at trial she has the limited emotional and intellectual capacity she has demonstrated at the summary judgment stage, Appellant should be treated as the equivalent of a willful, immature child who really has no idea of what is best for her in determining whether Babcock Center breached the duty of care owed to her. "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly." Franks v. Southern Cotton Oil Co., 78 S.C. 10, 18, 58 S.E. 960, 962 (1907).

---

[4] The mother of the mentally retarded adult male in Youngberg alleged violations of her son's constitutional rights pursuant to 42 U.S.C. § 1983. While Section 1983 cases may shed light generally on the rights of mentally retarded or disabled persons and the responsibilities of their caregivers, such cases are controlled by different standards than tort cases sounding in common law negligence. See e.g. Kyle K. v. Chapman, 208 F.3d 940 (11th Cir. 2000) (addressing § 1983 lawsuit brought pursuant to Youngberg by parents of mentally retarded child who allegedly was physically and mentally abused by various mental health professionals, administrators, and direct care personnel at state mental hospital); White by White v. Chambliss, 112 F.3d 731 (4th Cir. 1997) (addressing § 1983 lawsuit brought in connection with death of child in foster home and discussing different standards at issue in negligence and § 1983 actions); Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459 (3d Cir. 1990) (nonprofit organization which performed mental health intake and referral services for county may have acted negligently in failing to recommend feeding restrictions for profoundly retarded adult male with eating disorder, but organization did not violate victim's Fourteenth Amendment due process rights).

In Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786 (1982), we abandoned age-based presumptions previously used in assessing whether an injured child's own negligence contributed to his injury. "The capacities of children vary greatly, not only with age, but also with individuals of the same age. Therefore, no very definite statement can be made to just what standard is to be applied to them. . . . Of course, a child of tender years is not required to conform to an adult standard of care. . . . [A] minor's conduct should be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances." Id. at 339, 295 S.E.2d at 787; accord Jones ex rel. Castor v. Carter, 336 S.C. 110, 117, 518 S.E.2d 619, 622 (Ct. App. 1999); Brown v. Smalls, 325 S.C. 547, 556, 481 S.E.2d 444, 449 (Ct. App. 1997). Similarly, the conduct of a mentally retarded or disabled client of a residential home training program should be judged by the behavior to be expected of a person of like age, intelligence, and experience under like circumstances.

The factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case. The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. See e.g. Steinke v. S.C. Dept. of Labor, Licensing & Regulation, 336 S.C. 373, 387-89, 520 S.E.2d 142, 149-50 (1999) (affirmative legal duty may be created by statute which establishes the standard of care); Clifford v. Southern Ry. Co., 87 S.C. 324, 69 S.E. 513 (1910) (statute may create special duty of care and breach of that statute may constitute negligence per se); Peterson v. Natl. R.R. Passenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) (although federal regulations provided standard of care, internal policies of company which owned the line of track and railroad which owned the train were not preempted by federal law, and company's and railroad's deviation from own internal policies was admissible as evidence they deviated from standard of care, thus breaching duty owed to plaintiff, in lawsuit brought by plaintiff injured in train derailment); Elledge v. Richland/Lexington School Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (general rule is that evidence of industry safety standards is

relevant to establishing the standard of care in a negligence case); Tidwell v. Columbia Ry., Gas & Elec. Co., 109 S.C. 34, 95 S.E. 109 (1918) (relevant rules of a defendant are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury); Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct. App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages); Steeves v. U.S., 294 F. Supp. 446, 455 (D.S.C. 1968) (violation of a rule or regulation which is designed primarily for the safety of hospital patients will constitute negligence if the violation proximately results in the injury); Restatement (Second) of Torts § 285 (1965) (standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of a case).

Appellant cites federal Medicaid or Medicare regulations in her complaint, and both Appellant and Babcock Center mention various statutes, regulations, and program guidelines in their briefs. We express no opinion on particular standards of care which may be relevant and properly applied in this case. The identification of sources establishing the standard of care with regard to Appellant will be an issue for the parties and court on remand of this case.

In sum, we find the existence of a common law duty owed by Babcock Center to Appellant. The precise extent and nature of that duty, which is grounded in relevant standards of care, and whether the duty was breached must be determined by a jury on remand.

II. DUTY OF CARE OWED BY DEPARTMENT

Appellant argues the circuit court erred in granting summary judgment to Department on the ground it owes no legal duty of care to Appellant. Appellant asserts Department and the direct provider of services,

independent contractor Babcock Center, both owe a duty to exercise reasonable care with regard to Appellant. Appellant asserts Department's duty of care is grounded in both the common law and in various statutes and regulations pertaining to Department. We agree Department owes a common law duty, but decline to address the issue of Department's statutory duty.

A. DEPARTMENT'S DUTY UNDER THE COMMON LAW

As explained above, under the common law, a private person or business entity which accepts the responsibility of providing care, treatment, or services to a mentally retarded or disabled client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client. Thus, to the extent Appellant relies on this common law duty, summary judgment was wrongly granted to Department. See Arthurs ex rel. Estate of Munn v. Aiken County, 346 S.C. 97, 103-105, 551 S.E.2d 579, 582-83 (2001) (public duty rule is applied only when an action is founded upon a statutory duty; when duty is based on common law, then its existence is analyzed as it would be with a private defendant which is not a government entity pursuant to Tort Claims Act); Trousdell v. Cannon, 351 S.C. 636, 641, 572 S.E.2d 264, 266-67 (2002) (same); Morris v. Anderson, 349 S.C. 607, 611-12, 564 S.E.2d 649, 651-52 (2002) (same); S.C. Code Ann. § 15-78-40 (2005) (governmental entity is liable for its torts "in the same manner and to the same extent as a private individual under like circumstances," subject to limitations upon and exemptions from liability and damages contained in Tort Claims Act).

When a governmental entity owes a duty of care to a plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in S.C. Code Ann. § 15-78-60 (2005 & Supp. 2005) which are asserted by the governmental entity. Arthurs, 346 S.C. at 105, 551 S.E.2d at 583; Trousdell, 351 S.C. at 642, 572 S.E.2d at 267. The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability. Strange v. S.C. Dept. of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994).

Department asserts it is not liable for the torts of its independent contractor, Babcock Center, pursuant to S.C. Code Ann. § 15-78-60(20) (2005), which provides that a governmental entity is not liable for an "act or omission of a person other than an employee including but not limited to the criminal actions of third persons." Department also has asserted and the circuit court relied on S.C. Code Ann. § 15-78-30(c) (2005), which provides that the term "employee" "does not include an independent contractor doing business with the State."

We find this position unpersuasive because Department owes a common law duty of care directly to Appellant. The fact an independent contractor provided services to Appellant or the fact a third party may have committed a criminal act in harming Appellant does not affect the existence of Department's duty. In Greenville Memorial Auditorium v. Martin, this Court held the city liable for a patron's personal injuries resulting from the criminal acts of another despite the city's claim of immunity under § 15-78-60(20). 301 S.C. 242, 391 S.E.2d 546 (1990). The Court found liability based on the city's negligence in adequately securing the premises where the negligence created a foreseeable risk of injury. Id. We find that the Department's potential liability in this case could be based on a similar principle. Although the Department is not liable for the acts or omissions of its independent contractor, Department remains under a duty to provide reasonable care and treatment to its clients. If Department is negligent in its duty, which may include 1) adequately supervising the provision of services by another entity or 2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity, Department may be held liable for breach of its common law duty provided such negligence creates a foreseeable risk of and causes injury.

Next, Department asserts it is immune from liability under S.C. Code Ann. § 15-78-60(4) (2005), which provides that a governmental entity is not liable from "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." This argument was neither presented to nor ruled on by

the circuit court; therefore, it is not preserved for appellate review. E.g. Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (with very limited exceptions, appellate court may not address an issue unless the issue was raised to and ruled on by the trial court).

The circuit court also relied on S.C. Code Ann. § 15-78-60(25) (2005). This subsection provides that a governmental entity is not liable from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner."

"Gross negligence is ordinarily a mixed question of law and fact." Faile, 350 S.C. at 332, 566 S.E.2d at 545 (citing Clyburn v. Sumter County School Dist. #17, 317 S.C. 50, 451 S.E.2d 885 (1994)). "When the evidence supports but one reasonable inference, it is solely a question of law for court, otherwise it is an issue best resolved by the jury. . . . In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." Id. at 332, 566 S.E.2d at 545. We conclude that the issue of whether Department acted in a grossly negligent manner is a factual issue for a jury.

In sum, we find the existence of a common law duty owed by Department to Appellant. Whether the duty was breached and whether the Department met the applicable standard of care must be determined by a jury on remand.

B. DEPARTMENT'S STATUTORY DUTY AND IMPACT OF PUBLIC DUTY RULE

In Arthurs, we explained that

> [t]he public duty rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no

> duty of care towards individual members of the general public. . . . The public duty rule is a negative defense which denies an essential element of the plaintiff's cause of action: the existence of a duty of care to the individual plaintiff. . . . It is not a matter of immunity, which is an affirmative defense that must be pleaded and which may be waived. Further, it is a rule of statutory construction, that is, a means of determining whether the legislative body that enacted the statute or ordinance intended to create a private cause of action for its breach. . . .
>
> The public duty rule insulates public officials, employees, and governmental entities from liability for the negligent performance of their official duties by negating the existence of a duty towards the plaintiff.

Arthurs, 346 S.C. at 104, 551 S.E.2d at 582 (citations and quotes omitted).

We retained the public duty rule, finding it compatible with the Tort Claims Act. However, the rule is applied only when an action is founded upon a statutory duty, not when the duty is grounded in the common law. Arthurs, 346 S.C. at 103-05, 551 S.E.2d at 582-83,

> As explained in Arthurs,
>
> [a]n exception to the general rule exists when the statutory duty is owed to individuals rather than to the public at large. Our courts are reluctant to find a special duty. . . . [T]his Court [has] adopted a six part test developed by the Court of Appeals . . . for determining when such a "special duty" exists:
>
> > (1) an essential purpose of the statute is to protect against a particular type of harm;
> > (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;

in Arthurs, Steinke, and Jensen. The parties have not addressed these issues, which may be explored on remand of this case.

III. PROXIMATE CAUSE

Appellant contends the circuit court erred in ruling that the proximate cause of any damages suffered by Appellant, as a matter of law, was Appellant's own voluntary and intentional acts. We agree.

Negligence is not actionable unless it is a proximate cause of the injury. Hanselmann v. McCardle, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980). Proximate cause requires proof of both causation in fact and legal cause. Oliver v. S.C. Dept. of Highways and Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Id.; Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Foreseeability is determined by looking to the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable. Koester, 313 S.C. at 493, 443 S.E.2d at 394; Oliver, 309 S.C. at 317, 422 S.E.2d at 131; Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966).

The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence. The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Childers, 248 S.C. at 324, 149 S.E.2d at 765; McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998).

We hold that the issue of whether Appellant's injuries were proximately caused by the alleged negligence of Respondents is an issue of

fact for the jury. The jury must determine whether Appellant's damages would have occurred "but for" Respondents' alleged negligence, as well as whether such damages were foreseeable, i.e., whether the damages were the natural and probable consequence of a failure to exercise reasonable care in supervising and providing care and treatment to Appellant. The jury may perform its task after gaining a proper understanding of the facts and circumstances of Appellant's case, as well as the applicable standards of care.

We further agree with Appellant that the circuit court erred in reasoning she was competent to make her own decisions – such as leaving the Babcock Center home – because she was not adjudicated incompetent to handle her personal and financial affairs until some two years after the events of August 1995. The circuit court relied on S.C. Code Ann. § 44-26-90 (2002), which provides that unless a client has been adjudicated incompetent, she must not be denied the right to, among other things, execute instruments, enter into contractual relationships, and exercise rights of citizenship in the same manner as a non-disabled person.

Appellant alleges she has the emotional and intellectual capacity of a young child. Her actions and the alleged negligence of Respondents must be assessed in light of her mental abilities and the standards governing Respondents' duty of care. Appellant's competence and ability to handle her own affairs, or the lack thereof, is a factual issue related to proximate cause which must be resolved by a jury.[6] The circuit court erred in granting summary judgment to Respondents on the ground of proximate cause.

---

[6] Babcock Center contends Appellant is arguing she was not competent to testify due to her mental retardation, i.e., Babcock Center focuses on Appellant's competency to testify as opposed to her competency to make her own decisions. The circuit court focused on Appellant's competency to act on her own, not her competency to testify. As far as competency to testify, Appellant should be treated as a person of like age, intelligence, and experience. Cf. State v. Green, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976) (there is no fixed age which an individual must attain in order to be competent to testify as a witness); S.C. Dept. of Soc. Servs. v. Doe, 292 S.C.

continued . . .

IV. STATUTE OF LIMITATIONS

Appellant argues the circuit court erred in relying on the two-year statute of limitations contained in S.C. Code Ann. § 15-78-100(a) (2005) to rule that certain allegations of Department's negligence are time-barred. Appellant does not raise this issue in her Statement of Issues, but she does challenge the ruling in her brief. Given our remand of this case, we will address this issue to avoid future debate and confusion about it.

While the circuit court order is rather vague on this point, Department argued at the summary judgment hearing that allegations relating to the initial evaluation and admission of Appellant in 1994 were time-barred. Department apparently believes that only events occurring within the two years preceding the service of the complaint (i.e., 1995-97) may be considered, but cites no authority for this proposition. We disagree.

The events in question occurred August 30, 1995. Appellant served her initial complaint on Department on August 29, 1997, meeting the two-year deadline. Accordingly, allegations relating to Department's alleged negligence in connection with Appellant's initial evaluation and admission in 1994 are not time-barred.

CONCLUSION

We reverse the circuit court and hold that Babcock Center and its employee have a common law duty to exercise reasonable care in supervising and providing care and treatment to Appellant, a mentally retarded client with disabilities and special needs. Department also owes a common law duty to

---

211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) (child's competency to testify depends on showing to the satisfaction of the trial judge that child is substantially rational and responsive to the questions asked and is sufficiently aware of the moral duty to tell the truth and the probability of punishment if he lies).

Appellant and statutory exceptions to the waiver of immunity which Department asserts are inapplicable. We decline to reach the issues of whether Department owes a statutory duty or the impact of the public duty rule. We hold that whether the breach of a duty proximately caused Appellant's injuries is a question of fact for the jury. Finally, we hold that allegations relating to Department's alleged negligence in connection with Appellant's initial evaluation and admission are not time-barred.

REVERSED.

TOAL, C.J., MOORE, WALLER, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result reached by the majority because I agree that Babcock Center owed a common law duty of due care to Appellant. I write separately because I do not agree with that portion of the majority opinion that finds a duty based upon statute. In my opinion, the source of the duty owed to Appellant is not found in or created by any statute. Rather, as indicated in footnote 3 of the majority opinion, some of the statutes cited in the opinion "may be relevant in ... defining the appropriate standard of care."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Florence County Magistrate
Rena V.C. White, Respondent.

Opinion No. 26221
Submitted October 17, 2006 – Filed November 13, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

David Michael Ballenger, of Florence, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] The facts as set forth in the Agreement are as follows.

[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

FACTS

While serving as a magistrate for Florence County, respondent obtained cocaine on several occasions from an individual to whom she is distantly related by marriage. Respondent represents she usually paid only $20 for the cocaine (indicating, according to respondent, that the amount purchased on each occasion was small). The cocaine was purchased for respondent's own use; she did not share the cocaine with anyone else.

Criminal charges against the individual from whom respondent purchased the cocaine were pending during some portion of the period during which respondent purchased the cocaine. The criminal charges were either pending against the individual in Florence County Magistrate's Court or pending in other courts and related proceedings were conducted in Florence County Magistrate's Court.

In mitigation, respondent represents she consumed the cocaine in an effort to cope with a severe illness of a close family member. ODC has no factual basis to contest this representation.

Respondent acknowledges that, on multiple occasions, she used her judicial position to obtain favorable treatment for other individuals. At least one of these individuals was related to respondent.

Respondent was arrested on a charge of misconduct/malfeasance in office. The charge is pending before the Court of General Sessions for Florence County. After her arrest, respondent tendered her resignation as magistrate to the Governor. The Governor accepted respondent's resignation.

LAW

By her misconduct, respondent admits she has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A

(judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 3 (judge shall perform duties of judicial office impartially); Canon 3A (judicial duties take precedence over all of judge's other activities); Canon 3B(2) (judge shall be faithful to the law); Canon 3B(5) (judge shall perform judicial duties without bias); Canon 4 (judge shall conduct extra-judicial activities so as to minimize risk of conflict with judicial obligations); Canon 4A(1) (judge shall conduct all extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge); Canon 4A(2) (judge shall conduct all extra-judicial activities so they do not demean the judicial office); Canon 4A(3) (judge shall conduct all extra-judicial activities so that they do not interfere with proper performance of judicial duties); and Canon 4D(1)(a) (judge shall not engage in financial dealings that may reasonably be perceived to exploit the judge's judicial position). Respondent also admits she has violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for discipline for judge to violate the Oath of Office) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall not apply for, seek, or accept any judicial position whatsoever in this State without the prior written authorization of this Court after due service on ODC of any petition seeking the Court's authorization. Respondent is hereby reprimanded for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Craig A. Hurst, Appellant,

v.

East Coast Hockey League, Inc.; Knoxville Cherokees Hockey, Inc., d/b/a Pee Dee Pride Hockey, and d/b/a Florence Pride Hockey; Florence City-County Civic Center Commission d/b/a Florence City-County Civic Center; City of Florence; and County of Florence, Respondents.

Appeal From Florence County
James E. Lockemy, Circuit Court Judge

Opinion No. 26222
Heard October 4, 2006 – Filed November 13, 2006

AFFIRMED

Stephen J. Wukela, of Florence, for Appellant.

Robert T. King, of Willcox, Buyck & Williams, of Florence, for Respondents.

JUSTICE BURNETT: Craig A. Hurst (Appellant) appeals the circuit court's grant of summary judgment in favor of East Coast Hockey League, Inc.; Knoxville Cherokees Hockey, Inc., d/b/a Pee Dee Pride Jockey, and d/b/a Florence Pride Hockey ("Pride"); Florence City-County Civic Center Commission ("Commission") d/b/a Florence City-County Civic Center ("Civic Center"); City of Florence; and County of Florence (collectively referred to as Respondents). We certified the case for review from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant filed this negligence action against Respondents for injuries he sustained while attending a Pride hockey game at the Civic Center on January 11, 2002. During pregame warm-ups, Appellant entered the spectator area at the Civic Center through a curtained concourse entrance behind one of the goals. Appellant was struck in the face by a puck while standing behind the goal.

At the time of the accident, the ice rink at the Civic Center was encircled by dasher boards and a protective Plexiglas wall, which was attached to the top of the dasher boards. Also at that time, the Pride was a member of the East Coast Hockey League, Inc., a professional hockey league. The Pride played home games at the Civic Center under a lease with the Commission. The Civic Center was maintained and operated by the Commission, a governmental entity created by the City of Florence and the County of Florence.

After a hearing on the matter, the circuit court determined the risk of pucks leaving the ice rink and entering the spectator area is well-known, obvious, and inherent to the game of hockey. The circuit court granted summary judgment in favor of Respondents based on the doctrine of primary implied assumption of risk.

ISSUE

Did the circuit court err in granting summary judgment?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

LAW/ANALYSIS

Appellant argues the circuit court erred in granting summary judgment for Respondents based on the doctrine of primary implied assumption of risk. We disagree.

To prove negligence, a plaintiff must prove the following elements: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty. Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law. *Id.* at 387, 520 S.E.2d at 149.

"Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are *inherent* in a particular activity." Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 81, 508

S.E.2d 565, 570 (1998) (emphasis in original).[1] The Davenport Court further explained the doctrine as follows:

> Primary implied assumption of risk is not a true affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff. . . .[T]he Tennessee Supreme Court summarized the doctrine in the following way:
>
> > In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care. . . .Clearly primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.
>
> [Perez v. McConkey, 872 S.W.2d 897, 902 (Tenn. 1994)]. In this sense, primary implied assumption of risk is simply a part of the initial negligence analysis.

333 S.C. at 81, 508 S.E.2d at 570 (internal citations omitted); see also *id.* at 81 n.3, 508 S.E.2d at 570 n.3 (finding Gunther v. Charlotte Baseball, Inc., 854 F.Supp. 424 (D.S.C. 1994) implicitly applied primary implied assumption of risk).

The issue before the Court is whether Respondents owed a duty of care to protect Appellant from flying pucks. We find Gunther instructive because the risk of being injured by a foul ball at a baseball game and the risk of being injured by a flying puck at a hockey game are similar risks. See also Modec v. City of Eveleth, 29 N.W.2d 453, 456 (Minn. 1947) (finding no difference between baseball and hockey when determining liability for injuries sustained from a foul ball or a flying puck); Pestalozzi v.

[1] The Davenport Court also found the adoption of comparative negligence in this state did not affect the doctrine of primary implied assumption of risk. 333 S.C. at 87, 508 S.E.2d at 574.

Philadelphia Flyers Ltd., 576 A.2d 72, 74 (Pa. Super. Ct. 1990) (finding no difference between flying balls and flying pucks when determining the risk assumed by the spectators of baseball and hockey games). In Gunther, a spectator who was struck in the face by a foul ball during a baseball game sued the owner of the baseball team and the stadium alleging negligence. 854 F.Supp. at 425. The Gunther Court found "the vast majority of jurisdictions recognize this hazard [of being struck by a foul ball] to be a risk that is assumed by the spectators because it remains after due care has been exercised (erecting a screen), and it is not the result of negligence by the ball club. *Id.* at 428 (citing Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950)). The Gunther Court then found the spectator voluntarily assumed the risk of her injuries and granted summary judgment to the owner and the stadium.

Under the doctrine of implied primary assumption of risk, Respondents' duty of care did not encompass the risk involved. The risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey. See generally Prosser & Keeton, The Law of Torts § 684 (5th ed. 1984) ("[T]hose who participate or sit as spectators at sports . . . may be taken to assume the known risks of being hurt by . . . hockey pucks. . . ."). Respondents did not have a duty to protect Appellant, a spectator, from inherent risks of the game of hockey.[2] See also Nemarnik v. Los Angeles Kings Hockey Club, L.P., 127 Cal. Rptr. 2d 10 (Ct. App. 2002) (hockey arena owners and operators, hockey league, and professional ice hockey team did not owe a duty to spectator to eliminate the inherent risk of injury from flying pucks); Modec, 29 N.W.2d at 456-57 (spectator at hockey game assumes risk of injury from inherent risks of game); Ingersoll v. Onondaga Hockey Club Inc., 281 N.Y.S. 505 (Sup. Ct. 1935) (hockey rink operators did not owe a duty to protect a

[2] The application of the primary implied assumption of risk doctrine to a hockey spectator may not completely absolve hockey arena owners and operators of all duties. See, *e.g.*, Wagner v. Thomas J. Obert Enters., 396 N.W.2d 223 (Minn. 1986) (primary implied assumption of risk did not apply to negligent maintenance and supervision of a skating rink because these are not inherent risks of skating).

spectator from flying pucks, which is a risk incidental to the activity); Pestalozzi, 576 A.2d at 74-75 (same); Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329 (R.I. 1977) (spectator at a hockey game assumed risk of injury from flying pucks); see generally W.E. Shipley, Liability for Injury to One Attending Hockey Game or Exhibition, 14 A.L.R.3d 1018 (1967) (collecting cases that involve the issue of whether a hockey arena owner or operator owes a duty to protect hockey spectators from flying pucks).

CONCLUSION

Based on the foregoing analysis, we conclude Appellant's action fails as a matter of law under primary implied assumption of risk. The circuit court properly granted summary judgment for Respondents.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Greenwood County Magistrate Joe C. Cantrell, Respondent.

Opinion No. 26223
Submitted October 17, 2006 – Filed November 20, 2006

DEFINITE SUSPENSION

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

C. Rauch Wise, of Greenwood, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension pursuant to Rule 7(b), RJDE, Rule 502, SCACR. Respondent requests any suspension be made retroactive to the date of

his interim suspension.[1] We accept the agreement and impose a one (1) year suspension. We decline respondent's request that the suspension be made retroactive to the date of his interim suspension. The facts as set forth in the agreement are as follows.

FACTS

In 1981, respondent was appointed part-time magistrate for Greenwood County. In 1989, he became a full-time magistrate and the chief magistrate and served continuously as chief magistrate until being placed on interim suspension on May 4, 2006.

Until approximately January 2005, the Greenwood County Magistrate Court's deposit was taken directly to the bank. This procedure was changed at the request or suggestion of county officials or agencies and, from that point, deposits from various county agencies, including the magistrate court, were taken to the Greenwood County Treasurer's Office and responsibility for the deposits was given to that office.

Accordingly, the daily deposit for criminal, civil, and traffic courts were compiled at the end of each day and placed in a safe. The deposit would be taken to the Treasurer's Office the following morning. The Treasurer's Office did not issue a receipt for the deposit, but would forward the bank's deposit receipt back to respondent's office. On some occasions, it took several days for the receipt to be returned to respondent's office. Respondent acquiesced in these changes without inquiring whether the deposit procedure complied with the Chief Justice's Administrative Order of November 9, 1999.

Respondent gave the office manager, who was a part-time magistrate, exclusive or virtually exclusive authority to manage the daily financial activity of the Greenwood County Magistrate's Court. The extent of respondent's financial oversight consisted of making

---

[1] On May 4, 2006, the Court placed respondent on interim suspension.

"spot checks" to make sure the deposit slips coincided with the bank statements.

In 1998, Toni Cole began working in respondent's office. Her initial responsibilities were limited primarily to eviction and fraudulent check cases and to receiving and receipting money. Later, her responsibilities included compiling the deposit and taking it to the Treasurer's Office on occasions when other employees were absent or unavailable.

On February 3, 2004, $1,000.00 in cash was discovered missing from the safe. Law enforcement suspected Cole of taking the money but she scored "inconclusive" on a polygraph examination in connection with the investigation. No criminal charges were brought against her at the time and the issue of the missing $1,000.00 remained unsolved. Respondent made no changes to the financial procedures in the office and Cole was allowed to continue her duties with respect to office finances, which included unsupervised access to the safe.

In December 2005, $500.00 was discovered missing from the safe. Cole subsequently claimed to have found the money behind the file cabinet on which the safe sat, though recollections differ as to whether this occurred shortly after it was discovered missing or as much as a month or more later. Because the money was recovered, even though under suspicious circumstances, there was apparently no inquiry as to the validity of Cole's explanation. Respondent made no changes concerning the financial procedures and Cole was allowed to continue her duties with respect to office finances, which included unsupervised access to the safe.

On February 27, 2006, the Court issued Matter of Hensley, 367 S.C. 619, 627 S.E.2d 716 (2006), which addressed a magistrate's failure to exercise financial oversight of office staff. ODC is informed that the Hensley opinion was brought to respondent's attention by another Greenwood County Magistrate who expressed concern that the November 9, 1999 administrative order was not being followed in the Greenwood County Magistrate's Court, particularly in light of the

above-referenced incidents. Other magistrates reported that respondent stated he was not going to comply with the financial oversight procedures set forth in the order with the words "I'm not going to do it. You going to do it?"

Respondent acknowledges having a conversation with another magistrate about the Hensley opinion, but states his comments were misunderstood. Respondent represents that the other magistrate was the most knowledgeable about court financial procedures and that his intent was to change the deposit procedure by having the other magistrate review the deposits. Accordingly, respondent stated he said, "I'm not going to do it, you're going to do it, and then I'm going to check behind you." Respondent further acknowledges, however, that no efforts were undertaken on his part to put these specific changes into effect before the present matters came to light.

On March 8, 2006, a court employee discovered that $2,500.00 received as bond payment on February 16, 2006 was not shown as deposited on bank records. On April 5, 2006, an employee reconciling bank records discovered that the entire deposit of $4,803.20 on March 17, 2006 was missing. Respondent reported the matter to the Greenwood County Sheriff's Department which retained jurisdiction over the complaint and commenced an investigation. At a meeting of investigators and court personnel the next day, two investigators observed the employees in attendance and scored them in accordance with a nationally recognized psychologically-based deception detection and interview technique.

Based on that evaluation, investigators elected to question Cole first. Subsequently, Cole confessed to stealing the March 17, 2006, deposit as well as to the thefts of $4,497.50 (the deposit for March 27, 2006) and $10,157.00 (the deposit for April 3, 2006) that were not previously known to be missing. According to Cole, she took the deposits to her vehicle rather than to the Treasurer's Office, removed and kept the cash, and later shredded or discarded the checks and other non-cash payments. Cole also confessed to the $1,000.00

theft in February 2004, the $2,500.00 theft in February 2006, and to removing and replacing the $500.00 in December 2005.

Auditors hired by the Sheriff's Department determined that other money was taken by a second employee through voiding or deleting cases from the computer system. The exact amount missing is unknown at this time.

Questions concerning the oversight of restitution monies were also raised to ODC during the investigation of this matter. It was reported that the Greenwood County Magistrate's Court accepted and disbursed restitution payments, including cash "off the books" either without receipts or with receipts handwritten on whatever scrap of paper might be available.

Respondent informs ODC that restitution was either paid directly to the victim in court or that the payor was required to later deliver a check or money order payable to the victim. Court personnel would notify the victim who would pick up the payment. Respondent represents that any other receipt of restitution funds by court personnel was not authorized and that he had no knowledge of the receipt of restitution payments in any unauthorized manner.

The Chief Justice's Administrative Order of November 9, 1999 provides, among other things, that:

> [w]hile the Court recognizes that magistrates must utilize employees of their office to assist in the handling of monies of their office, each magistrate is personally responsible for compliance with all procedures for the handling of the monies of their magisterial office and proper record keeping related thereto and shall regularly, but no less than monthly, review bank statements and other records to insure such compliance.

Respondent represents that he relied entirely on his staff to properly document and disburse the monies of his office and acknowledges that his supervision and oversight did not comply with

the requirements of the Chief Justice's Administrative Order of November 9, 1999.

ODC contends that the misappropriations would have been deterred or minimized had the mandates and procedures required by the November 9, 1999 order been in place. Respondent does not contest this representation.

In addition, it was reported to ODC that, during the course of the investigation of these matters by the Greenwood County Sheriff's Department, respondent attempted to influence one or more other magistrates to limit the scope of the questions they would be willing to answer during polygraph examinations. According to one magistrate, respondent suggested they only answer questions about whether they took money or whether they knew anyone else had taken money, thereby avoiding any questions about the lack of financial oversight in the magistrate's court.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A (judge should personally observe high standards of conduct); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law); Canon 3 (judge shall diligently perform duties of judicial office); Canon 3A (judge shall perform all duties prescribed by law); Canon 3(C)(1) (judge shall maintain professional competence in judicial administration); and Canon 3(C)(2) (judge shall require staff to observe standards of fidelity and diligence that apply to the judge), of Rule 501, SCACR. Respondent further admits he violated the Chief Justice's Administrative Order of November 9, 1999. Finally, respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct), Rule 7(a)(4) (it shall be ground for discipline for judge to persistently fail to perform judicial duties or persistently

perform judicial duties in an incompetent or neglectful manner), and Rule 7(a)(7) (it shall be ground for discipline for judge to willfully violate a valid court order issued by a court of this state) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent for one (1) year. The suspension shall be without pay.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Williamsburg County Magistrate
and Former Greeleyville
Municipal Court Judge Bruster
O'Neal Harvin, Respondent.

Opinion No. 26224
Submitted October 17, 2006 – Filed November 20, 2006

PUBLIC REPRIMAND

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

Bruster O'Neal Harvin, of Lane, pro se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] The facts as set forth in the Agreement are as follows.

[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a

FACTS

On June 7, 2006, an out-of-state resident was cited by the Greeleyville Police Department for speeding in violation of South Carolina Code Ann. § 56-5-1520 (2006). The violator was instructed by the police officer who issued the ticket to contact respondent at a telephone number written on the bottom of the ticket. The violator subsequently contacted respondent by telephone and was informed she could pay a higher fine for a different offense that would not blemish her driver's record and that, if she chose to do so, payment should be sent to respondent's home address and made payable to him. On June 9, 2006, the violator purchased a money order payable to respondent and sent it to respondent's home address by certified mail. Respondent negotiated the money order on or about June 19, 2006.

On July 12, 2006, investigators from ODC traveled to Greeleyville with demand subpoenas for respondent, the police department, and the court clerk to obtain records related to the disposition of the ticket. Investigators learned the ticket had been marked "not guilty," that there was no receipt for the payment sent by the violator, and that there was no other ticket adjudicating the violator guilty of any traffic offense alleged to have occurred on June 7, 2006.

Respondent provided a written statement to investigators in which he stated he converted money he received for more than one ticket in the month of June to his own use. He admitted he used the money from the ticket described above to pay his bills. Respondent was placed on interim suspension by the Court on the same day he gave this statement to investigators.

Later, respondent gave ODC a statement under oath pursuant to Rule 19(c)(5), RJDE, Rule 502, SCACR. Respondent

---

judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

stated: 1) he needed money to pay bills; 2) he took money from four tickets in June 2006, but not from any others; and 3) it was his intent to pay the money back on the next pay day, which had yet to occur when investigators visited him on July 12, 2006.

Subsequently, investigators determined respondent had engaged in similar conduct concerning at least one other ticket in a month other than June. Respondent acknowledges that the information he gave ODC in his statement under oath was not accurate.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2(A) (judge shall respect and comply with the law and shall at all times act in a manner that promotes public confidence in the integrity and impartiality of judiciary); Canon 3 (judge shall perform duties of judicial office impartially); Canon 3A (judicial duties take precedence over all of judge's other activities); Canon 3B(1) (judge shall hear and decide matters assigned); Canon 3B(7) (judge shall not initiate ex parte communications); Canon 3(B)(8) (judge shall dispose of all judicial matters fairly); Canon 3(C) (judge shall diligently discharge judge's administrative responsibilities and shall maintain professional competence in judicial administration); Canon 4 (judge shall conduct extra-judicial activities so as to minimize risk of conflict with judicial obligations); and Canon 4A(2) (judge shall conduct all extra-judicial activities so that they do not demean the judicial office). He further agrees that he violated the Chief Justice's Administrative Order of November 9, 1999 which addresses financial recordkeeping standards for magistrates. Finally, respondent admits his misconduct constitutes grounds for discipline under Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial

Conduct), Rule 7(a)(7) (it shall be ground for discipline for judge to violate valid order issued by a court of this state), and Rule 7(a)(9) (it shall be ground for discipline for judge to violate the Oath of Office) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall not apply for, seek, or accept any judicial position whatsoever in this State without the prior written authorization of this Court after due service on ODC of any petition seeking the Court's authorization. Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sumter County Master-in-Equity Linwood S. Evans, Jr., Respondent.

Opinion No. 26225
Submitted October 17, 2006 – Filed November 20, 2006

DEFINITE SUSPENSION

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

G. Murrell Smith, Jr., of Lee Erter Wilson James Holler & Smith, LLC, of Sumter, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction pursuant to Rule 7(b), RJDE, Rule 502, SCACR. Respondent requests the

suspension be made retroactive to the date of his interim suspension.[1] We accept the agreement and impose a one year suspension retroactive to the date of respondent's interim suspension. The facts as set forth in the agreement are as follows.

FACTS

Respondent was admitted to practice law in South Carolina in 1968. In 1993, he became the part-time Master-in-Equity for Sumter County. In March 2002, respondent sustained a spinal cord injury that permits him to work only from a wheelchair.

In late 2002, respondent hired Shirley Holloman as a secretary at his law firm. In or about December 2002, respondent curtailed his private law practice and relocated his office to the Sumter County Courthouse. At or around the time of the move, Holloman was hired by Sumter County as a full-time secretary or assistant in respondent's Master-in-Equity's office. Holloman's duties included disbursing monies related to cases handled by respondent. While employed full-time as a county employee, Holloman also performed work for respondent's private law practice. Respondent had full faith in Holloman's honesty and integrity.

In 2006, Holloman began to be absent from work in a manner that respondent believed excessive and, on May 12, 2006, respondent terminated Holloman for that reason. On May 13, 2006, while organizing and balancing the financial records of the Master-in-Equity's office, respondent determined that funds were missing from the Master-in-Equity's account.

Holloman confessed to embezzling money from the Master-in-Equity account. According to Holloman, it was customary procedure in the office for respondent to sign "blank" checks so she could later make legitimate disbursements from the Master-in-Equity

[1] On June 12, 2006, the Court placed respondent on interim suspension.

account. During the 40 month period from February 2003 to May 2006, there were 89 checks drawn on respondent's Master-in-Equity account payable to Holloman totaling $637,445.68 (including more than $300,000.00 payable to Holloman in 2005 alone), though Holloman contends a small number of the checks were legitimate payments or reimbursements.

Analysis of the Master-in-Equity bank records indicates Holloman usually wrote two to four checks to herself every month between October 2003 and May 2006, though in five of those months she only wrote one check and in another month she wrote six. Fifty-eight of the sixty-three checks payable to Holloman after August 13, 2004, were for multiples of $5,000.00. These include thirty-five $5,000.00 checks, twelve $10,000.00 checks, four $15,000.00 checks, three $20,000.00 checks, two $25,000.00 checks, one $40,000.00 check, and one $50,000.00 check. The five checks not written for multiples of $5,000.00 after August 13, 2004, were for $12,460.36, $8,000.00, $400.00, $250.00, and $16.60.

To cover her embezzlement scheme, Holloman made false entries in the check ledger concerning the payee and amount. Respondent represents Holloman also concealed her actions by prohibiting other office staff from opening bank statements, by storing the statement in the top portion of a closet or filing cabinets that were not within reach from his wheelchair, and, on one occasion when he asked to review the statements, by falsely representing that she had taken them home to work on them and forgotten to bring them back. Respondent concedes, however, that except for the one occasion mentioned above, he did not ask Holloman for the bank statements and related records in order to review them, that he made no meaningful review of the cancelled checks and bank statements, and that Holloman's scheme of misappropriation would have been easily discovered by reviewing the financial records for any month during the period of time from October 2003 through May 2006.

Respondent reports he did not knowingly or willfully sign blank checks and has no recollection of having done so, though he

could see how it happened that he did. Respondent also represents that his signature was forged on a small number of the aforementioned checks. ODC does not dispute that representation.[2]

During its investigation of this matter, ODC learned respondent was charging an assessment or fee of $15.74 on each Master-in-Equity case. Respondent represents this amount was charged to cover the average expenses of handling a matter in the Master-in-Equity court (i.e., copies, postage, long distance calls, and supplies). Respondent accumulated and held these monies in the Master-in-Equity account and directed certain payments from these accumulated monies for Judicial Continuing Legal Education fees, seminar expenses, judicial conferences, employee mileage, and other expenses. Respondent acknowledges that he charged and expended these monies without statutory authority.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct: Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 3 (judge shall perform the duties of judicial office diligently); Canon 3A (judge shall perform all duties prescribed by law); Canon 3(C)(1) (judge shall maintain professional competence in judicial administration); Canon 3(C)(2) (judge shall require staff to observe standards of fidelity and diligence that apply to the judge); and Canon 4(D)(1)(a) (judge shall not engage in financial dealings that may be reasonably perceived to exploit the judge's judicial position), of Rule 501, SCACR. Respondent further admits that his misconduct constitutes grounds for discipline pursuant to Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct) and Rule 7(a)(4) (it shall be ground for discipline for judge to persistently fail to perform judicial duties or persistently perform

[2] To ODC's best knowledge, respondent reviewed the financial records of his law practice as required by Rule 417, SCACR, and no funds were taken from that account by Holloman.

judicial duties in an incompetent or neglectful manner) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent for one (1) year, retroactive to the date of his interim suspension. The suspension shall be without pay.

DEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Rosalyn Kimberly Grigsby, Respondent.

Opinion No. 26226
Submitted October 2, 2006 – Filed November 20, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Paulette Edwards, of Law Office of Paulette Edwards, PA, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed two (2) years. See Rule 7(b), RLDE, Rule 413, SCACR. She requests the suspension be made retroactive to the