The Supreme Court of South Carolina

In the Matter of Thomas Moore Gremillion, Petitioner

Appellate Case No. 2014-000414

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 7, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated March 5, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 20, 2014

The Supreme Court of South Carolina

In the Matter of Paul C. White, Petitioner

Appellate Case No. 2014-000425

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 1995, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Daniel E. Shearouse, Clerk of Court, received March 6, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 20, 2014

The Supreme Court of South Carolina

In the Matter of Nicole Ann Wagner, Petitioner

Appellate Case No. 2014-000384

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 17, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, received March 3, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she cannot locate her Certificate of Admission and that she has fully complied with the provisions of this order. The resignation of Nicole Ann Wagner shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 20, 2014

The Supreme Court of South Carolina

In the Matter of Viki M. West, Petitioner

Appellate Case No. 2014-000389

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 16, 1994, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated March 4, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Viki M. West shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

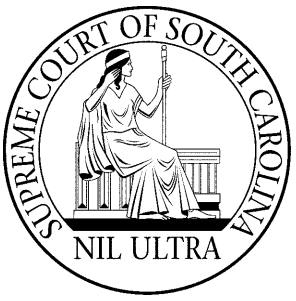
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 20, 2014



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12
March 26, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stevens Aviation, Inc., Petitioner,

v.

DynCorp International LLC, and Science Applications International Corporation, Defendants,

of whom DynCorp International LLC is, Respondent.

Appellate Case No. 2011-202686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27369
Heard January 7, 2014 – Filed March 26, 2014

REVERSED IN PART AND AFFIRMED IN PART

Keith D. Munson and Michael J. Bogle, both of Womble Carlyle Sandridge & Rice, LLP, of Greenville, for Petitioner.

C. Mitchell Brown and Michael J. Anzelmo, both of Columbia, and William S. Brown, V and Lane W. Davis, both of Greenville, all of Nelson Mullins Riley & Scarborough, LLP, for Respondent.

JUSTICE HEARN: This case concerns whether a subcontract for the maintenance of aircraft requires a contractor to turn to a subcontractor for all maintenance the contractor needs to fulfill a contract with the United States Army. The contractor, DynCorp, contends the contract does not create an exclusive relationship between the parties and it may send aircraft to other maintenance providers. The subcontractor, Stevens, contends the contract is a requirements contract under which DynCorp must send all aircraft requiring maintenance to Stevens.

Stevens moved for a partial summary judgment on the issue, the trial court granted the motion, and the court of appeals reversed and granted partial summary judgment to DynCorp. We reverse the court of appeals' decision in part and affirm in part, holding the contract is a requirements contract for certain aircraft.

FACTUAL/PROCEDURAL BACKGROUND

DynCorp is a large defense contractor who was interested in being awarded a contract from the United States Army to service the Army's fleet of C-12, RC-12, and UC-35 aircraft. In furtherance of the goal of securing the contract, DynCorp looked to Stevens as a potential subcontractor.

DynCorp and Stevens executed a "Teaming Agreement" which set forth how the parties would cooperate in attempting to procure the Army contract (the Prime Contract). The Teaming Agreement provides that should DynCorp be awarded the Prime Contract, it would award a subcontract to Stevens to perform certain work required under the Prime Contract and specifies in detail what work Stevens would perform.

A. THE SUBCONTRACT

The Army awarded the Prime Contract to DynCorp, and DynCorp and Stevens subsequently executed a subcontract (the Subcontract). The Subcontract begins with a preamble which provides in part:

> WHEREAS, the parties entered into a Teaming Agreement . . . which identifies the roles and responsibilities of the parties as Prime and Subcontractor in a cooperative effort to perform the requirements of U.S. Army Contract DAH23-00-C-0226 ("Prime Contract");
>
> WHEREAS, this Subcontract supersedes all prior written or oral agreements between the parties, excluding the Proprietary Data Exchange Agreement . . . and constitutes the entire agreement between the parties with respect to this Subcontract.

The body of the Subcontract begins with a definitional section which defines the term "Aircraft" as: "All Army RC/C-12 and UC-35 aircraft covered under the Prime Contract." The Subcontract has a "Statement of Requirements" which provides that:

> A. [Stevens], as a Subcontractor to DYNCORP, shall provide items consisting of management, parts and materials, repairs, skilled labor, facilities and engineering data for the maintenance and repair of the Government's fleet of C-12/RC-12 Aircraft and related support equipment under the Prime Contract as specifically set forth in Section B.
>
> B. [DynCorp] is not required to purchase from the Subcontractor any requirement in excess of the total funding identified under Section G under this Subcontract.

The Subcontract makes use of "CLINs"—"Contract Line Item Number[s]" which are carried over from the Prime Contract—to describe the work to be performed and defines eight CLINs as covered by the Subcontract. The Subcontract contains a Statement of Work defining the different CLINs in part as:

> B. C-12/RC-12 STRIP AND PAINT. [Stevens] shall provide all labor, services, facilities, equipment, and direct and indirect parts and materials required to strip and completely repaint aircraft (for other than ACI requirements), at the direction of [DynCorp]. . . .
>
> C. AIRCRAFT CONDITION INSPECTION (ACI). [Stevens] shall provide all labor, services, equipment, tools, facilities,

> tooling, lubricants, excluding engine oil, direct and indirect parts and material, fuel, and strip and repaint services required to perform all the requirements of [the Prime Contract's] Statement of Work. . . .
>
> D. OVER AND ABOVE MAINTENANCE. [Stevens] shall perform both Depot and Non-Depot Maintenance in accordance with Sections 4.0 and 5.0 of the [Statement of Work], and shall provide parts and materials required for the same. . . .
>
> E. SITE ORGANIZATIONAL MAINTENANCE. As directed by [DynCorp], Stevens shall accomplish work, at [Stevens'] facility, that would normally be performed at the site by the site personnel.

The Subcontract provides a schedule of per-unit or per-hour prices for each of the CLINs.

Section G limits the parties' relationship based on the funding available from the Prime Contract. It provides that if funds from the Prime Contract are exhausted for any CLIN, Stevens has no obligation to continue to perform that CLIN and DynCorp is not liable for any performance Stevens engages in after the funding for a CLIN is exhausted.

The Subcontract provides that DynCorp may terminate the contract or seek other remedies upon the occurrence of any of several enumerated ways in which Stevens may default. Among those, Stevens may default by failing to faithfully perform its obligations for ten days after receipt of a cure notice, receiving three or more cure notices in one year, or suspending its operations.

The Subcontract contains an integration clause providing: "This Subcontract constitutes the entire understanding of the parties with respect to the subject matter hereof, and supersedes all prior representations and agreements, except for those specifically and expressly incorporated herein." Finally, the Subcontract provides that it is to be construed according to the "federal common law of government contracts."

B. THE PRESENT SUIT

The parties performed under the Subcontract for approximately nine years until Stevens believed that DynCorp was sending C-12 and RC-12 aircraft covered by the Subcontract to other aviation maintenance providers. Stevens brought suit against DynCorp alleging it breached the Subcontract by sending covered aircraft to other service providers. DynCorp moved for a judgment on the pleadings asserting the Subcontract does not create an exclusive relationship between DynCorp and Stevens and therefore Stevens' breach of contract claim fails as a matter of law. Stevens moved for a judgment on the pleadings or, in the alternative, a partial grant of summary judgment finding the Subcontract creates an exclusive relationship.

The circuit court denied both motions for judgment on the pleadings, but granted Stevens' partial motion for summary judgment, holding the Subcontract "is a 'requirements contract' which obligates DynCorp to send to Stevens all C-12, RC-12, and UC-35 aircraft submitted to DynCorp under [the Prime Contract] for the purpose of allowing Stevens to perform the aviation maintenance services specified in that [Subcontract]." In support of that holding, the circuit court found the Subcontract is unambiguous, the Teaming Agreement is incorporated into the Subcontract, and the language of the Subcontract combined with the language of the Teaming Agreement unambiguously establishes that the Subcontract is a requirements contract.

DynCorp appealed asserting the circuit court erred in granting partial summary judgment before the completion of discovery, in granting partial summary judgment on grounds not before the court, in finding the Teaming Agreement was incorporated into the Subcontract, and in holding the Subcontract created an exclusive relationship between the parties. The court of appeals reversed the circuit court, first holding the Teaming Agreement is not incorporated into the Subcontract. *Stevens Aviation, Inc. v. DynCorp Intern. LLC*, 394 S.C. 300, 307–09, 715 S.E.2d 655, 659–60 (Ct. App. 2011). The court reasoned that the reference to the Teaming Agreement is in a "whereas" clause and such clauses are generally not considered contractual and not permitted to control express provisions of a contract. *Id.* at 308, 715 S.E.2d at 659. The court went on to find the contractual language establishes the parties did not intend to incorporate the Teaming Agreement because an incorporation provision contained in a "whereas" clause provides that the Subcontract supersedes any prior written agreements.

Having found the Teaming Agreement was not incorporated, the court considered the language of the Subcontract and concluded it does not establish an exclusive relationship between the parties and therefore is not an enforceable requirements contract. *Id.* at 309–11, 715 S.E.2d at 660–61. As an initial matter, the court found the Subcontract does not apply to UC-35 aircraft because it does not contain per-unit pricing for those planes. *Id.* at 309–10, 715 S.E.2d at 660. Addressing exclusivity generally, the court acknowledged some language in the Subcontract suggests exclusivity, but found other language established that no exclusive relationship exists. *Id.* at 311, 715 S.E.2d at 661. Specifically, the court quoted the language in the Subcontract's Statement of Work providing that Stevens is to perform strip and paint services "*at the direction* of DynCorp" and is to perform other maintenance "*as directed* by DynCorp." *Id.* The court concluded the Subcontract is not an enforceable contract and therefore DynCorp is only obligated to pay Stevens for work already performed. *Id.* Finally, the court granted partial summary judgment to DynCorp. *Id.* at 312, 715 S.E.2d at 661. This Court granted certiorari to review the court of appeals' decision.

ISSUES PRESENTED

I. Did the court of appeals err in holding the Subcontract is not an enforceable requirements contract for C-12 and RC-12 aircraft covered by the Prime Contract?

II. Did the court of appeals err in holding the Subcontract is not an enforceable requirements contract for UC-35 aircraft covered by the Prime Contract?

III. Did the court of appeals err in granting summary judgment to DynCorp when DynCorp never moved for summary judgment?

STANDARD OF REVIEW

While federal law governs the Subcontract, the South Carolina Rules of Civil Procedure and South Carolina Rules of Appellate Procedure govern the resolution of this dispute. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment where "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." In determining whether a genuine issue of material fact exists, the evidence

and inferences that can reasonably be drawn therefrom are to be viewed in the light most favorable to the nonmoving party. *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). In reviewing a grant of summary judgment, an appellate court applies the same standard as the trial court. *Id.*

LAW/ANALYSIS

I. C-12 AND RC-12 AIRCRAFT

Stevens contends that regardless of whether the Subcontract incorporates the Teaming Agreement, it establishes an exclusive relationship between the parties and is an enforceable requirements contract. We agree as to the C-12 and RC-12 aircraft and conclude the court of appeals erred in holding to the contrary.

Under the federal common law, a services or supply contract must fit into one of three forms: a contract for a definite quantity, a contract for an indefinite quantity, or a requirements contract. *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1331 (Fed. Cir. 2000). As set forth in *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), and quoted by subsequent federal decisions, these three forms of supply contracts are described as:

> With contracts for a definite quantity, the promises and obligations flowing from each party to the other define both the minimum and maximum performances of each and furnish the consideration from each party that courts require for enforceability. With indefinite quantities contracts, however, the buyer's promise specifically is uncertain, and such a contract would fail for lack of consideration if it did not contain a minimum quantity term. Without an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable. Requirements contracts also lack a promise from the buyer to order a specific amount, but consideration is furnished, nevertheless, by the buyer's promise to turn to the seller for all such requirements as do develop. Such contracts clearly are enforceable on that basis. The entitlement of the seller to all of the buyer's requirements is the key, for if the buyer were able to turn elsewhere for some of its needs, then the contract would not be distinguishable from an indefinite quantities contract with no stated minimum, unenforceable as we have stated.

Torncello, 681 F.2d at 761–62 (citations omitted).[1]

"Contract interpretation begins with the plain language of the agreement." *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). In determining which type of services or supply contract parties entered into, a court is to look "beyond the first page of the contract to determine what were the legal rights for which the parties bargained." *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 515 (1993). Courts are to "assume that the parties intended that a binding contract be formed," and "[t]hus, any choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract." *Torncello*, 681 F.2d at 761, *see also Crown Laundry*, 29 Fed. Cl. at 515–16 ("[B]ecause it must be assumed that the parties intended to form a binding contract, the court should favor an interpretation that saves the contract instead of voiding it.").[2] Additionally, "an interpretation that gives meaning to all parts of the

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[1] We reject DynCorp's assertion that in light of the United States Court of Appeals for the Federal Circuit's decision in *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302 (Fed. Cir. 1998), a fourth form of services or supply contract—a "purchase order pricing structure contract"—exists. DynCorp suggests the Subcontract is such a "purchase order pricing structure contract" whereby DynCorp contractually only must pay Stevens for services DynCorp orders and Stevens completes at their previously agreed upon pricing. *Coyle's* plainly did not approve such a contract. To the contrary, the *Coyle's* decision made clear the contract at issue there was not enforceable. *Coyle's*, 154 F.3d at 1304 (finding "no error in the Board's reasoning or conclusion" that "the contract is not enforceable for lack of consideration"). DynCorp misreads the language in *Coyle's* providing that the plaintiff was "entitled to payment only for services actually ordered by [the defendant] and provided by [the plaintiff]." *Id.* at 1306. Having found the contract unenforceable, that language clearly did not establish a new form of services or supply contracts, but rather merely acknowledged that the plaintiff could recover on equitable grounds for services ordered and performed.

[2] We also reject DynCorp's contention that the *Coyle's* decision overturned this rule of contract construction. In *Coyle's*, the court rejected "the notion that *Torncello . . . requires* [a court] to save an otherwise unenforceable indefinite quantity contract by interpreting it as an 'implied' requirements contract." *Coyles*, 154 F.3d at 1304 (emphasis added). DynCorp urges this Court to read that holding as rejecting *Torncello*'s instruction to favor an interpretation of an enforceable

contract is preferable to one which renders provisions in the contract meaningless or superfluous." *Crown Laundry*, 29 Fed. Cl. at 515.

Here, the contractual language indicates an intent to establish an exclusive relationship between the parties. The Subcontract's Statement of Requirements provides that Stevens, as DynCorp's subcontractor, is to provide aircraft maintenance to "the Government's *fleet* of C-12/RC-12 Aircraft . . . under the Prime Contract." (emphasis added). The use of the word "fleet" indicates Stevens is to service *all* of the government's C-12 and RC-12 aircraft covered by the Prime Contract rather than just those aircraft DynCorp chooses to send to Stevens.

Additionally, the Statement of Requirements provides that DynCorp "is not required to purchase from the Subcontractor any requirement in excess of the total funding" under the Prime Contract. That language implies that DynCorp is required to purchase from Stevens all requirements within the total funding provided by the Prime Contract. If that was not the case, the provision would be superfluous because DynCorp could purchase only those services from Stevens it so chooses.

The Subcontract's Statement of Work also evidences an intent to create an exclusive relationship. Its description of the "strip and paint" work states that Stevens "shall provide *all*" services needed to "strip and completely repaint *aircraft.*" (emphasis added). The Subcontract defines "Aircraft" as including "all" C-12 and RC-12 aircraft covered by the Prime Contract. Similarly, the Statement of Work's description of the "aircraft condition inspection" work states that Stevens

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requirements contract where such an interpretation is possible. However, the *Coyle's* holding does not extend that far and only rejected the extreme reading of *Torncello* as requiring a court to interpret an otherwise unenforceable contract as a requirements contract. DynCorp fails to acknowledge that *Torncello* only instructs a court to favor an interpretation as a requirements contract, rather than as an unenforceable agreement, *only* when the contract is susceptible to interpretation as a requirements contract. *Torncello*, 681 F.2d at 761 (stating a court should favor an interpretation as a requirements contract only when that is a legitimate "choice of alternative interpretations"). The *Coyle's* court made this distinction clear, stating "the *Torncello* court implicitly rejected a rule of 'saving the contract' by interpreting it as a requirement contract when it is not so susceptible." *Coyle's*, 154 F.3d at 1305.

"shall provide *all*" services needed to "perform *all* the requirements" of the Prime Contract's Statement of Work. The Statement of Work also states that Stevens "*shall perform* both Depot and Non-Depot Maintenance." Finally, the Subcontract sets forth a detailed list of per-unit pricing for each of the items of work Stevens is to perform. While these provisions do not explicitly state that the Subcontract creates an exclusive relationship between the parties, they utilize language consistent with and indicative of such a relationship.

Additionally, to interpret the Subcontract as not creating an exclusive relationship would render the Subcontract's termination provisions superfluous. The Subcontract's termination provisions permit DynCorp to terminate the Subcontract if Stevens fails to perform despite receipt of cure notices. If the Subcontract is not a requirements contract, the termination provision would be superfluous. DynCorp would not need to issue cure notices or formally terminate the contract. DynCorp could effectively unilaterally terminate the contract at any time by choosing to not send additional aircraft to Stevens.

The court of appeals erroneously discounted that contractual language and focused on the "at the direction of" language used in the Subcontract's Statement of Work for the "strip and paint" and "site organizational maintenance work." *Stevens Aviation*, 394 S.C. at 311, 715 S.E.2d at 661. Presumably, the court of appeals believed that language indicated Stevens was only to perform work on those aircraft that DynCorp directed it to perform work on, thus leaving open the possibility of DynCorp sending some aircraft to other maintenance providers. We find this contractual language does not support that conclusion. As we understand the Subcontract, C-12 and RC-12 aircraft would come to Stevens for an inspection. After Stevens performed the inspection, some of the inspected aircraft would need to be stripped and painted. Thus, the "at the direction of" language for the strip and paint work is best interpreted as meaning that DynCorp directs Stevens as to which aircraft need to be stripped and painted and how they are to be stripped and painted. The fact that DynCorp can tell Stevens which aircraft need this work is in no way inconsistent with Stevens performing all such "strip and paint work."

For the "site organizational maintenance" work, the Subcontract's description of that work is instructive:

> Both Parties recognize that at times it will be beneficial for work that would have normally been performed at the site by the site personnel to be accomplished at [Stevens'] facility. [Stevens] is not authorized

> to proceed with such efforts without written authorization from DYNCORP. The procedures for request, provision of estimate, authorization, and performance of such efforts will be in accordance with Section H.12, "Over and Above Work."

In other words, "site organizational maintenance" is work that needs to be performed at a special location—Stevens' facilities. The fact that Stevens cannot transfer its work under the Subcontract to its facilities without DynCorp's prior authorization in no way conflicts with the premise that Stevens is to perform all such work required by DynCorp. In short, we interpret these provisions as meaning that Stevens is to perform *all* "strip and paint" work and *all* "site organizational maintenance" work, but is to do so subject to DynCorp's instructions.

Accordingly, we find the unambiguous language of the Subcontract, regardless of whether the Teaming Agreement is incorporated, establishes an exclusive relationship between the parties as to C-12 and RC-12 aircraft covered by the Prime Contract. Therefore, we hold the Subcontract is an enforceable requirements contract as to those aircraft and reverse that portion of the court of appeals' decision.

II. UC-35 AIRCRAFT

Stevens also contends the court of appeals erred in holding the Subcontract does not create an exclusive relationship as to UC-35 aircraft covered by the Prime Contract. We disagree.

The Subcontract mentions the UC-35 aircraft in only one provision. The definitions section of the Subcontract defines "Aircraft" as "All Army RC/C-12 and UC-35 aircraft covered under the Prime Contract." However, the remainder of the Subcontract makes clear that it covers only RC-12 and C-12 aircraft by the use of provisions specific to those aircraft and the absence of any provisions related to the UC-35 aircraft. Specifically, the "Statement of Requirements" provides that Stevens "shall provide" services for "the Government's fleet of C-12/RC-12 Aircraft." The UC-35 is never mentioned in the Statement of Work nor in the

descriptions of the CLINS covered by the Subcontract.[3] Finally, the Subcontract does not contain a schedule of services and costs for the UC-35 aircraft, and "per-unit pricing . . . is an essential element in a requirements contract . . . ." *Ceredo Mortuary Chapel, Inc. v. United States*, 29 Fed. Cl. 346, 351 (1993). Accordingly, we conclude the Subcontract does not contain language establishing that Stevens is to perform *any* work on the UC-35 aircraft, much less language establishing that Stevens has an exclusive relationship with DynCorp as to the maintenance of the UC-35 aircraft under the Prime Contract. Therefore, we affirm the court of appeals' holding as to the UC-35 aircraft.

III. THE COURT OF APPEALS' GRANT OF SUMMARY JUDGMENT TO DYNCORP

Finally, we hold the court of appeals erred in granting summary judgment to DynCorp. While this Court has not yet addressed whether an appellate court may grant summary judgment to a party who did not move for that relief below, the rule in other jurisdictions is that an appellate court may do so only under limited circumstances. *See, e.g.*, *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000) ("It is generally recognized that a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion."); *In the Matter of Cont'l Airlines*, 981 F.2d 1450, 1458 (5th Cir. 1993) ("This court has the power to render summary judgment for a nonmoving party if we find that the moving party is not entitled to summary judgment and that no factual dispute exists and the nonmoving party is entitled to summary judgment as a matter of law."); *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 132 P.3d 825, 830–31 (Ariz. 2006) (acknowledging that an appellate court may grant summary judgment for a nonmoving party where the moving party had an opportunity to address the issue before the trial court and to show that a genuine issue of material fact exists).

We need not decide whether to adopt the rule from these other jurisdictions because the limited circumstances wherein an appellate court may grant summary judgment are not present here. Accordingly, we hold the court of appeals erred in granting summary judgment to DynCorp.

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[3] The Statement of Work does use the term "aircraft" in its description of the "strip and paint" work, but the heading for that work is "C-12/RC-12 STRIP AND PAINT."

CONCLUSION

We hold the Subcontract is a requirements contract creating an exclusive relationship as to the C-12 and RC-12 aircraft, reverse the court of appeals' holding to the contrary, and reinstate the circuit court's grant of summary judgment as to this issue. We also affirm the court of appeals' holding that the Subcontract is not a requirements contract as to the UC-35 aircraft. Finally, we reverse the court of appeals' grant of summary judgment to DynCorp.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dr. Cynthia Holmes, M.D., Appellant,

v.

East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc., Respondents.

Appellate Case No. 2011-198092;
Appellate Case No. 2012-209666

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27370
Heard March 19, 2013 – Filed March 26, 2014

AFFIRMED

Chalmers Carey Johnson, of Tacoma, Washington, for Appellant.

Erskine Douglas Pratt-Thomas, Lindsay Kathryn Smith-Yancey, and Daniel Simmons McQueeney, Jr., all of Pratt-Thomas Walker, PA, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: In this consolidated appeal, Dr. Cynthia Holmes, M.D. (Appellant) asks this Court to reverse the circuit court's decisions granting summary judgment in favor of East Cooper Community Hospital, Incorporated,

and Tenet HealthSystem Medical, Incorporated (collectively, Respondents), and sanctioning her pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, section 15-36-10 of the South Carolina Code (the FCPSA). We affirm the circuit court's grant of summary judgment in favor of Respondents and the award of sanctions against Appellant.

FACTS/PROCEDURAL BACKGROUND

Respondent East Cooper Community Hospital, Incorporated, is a subsidiary of Respondent Tenet HealthSystem Medical, Incorporated, and owns, operates and does business as East Cooper Medical Center (the Hospital), a private hospital in Mount Pleasant, South Carolina. Appellant is a doctor, who currently practices ophthalmology in Sullivan's Island, South Carolina, and was previously a member of the consulting medical staff of the Hospital.[1] During the relevant time period, Appellant was a member of the Hospital's medical consulting staff, appointed in two-year increments. In October 2006, Appellant submitted a reappointment application seeking advancement in medical staff category and clinical privileges to perform surgery on the eye. The Hospital's credentialing committee found Appellant unqualified for the level of privileges she requested. Appellant received administrative review of this decision, and was ultimately reappointed as consulting medical staff for another two-year term. In October 2008, Appellant submitted another reappointment application requesting advancement. This time, the Hospital determined that Appellant's application was incomplete and requested she voluntarily resign from the medical staff without appellate rights under the medical staff bylaws. The current appeal stems from these privileging decisions.

By way of background, this case represents the fourth lawsuit filed by Appellant against Respondents regarding credentialing decisions.[2] In each case, Appellant has alleged breach of contract and breach of the covenant of good faith and fair dealing arising out of Respondents' alleged mishandling of Appellant's medical staff privileging applications. Appellant filed her first lawsuit against Respondents in federal court in 1999, alleging violations of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, et seq. (2004), and pendant state law claims, including

[1] Appellant is also a licensed attorney and member of the South Carolina Bar.

[2] Appellant has also brought two legal malpractice claims against the attorneys who represented her in the first two lawsuits.

inter alia, claims for wrongful termination of hospital privileges, breach of contract, breach of contract accompanied by a fraudulent act, civil conspiracy, and unfair trade practices. That lawsuit ended when the district court granted summary judgment in favor of Respondents on the federal claim, and dismissed the remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3) (providing a court may decline to exercise supplemental jurisdiction over state law claims in cases where the district court has dismissed all claims over which it has original jurisdiction).[3]

On May 16, 2000, Appellant again challenged the Hospital's credentialing decisions, this time in circuit court. On January 20, 2003, the parties executed a settlement agreement in the second lawsuit (the Settlement Agreement). The Settlement Agreement provided, in part, that Appellant be reappointed to the consulting medical staff position from 2002 until 2004 with "the right to apply for a change in status in accordance with the Bylaws."

In 2005, Appellant filed a third lawsuit against Respondents alleging, *inter alia*, that Respondents breached the Settlement Agreement and the covenant of good faith and fair dealing in reviewing Appellant's applications for medical staff privileges in 2002 and 2004. More specifically, Appellant alleged that she and Respondents were parties to a contractual agreement "the terms of which are set forth in the Medical Staff Bylaws, Rules and Regulations, and related documents."

The circuit court ultimately granted summary judgment in favor of Respondents in the 2005 lawsuit on May 23, 2007. In addressing the allegations relating to Appellant's 2004 application, Circuit Court Judge R. Markley Dennis, Jr., stated, in pertinent part:

> The [Appellant's] Amended Complaint seeks judicial determination of whether the decisions regarding her credentialing and privileges at East Cooper Hospital were reasonable and in compliance with the Hospital's Bylaws. Specifically, she requests the Court to review whether the failure to process and consider her application for

[3] Appellant filed a pro se appeal from the district court's decision in the United States Court of Appeals for the Fourth Circuit, which was dismissed on November 17, 2000. She subsequently sought a writ of certiorari from the United States Supreme Court, which was denied on October 1, 2001.

> associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. The [Appellant's] claims all arise out of the peer review process at [the Hospital] and, as such, are not subject to judicial review. The Court does not have jurisdiction to determine these issues and [Appellant] has presented no evidence or reason to persuade the Court to depart from the long-standing principle that such actions are not subject to judicial review.

Judge Dennis explained further:

> [Appellant] argues that the Court does have jurisdiction over this matter based on *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt [Appellant's] interpretation of the *Lee* decision as applicable to the matter herein. In *Lee* the Court confirmed the decision reached in *Gowen* [sic][4] but found subject matter jurisdiction where [Appellant] did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure [Appellant]. *Lee*[, 289 S.C.] at 10. Here [Appellant] asks the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that [the] *Strauss*,[5] *Gowen* [sic], and *Wood*[6] decisions sought to prevent.[7]

In a subsequent order, dated August 6, 2009, sanctioning Appellant pursuant to the FCPSA, Judge Dennis stated:

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[4] *Gowan v. St. Francis Comty. Hosp.*, 275 S.C. 203, 268 S.E.2d 580 (1980).

[5] *Strauss v. Marlboro Cnty. Gen. Hosp.*, 185 S.C. 425, 194 S.E. 65 (1937).

[6] *Wood v. Hilton Head Hosp., Inc.*, 292 S.C. 403, 405, 356 S.E.2d 841, 842 (1987).

[7] Appellant appealed this order to the court of appeals on three separate occasions, and the court of appeals dismissed and remitted the case each time.

> Despite clear case law to the contrary, [Appellant] filed this action seeking judicial determination of whether the decisions regarding her credentialing and privileges were reasonable and in compliance with the Hospital's Bylaws. Specifically, she sought the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. [Appellant's] claims all arose out of the peer review process and, under South Carolina law, are not subject to judicial review, and [Appellant] presented no evidence or reason to persuade the Court to depart from this longstanding principle.

On April 26, 2010, Appellant filed her complaint in the instant action,[8] alleging Respondents breached their contract and covenant of good faith and fair dealing by "attempting (successfully to date) to block [Appellant] from being able to seek review of its decision to deny her application for advancement in staff privileges in violation of the letter and the spirit of the applicable bylaws." As a result, Appellant submitted that she "suffered actual damages and special damages, in the form of lost income, and loss of business to her practice, as she has been unable to admit any patients to the hospital to perform medical procedures from 2007 . . . and continuing presently." Appellant sought review of the specific decisions of the Hospital to deny her application for surgical privileges in 2006 and to reject her 2008 application as incomplete.

On September 17, 2010, Respondents filed an answer and counterclaims for abuse of process and malicious prosecution. As part of their Answer, Respondents also moved for sanctions under the FCPSA.

On September 24, 2010, Respondents moved for judgment on the pleadings pursuant to 12(c), SCRCP.[9] In their motion, Respondents argued that, based on the

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[8] Appellant is represented in this litigation by the same counsel who represented her in the 2005 litigation.

[9] Rule 12(c), SCRCP, provides:

pleadings, the circuit court lacked jurisdiction to consider Appellant's claims. A hearing was convened before Judge Dennis to hear arguments on Respondents' motion on December 16, 2010. At the hearing, Judge Dennis orally denied the motion on the basis that it would be more appropriately considered as a motion for summary judgment:

> I think the safest for everybody, for review purposes is to have this matter resolved not on a [m]otion on the pleadings but on a [m]otion for summary judgment. I just am not—I understand the jurisdictional issue. There are matters, though, that I—I really would have to rely on certain things outside of the context of the pleadings.

In denying the motion, Judge Dennis not only warned Appellant's counsel against engaging in frivolous proceedings, but took care to reiterate he was not making any ruling with respect to the merits of Respondents' claims that the circuit court lacked subject matter jurisdiction:

> I don't quarrel with anything you've [Respondents' counsel] said. I would remind everybody—I don't have to, we have very competent lawyers involved in this, but if this is another effort that really is nothing more than—could be considered frivolous, though I am not making that finding now, and I would not hesitate, nor am I sure any other judge would hesitate to impose sanctions.
>
> So I—I just remind everybody what we're doing here because I think it has to be looked at in a real sense. I think that the [sic] there are things, [Appellant's counsel],—no disrespect to you, sir, but—I understand what you say sounds like that might be creative lawyering, too, by using semantics—and I don't think that it is there. That's not

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> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

for me to judge today.

> I agree with you that it would be a mistake to grant this on the basis of the pleadings. So that's the reason that I am denying it—not anything about the merits.

Respondents filed a motion to reconsider pursuant to Rule 59(e), SCRCP. Judge Dennis held a hearing on this motion on March 8, 2011, and orally denied the motion. On March 9, 2011, Judge Dennis denied this motion in a form order.

On June 6, 2011, Respondents filed a motion for summary judgment on several grounds, including that the circuit court lacked subject matter jurisdiction to review the medical staff privileging decisions of a private hospital. A hearing was convened on July 8, 2011, before the Honorable Kristi Lee Harrington. By order dated July 29, 2011, Judge Harrington entered summary judgment in favor of Respondents (the Summary Judgment Order). In the Summary Judgment Order, Judge Harrington found that the circuit court lacked subject matter jurisdiction to review the Hospital's privileging decisions with respect to Appellant.

On August 8, 2011, Respondents filed a motion for sanctions under the FCPSA, arguing, *inter alia*, that the circuit court should sanction Appellant for "seeking adjudication of claims over which this Court does not have jurisdiction" and "raising issues which have been previously adjudicated against [Appellant] and in [Respondents'] favor."

On August 24, 2011, Appellant appealed the Summary Judgment Order. Appellant also filed a response to Respondents' motion for sanctions in the circuit court, arguing that the circuit court could not grant sanctions against her where the court had previously denied Respondents' motion to dismiss; that she was competently represented by counsel, and therefore, immune from sanctions; and that Respondents' motion was premature because of the pending appeal of the Summary Judgment Order.

On November 22, 2011, Judge Harrington heard arguments concerning Respondents' motion for sanctions. During the hearing, Appellant argued that the FCPSA unconstitutionally holds pro se litigants to a reasonable attorney standard and deprives litigants of due process by requiring the circuit court to report any violation of the FCPSA directly to this Court. No other constitutional issues were

raised by Appellant during this hearing.

By order dated February 1, 2012, Judge Harrington awarded sanctions against Appellant for violating the FCPSA (the Sanctions Order) by "initiating and continuing this litigation despite this Court's lack of subject matter jurisdiction, despite a prior ruling against [Appellant] that this Court lacks subject matter jurisdiction, and despite being sanctioned for arguing that this Court has subject matter jurisdiction in a previous case based on the very same allegations." Judge Harrington further found that Appellant violated the FCPSA by initiating and continuing "the present action despite [Respondents'] compliance with the plain language of [the Hospital's] Bylaws." Judge Harrington also noted:

> While [Appellant] contends that this previous circuit court order is not binding precedent and that Judge Dennis's decision in this instance was incorrect, [Appellant] ignores that "[u]nder the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). [Appellant] failed to offer any argument as to why Judge Dennis's decision does not collaterally estop her in this action. Moreover, [Appellant's] argument on this point emphasizes her willingness to re-litigate the case she lost in 2005.

Therefore, Judge Harrington ordered Appellant to pay Respondents' attorneys' fees and other costs associated with this action in the amount of $53,447.15 and enjoined Appellant from any future filings against Respondents absent the posting of a bond to pay Respondents' attorneys' fees and costs in the event Respondents prevail in future litigation and upon a showing that Respondents would be entitled to such fees and costs.[10]

On February 21, 2012, Appellant filed a motion to reconsider the Sanctions

[10] Noticeably, the Sanctions Order did not address any constitutional arguments made by Appellant.

Order.[11] Appellant appealed the Sanctions Order on March 6, 2012. On March 7, 2012, Judge Harrington denied Appellant's motion to reconsider the Sanctions Order. On March 21, 2012, Appellant filed an amended notice of appeal of the Sanctions Order after the circuit court denied her motion to reconsider.

On May 24, 2012, this Court certified these cases for review pursuant to Rule 204(b), SCACR, and consolidated Appellant's two appeals for purposes of briefing and oral argument.

ISSUES

I. Whether the circuit court erred in awarding sanctions against Appellant?

II. Whether the FCPSA is unconstitutional?

ANALYSIS

I. Successive "Motions to Dismiss"

Appellant argues that because the hospital failed to prevail on its first and second "motions to dismiss" for lack of subject matter jurisdiction before Judge Dennis, South Carolina law prohibits a finding of frivolity where the case was ultimately dismissed on a third, identical "motion to dismiss" before a different judge, Judge Harrington. On the other hand, Respondents contend that the circuit court's ruling with respect to Respondents' motion for judgment on the pleadings and summary judgment motion does not preclude sanctions under the FCPSA.

First, we find that Appellant mischaracterizes the nature of Respondents' motions. The characterization of Respondents' motions as "motions to dismiss" contradicts the Record. Initially, Respondents submitted a motion for judgment on the pleadings to Judge Dennis, followed not by a second "motion to dismiss," but a subsequent motion to reconsider the denial of that motion. In discussing the

[11] In her motion to reconsider, Appellant sought a ruling on her prior constitutional argument that the "reasonable attorney" standard in the FCPSA violates due process. However, for the first time, Appellant argued that the FCPSA inhibits free speech.

motion for judgment on the pleadings, Judge Dennis explicitly stated that he was not denying the motion on the merits, finding instead that summary judgment would be the proper avenue to consider Respondents' arguments. Therefore, Respondents filed a motion for summary judgment, which Judge Harrington ultimately granted in their favor. This was not a third motion to dismiss, as Appellant claims.

Appellant's attempt to characterize these motions as successive "motions to dismiss" is a veiled effort to make the facts of this case conform to those in *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), as Appellant relies on *Hanahan* for the proposition that sanctions were inappropriate based on the posture of her case. In that case, the Court, acting under a prior version of the FCPSA, reversed the award of sanctions after the sanctioned party prevailed on a summary judgment motion, but lost the case after a full trial on the merits. *Id.* at 158, 485 S.E.2d at 913. The Court adopted the rationale "that a party who survives pre-trial motions to dismiss and for summary judgment are not subject to sanctions after a trial on the surviving claims," stating that "[t]he theory behind these cases is that if a case is submitted to the jury, it cannot be deemed frivolous." *Id.* at 157, 485 S.E.2d at 912 (citation omitted). Thus, by claiming that she survived successive motions to dismiss, Appellant attempts to utilize *Hanahan* to avoid sanctions.

However, the present case is distinguishable from *Hanahan* in that, here, Appellant did not "survive" a pre-trial motion to dismiss or for summary judgment and never made it to a trial on the merits. Rather, Judge Dennis expressly deferred a decision on the merits until such motion was in the proper procedural posture. Therefore, because Judge Harrington granted Respondents' motion for summary judgment and Appellant's case was never tried on the merits, Appellant is not immune from sanctions under *Hanahan*'s rationale.

Nevertheless, *Hanahan* was decided in 1997 under a prior version of the FCPSA. At that time, the FCSPA provided:

> Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:

> (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and
>
> (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15–36–10 (2005). Under the prior version of the Act, the party seeking sanctions bore the burden of proving:

> (1) the other party has procured, initiated, continued, or defended the civil proceedings against him;
>
> (2) the proceedings were terminated in his favor;
>
> (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings;
>
> (4) the aggrieved person has incurred attorney's fees and court costs; and
>
> (5) the amount of the fees and costs set forth in item (4).

Id. § 15-36-40.

In 2005, the General Assembly substantially amended section 15-36-10, and repealed sections 15-36-20 through -50. *See* Act No. 27, 2005 S.C. Acts 114, § 5 (effective July 1, 2005) (revising § 15-36-10); Act No. 27, 2005 S.C. Acts 121, § 12 (effective March 21, 2005) (repealing §§ 15-36-20 through -50). Section 15-36-10 now reads, in pertinent part:

> At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.

S.C. Code Ann. § 15-36-10(C)(1) (Supp. 2012).

Under the plain terms of this new section of the FCPSA, *Hanahan*'s reasoning as to the disposition of pre-trial motions no longer applies. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.") (citation omitted). Rather, sanctions may be awarded under section 15-36-10 regardless of whether or not the case has been tried to verdict so long as the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the FCPSA. S.C. Code Ann. § 15-36-10(C).

Here, Appellant lost at the summary judgment stage. Therefore, while the circuit court erred in relying on *Hanahan*, the circuit court did not err in assessing sanctions pursuant to the FCPSA at that point.

II. Merits of Appellant's Case under Existing Law

However, Appellant further argues that her position on subject matter jurisdiction is supported by existing law, and therefore, the circuit court erred in finding that she frivolously pursued her claims. *See* S.C. Code Ann. § 15-36-10(J) (stating the provisions of the FCPSA "shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law."). On the other hand, Respondents argue that the circuit court acted within its discretion in finding that a reasonable attorney under the same circumstances would believe that under the facts, Appellant's claim was unwarranted under existing law, and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law.

Appellant's argument concerning sanctions hinges on the validity of the Summary Judgment Order. In this respect, Appellant argues that sanctions were not warranted under the FCPSA where summary judgment was inappropriate as a matter of law and fact. Of course, Respondents argue that summary judgment was

appropriate as a matter of law.[12]

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) ("An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." (citation omitted)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citations omitted). As in the trial court, "[o]n 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." *Id.* (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Nevertheless, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (citation omitted).

Appellant contends that her subject matter jurisdiction argument is based on a good faith or reasonable extension of the court of appeals' decision in *Lee v. Chesterfield General Hospital, Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986).

We agree with Respondents that Appellant made this exact legal argument in the 2005 litigation before Judge Dennis and has provided no reason why her argument is any different in this case, aside from the dates of the credentialing decisions. In fact, at the hearing on sanctions, Appellant's counsel indicated that he wanted another "bite of the apple," as he aimed to obtain a ruling by an appellate court that Judge Dennis's interpretation of *Lee* was wrong, and Appellant's

[12] We note that in the proceedings below, the parties stipulated that the matters under consideration were matters of law for the court.

interpretation was indeed correct.[13] In granting summary judgment to

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[13] At the sanctions hearing, Appellant's counsel argued:

> Your order was issued on your interpretation [in the present lawsuit] and Judge Dennis's interpretation [in the 2005 lawsuit] of the *Lee* case. And while I fully respect that the Court has the authority to interpret these cases and issue an order, the only other order in existence that supports Your Honor's order is Judge Dennis's [order in the 2005 lawsuit], which is a circuit court order and not an appellate opinion. And we're in the Court of Appeals now for me to challenge that order, which is the proper way to do it.
> . . . .
>
> In fact, attorneys are allowed to even go against existing appellate opinion if they have a good-faith argument against it. In this case I wasn't going against appellate law. I felt that Judge Dennis was incorrect, and you felt that I was incorrect, and now we are in the Court of Appeals. That's the way the system is supposed to work. It's not a frivolous lawsuit.
> . . . .
>
> The second sanctions order [issued by Judge Dennis in the 2005 case] I'm very well aware of. And I was aware of that when I took this case which is why I did the research, I talked to other lawyers in the community to see what they thought.
>
> And the question was, was Judge Dennis right about *Lee versus Chesterfield*. The consensus that I got was that he wasn't right about *Lee versus Chesterfield*. I don't think he was right about *Lee versus Chesterfield*.
>
> And it does me no good to say that to anybody except to you and then to the [a]ppellate [c]ourt, which is exactly where I'm going. The case was very specifically tailored for that purpose . . . was either I'm going to convince a judge this time that I'm right about *Lee versus Chesterfield*, or I'm going to convince an appellate panel on the Supreme Court that I'm right about *Lee versus Chesterfield*, or I'm just

Respondents, Judge Harrington found that "at least two prior orders entered by [Judge Dennis] in a previous case between these parties operate as res judicata and/or collateral estoppel as to this issue, and these also support the Court's decision herein."

We affirm the grant of summary judgment in favor of Respondents on the basis that Appellant is collaterally estopped from bringing this suit.

"Under the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Carman*, 317 S.C. at 6, 451 S.E.2d at 386 (citing *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991)). "The estoppel of a judgment does not extend to matters not expressly adjudicated, and which can be inferred only by argument or construction from the judgment, except where they are necessary and inevitable inferences in the sense that the judgment could not have been rendered as it was without deciding such points." *Id.* (citing *Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322, 199 S.E. 296 (1938)).

Judge Dennis rejected Appellant's *Lee* argument in the 2005 lawsuit:

> [Appellant] argues that the Court does have jurisdiction over this matter based on *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt [Appellant's] interpretation of the *Lee* decision as applicable to the matter herein. In *Lee* the Court confirmed the decision reached in *Gowen* [sic] but found subject matter jurisdiction where [Appellant] did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure [Appellant]. *Lee*[, 289 S.C.] at 10. Here [Appellant] asks the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that [the]

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dead wrong and everybody is going to tell me so all the way up.

Strauss, *Gowen* [sic], and *Wood* decisions sough to prevent.

Because Judge Dennis issued a final ruling on whether Respondents breached the Settlement Agreement with respect to privileging decisions made in 2002 and 2004 based on the *Lee v. Chesterfield* decision, Appellant is estopped from bringing the exact legal arguments against Respondents with respect to the 2006 and 2008 credentialing decisions.

Nevertheless, Appellant's argument that existing law supports her claim fails on the merits. Appellant argues that her attorney was concerned with the dismissal for lack of subject matter jurisdiction in the 2005 case, so he specifically limited the claims in this case to fall within the ambit of the *Lee* holding, "which he read as restricting the immunity granted to private hospitals from suits requesting a due process review, rather than other types of common law claims." Therefore, Appellant contends that her claims are specifically tailored to the Settlement Agreement, and not the Hospital's by-laws. At the hearing before Judge Harrington on Respondents' summary judgment motion, Respondents again argued that the circuit court lacked jurisdiction to hear this claim under *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980) and its progeny. On the other hand, Appellant again argued that the facts alleged in Appellant's complaint were indistinguishable from those in *Lee*. Judge Harrington ruled in favor of Respondents, finding that *Lee* was inapplicable to this case, and stating Appellant's "claims all arise out of the peer review process at the Hospital and, as such, are not subject to judicial review."

In *Lee*, a licensed and certified physician's assistant, Lee, and a licensed physician, Newson, had been granted staff privileges to perform procedures by Chesterfield General Hospital (the hospital) for several years. *Lee*, 289 S.C. at 8, 344 S.E.2d at 380. In October 1982, Lee reapplied for privileges to perform a host of medical procedures at the hospital. *Id.* In January 1983, the hospital approved privileges to perform some of these procedures, but not all of them. *Id.* In February 1983, the hospital's board of trustees again limited Lee's privileges. *Id.* at 7, 344 S.E.2d at 381. In their complaints, Lee and Newson alleged that the hospital administrator, the hospital and other members of the medical staff conspired "'to dominate the practice of medicine by licensed physicians in Chesterfield County' and 'to restrain and eliminate, for their own financial advantage and professional enhancement, the element of fair competition' in the practice of medicine in Chesterfield County." *Id.* at 9, 344 S.E.2d at 381. As a

result, Lee and Newson alleged that they had suffered damages, including mental anguish, loss of professional reputation, and loss of trade. *Id.*

Citing *Gowan*, the court of appeals restated the general rule[14] with respect to challenging hospital staff privileging decisions:

> We agree that a private hospital is free, in the absence of controlling legislation or regulatory provisions, to decide the nature and extent of medical practice permitted to persons it grants staff privileges. Ordinarily, such decisions involve matters of expert medical judgment not subject to judicial review.

Id. Moreover, the court reiterated that "[a] medical professional has no right, simply because he is licensed by state authority[,] to claim unrestricted staff privileges in a hospital." *Id.* Nevertheless, that court found:

> These principles are not dispositive of the present cases, however. In ruling on the demurrers, the circuit court did not conduct a judicial review of internal hospital rules. The question to be decided is not whether the rules are valid or reasonable or medically sound, but

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[14] In *Wood*, this Court explained:

> It is well settled in South Carolina, and throughout the country, that it is improper for the courts to review the decisions of governing boards of private hospitals concerning the staff privileges of practitioners. This Court adopted the majority rule many years ago in the case of *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937). In the recent decision of *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980), *cert. denied*, 449 U.S. 1062 (1980), we affirmed our view that the implementation of the regulations of a private hospital which are initiated to restrict a practitioner's practices are not subject to judicial review. We stated that we would not "depart from the longstanding principle that such action [by the hospital] is not subject to judicial review." *Gowan*, 275 S.C. at 204, 268 S.E.2d at 581 (citations omitted).

292 S.C. at 405, 356 S.E.2d at 842.

> whether the rules were imposed in furtherance of a conspiracy, the primary purpose of which was to injure the plaintiffs. If the complaints, liberally construed, allege such a conspiracy, it is irrelevant that the Hospital has the legal right to restrict staff privileges and that its rules are not subject to judicial review.

Id. at 9–10, 344 S.E.2d at 381.

Appellant now contends that the *Lee* decision does not stand for the proposition that a party must make a claim for civil conspiracy to avoid dismissal for lack of subject matter jurisdiction to review a hospital's staff decisions. Therefore, she contends that the Summary Judgment Order is erroneous as a matter of law because it "circumvents the clear ruling of the *Lee* Court by interpreting the opinion as meant only to apply to cases in which the [p]laintiff has alleged civil conspiracy."

While we agree with the gravamen of Appellant's argument that *Lee* might not be limited to claims of civil conspiracy, the import of *Lee* is that any claim involving staffing decisions made by a private hospital must require review beyond the internal procedures, e.g. bylaws, of a private hospital, to fall within an exception to the general rule that courts will not delve into a hospital's internal affairs with regard to credentialing or other staffing decisions. Here, despite her attempt to characterize her claims as a challenge to the Settlement Agreement, in our view, Appellant's lawsuit constitutes another attempt on her part to get at the heart of the hospital's internal procedures and staffing decisions. At its core, Appellant's lawsuit challenges staff decisions made after the Hospital complied with the express terms of the Settlement Agreement. No review of the Hospital's decisions can be had here without reviewing the Hospital's 2006 and 2008 privileging decisions and its by-laws.[15]

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[15] Even Appellant's complaint proclaims that Respondents breached a duty to Appellant "by attempting (successfully to date) to block [Appellant] from being able to seek review of its decision to deny her application for advancement in staff privileges *in violation of the letter and the spirit of the applicable bylaws*." (Emphasis added). Likewise, during a later hearing, Appellant characterized the arguments contained in her complaint as follows:

Therefore, because Appellant again attempts to challenge the internal decision-making process of the Hospital with respect to staff credentials, which has been already adjudicated as clearly improper under our jurisprudence, Appellant's lawsuit lacked merit from the outset. Accordingly, we affirm the circuit court's grant of summary judgment to Respondents. Moreover, we find that Respondents were justified in seeking sanctions against Appellant here because there was clearly no "good faith argument for an extension, modification, or reversal of the existing law," especially in light of Judge Dennis's prior ruling in the 2005 lawsuit. *See* S.C. Code Ann. § 15-36-10(J).

III. Timing

Despite obvious preservation issues,[16] Appellant argues that to allow the circuit court to determine whether a claim is frivolous on a motion for sanctions

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> [Respondents] claim[] that a settlement agreement executed by the parties which required that [Appellant] be reappointed to the consulting staff in 2002 precludes [Appellant] from suing in this case because she was, actually, reappointed to the consulting staff in 2002. [Respondents] misinterpret[] the complaint, which should be clear on its face. [Appellant] was given two rights under the former agreement. One was to be reappointed to the consulting staff in 2002 for two years. The other, as [Respondents] explain[] in [their] own brief, was that [Appellant] would have the right to apply for a change in status pursuant to the by-laws. *It is the denial of [Appellant's] right to apply for a change in status pursuant to the by-laws which is the basis of her claims in this case*.

(Emphasis added).

[16] Appellant failed to raise the conflict she proposes between the South Carolina Appellate Court Rules and the FCPSA before the circuit court in either her brief opposing sanctions, at the hearing, in her proposed order, or in her motion to reconsider. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

under the FCPSA while the order dismissing the case is under appeal creates a conflict with the South Carolina Appellate Court Rules, and causes unnecessary litigation. Appellant contends that this conflict may be resolved by requiring circuit courts confronted with this situation to stay their consideration of frivolity until after the resolution of the appeal of the underlying dispositive judgment. To the contrary, Respondents contend that the circuit court acted within its discretion by hearing Respondents' motion for sanctions after Appellant filed her notice of appeal. We agree.

Motions made pursuant to the FCPSA are post-trial motions. *See* S.C. Code Ann. 15-36-10(C)(1) (Supp. 2012) ("At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous."). As such, a party has ten days after the filing of a court order to file a motion pursuant to the FCPSA. *See In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (referring to motions made under the FCPSA as "post-trial motions for sanctions" and finding that the general ten-day limitation for post-trial motions applies to motion made pursuant to the FCPSA); *Pitman v. Republic Leasing Co.*, 351 S.C. 429, 432–33, 570 S.E.2d 187, 189–90 (Ct. App. 2002) ("Absent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment. Such an interpretation would run counter to our established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) ("[B]ecause a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment." (alteration in original)).[17]

Nevertheless, Appellant contends that the requirement that a motion pursuant to the FCPSA be made within ten days of a final judgment conflicts with Rule 241(a), SCACR, which provides:

[17] Appellant concedes in her brief that 10 days is the appropriate time to file a motion for sanctions.

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Appellant argues that the circuit court should have awarded sanctions prior to the outcome on appeal of the order upon which the sanctions were based, or the Summary Judgment Order. However, this Court has held that the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion. *See, e.g., Hudson v. Hudson*, 290 S.C. 215, 215, 349 S.E.2d 341, 341 (1986). For example, in *Hudson*, the order appealed was filed on March 18, 1986, and a notice of appeal was filed on March 24, 1986. *Id.* On March 27, 1986, timely post-trial motions were made pursuant to Rule 59(e), SCRCP. *Id.* at 215–16, 349 S.E.2d at 341. Holding "that the service and filing of a Notice of Appeal before the filing of timely post-trial motions under Rule 59 by any party does not deprive the lower court of jurisdiction to consider the motions," *id.* at 216, 349 S.E.2d at 341, the Court ordered the notice of appeal to be dismissed without prejudice as prematurely filed, *id.* at 216, 349 S.E.2d at 341–42 ("[I]n the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of this Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice. Any party can appeal within ten (10) days after the order disposing of the post-trial motions. A second filing fee will not be collected from a party who previously appealed." (footnote omitted)). This way, all ancillary matters can be timely heard, and appealed, if necessary, in an efficient and wholesale manner, and not, as Appellant suggests, in a piecemeal fashion.

Accordingly, Appellant's contention that the FCPSA and the South Carolina Appellate Court Rules contain conflicting terms lacks merit, and the circuit court acted properly and well within its jurisdiction in hearing Respondents' sanctions motion, even though Appellant already had filed a Notice of Appeal in this case.

IV. The Constitutionality of the FCPSA

Appellant argues that the FCPSA is unconstitutional. Respondents contend that Appellant's "everything-but-the-kitchen-sink" approach must fail her because she did not preserve her arguments for review in the circuit court and because her arguments lack merit.

We agree with Respondents that Appellant did not preserve most of her constitutional arguments for review. Appellant never argued the following to the circuit court: (1) that the FCPSA is redundant to a claim for abuse of process or a request for sanctions under Rule 11, SCRCP; (2) that the FCPSA deprives litigants of their rights to a jury trial; or (3) that the FCPSA violates the prohibition against double jeopardy. Finally, Appellant raised her argument that the FCPSA constitutes an unconstitutional inhibition on free speech for the first time in her motion to reconsider the Sanctions Order. Therefore, we will not consider the merits of those arguments.

With respect to her due process argument, despite Respondents' assertion to the contrary, Appellant did argue this issue to the circuit court and again raised it in her motion for reconsideration of the Sanctions Order. Appellant argues that the FCPSA denies litigants procedural due process because "the *pro se* litigant or non-attorney party is held to a standard of expertise which the layperson and affected party do not possess." Respondents contend that Appellant lacks standing to bring this argument, and regardless, the FCPSA provides constitutionally adequate procedural due process.

We agree with Respondent that Appellant lacks standing to bring this argument because she is a licensed attorney in good standing with the South Carolina Bar. In addition, Appellant has been represented in this action by a licensed attorney. As such, Appellant cannot test the constitutionality of the statute from the standpoint of a pro se litigant or non-attorney party. *See United States v. Raines*, 362 U.S. 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." (citations omitted)).

V. Sanctions

Appellant also argues that she should not be subject to sanctions because she was competently represented by counsel in these proceedings, and section 15-36-10's "reasonable attorney" standard has been met, precluding a finding of frivolity.

Under the FCPSA,

> An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:
>
> (a) filing a frivolous pleading, motion, or document if:
>
> (i) the person has not read the frivolous pleading, motion, or document;
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which

> the proceedings are based;
>
> (b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or
>
> (c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

S.C. Code Ann. § 15-36-10(A)(4)(a)–(c) (Supp. 2012).

To begin with, Appellant argues that she cannot be sanctioned under the FCPSA because she was represented by competent counsel in these proceedings. Under the prior iteration of the FCPSA, section 15-36-20 provided that "[a]ny person who takes part in the procurement, initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose . . . if he reasonably believes in the existence of the facts upon which his claim is based and . . . (2) relies upon the advice of counsel, sought in good faith and given after full disclosure of all facts within his knowledge and information which may be relevant to the cause of action . . . ." *See* S.C. Code Ann. § 15-36-20 (2005). There is no corresponding provision in the amended version of the FCPSA. *See* S.C. Code Ann. § 15-36-10 (Supp. 2012). However, the new version of the FCPSA repeatedly speaks in terms of sanctioning a "party" in addition to an attorney or pro se litigant. *See, e.g.*, S.C. Code Ann. § 15-36-10(C)(1) (stating "[a]n attorney, party, or pro se litigant shall be sanctioned . . . ."). Thus, we must presume that the legislature intended for a *party*, even a party represented by counsel, to be sanctionable under the FCPSA.[18] *See Vernon v. Harleysville Mut.*

[18] The dissent would not award sanctions against Appellant alone. We disagree. We call attention to the circumstances of this particular case. In December 2009, this Court ordered all clerks of court to refuse filings from Appellant, unless she was represented by a licensed attorney (other than herself), due to her vexatious and meritless filings. *See Doe v. Duncan*, S.C. Sup. Ct. Order dated Dec. 2, 2009 (Appellate Case No. 2009-115446). Consequently, counsel graciously agreed to represent Appellant. However, Appellant drove this lawsuit (and many others) with the knowledge that she did not have a claim. As an attorney, she is familiar

Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964) ("It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law.").

Appellant further contends that sanctions were unwarranted here.

Under the FCPSA:

> (1) An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:
>
> > (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
> >
> > (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or
> >
> > (c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.
>
> (2) Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous

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with the law and understands the court system, yet has continuously pursued frivolous proceedings. Thus, counsel, merely assisting her in filing papers with the court, should not also be penalized under these facts.

> claim or defense, the attorney, party, or pro se litigant shall not be sanctioned.

S.C. Code Ann. § 15-36-10(C)(1)–(2). The sanctioning court is entitled to consider the following in awarding sanctions:

> (1) the number of parties;
>
> (2) the complexity of the claims and defenses;
>
> (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
>
> (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
>
> (5) previous violations of the provisions of this section;
>
> (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
>
> (7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E)(1)–(7). Moreover, "[i]n determining whether sanctions are appropriate or the severity of a sanction, the court shall consider previous violations of the provisions of this section." S.C. Code Ann. § 15-36-10(F).

Nevertheless, Appellant argues that she should not be subject to sanctions under section 15-36-10(J), which provides the FCPSA "shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law."

Here, the circuit court sanctioned Appellant because she continued the lawsuit despite a prior ruling that the court lacked subject matter jurisdiction, despite previously receiving sanctions for arguing that the court lacked jurisdiction based on the exact same allegations, and despite Respondents' compliance with the

plain language of the Hospital's by-laws.

Because "the decision whether to impose sanctions under the FCPSA is a decision for the judge, not the jury, it sounds in equity rather than at law." *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003) (refusing to adopt the more deferential "abuse of discretion" federal standard of review in assessing decisions to impose sanctions under the FCPSA). Therefore, an appellate court must review the findings of fact with respect to the decision to grant sanctions under the FCPSA by "taking its own view of the evidence." *Id.* (citing S.C. Const. art. V, § 5); *see also* S.C. Code Ann. § 14-3-320 (Supp. 2012). However, "[t]he 'abuse of discretion' standard . . . does . . . play a role in the appellate review of a sanctions award." *Father*, 353 S.C. at 261, 578 S.E.2d at 14. For example, "where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citation omitted); *Se. Site Prep, L.L.C. v. Atl. Coast Builders & Contractors, L.L.C.*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011). "An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." *Father*, 353 S.C. at 261, 578 S.E.2d at 14.

In our view, Judge Harrington was warranted in ordering sanctions in this case, especially because Appellant, a licensed attorney, made identical legal arguments in the 2005 litigation and did not prevail on the merits. Appellant has continuously and repeatedly challenged the Hospital's credentialing decisions without any legal basis to do so, and in the process, has cost the Hospital untold amounts of time and resources in defending these claims. Therefore, we further find that Judge Harrington was warranted in enjoining Appellant from filing any future claims in the circuit court without first posting bond.

Accordingly, we affirm the award of sanctions under the FCPSA.

CONCLUSION

Based on the foregoing, both the Summary Judgment Order and the Sanctions Order are

AFFIRMED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: We consolidated appeals from a 2011 order granting respondents summary judgment and from a 2012 order sanctioning the appellant pursuant to the Frivolous Civil Proceedings Sanctions Act (FCPSA).[19] I would affirm the summary judgment order but reverse the sanctions order.

Appellant is represented in this case by a well-respected member of the bar.[20] The sanctions were imposed on appellant as a party based upon a number of findings by the trial judge. As explained below, I do not find that any of the bases relied upon by the circuit court support the imposition of sanctions on appellant.

The FCPSA allows for sanctions at two different points in litigation. First, the statute provides that an attorney or pro se litigant who signs a pleading certifies that a reasonable attorney in the same circumstances would believe that under the facts his claim may be warranted by a good faith extension of the law, is not intended to harass the other party, and is not brought for any improper purpose. S.C. Code Ann. § 15-36-10(A)(1) (Supp. 2012). A violation of subsection (A) may result in the lawyer or pro se litigant being sanctioned.

The second point at which the FCPSA provides for sanctions is set forth in § 15-36-10(C). Section (C) provides that after a verdict, a directed verdict, or a judgment non obstante veredicto has been entered a party,[21] an attorney, or a pro se litigant may be sanctioned if that individual "engaged in advancing a frivolous claim or defense." While subsection (A) is concerned with

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[19] S.C. Code Ann. §§ 15-36-10 et seq. (Supp. 2012).

[20] As explained *infra* I interpret the FCSPA differently than does the majority and conclude that no sanction is appropriate against appellant who is merely a party in this case. The interpretation the Court adopts today will apply to every request for sanctions under the FCSPA, and I do not believe that we can create a special rule because a litigant is also an attorney even if that individual has a history with the court system.

[21] I do not agree with the majority that the FCPSA "repeatedly speaks in terms of sanctioning a "party" in addition to an attorney or pro se litigant."

frivolous filings, subsection (C) permits sanctions only where it is determined, after factual findings are made, that a frivolous claim or defense was advanced. I would not find those circumstances present here.

In my view, subsection (C) permits the party herself to be sanctioned only where the evidence adduced at the trial, or submitted at summary judgment, reveals factual misrepresentations or omissions on the part of that party, not previously known to her attorney, which establish that the party's position in the litigation is frivolous. If the attorney learns of these facts but allows the claim or defense to continue, then she too is subject to sanctions under (C). Where the sanction rests upon facts known to both the lawyer and the party at the time the suit is brought, I would hold no sanction against the party alone is permissible under subsection (C).[22] Similarly, I would not read subsection (C) to authorize sanctions upon a party because her attorney's argument against legal precedent was deemed not to have been made in good faith or because the trial judge finds no substantive discovery was undertaken.

The order finds the present lawsuit restates allegations made and denied in a 2005 action. It concludes that had appellant "even cursorily reviewed her previous filings, prior Court orders, the Settlement Agreement, and the Bylaws *prior to filing this lawsuit*, it would have shown her the unreasonableness of her actions." (emphasis supplied). The order goes on to state that appellant "was in possession of or had access to the dispositive facts- the 1999 federal suit complaint, the 2009 state court complaint, the Settlement Agreement, the 2005 filings, the prior Court orders, and the Bylaws- since before she filed this action." I would hold that because this ground rests on public facts known to both appellant and her attorney at the time the suit was brought, and because it punishes appellant for bringing the suit, that if a sanction were to be imposed under the FCPSA for this conduct, it must be imposed under subsection (A) on the lawyer who signed the pleadings. A member of the bar reviewed these facts and determined that he

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[22] For purposes of my analysis, it matters not that appellant is also an attorney. She chose not to represent herself but employed an attorney who brought this suit with full knowledge of the prior proceedings and history of the parties, and was sanctioned solely in her capacity as a party.

could bring the suit without running afoul of the FCPSA or Rule 11, SCRCP. Under these circumstances, no FCSPA sanction should be imposed on the party under §15-36-10(C). The order also sanctions appellant for contending that the Settlement Agreement had been breached and then failing to produce evidence of any breach, and for failing to conduct any quasi-substantive discovery "until the eve of the summary judgment hearing. . . ." Again, these alleged delicts should be laid at the feet of the attorney and not the party.

Finally, the judge appears to have read *Lee v. Chesterfield Gen. Hosp. Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986) as limited to civil conspiracy claims, and to have concluded on that basis that no reasonable attorney would have argued for its extension to these facts.[23] I would not hold appellant liable for failing to anticipate that the legal argument for distinguishing the *Lee* case would be deemed not to have been made in good faith, nor would I uphold a sanction that rests, in part, on the trial judge's limited reading of the holding in *Lee*. In my view, the conclusion that it was not reasonable to argue for *Lee's* extension addresses the attorney's conduct and not the client's, and therefore I would hold it is insufficient to form the basis for sanctioning a party under subsection (C).

For the reasons given above, I would affirm the grant of summary judgment but reverse the sanction award.

[23] The majority agrees with appellant that "*Lee* might not be [so]limited. . . . "

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Fredda A. Cathey Meehan, Appellant,

v.

Jerry A. Meehan, Sr., Respondent.

Appellate Case No. 2012-212864

Appeal From Anderson County
Richard W. Chewning, III, Family Court Judge

Opinion No. 5210
Heard January 8, 2014 – Filed March 26, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Candy M. Kern-Fuller, of Upstate Law Group, LLC, of Easley, for Appellant.

Michael F. Mullinax, of Mullinax Law Firm, P.A., of Anderson, for Respondent.

LOCKEMY, J.: In this appeal from a divorce action, Fredda A. Cathey Meehan (Wife) contends the family court erred in (1) finding the parties' prenuptial agreement removed its jurisdiction to enforce and interpret the terms pursuant to *Gilley v. Gilley*, 327 S.C. 8, 488 S.E.2d 310 (1997), (2) ruling the parties agreed that the only issues to be decided were the divorce and child support, and (3) relying upon Rule 2, SCRFC, to deny her motion to amend her complaint to

include a request for attorney's fees. We affirm in part, reverse in part, and remand.

FACTS

Wife and Husband were married on September 25, 1992. Prior to their marriage, the parties entered into an agreement which provided in part that "[Husband] and [Wife] agree that the only marital property which they will acquire will be that property which is formally titled in both names. [Husband] and [Wife] agree that property acquired after this marriage shall remain non-marital property, so long as same remains legally titled other than jointly." Notably, in paragraph 12, the prenuptial agreement stated:

> Both parties agree that the Family Court shall not have jurisdiction over any pre-marital property of either party (the HUSBAND'S pre-marital property being shown by Exhibit "A"), and over property acquired after the marriage, unless same be titled in joint names, and that this agreement as to the absence of jurisdiction shall be unmodifiable.

Wife and Husband also agreed "to waive alimony from each other," and Wife agreed she would not make a claim against Husband's property, including but not limited to bank accounts, personal property, and retirement, "whether acquired before or after the marriage, so long as this property is not titled in both names." In consideration of the prenuptial agreement, Husband agreed to procure a life insurance policy in the amount of $1,000,000 with Wife as the beneficiary. Husband also agreed that "[u]pon the divorce of the parties, provided that this agreement is upheld by the [Wife], the [Husband] shall pay to the [Wife] the sum of ten thousand and No/100 ($10,000.00) Dollars for each full year that the parties remained married."

On the date of the parties' divorce hearing, May 12, 2012, they had been married in excess of nineteen years. Wife sought to enforce the prenuptial agreement and requested Husband pay $190,000 pursuant to the term within the prenuptial agreement stating that Husband would pay her ten thousand for each full year they were married. Husband presented a motion at the beginning of the hearing and argued the family court lacked jurisdiction to enforce the prenuptial agreement.

Husband maintained the Wife must pursue the prenuptial's enforcement in the circuit court.

The family court first found the parties had freely, fairly, and in good faith entered into the prenuptial agreement. The family court then stated that based upon *Gilley v. Gilley*, 327 S.C. 8, 488 S.E.2d 310 (1997), and the clear language of the parties' prenuptial agreement, it did not have jurisdiction to enforce the prenuptial agreement. It further found the prenuptial agreement's provisions were contractual and could only be interpreted and enforced by the circuit court. The family court denied Wife's motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

"'The family court is a court of equity.'" *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012) (quoting *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011)). "In appeals from the family court, the appellate court reviews factual and legal issues de novo." *Id.* (citing *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011)). "'*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings.'" *Id.* (quoting *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55) (alteration in original). "However, this broad standard of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court is in the better position to assess the credibility of the witnesses." *Id.* (citing *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001)). "Moreover, the appellant is not relieved of the burden of demonstrating error in the family court's findings of fact." *Id.* (citing *Pinckney*, 344 S.C. at 387-88, 544 S.E.2d at 623). "Accordingly, we will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court." *Id.*

LAW/ANALYSIS

Jurisdiction

Wife argues the family court erred in finding it did not have jurisdiction to interpret and enforce the prenuptial agreement. She asserts the interpretation and enforcement of the prenuptial agreement were incident to an action requesting an

alteration of the marital status, and, thus, *Gilley v. Gilley*, 327 S.C. 8, 488 S.E.2d 310 (1997), did not apply. We disagree.

"The family court has exclusive jurisdiction to hear and determine actions for separate support and maintenance, legal separation, other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions related to the real and personal property of the marriage." *Gilley*, 327 S.C. at 11, 488 S.E.2d at 312 (citing S.C. Code Ann. § 20-7-420(2) (Supp. 1995) (current version at S.C. Code Ann. § 63-3-530 (2010))). While we agree the family court in this case would typically have jurisdiction over the issues raised during the parties' hearing, we must examine whether the prenuptial agreement removed the family court's jurisdiction from some or all of those issues.

When a prenuptial agreement is unambiguous, clear, and explicit, "it must be construed according to the terms the parties have used." *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) (citing *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999)). "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous." *Id.* (citing *S.S. Newell & Co. v. Am. Mut. Liab. Ins. Co.*, 199 S.C. 325, 332, 19 S.E.2d 463, 466 (1942)). "Property excluded by written contract or antenuptial agreement of the parties is excluded from marital property and is considered nonmarital property." *Gilley*, 327 S.C. at 11, 488 S.E.2d at 312 (citing S.C. Code Ann. § 20-7-473 (Supp. 1995) (current version at S.C. Code Ann. § 20-3-630(A)(4) (2014))). "The family court does not have authority to apportion nonmarital property." *Id.* (citing § 20-7-473 (current version at § 20-3-630(B))).

Because the Wife and the family court emphasized our supreme court's decision in *Gilley*, we give a brief synopsis of the case. In *Gilley*, the wife instituted an action in circuit court for the partition of property held by the parties as tenants-in-common and further requested a temporary injunction. 327 S.C. at 9-10, 488 S.E.2d at 311. The husband sought dismissal of all the wife's requests and argued the family court had exclusive jurisdiction over the claims. *Id.* at 10, 488 S.E.2d at 311. The circuit court denied his motion and ruled that because "the relief sought by wife was not incidental to a divorce action or an action for separate support and maintenance, the circuit court had exclusive jurisdiction." *Id.* Subsequently, the husband brought an action in family court for separate support and maintenance

and equitable distribution of marital property, but the family court dismissed the action **"because the prenuptial agreement precluded any claim for equitable apportionment or separate maintenance and the family court lacked jurisdiction to hear [the] matter."** *Id.* at 10, 488 S.E.2d at 311-12 (emphasis added); *compare Hardee v. Hardee,* 355 S.C. 382, 386-87, 585 S.E.2d 501, 503 (2003) (finding the parties' prenuptial agreement stated its provisions "shall in no way affect the property, whether real, personal or mixed which shall be acquired by the parties, whether titled separately or jointly, subsequent to the date of this Agreement," which unambiguously allowed the wife equitable distribution of any and all property acquired by the parties during the marriage). The husband then appealed both the circuit court and family court orders. *Id.* at 10, 488 S.E.2d at 312. Our supreme court determined that the question was whether the husband's latter action divested the circuit court of subject matter jurisdiction over the partition action. *Id.*

Our supreme court found that because the jurisdiction of a court attaches to the person and subject matter of the litigation, any subsequent happenings "will not ordinarily operate to oust the jurisdiction already attached." *Id.* at 10-11, 488 S.E.2d at 312. Thus, the circuit court had properly maintained its jurisdiction over the partition claim based on the status of the case at the time of filing. *Id.* at 11, 488 S.E.2d at 312. Then our supreme court affirmed the family court's dismissal of the husband's request for equitable distribution because the prenuptial agreement provided that property acquired by the parties during the marriage or owned at the time of the marriage would not be the subject of any claims for equitable apportionment. *Id.*

In her brief, Wife focused on the portion of *Gilley* in which our supreme court discussed the partition action and when jurisdiction attaches to a particular claim. However, we believe the more pertinent portion involved the husband's request for equitable distribution. The prenuptial agreement here stated the family court would not have jurisdiction over any pre-marital property and property acquired after the marriage, unless same is titled in joint names. The terms stated the absence of the family court's jurisdiction would be unmodifiable. Similar to our supreme court's decision in *Gilley*, we believe the $190,000 Wife requested was nonmarital property according to the terms of the parties' prenuptial agreement, and, thus, the family court was correct in determining that it did not have jurisdiction over that particular issue. Further, we find the record supports the family court's decision that the prenuptial agreement unambiguously removed its

jurisdiction from the other issues that Wife raised at trial, with the exception of the divorce and child custody and support. Thus, we affirm the family court's ruling that it did not have jurisdiction to enforce the prenuptial agreement.

Issues Before the Family Court

Wife argues the family court erred in finding she agreed that the only issues to be decided were the divorce and child support. She contends the family court's statement was contrary to the record because she argued for not only the $10,000 per year payment, but also a one million dollar life insurance policy and attorney's fees. We agree, but we believe the error was harmless.

Wife requested the family court decide the issues of the $10,000 per year payment, one million dollar life insurance policy, and attorney's fees. She argued the other issues and preserved these issues for our review. Thus, we believe the family court erred in finding Wife agreed that the only issues to be decided were the divorce and child support. However, the family court ultimately determined the prenuptial agreement removed the family court's jurisdiction over Wife's contested issues, with the exception of divorce and child support. As we explained in the previous section, we believe this statement is correct. Thus, we affirm the family court on this issue because the error was minor and did not affect the substantive outcome. *See Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) ("Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.") (citations omitted).

Rule 2, SCRFC and Rule 15, SCRCP

Wife argues that not only was the family court incorrect in its ruling that only the issues of divorce and child support were before it, it also was incorrect in finding that she was not allowed to amend her complaint at the hearing unless consent was given by Husband, pursuant to Rule 2, SCRFC. We find the family court did have jurisdiction to decide Wife was entitled to attorney's fees on the issues of child support and child custody, and Rule 2, SCRFC, did not necessarily prevent Wife from amending her complaint.

Rule 2, SCRFC, provides:

> (a) Domestic Relations Actions. In addition to the rules set forth in Sections I, II and III of these Rules of Family Court, the South Carolina Rules of Civil Procedure (SCRCP) shall be applicable in domestic relations actions to the extent permitted by Rule 81, SCRCP. The following SCRCP, however, shall be inapplicable: 5(a) to the extent it does not require notice to a defendant of every hearing, 8(d) to the extent it provides that the failure to file a responsive pleading constitutes an admission, 12(b) to the extent it permits a 12(b)(6) motion to be converted to a summary judgment motion, 12(c), 13(j), 18, 23, 38, 39, 40(a & b), 42 to the extent it refers to trial by jury, 43(b)(1) to the extent it limits the use of leading questions to cross-examination, 43(i & j), 47, 48, 49, 50, 51, 54(c) to the extent it permits the court to grant relief not requested in the pleadings, 55, 56, 68, 69, 71, 72, 78, 79, and 84.

Rule 15(b), SCRCP, which is applicable to family court pleadings, *Pool v. Pool*, 329 S.C. 324, 327-28 & n.5, 494 S.E.2d 820, 822 & n.5 (1998), states:

> If evidence is objected to at the trial on the ground that it is not within the issue made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits.

"The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party." *Pool*, 329 S.C. at 328, 494 S.E.2d at 822; *see also Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993) ("It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice.").

Here, the Wife requested attorney's fees during the trial, and the Husband objected pursuant to Rule 2, SCRFC, because the Wife did not request attorney's fees in her pleadings. The Wife argued Rule 15, SCRCP, allowed the family court to amend the pleadings to conform to the evidence if it did not prejudice the opposing party. The family court ruled that because the parties had agreed only the issues of divorce and child support were before the family court, it did not have jurisdiction over the issue of attorney's fees. The family court thus upheld the Husband's objection.

While the parties framed this issue as one that involved the right to amend, the family court first based its decision upon jurisdiction. It then found as an additional sustaining ground that pursuant to the provisions of Rule 2, FCRCP, Wife was not allowed to amend her complaint at the hearing unless consent was given by Husband. The pertinent portion of the parties' prenuptial agreement stated:

> Both parties agree to waive their respective rights to attorney's fees, witness fees, counsel fees or other fees normally incident to the prosecution of actions for divorce or legal separation.

The following paragraph stated the prenuptial agreement did not "pertain to child support nor child custody."

While allowing parties to remove the right of the family court to impose attorney's fees on an uncooperative or deceptive party could result in a great burden on the opposing litigant as well as be costly to the court system, we acknowledge this court has "previously held that despite the general rule that attorney fees are within the discretion of the family court, if an agreement is 'clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to them.'"[1]

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[1] The family court found the prenuptial agreement was valid and enforceable, and Wife does not appeal that ruling. *See Hardee v. Hardee,* 355 S.C. 382, 389, 585 S.E.2d 501, 504 (2003) (stating that when determining whether a prenuptial agreement should be enforced, a court must consider "(1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the

Hardee v. Hardee, 348 S.C. 84, 96-97, 558 S.E.2d 264, 270 (Ct. App. 2001), *affirmed as modified by* 355 S.C. 382, 585 S.E.2 501 (2003) (quoting *Bowen v. Bowen*, 327 S.C. 561, 563, 490 S.E.2d 271, 272 (Ct. App. 1997)).

The parties clearly and unambiguously waived their right to attorney's fees regarding a majority of the issues, but they did not waive their right to attorney's fees as they pertain to child support and child custody. Here, the family court took action regarding child support and child custody and, thus, it had jurisdiction over any attorney's fees that might have been related to those issues.

Additionally, Rule 2, FCRCP, did not prevent Wife from amending her complaint if the Husband could not prove any resulting prejudice. *Pool*, 329 S.C. at 329, 494 S.E.2d at 823 (affirming the award of attorney's fees to the husband pursuant to Rule 15, SCRCP, despite his failure to request them in the pleadings because the wife could not show prejudice). Accordingly, we reverse and remand for the family court to determine whether Wife is entitled to any such attorney's fees that are directly or indirectly associated with child support or child custody.

CONCLUSION

For the foregoing reasons, we affirm the family court in part, reverse in part, and remand.

HUFF and GEATHERS, JJ., concur.

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facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?"); *see also Holler v. Holler*, 364 S.C. 256, 270, 612 S.E.2d 469, 477 (finding the family court possessed jurisdiction to determine whether the premarital agreement was valid and enforceable).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CoastalStates Bank, Respondent,

v.

Hanover Homes of South Carolina, LLC; Hanover Homes, Inc.; and George Cosman, Defendants,

Of Whom George Cosman is the Appellant.

George Cosman, Third-Party Plaintiff,

v.

Phillip Petrozzelli, Third-Party Defendant.

Appellate Case No. 2012-213154

Appeal From Beaufort County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 5211
Heard January 14, 2014 – Filed March 26, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Richard R. Gleissner, of Gleissner Law Firm, LLC, of Columbia, for Appellant.

Russell P. Patterson, of Russell P. Patterson, PA, of Hilton Head Island, for Respondent.

SHORT, J: This is an appeal from an order granting partial summary judgment to CoastalStates Bank (the Bank) in its breach of contract action against Hanover Homes of South Carolina, LLC, Hanover Homes, Inc., and George Cosman. Cosman appeals, arguing the trial court erred in: (1) finding the statute of limitations had not expired; (2) finding personal guaranties were controlling; and (3) granting the Bank summary judgment while also finding a genuine issue of material fact existed as to Cosman's defenses to the Bank's breach of contract claim. We affirm in part, reverse in part, and remand.

BACKGROUND FACTS

Cosman, a residential builder, entered into a series of business deals with Phillip Petrozzelli in 2007. Cosman and Petrozzelli formed the company, Hanover Homes of South Carolina, LLC (Borrower) to pursue real estate development. Petrozzelli was the managing partner of Borrower and was the "point man" for the Traditions, a development in Jasper County. According to Cosman, Petrozzelli had a previous longstanding relationship with the Bank and with a bank employee, Buzzy Lawson. Cosman explained his role was to "watch over the construction of [the two model homes]" at Traditions and to oversee the Borrower's other development.

On July 19, 2007, the Bank made three loans totaling $3.632 million to Borrower as follows:

Loan 203611	$2.6 million to purchase 21 vacant lots in the Traditions, a community in Jasper, South Carolina
Loan 203613	$520,000 to construct a model home
Loan 203583	$512,000 to construct a second model home

Cosman and Petrozzelli each signed a personal guaranty to secure each loan. The guaranties provided the following:

> 1. **Agreement to Guaranty.** For value received, . . . [the Guarantor] . . . absolutely and unconditionally guaranties . . . the payment . . . of: (a) all liabilities and obligations of the Borrower to the Bank . . . . The liability of the Guarantor shall be joint and several for the payment in full of the entire amount of the Guarantied

> Obligations with that of the Borrower . . . or any other guarantor.
>
> 2. **Absolute and Unconditional Guaranty; Waiver of Defenses.** This Guaranty is an absolute and unconditional guaranty of payment . . . . This Guaranty creates a direct and primary obligation of the Guarantor to the Bank without regard to any other guarantor or obligor to the Bank or the value of any security or collateral held by the Bank. . . . [T]he Guarantor's obligations hereunder may be enforced with or without joinder of the Borrower or any other guarantor and without proceeding against the Borrower, any other guarantor or against any collateral held by the Bank. Guarantor expressly waives, to the fullest extent permitted by applicable law, each and every defense which under principles of guaranty or suretyship would otherwise operate to impair or diminish the Guarantor's direct and primary liability . . . . Guarantor acknowledges and understands that nothing except the full and final payment . . . shall release and discharge the Guarantor from his obligations and liability hereunder.

Section 2(a) provided the following:

> Guarantor agrees that the Bank may take . . . the following actions without diminishing, impairing, limiting or abridging the Guarantor's obligations hereunder, and the Guarantor expressly waives any defense . . . arising out of any of the following actions taken by the Bank, whether with or without notice to, or consent by, the Guarantor: . . . (iii) any release or discharge by the Bank of the Borrower, or any . . . other guarantor; . . . (v) any settlement made with . . . the Borrower, or . . . any other guarantor.
>
> 3. **Waiver of Notices; Additional Waivers.** Guarantor expressly waives, to the fullest extent permitted by applicable law, each and every notice to which it would otherwise be entitled under principles of

> guaranty or suretyship law. . . . including but not limited to: . . . notice of any default or nonpayment . . . by the Borrower[,] notice of the obtaining or release of any guaranty or surety agreement[, and] notice of nonpayment.

By the end of 2008, Borrower was experiencing financial difficulty. The notes were renewed on October 28, 2009. Thereafter, Cosman alleges he negotiated for both he and Petrozzelli to be released on loans for the other property they developed. As to the Traditions property at issue in this case, Borrower made three short sales to third parties with the Bank's consent and applied the proceeds to the loan balances. The first short sale, one of the model homes, was made in September 2010, and the Bank netted just over $220,000.

Unbeknownst to Cosman, the Bank entered into an agreement (the Agreement) with Borrower and Petrozzelli on October 22, 2010. The Agreement released Borrower and Petrozzelli from liability under the loans and guaranties in exchange for cooperation with any further sales of the property. The Agreement also provided the following:

> **No Release of Other Guarantors.** Lender does not release or discharge any obligations, liabilities or guaranties of any other guarantor of the Notes and nothing provided for in this Agreement shall be construed as a waiver of any of Lender's rights and remedies with regard to any other guarantor of the Notes.

The second model home was then sold as a short sale in April 2011, and the Bank netted approximately $181,000. In October 2011, a short sale of the 21 lots netted the Bank approximately $604,000.

The Bank filed this action against Cosman on the guaranties. In his answer and counterclaim, Cosman alleged, *inter alia*, a conspiracy between the Bank and Petrozzelli and breach of contract accompanied by a fraudulent act.[1] Cosman also

[1] Cosman alleged, *inter alia*, that Petruzzelli fraudulently transferred assets; created self-settled trusts; and conspired with the Bank to sell the property under market value to a "friend of the [B]ank." Cosman produced appraisals indicating that at the time the documents were signed in 2007, the value of the lots was $4.3 million, and the value of each model home was $650,000, for a combined value of $5.6

raised numerous defenses, including the expiration of the statute of limitations and Bank's discharge of Borrower's liability under the notes.

On August 10, 2012, and September 7, 2012, the trial court held hearings on the parties' cross-motions for summary judgment. At the time of the hearings, the Bank claimed a balance due on the notes of $3.299 million. The trial court: (1) dismissed Cosman's statute of limitations defense; (2) granted the Bank partial summary judgment, finding the release by the Bank of Borrower and Petrozzelli did not result in the release or discharge of Cosman under the three guaranties; (3) denied the Bank's motions for summary judgment as to Cosman's breach of contract accompanied by a fraudulent act and conspiracy causes of action; (4) granted judgment to the Bank for $3,299,665.51; and (5) awarded reasonable attorney fees and costs to be determined at a subsequent hearing. This appeal follows.

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "'Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Adamson v. Richland Cnty. Sch. Dist. One*, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)).

"Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). "However, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Id.* "In determining whether any triable issues of fact exist, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party." *Pee Dee*, 381 S.C. at 240, 672 S.E.2d at 802. "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." *Id.* Further, "'[s]ummary judgment should not be granted even

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million. Cosman also produced emails and made other allegations of wrongdoing that are relevant only to the conspiracy and breach of contract accompanied by a fraudulent act causes of action.

when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.'" *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting *Brockbank*, 341 S.C. at 378, 534 S.E.2d at 692).

LAW/ANALYSIS

A. The Statute of Limitations

Cosman argues the trial court erred in finding the Bank was not barred from bringing the action based on the expiration of the statute of limitations. Cosman argues the statute of limitations began to run at the time the notes were made in July 2007.[2] We disagree.

Section 1 of the guaranty provides for "payment when and as due upon maturity." The maturity dates of the loans were August 2009 and April 2010. The Bank filed this action in December 2011.

An action for breach of contract must be commenced within three years. S.C. Code Ann. § 15-3-530(1) (2005). Under "the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "The discovery rule applies to breach of contract actions." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010). "Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). "[T]he statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults." 38 Am.Jur.2d *Guaranty* § 96, at 1040 (2010).

Cosman argues the guaranties are demand notes, which are due immediately; thus, the statute of limitations runs in favor of the maker from the date of the execution of the instrument.[3] *See Coleman v. Page's Estate*, 202 S.C. 486, 488-89, 25 S.E.2d

[2] The notes were renewed in 2009.

[3] Cosman also argues for the first time on appeal that the guaranties and notes should be considered demand notes because they are perpetual contracts with no

559, 559-60 (1943) (stating "the law is well settled that a promissory note payable on demand, with or without interest, is due immediately, and that the statute of limitations runs in favor of the maker from the date of the execution of the instrument"). However, we agree with the trial court that the guaranties in this case were not demand notes because they all had specific maturity dates. We likewise agree with the trial court that to accept Cosman's theory that the statute of limitations begins to run on the date the guaranty is signed could result in "virtually no guarantee ever being enforceable in our State" and is "inconsistent with . . . South Carolina law." Accordingly, we affirm the trial court's finding that the Bank was not barred from bringing the action based on the expiration of the statute of limitations.

B. The Guaranties

Cosman also argues the trial court erred in interpreting the guaranties as imposing liability on him when Borrower's obligations were fully satisfied. We agree.

"A guaranty is a contract." *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "'Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.'" *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)).

"The law in this state regarding the construction and interpretation of contracts is well settled." *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). "In construing a contract, it is axiomatic that the main

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specific duration, and perpetual contracts are not favored in South Carolina. *See Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) (stating "perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract"). This argument is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

concern of the court is to ascertain and give effect to the intention of the parties." *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

"On the other hand, a contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46-47, 747 S.E.2d 178, 184 (2013). "[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).

"A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity." *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994). "The general rule in South Carolina . . . is that a guaranty of payment is an obligation separate and distinct from the original note." *Id.* at 544, 443 S.E.2d at 551 (internal citation omitted). In *Lanford*, our supreme court further defined a guaranty as follows:

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral.

Id. (quoting 38 Am.Jur.2d *Guaranty* § 4). The court in *Lanford* "adhere[d] to the principle that the guaranty of payment and the promissory note are two separate contracts" and concluded the guarantor, who was not a party to the note, could not avail himself of defenses available to the debtor. *Id.*; *see* Frank S.H. Bae & Marian E. McGrath, *The Rights of A Surety (or Secondary Obligor) Under the Restatement of the Law, Third, Suretyship & Guaranty*, 122 Banking L.J. 783, 783 (2005) (("The Bible warned against becoming a surety (secondary obligor), stating that '[h]e who is a surety for a stranger will surely suffer for it, but he who hates going surety is safe.'") (quoting Proverbs 11:15))).

Citing the Restatement (Third) of Suretyship & Guaranty §§ 37-41(1996), Cosman argues, "The law developed so that a guarantor may be discharged under certain circumstances if modifications of the obligations between the bank and the borrower are made without the consent of the guarantor." For instance, Cosman relies on sections 37, 38, and 41, which provide protection to guarantors. Restatement (Third) of Suretyship & Guaranty §§ 37-41 (1996) (providing for protection of a guarantor when the principal obligor is released). Cosman also argues the Restatement provides for (1) the protection of a guarantor when an agreement between the bank and the borrower provides for a reservation of a right of action against the guarantor, and (2) the prevention of opportunistic behavior by the bank and the borrower without regard to the consequences to the guarantor.

Cosman maintains that amendments to South Carolina's UCC after our supreme court's decision in *Lanford* indicate our Legislature intended to provide the Restatement protections to guarantors. Cosman argues our Legislature has recognized this development in the law by enacting the current versions of Articles 3 and 4 of the UCC, found in S.C. Code Ann. §§36-3-101, 36-4-101 (2003 & Supp. 2013). Cosman contends that reading the guaranties as the trial court did, which results in guarantors being forever obligated on a debt that is forgiven, is unconscionable. A South Carolina commentator recently explained:

> In 1994 [in *Lanford*], the S.C. Supreme Court set the stage in commercial transactions that left guarantors largely defenseless. Since then, changes in the law of commercial transactions have been largely ignored or left unnoticed in commercial litigation.
>
> . . . .
>
> In South Carolina, guarantees were seen as separate and distinct agreements and not negotiable instruments allowing for the protections of parties to the instrument under South Carolina's former Section 36-3-606. Guarantees are contracts, and general contract law governs their interpretation. In *Citizens & Southern National Bank of South Carolina v. Lanford*, 313 S.C. 540, 543-44, 443 S.E.2d 549, 550-51 (1994), the Supreme Court of South Carolina addressed an unambiguous guaranty. . . . [I]n addressing the defenses raised on behalf of the guarantor and the genuine issues

of material fact related to those defenses, the Supreme Court held that guarantors were not entitled to the protections provided by former Section 36-3-606: (a) release of the principal, (b) extension of time, (c) modification of the primary obligor's agreement, (d) impairment of collateral and (e) other conduct impairing the ability of the guarantor to recover from the principal. . . . Thus, under *Lanford*, there were few defenses for a guarantor. The law started to change in 2001 with the adoption of the revised Article 9 of the Uniform Commercial Code (UCC), and this change was strengthened and reinforced by the adoption of the revised Articles 3 and 4.

. . . .

Under Article 9 of the UCC, guarantors may be referred to as accommodating parties or secondary obligors. When Article 9 uses the generic words "debtor" or "obligor," those terms include a guarantor. By including a guarantor within these generic terms, the duties of the creditor to the debtor or obligor flow to the guarantor. Section 36-9-608(a)(4) states the general rule that a "[creditor] shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency." S.C. Code Ann. § 36-9-608(a)(4).

. . . .

Included in the requirements of Article 9 is the requirement to provide notice to the guarantor. *See* S.C. Code Ann. § 36-9-611 (relating to notice in all transactions); S.C. Code Ann. § 36-9-613 (relating to contents and form of notification) . . . . Further, this right to a notice can only be waived by an agreement entered into after the default, not in the initial guaranty. *See* S.C. Code Ann. § 36-9-624.

If the creditor does not act in a commercially reasonable manner, Section 36-9-625 provides remedies to the guarantor, including the elimination of a deficiency . . . .

Thus, in situations where Article 9 applies, the guarantor has statutory defenses, and many of these defenses cannot be waived in the initial guaranty.

. . . .

In 2008, the South Carolina legislature adopted newer versions of the UCC's Articles 3 and 4. Like the older versions of the UCC, the newer versions provide certain defenses to actions on instruments and appear to limit the application of these defenses to a "party to the instrument." . . . Thus, the newer sections appear to provide no assistance to the defense of the guarantor, which is still seen as a separate undertaking. However, some defenses may be developed upon closer inspection of the comments to these sections.

For example, the first and second official comments to Section 36-3-605 refer explicitly to the Restatement of Suretyship and Guaranty. In fact, the second comment posits an example similar to the facts of *Lanford* and states that suretyship and guaranty law should apply to that transaction.

The incorporation of the surety defenses for guarantor liability is further strengthened in the statutory language of Section 36-3-603(a). That section deals with the issue of tender and states:

> If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

S.C. Code Ann. § 36-3-603(a) . . . . The "principles of law applicable to tender of payment under a simple contract" may be a reference to the general laws of suretyship and guaranty as manifested in the Restatement.

Thus, through the adoption of the newer versions of Articles 3 and 4 of the UCC, the South Carolina legislature has provided guarantors with hope that they may have defenses against unreasonable and unjustified actions by the creditor.

. . . .

As with most commercial transactions, most of the defenses provided to guarantors in the Restatement may be varied by the written contract between the parties. Restatement (Third) of Suretyship & Guaranty § 6 (1996). However, if the written contract seeks to eliminate a suretyship defense, it may create an argument that the guaranty is an adhesion contract that is unconscionable. Further, some general defenses are so fundamental to the guaranty relationship that they may be seen as not capable of being waived "in the contract creating the secondary obligation." *See* Restatement § 48.

Generally, the Restatement provides defenses for a guarantor based upon the following actions by the creditor:

1. Release of the principal (Section 39);

. . . .

It would seem logical that if the primary obligor is released by the creditor, that discharge of the underlying obligation would also discharge the guarantor. After all, the guarantor is only guarantying the underlying obligation, and if the underlying obligation is no more,

> there is nothing left to be guaranteed. The Restatement seems to follow this logic in Section 39.
>
> In commercial transactions, however, sometimes it is reasonable to release the primary obligor and preserve the creditor's rights against the guarantor. In the old days, some jurisdictions adopted the reservation of rights doctrine. Under this doctrine, the creditor could preserve his rights against the guarantor through a mere declaration that it was "reserving rights." In some cases, the declaration did not even need to be provided to the guarantor. The Restatement rejects the reservation of rights doctrine in a rather unflattering comment, stating specifically "the traditional reservation of rights doctrine has outlived whatever usefulness it may have had." Restatement § 38 cmt. a. Now, if a creditor wants to preserve its rights against the guarantor, it must follow the procedures in Section 38 of the Restatement. Specifically, to preserve the creditor's rights against the guarantor, the creditor must preserve the guarantor's "recourse" against the principal obligor. Restatement § 38(2). Simply, if the creditor's actions discharge the primary obligor, the guarantor should also be discharged unless the creditor takes some action to preserve the guarantor's rights against the primary obligor. Thus, under the Restatement, creditors can no longer unilaterally discharge the primary obligor in hopes that they can still proceed against a guarantor.

Richard R. Gleissner, *In Defense of the Guarantor*, 22-Nov. S.C. Law. 18, 18-21 (Nov. 2010).

The Bank argues section 36-3-605(a), providing for the discharge of secondary obligors, only applies to an "instrument," which is a negotiable, unconditional promise to pay a fixed sum. *See* S.C. Code Ann. § 36-3-605(a) (Supp. 2013).[4] The

[4] Section 36-3-605(a) provides: "If a person entitled to enforce an instrument releases the obligation of a principal obligor in whole or in part, and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

Bank further argues the protection of section 36-3-605(a) does not apply if the guarantor expressly waives the defenses based on the law of suretyship, and Cosman waived his defenses in the guaranties. *See* S.C. Code Ann. § 36-3-605(f) (Supp. 2013) (stating "[a] secondary obligor is not discharged under this section if the secondary obligor consents to the event or conduct that is the basis of the discharge . . . or a separate agreement of the party provides for waiver of discharge under this section specifically or by general language indicat[es the waiver of] defenses"). Finally, the Bank argues the South Carolina Legislature did not adopt all of the provisions of the Restatement, and the Official Comment 9 to section 36-3-605 of the South Carolina Code provides that the release of a guarantor will occur "only in the occasional case" and "[t]he importance of the suretyship defenses provided . . . is greatly diminished by the fact that the right to discharge can be waived . . . ." S.C. Code Ann. § 36-3-605 cmt. 9 (Supp. 2013).

The general rule releasing a guarantor when a creditor is released provides:

> Generally, acts of the guarantee which have the effect of discharging the principal debtor despite the lack of

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> (1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the release preserve the secondary obligor's recourse, the principal obligor is discharged, to the extent of the release, from any other duties to the secondary obligor under this chapter.
>
> (2) Unless the terms of the release provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor, the secondary obligor is discharged to the same extent as the principal obligor from any unperformed portion of its obligation on the instrument. . . .
>
> (3) If the secondary obligor is not discharged under Paragraph (2), the secondary obligor is discharged to the extent of the value of the consideration for the release, and to the extent that the release would otherwise cause the secondary obligor a loss.

> complete payment or of complete performance of the guaranteed contract also operate as a discharge of the guarantor.
>
> Where the principal debtor has not made complete payment or has not completely performed the guaranteed contract, but the effect of the creditor's acts is nevertheless to release or discharge him or her, the guarantor is also discharged, unless the guarantee's right of recourse against the guarantor is expressly reserved in the contract releasing the principal, or in the guaranty contract . . . . Thus, where the creditor enters into a compromise agreement with the debtor, the effect of which is to release the debtor from further liability, the guarantor can no longer be held liable, unless the guaranty contract or the compromise agreement provides otherwise.

38A C.J.S. *Guaranty* § 111, 720-21 (2008); *see Poole v. Bradham*, 143 S.C. 156, 166, 141 S.E. 267, 270-71 (1927) (stating "in equity[,] the discharge of one surety operates to discharge all others 'in the like relation to the debt,' unless it be shown by competent testimony that the parties intended otherwise," and further explaining that equity "construes a release according to the intention of the parties").

However, in *Cochran*, 324 S.C. at 294, 478 S.E.2d at 65, this court found the guarantor unconditionally agreed to pay all sums due and all losses the lender suffered due to the creditor's default. The court found "[t]he terms of the guaranty provided that [the guarantor's] obligation to [the lender] would be unaffected if [the lender] decided to release [the creditor's] obligation." *Id.* This court found the release of the creditor from liability did not relieve the guarantor of liability. *Id.*

Cosman distinguishes his guaranties from those in *Cochran*. In *Cochran*, the lender loaned money to a used car dealership, and three corporate officers and a company guarantied the loan. *Id.* at 292, 478 S.E.2d at 64. A collection action by the lender resulted in a confession of judgment against all parties except one guarantor, Ralph Cochran. *Id.* Many years later, the lender filed an action against Cochran to collect the judgment. *Id.* at 292-93, 478 S.E.2d at 64. The trial court directed a verdict in favor of Cochran; however, this court reversed, finding the ten-year expiration of the confession of judgment did not extinguish Cochran's

obligation to the lender under his guaranty, which was an independent contractual obligation. *Id.* at 293-95, 478 S.E.2d at 65.

The relevant provisions of Cochran's guaranty provided:

> [E]ach of us as primary obligor jointly and severally and unconditionally guarantees to you that Dealer will fully, promptly and faithfully perform, pay and discharge all Dealer's present, existing and future obligations to you; and agrees, without your first having to proceed against Dealer . . . , to pay on demand all sums due and to become due to you from Dealer and all losses, costs, attorney's fees or expenses which you may suffer by reason of Dealer's default . . . .

Id. at 294, 478 S.E.2d at 65 (alteration in original). As the guarantor, Cochran "unconditionally agreed to pay 'all sums due' and 'all losses' that [the lender] suffered due to [the car dealership's] default. The terms of the guaranty provided that Cochran's obligation to [the lender] would be unaffected if [the lender] decided to release [the car dealership's] obligation." *Id.* This court found the lender suffered "a loss" due to the dealership's default, and Cochran's obligation to the lender was unaffected by the release of the dealership's obligation. *Id.*

Cosman argues the guarantor in *Cochran* guarantied more than the obligations of the borrower; whereas in this case, he provided a guaranty only for the liabilities of Borrower, and the Agreement extinguished those obligations. Cosman also distinguishes *Cochran*, arguing the debt in *Cochran* was no longer enforceable against the borrower; thus, the obligation of the guarantor was not extinguished. In this case, the underlying debt is satisfied.

Under our reading of the relevant authorities, we must review the terms of the guaranty and the Agreement to determine if Cosman was released from liability with the release of Borrower. Cosman argues section 1 of the guaranty is controlling: The guarantor "absolutely and unconditionally guaranties to the Bank . . . the payment . . . of: (a) all liabilities and obligations of the Borrower to the Bank . . . ." Cosman maintains the release of Borrower released him as a guarantor under this section of the guaranty because there is no longer an obligation of Borrower to the Bank.

Cosman also argues that section 2, in which he "acknowledges and understands that nothing except the full and final payment . . . shall release and discharge the Guarantor from his obligations and liability hereunder" supports his interpretation of the guaranties because the Bank's acceptance of the proceeds of the short sales and release of Borrower acted as "full and final payment" of Borrower's debts. Cosman argues that at a minimum, the guaranties are unclear about whether he is released from liability when Borrower is released; thus, there is a genuine issue of material fact precluding summary judgment.

As to the waiver portion of section 2(a), Cosman argues that interpreting it to provide that the guarantor is obligated would lead to the ridiculous and unconscionable outcome of requiring Cosman to pay the full amount of the notes regardless of any amounts already paid to the Bank. Cosman maintains the trial court erred in relying on cases that consider guaranties with materially different terms than the guaranties in this case.

Section 2(a) provided the following:

> Guarantor agrees that the Bank may take . . . the following actions without diminishing, impairing, limiting or abridging the Guarantor's obligations hereunder, and the Guarantor expressly waives any defense . . . arising out of any of the following actions taken by the Bank, whether with or without notice to, or consent by, the Guarantor: . . . (iii) any release or discharge by the Bank of the Borrower, or any . . . other guarantor; . . . (v) any settlement made with . . . the Borrower, or . . . any other guarantor.

We agree the guaranties in this case can reasonably be read to limit Cosman's liability to "all liabilities and obligation of the Borrower to the Bank." Because the Bank has accepted full and final payment from the Borrower, the guaranties can reasonably be interpreted to conclude there is no longer any liability of the Borrower to the Bank. Viewing the evidence in the light most favorable to Cosman, as we must do in reviewing the trial court's grant of the Bank's motion for summary judgment, we find the guaranties created an ambiguity. *See Hard Hat Workforce Solutions, LLC v. Mech. HVAC Servs., Inc.*, 406 S.C. 294, 750 S.E.2d 921, 923-24 (2013) (reviewing the grant of a motion for summary judgment in the light most favorable to the nonmoving party in an action for a claim against a payment bond). Thus, we find the trial court erred in finding Cosman's liability

was not extinguished as a matter of law. *See Progressive Max Ins. Co.*, 405 S.C. at 46-47, 747 S.E.2d at 184 (finding a contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement); *Mathis*, 389 S.C. at 309, 698 S.E.2d at 778 (construing ambiguities in an agreement against the drafter of the agreement). Accordingly, we reverse the trial court's order granting summary judgment, which concluded the release of the Bank and Petrozzelli did not release Cosman.

C. The Breach of Contract Claim

Cosman lastly argues the trial court erred in granting summary judgment on the breach of contract cause of action while also finding a genuine issue of material fact existed as to his "defenses" to the breach of contract claim. Based on our disposition of the trial court's grant of summary judgment on the guaranties, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an issue when a decision on a prior issue is dispositive).

IV. CONCLUSION

For the foregoing reasons, the order granting summary judgment is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sandra Richardson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2010-151193

ON WRIT OF CERTIORARI

Appeal From Kershaw County
L. Casey Manning, Trial Court Judge
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

Opinion No. 5212
Heard February 3, 2014 – Filed March 26, 2014

REVERSED

Assistant Deputy Attorney General David A. Spencer and Assistant Attorney General Daniel Francis Gourley, II, both of Columbia, for Petitioner.

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent.

FEW, C.J.: In this appeal from an order granting post-conviction relief (PCR) to Sandra Richardson, we hold a trial court has no power to suspend a sentence imposed on a person convicted of homicide by child abuse under section 16-3-85(A)(1) of the South Carolina Code (2003). We reverse.

I. Facts and Procedural History

Richardson pled guilty to homicide by child abuse under subsection 16-3-85(A)(1), which carries a minimum sentence of twenty years and a maximum of life imprisonment. S.C. Code Ann. § 16-3-85(C)(1) (2003). The trial court initially sentenced her to twenty-two years in prison, but Richardson moved the court to reduce and suspend the sentence. At the hearing on the motion, her plea counsel stated,

> I believe you do have the discretion to sentence her to 20 years, . . . and . . . we ask that you reduce it to the 20 year minimum but that you . . . further have discretion to suspend it because [section 16-3-85] is silent on whether you can suspend a minimum sentence.

The trial court reduced the sentence to twenty years but found it lacked the power to suspend the sentence. Specifically, the court stated, "I think my hands are tied by the . . . legislature setting [a] mandatory minimum"; "as far as I'm concerned, legally, the only thing I can do today . . . is reduce it to the 20 years."

Richardson's plea counsel filed an appeal to challenge the trial court's ruling that it lacked the power to suspend the minimum sentence. The appeal was assigned to an appellate defender at the Division of Appellate Defense, who sent Richardson a letter that indicated she had "no meritorious issues for appeal." Relying on her appellate counsel's advice, Richardson submitted an affidavit to this court stating, "I do not wish to appeal." We dismissed the appeal.

Richardson filed an application for PCR and alleged ineffective assistance of appellate counsel. At the PCR hearing, Richardson's appellate counsel testified she "would have strongly encouraged [Richardson] to proceed with an appeal." She explained this was because Richardson's plea counsel asked the court to exercise its discretion in suspending her sentence, and "when a judge has discretion and he

thinks he doesn't that's reversible error." She stated, "I must have missed that [issue] when I read the guilty plea transcript."

The PCR court found that under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), (1) appellate counsel rendered ineffective assistance by advising Richardson to withdraw the appeal, and (2) Richardson was prejudiced because there was a reasonable probability this court would have reversed and ordered a new sentencing hearing. Relying on *State v. Thomas*, 372 S.C. 466, 642 S.E.2d 724 (2007), the PCR court explained "there were potentially meritorious issues which were raised during the guilty plea" because the trial court actually had the power to suspend the sentence. The PCR court ordered a new sentencing hearing. The State filed a petition for writ of certiorari, which this court granted. *See* S.C. Code Ann. § 17-27-100 (2014) ("A final judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules."); Rule 243(a), SCACR ("A final decision entered under the Post-Conviction Relief Act shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari."); Rule 243(l), SCACR ("The Supreme Court may transfer a case filed under this rule to the Court of Appeals.").

II. Law/Analysis

We will reverse the PCR court's decision when it is controlled by an error of law. *Lorenzen v. State*, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008). For a court to grant PCR on the grounds of ineffective assistance of counsel, the applicant must show: (1) trial counsel "failed to render reasonably effective assistance under prevailing professional norms"; and (2) "the deficient performance prejudiced the applicant[]." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). In finding Richardson made both showings, the PCR court stated, "Given the Supreme Court's decision in *Thomas*, it is clear that [Richardson] possessed a potentially meritorious issue for appeal." The PCR court explained, "*Thomas* stands for the proposition that a sentence can be suspended unless the statute contains limiting language prohibiting suspension of the sentence."

In *Thomas*, the supreme court held a trial court has the authority to suspend a minimum sentence when the statute under which the defendant was convicted contains no provision prohibiting suspension of the sentence. 372 S.C. at 468, 642 S.E.2d at 725. The supreme court explained the power to suspend a sentence

derives from South Carolina Code section 24-21-410 (2007), which empowers the trial court to suspend a sentence when the crime is not "punishable by death or life imprisonment." 372 S.C. at 468, 642 S.E.2d at 725. The supreme court found that while "[t]his power does not extend to offenses where the legislature has specifically mandated that no part of a sentence may be suspended," 372 S.C. at 468, 642 S.E.2d at 725, "the omission of any such provision in [a statute] indicates the legislature did not intend to limit the general authority to suspend sentences." 372 S.C. at 469, 642 S.E.2d at 725.

We find the PCR court's reliance on *Thomas* was misplaced because homicide by child abuse under subsection 16-3-85(A)(1) carries a maximum penalty of life imprisonment. *See* § 16-3-85(C)(1). In *State v. Jacobs*, 393 S.C. 584, 713 S.E.2d 621 (2011), the supreme court faced a similar situation. The defendant there pled guilty to first-degree burglary, 393 S.C. at 586, 713 S.E.2d at 622, which carries a minimum sentence of fifteen years but is punishable by life in prison. S.C. Code Ann. § 16-11-311(B) (2003). The supreme court held "the sentence for a conviction of first degree burglary falls squarely within the exception provided in section 24-21-410 because first degree burglary is a felony 'punishable by life imprisonment.'" 393 S.C. at 588, 713 S.E.2d at 623 (quoting § 16-11-311(B)). The court found "[t]he holding in *Thomas* has no bearing on this case" because the crime committed in *Thomas* "was not punishable by death or life imprisonment, and therefore, did not fall within the exception of section 24-21-410." *Id.* Thus, the *Jacobs* court held a trial court may not suspend a minimum sentence for a crime punishable by death or life in prison, even when the statute does not expressly prohibit suspension. 393 S.C. at 588-89, 713 S.E.2d at 623-24.

In this case, Richardson pled guilty to homicide by child abuse under subsection 16-3-85(A)(1). The sentence for a person convicted pursuant to that subsection is found in section 16-3-85(C)(1), which provides a person "may be imprisoned for life but not less than a term of twenty years." Although the homicide by child abuse statute does not specifically prohibit suspension of a sentence, it falls within the exception provided in section 24-21-410 because the crime is punishable by life imprisonment. Thus, under *Jacobs*, the PCR court's finding that Richardson was entitled to PCR because she "possessed a potentially meritorious issue for appeal" was controlled by an error of law.

Richardson argues, however, that *Jacobs* does not apply to the facts of this case because her plea counsel did not request probation to follow the suspended

sentence. She argues the *Jacobs* court's interpretation of section 24-21-410 is inapplicable unless the sentencing court is considering probation, because the statute states the "court . . . may suspend the imposition or the execution of a sentence *and* place the defendant on probation." (emphasis added). She contends the defendant in *Jacobs* asked the trial court to suspend the minimum sentence and place him on probation, 393 S.C. at 586, 713 S.E.2d at 622, and points out Richardson's plea counsel did not mention probation in his sentencing request but only asked the court to impose "the minimum [sentence] of twenty years . . . [and] suspend the twenty-year [sentence] and give her . . . a ten year sentence." Richardson argues this distinguishing fact renders *Jacobs* inapplicable because the court in *Jacobs* restricted the court's power to suspend a sentence under section 24-21-410 only when the defendant requests probation to follow the active portion of the sentence.

Richardson's interpretation of *Jacobs* depends on the premise that section 24-21-410 acts as a limitation on a trial court's power to suspend sentences, such that the limitations apply only when the court "place[s] the defendant on probation" after suspending a sentence. Based on this premise, she argues that when the trial court is not considering probation, *Jacobs* imposes no limitations on a trial court's power to suspend a sentence, even when the sentencing statute provides a maximum of life in prison. The supreme court refuted Richardson's premise in *Moore v. Patterson*, 203 S.C. 90, 26 S.E.2d 319 (1943), by holding that trial courts lack the inherent power to suspend sentences, and thus the General Assembly must confer such power onto the courts. *See* 203 S.C. at 93-94, 26 S.E.2d at 320-21 ("It is clear that trial Judges had no general and unlimited power at common law to suspend sentences, but such authority may be conferred upon them by the General Assembly."); *see also Jacobs*, 393 S.C. at 587, 713 S.E.2d at 623 ("A circuit court's authority to suspend a sentence and impose probation derives solely from section 24-21-410 . . . ."); *Thomas*, 372 S.C. at 468, 642 S.E.2d at 725 ("The general power to suspend sentences derives from [section] 24-21-410[]."). The question in *Moore* was whether "a Circuit Judge [has the power to] impose a sentence of imprisonment . . . and provide in it that after the defendant shall have served a part of the time he be placed on probation for the remainder of the term." 203 S.C. at 93, 26 S.E.2d at 320. The court explained that in 1911 the General Assembly granted courts the power to suspend sentences for misdemeanor crimes, and in 1941 enacted the predecessor statute to section 24-21-410—S.C. Code Ann. § 1038-1 (1942)—that "extend[ed] the power to suspend sentences" for felony crimes. 203 S.C. at 94-95, 26 S.E.2d at 321. To answer the question before it, the

court interpreted the language of the statute and concluded the statute "is . . . intended to give [circuit judges] the right" to impose a split sentence. 203 S.C. at 95, 26 S.E.2d at 321. In other words, the *Moore* court interpreted the predecessor to section 24-21-410 contrary to Richardson's premise—as granting a court's power to suspend sentences, with exceptions to that grant of power, instead of as a limitation on an inherent power to suspend sentences.[1] *See* 203 S.C. at 94-96, 26 S.E.2d at 321.

Under *Moore*, a trial court has no power to suspend a sentence unless that power has been granted to it by the General Assembly. 203 S.C. at 95, 26 S.E.2d at 321. Richardson points to no such grant of power except section 24-21-410, which by its own terms does not apply to "any offense . . . punishable by death or life imprisonment." Under *Jacobs*, *Moore*, and the plain language of section 24-21-410,[2] the trial court in this case had no power to suspend Richardson's sentence. Therefore, Richardson's appellate counsel correctly advised her that no meritorious issues existed for appeal, as there was no possibility this court would have ordered a new sentencing hearing.

III. Conclusion

The PCR court erred in granting Richardson a new sentencing hearing, and the order is **REVERSED**.

SHORT and LOCKEMY, JJ., concur.

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[1] The language of section 1038-1 is nearly identical to the current language contained in section 24-21-410.

[2] "As the language of section 24-21-410 is *unambiguous*, we are confined to interpret its plain meaning." *Jacobs*, 393 S.C. at 589, 713 S.E.2d at 623-24 (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Ann Bell Lynch, Appellant/Respondent,

v.

Carolina Self Storage Centers, Inc.,
Respondent/Appellant.

Appellate Case No. 2012-212109

Appeal From Florence County
D. Craig Brown, Circuit Court Judge

Opinion No. 5213
Heard December 10, 2013 – Filed March 26, 2014

AFFIRMED

Kirby D. Shealy, III, Adams and Reese, LLP, of Columbia, for Respondent/Appellant.

Kevin M. Barth and Brendan P. Barth, both of Ballenger, Barth, Hoefer & Lewis, LLP, of Florence, for Appellant/Respondent.

FEW, C.J.: Susan Ann Bell Lynch brought this premises liability lawsuit against Carolina Self Storage Centers, Inc. after a metal door at one of its storage facilities closed on her foot. Although the jury returned a verdict for Lynch, she moved for a new trial, alleging juror misconduct during deliberations and intentional

concealment by a juror during voir dire. We affirm the trial court's decision to deny her motion, and all other issues raised by the parties.

I. Facts and Procedural History

While moving furniture out of a storage unit rented from Carolina Self Storage, Lynch propped open a hinged exterior door to the storage building by placing a small table against the door. After she finished loading the furniture into her vehicle, Lynch picked up the table and turned to walk out. When the door began to close, she "put [her] foot back instinctively . . . to catch the door." Due to the height between the door and the ground, the sharp metal bottom edge of the door struck the back of her heel. She suffered a deep cut "that went to the [Achilles] tendon." Several days after the incident, Lynch fell while ascending a flight of stairs and ruptured her Achilles tendon, which required surgery to repair. A month later, the wound became infected due to a bacterial infection "growing in [her] wet cast," and she underwent five surgeries to repair the wound with skin grafts.

Lynch commenced this action against Carolina Self Storage, alleging it was negligent in failing to maintain the door in a reasonably safe condition or warn her of its dangerous condition. At trial, Carolina Self Storage argued Lynch failed to prove proximate cause as to the vast majority of her medical expenses because, by ignoring her physician's medical advice to stay off her foot and keep her cast dry, she was the sole cause of the medical expenses associated with the surgery to repair her ruptured Achilles tendon and the treatment for the resulting infection. The jury returned a verdict for Lynch and awarded her $246,068.42—the exact amount of the medical expenses she claimed resulted from her injury. The jury found, however, that Lynch was fifty-percent at fault in causing her injuries, and the court reduced the verdict accordingly. *See Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (stating the law of comparative fault requires the trial court to reduce a plaintiff's damages "in proportion to the amount of his or her negligence" as determined by the jury). Lynch moved for a new trial *nisi additur*, arguing the jury failed to consider evidence of noneconomic damages. Carolina Self Storage moved for judgment notwithstanding the verdict (JNOV) on two grounds: (1) it owed no duty to Lynch; and (2) Lynch's own negligence exceeded its negligence as a matter of law. The court denied both motions.

After trial, the jury foreperson told Lynch's attorney that the jury was biased and used improper information to reach its decision. Lynch later filed an affidavit from the foreperson, who stated,

> One of the jurors stated she could not stand [Lynch's attorney] and Ms. Sue Lynch was getting nothing. I told her she could not punish [Lynch] for not liking [her attorney]. She said she did not care we would sit there until doomsday [because Lynch] wasn't going to get anything and it would end up in a hung trial and she still would not get anything. . . . [Some jurors] had a problem with Ms. Lynch because . . . [she] could afford to live beside a doctor . . . . The statement was made she must have money. . . . [A]nother juror spoke up and said [Lynch] had a large bank account she doesn't need the money. Another juror spoke up and said, "How do you know? Does she bank with you?" The lady that worked at the bank replied no.

The foreperson also stated in her affidavit, "I did not know we had such bias[ed] jurors until we went into deliberating. . . . The only thing they were concerned about was Ms. Lynch not getting anything. . . . I feel Ms. Lynch needs a new trial. The jurors were very much bias[ed]."

The affidavit did not provide the names of the jurors who made these comments. Lynch's attorney reviewed his firm's records and discovered one juror "was the adverse party in domestic litigation in which our firm represented her husband." Nicholas Lewis, a partner of the firm, submitted an affidavit stating he believed the juror who expressed her "intense dislike for [Lynch]'s counsel" during deliberations was the same juror previously involved in the domestic litigation.

Relying on Lewis's and the foreperson's affidavits, Lynch moved for a new trial based on (1) juror misconduct that affected jury deliberations, and (2) a juror's alleged intentional concealment during voir dire. She also requested the court hold a hearing to take the testimony of jurors regarding both grounds. The court denied the motion, finding the foreperson's affidavit was inadmissible under Rule 606(b), SCRE, and no intentional concealment occurred. The court also denied Lynch's request to take juror testimony.

II. Lynch's New Trial Motion

We review the trial court's decision to deny Lynch's motion for a new trial under an abuse of discretion standard. *See State v. Galbreath*, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct. App. 2004) (providing it is within the trial court's discretion to grant a new trial based on juror misconduct during deliberations or intentional concealment during voir dire); *Long v. Norris & Assocs., Ltd.*, 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000) (stating "[t]he granting of a new trial based on a juror's failure to honestly respond to the court's voir dire remains within the sound discretion of the trial court").

A. Juror Misconduct During Deliberations

We first address Lynch's argument that the trial court erred in denying her motion for a new trial due to juror misconduct during deliberations.

"Initially, the trial judge must make a factual determination as to whether juror misconduct has occurred." *State v. Covington*, 343 S.C. 157, 163, 539 S.E.2d 67, 70 (Ct. App. 2000). The foreperson's affidavit is the only evidence Lynch presented as to what happened inside the jury room, and thus is the only evidence to prove juror misconduct in this case. Because the trial court found the affidavit inadmissible, it found no evidence to support Lynch's motion. We find the trial court acted within its discretion to exclude the foreperson's affidavit. *See Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (stating the admission or exclusion of evidence "is within the sound discretion of the trial court," and "will not be disturbed on appeal absent an abuse of discretion").

Under Rule 606(b), SCRE, a juror's testimony or affidavit as to what occurred during deliberations is not admissible to challenge "the validity of the verdict." However, Rule 606(b) allows the admission of a juror's testimony or affidavit "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The trial court explained the affidavit did not "give rise to allegations of external misconduct" because it did not allege the jury received evidence or influence from outside sources.

We find there is evidence to support the trial court's determination that none of the information in the foreperson's affidavit is extraneous or relates to outside influence. Regarding the juror's statement that Lynch "had a large bank account [and] she doesn't need the money," the affidavit indicates the juror made this statement after other jurors remarked Lynch had a "friend which is a doctor's wife," and "she could afford to live beside a doctor." Apparently based on these remarks, a juror also stated, "[Lynch] must have money." The foreperson's affidavit does not indicate that any of this discussion was based on information received outside of the evidence presented at trial. In fact, Lynch testified about her friend who was a doctor, and from that and other testimony, the jury could readily have concluded they lived "beside" each other. Although the affidavit indicates the juror who commented about Lynch's bank account worked at a bank, it also states the juror denied Lynch had an account with that bank. Thus, the record supports the trial court's finding "there was no evidence of any improper outside influence." *See State v. Zeigler*, 364 S.C. 94, 110, 610 S.E.2d 859, 867 (Ct. App. 2005) ("Internal influences involve information coming from the jurors themselves.").

The trial court also correctly ruled the foreperson's statements that the jurors were biased against Lynch were inadmissible under Rule 606(b). *See generally* Fed. R. Evid. 606(b) advisory committee's note (stating "[t]he mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment"); Rule 606, SCRE note (stating "[t]he language of this rule is identical to the federal rule"). In *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), the court discussed whether juror testimony as to statements by other jurors during deliberations regarding bias toward Native Americans should be excluded under Rule 606(b). *See* 546 F.3d at 1235 (describing the argument it addresses as whether juror "testimony concerning racial bias falls outside the ambit of . . . Rule [606(b)]"). The defendant in *Benally* was a Native American charged with assaulting an officer with a dangerous weapon. After trial, a juror claimed the jury foreman stated during deliberations, "When Indians get alcohol, they all get drunk, and . . . when they get drunk, they get violent," and at least one other juror "chimed in" to agree. 546 F.3d at 1231-32 (internal quotations omitted). The court focused its inquiry "not [on] whether the jurors became witnesses in the sense that they discussed any matters not of record, but whether they discussed specific extra-record *facts* relating to the defendant" and "whether the statements concerned specific facts about [the defendant] or the incident in which he was charged." 546

F.3d at 1237 (internal quotation marks omitted) (emphasis in original). The Tenth Circuit found Rule 606(b) required the jurors' testimony to be excluded, and reversed the district court's decision to admit the evidence. 546 F.3d at 1241-42.

The facts of *Benally* present a far more compelling case for the admission of the juror's statements than Lynch presents. In this case, the foreperson's affidavit demonstrates nothing more than a generalized bias against a party unconnected to any specific facts about Lynch or the accident that are not in the record. Rule 606(b) requires the exclusion of testimony or affidavits by jurors that claim other jurors expressed generalized bias against a party during jury deliberations.

As to the juror who voiced her dislike of Lynch's attorney during deliberations, Lynch asserts this juror was biased for a reason outside the record because she was the same juror mentioned in Lewis's affidavit—the adverse party in previous litigation. Lynch argues this proves an "outside influence was improperly brought to bear upon [the] juror," and therefore the affidavit is not excluded by Rule 606(b). We disagree. The affidavit provides only speculation that the same juror made the comments, or if so, to connect the juror's bias to the previous litigation. The affidavit does not (1) name the juror who made the comments, (2) state the reason the juror held this opinion, or (3) suggest the juror developed this opinion based on something other than her observation of Lynch's attorney during trial. Thus, the record supports the trial court's conclusion that the foreperson's affidavit was inadmissible under Rule 606(b).

Because the trial court properly refused to consider the foreperson's affidavit, there was no evidence of juror misconduct, and the trial court correctly denied the motion for a new trial.

B. Intentional Concealment During Voir Dire

We next address Lynch's argument regarding a juror's alleged intentional concealment of information during voir dire. Lynch argues she is entitled to a new trial under *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), because a juror did not disclose her participation in divorce proceedings in which her ex-husband was represented by an attorney in the firm that represented Lynch in this case. In *Woods*, our supreme court articulated a two-part test to determine whether a juror's failure to disclose information during voir dire warrants a new trial. 345 S.C. at 587, 550 S.E.2d at 284 (citing *Thompson v. O'Rourke*, 288 S.C. 13, 15, 339 S.E.2d

505, 506 (1986)). First, the trial court must find "the juror intentionally concealed the information." *Woods*, 345 S.C. at 587, 550 S.E.2d at 284. If the court finds no intentional concealment occurred, the inquiry ends there. *State v. Sparkman*, 358 S.C. 491, 497, 596 S.E.2d 375, 377 (2004). However, if the court finds the juror's concealment was intentional, it must then determine whether the concealed information "would have been a material factor in the use of the party's peremptory challenges." *Woods*, 345 S.C. at 587, 550 S.E.2d at 284.

"[I]ntentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." 345 S.C. at 588, 550 S.E.2d at 284. On the other hand, unintentional concealment occurs "where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Id.*

We agree with the trial court's finding that none of the voir dire questions posed to the jury unambiguously called for this juror to disclose that her ex-husband was represented in divorce proceedings by another member of Lynch's attorney's law firm at some point in the past. The court asked the following questions during voir dire:

> Is there any member of the jury panel related by blood, connected by marriage or has a close personal or social relationship with any of the attorneys involved in this case?
>
> Does any member of the jury panel have any type of business relationship . . . with the law firms [involved in the case]?

We find neither of these questions would be reasonably comprehensible to the average juror such that the juror's failure to respond with this information was unreasonable. As to the first question, it is undisputed the juror is not related by blood or marriage to any of the attorneys, and Lynch does not contend the juror had any personal or social relationship with her attorney. As to the second question, it is also undisputed that the only interaction between the juror and the law firm was through her ex-husband's representation by the firm. Thus, it was not

the juror, herself, who had a business relationship with the firm. Moreover, even her ex-husband's relationship with the firm did not involve the attorney in this case, but rather a partner whose name was never mentioned during voir dire. More importantly, because the interaction between the juror and the attorney arose out of her divorce proceedings, the interaction was adverse. In fact, the premise of Lynch's argument is that the interaction was so antagonistic that the juror later acted on that antagonism against Lynch in violation of her sworn duty to be fair and impartial.

We do not believe this indirect and adverse interaction is what an average juror would characterize as a "relationship." The definition of "relationship" denotes a "connection" between people. *See Webster's New World College Dictionary* 1209 (4th ed. 2008) (defining "relationship" as "the quality or state of being related; connection" and "a continuing attachment or association between persons, firms, etc."); *The American College Dictionary* 1022 (1969) (defining "relationship" as "connection; a particular connection"). The only connection between the juror and the attorney representing Lynch was indirect—through a combination of three direct relationships: (1) the juror's relationship with her ex-husband, (2) her ex-husband's attorney-client relationship, and (3) the law firm partnership. In common usage, the word "relationship" has more direct and positive connotations than the juror's indirect and adverse interaction with Lynch's attorney.

We do not doubt the disclosure of this information would have given Lynch valuable information to use in exercising peremptory challenges. However, the responsibility for obtaining such information falls on the attorneys to request precise voir dire questions that are reasonably comprehensible to the average juror. The first part of the *Woods* test requires a showing of intentional concealment because it is not a juror's responsibility to anticipate what an attorney might be seeking by asking a particular question. Rather, the juror's responsibility is only to disclose information that reasonably should be disclosed in response to a question that is reasonably comprehensible. *See Woods*, 354 S.C. at 587-88, 550 S.E.2d at 284-85. The *Woods* inquiry requires us to determine whether the question was reasonably comprehensible in that it unambiguously applied to the juror's particular situation. We find the voir dire questions in this case did not clearly call for the juror to disclose this information, and her "failure to respond [was] reasonable under the circumstances." 345 S.C. at 588, 550 S.E.2d at 284.

Lynch contends the fact that two other jurors responded to these questions demonstrates the questions were reasonably comprehensible to the average juror. Specifically, Lynch points out that one juror indicated Lynch's attorney represented him in his divorce, and another stated his wife "had a lawsuit against" a partner of Lynch's attorney's firm. We are aware of no authority to support the argument that one juror's response to an ambiguous question with the same information not disclosed by another juror renders the question comprehensible, or the juror's silence intentional concealment.[1] Rather, a court should focus on the voir dire question—not on answers given by other jurors—to determine whether it unambiguously calls for the challenged juror to answer. In any event, the jurors who responded were in different situations than the juror Lynch challenges. They were either directly represented by Lynch's attorney, not just the law firm, or had a current spouse who had her own lawsuit against a partner of the firm whose name *was* mentioned during voir dire. Neither of these circumstances mirrors the indirect connection of the juror Lynch challenges.

The trial court also asked:

> Is there any member of the jury panel that knows of any reason whatsoever why they should not sit on a jury in this case with particular emphasis being placed upon your ability to be fair and impartial to both the plaintiff and the defense?

This court addressed the significance of a juror's failure to respond to this question in *Galbreath*, and held a juror's "decision not to respond to this question suggests that [the juror] felt she could be an impartial and fair juror." 359 S.C. at 404, 597 S.E.2d at 848. For the reasons discussed above, we find the trial court acted within its discretion to conclude no juror concealed a bias against Lynch's attorney.

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[1] In *Woods*, the supreme court noted other jurors responded to the voir dire questions at issue, but did not state whether the responding jurors' situations were similar and did not rely on their responses in its analysis. 345 S.C. at 586-90, 550 S.E.2d at 283-84.

We find the trial court acted within its discretion in denying Lynch's motion for a new trial because there is evidence to support the court's conclusion that no intentional concealment occurred.

C. Request for Post-Trial Evidentiary Hearing

Lynch also argues the trial court erred by not taking juror testimony regarding her allegations of juror misconduct and intentional concealment. As to her claim of juror misconduct, "[t]he party contending that misconduct occurred must make a threshold showing that there was in fact an improper outside influence or extraneous prejudicial information, and if such a showing is made, the trial court should conduct a hearing." 75B Am. Jur. 2d *Trial* § 1393 (2007). As we previously found, the juror's affidavit was inadmissible under Rule 606(b). Lynch presented no other evidence of juror misconduct during deliberations. Thus, the trial court properly refused to permit further inquiry because there was no threshold showing to support Lynch's claim.

Lynch relies on three cases in which the trial court took juror testimony as part of its inquiry into allegations of misconduct. In each of these cases, however, the parties presented evidence that external influences affected the jury's deliberations. *See Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 384 S.C. 441, 444, 682 S.E.2d 489, 491 (2009) (evidence that a juror communicated with outside sources about the case); *State v. Elgin*, 398 S.C. 39, 43, 726 S.E.2d 231, 233 (Ct. App. 2012) (evidence that a juror's mother told her the defendant was "framed"); *State v. Bantan*, 387 S.C. 412, 421, 692 S.E.2d 201, 205-06 (Ct. App. 2010) (evidence that a juror learned from an outside source that the defendants were "targeted by the police"). In each of these cases, the juror's testimony about the external influence was admissible because Rule 606(b) does not exclude evidence that "extraneous prejudicial information" or "outside influence" was injected into deliberations. Therefore, the cases Lynch relies on are distinguishable from this case because Lynch presented no evidence of extraneous prejudicial information or an outside influence.

Regarding Lynch's argument that the trial court erred by refusing to take juror testimony on her claim of intentional concealment, we previously found the trial court posed no question that unambiguously called for the juror to disclose her ex-husband's representation in divorce proceedings by another member of Lynch's attorney's law firm. Because this finding requires the conclusion that there was no

intentional concealment, there was no reason for the trial court to engage in further inquiry. *See Woods*, 345 S.C. at 588, 550 S.E.2d at 284 (holding "intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror" and "[u]nintentional concealment . . . occurs where the question posed is ambiguous or incomprehensible to the average juror").

Lynch argues, however, the statement in the foreperson's affidavit that a juror said "she could not stand" Lynch's attorney is additional information the trial court should have considered, and based on that information, the court should have conducted a hearing to determine if the juror who said that was the same juror described in Lewis's affidavit. This inquiry, Lynch argues, would have given the trial court a "subjective" component to the *Woods* analysis that the court would not otherwise have in this case. *See State v. Miller*, 398 S.C. 47, 54, 727 S.E.2d 32, 36 (Ct. App. 2012) (stating "we interpret *Woods* to support a subjective analysis, in addition to an objective one, in which the trial court considers the testimony of the juror if it is reasonably available").[2]

Lynch's argument is premised on the admissibility of the foreperson's affidavit. As we have already determined, Rule 606(b) required the exclusion of the affidavit for the purpose of determining juror misconduct in the jury room. We also find the trial court correctly applied the rule to exclude the affidavit on the question of intentional concealment.

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[2] In *Miller*, the trial court made no finding regarding the first prong of *Woods*, and denied the defendant's new trial motion based on the second prong. 398 S.C. at 50, 727 S.E.2d at 34. This court reversed as to the second prong and remanded for the trial court to hold an evidentiary hearing and make a ruling on the first prong. 398 S.C. at 49, 52, 55, 57, 727 S.E.2d at 35, 36, 38. We explained the record before us was not sufficient for this court to rule on the first prong. 398 S.C. at 52, 55, 727 S.E.2d at 35-36. *Miller* is distinguishable, and thus does not require a remand for an evidentiary hearing in this case, because the trial court here made a finding as to the first prong of *Woods*, and the record before us is sufficient to affirm the finding. Although we stated in *Miller* that the *Woods* analysis includes a subjective component, "in which the trial court considers the testimony of the juror," 398 S.C. at 54, 727 S.E.2d at 36, a trial court is not obligated to take juror testimony when the court determines it can rule on the first prong without it.

In some cases, our courts have considered the testimony of jurors in deciding whether a juror intentionally concealed information during voir dire. In each of these cases, however, Rule 606(b) was not an issue because the matters to which jurors testified did not involve the internal deliberations of the jury. *See Woods*, 345 S.C. at 585-86, 550 S.E.2d at 283 (stating juror testified at evidentiary hearing she worked as a volunteer in the solicitor's office that prosecuted the case); *Miller*, 398 S.C. at 55, 57, 727 S.E.2d at 36, 38 (remanding for evidentiary hearing regarding juror's failure to disclose that she testified for the State ten months earlier against man accused of stabbing juror's mother); *State v. Guillebeaux*, 362 S.C. 270, 273, 607 S.E.2d 99, 101 (Ct. App. 2004) (stating juror testified at post-trial hearing regarding the failure to disclose her relationship with State's chief witness). In each of those cases, the trial court learned of the potential concealment from a source other than a juror, and the court's inquiry did not relate to the jury's deliberations.

In *Sparkman*, the trial court held an evidentiary hearing to inquire into a juror's alleged intentional concealment and considered the jury's internal deliberations. 358 S.C. at 494-95, 596 S.E.2d at 376. It was alleged that a juror made a statement during deliberations that "forty years ago he had been the victim of an attack and that he would never forget the face of his attacker." *Id.* The defendant argued this statement bolstered the credibility of the victim's eyewitness testimony. 358 S.C. at 495, 596 S.E.2d at 376. The trial court took the juror's testimony, asking why the juror did not disclose during voir dire "that he was a victim of a serious crime." *Id.* The trial court also questioned the other jury members as to whether these statements affected their decision. *Id.* Although the supreme court did not squarely address the applicability of Rule 606(b), the court appears to have considered the undisclosed information to be extraneous. *See* 358 S.C. at 497-98, 596 S.E.2d at 378 (stating "[u]sually . . . we do not have the luxury of post-verdict juror testimony" and citing authority for a trial court's discretion to find prejudice based on "extraneous material received by a juror"). Thus, Rule 606(b) did not exclude the jurors' testimony, and *Sparkman* does not affect the applicability of the rule when intrinsic evidence is offered to prove intentional concealment.

Here, Lynch claims a juror's statements during deliberations in the jury room, when considered in combination with Lewis's affidavit, are evidence of intentional concealment, and thus, the trial court should have conducted a hearing. To connect these inferences, Lynch must prove events that occurred during jury deliberations

by introducing the juror's affidavit and corresponding testimony for the purpose of challenging the validity of the verdict. This is exactly what Rule 606(b) was intended to prohibit. *See* Rule 606(b), SCRE (providing "[u]pon an inquiry into the validity of the verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations"); *State v. Franklin*, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct. App. 2000) (stating "the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process"). The trial court correctly determined the foreperson's affidavit was inadmissible, and without this affidavit, there was no basis for the court to conduct an evidentiary hearing.

III. Other Issues Raised on Appeal

Both parties raised additional issues on appeal. We affirm the trial court's rulings as to each of these issues pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. The trial court properly denied Carolina Self Storage's motion for JNOV because Carolina Self Storage owed Lynch a duty to warn or to take measures to render its premises free from the particular risk she encountered. *See Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001) (providing a merchant owes a customer the duty to exercise ordinary care in maintaining its premises in a reasonably safe condition); *Larimore v. Carolina Power & Light*, 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000) (stating a merchant has a duty to warn a customer "only of latent or hidden dangers of which the [merchant] has knowledge or should have knowledge"); *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 125, 406 S.E.2d 361, 362 (1991) (defining a latent defect as one that a merchant has, or should have, knowledge of, and of which a customer is reasonably unaware); 305 S.C. at 126, 406 S.E.2d at 362-63 (providing that when a merchant should have anticipated the harm to a customer despite the obvious nature of the defect, the merchant is liable, particularly when the merchant has a "reason to expect that the [customer]'s attention may be distracted").

2. The trial court properly submitted the question of whether Lynch's own negligence exceeded any negligence of Carolina Self Storage to the jury. *See Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712-13 (2000)

("[U]nder South Carolina's doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant."); *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 32-33, 491 S.E.2d 571, 575 (1997) (stating "[c]omparison of a plaintiff's negligence with that of the defendant is a question of fact for the jury to decide" unless the "only reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent").

3. The trial court did not err in excluding (1) Carolina Self Storage's interrogatory answers and portions of its employee's deposition testimony, and (2) a document that showed Carolina Self Storage terminated Lynch's lease the same day her expert inspected the premises, because it was within the trial court's discretion to find this evidence was not relevant to proving Carolina Self Storage was negligent in maintaining its premises. *See* Rule 401, SCRE ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 402, SCRE ("Evidence which is not relevant is not admissible."); Rule 33(d), SCRCP (providing that interrogatory answers are admissible "to the extent permitted by the rules of evidence"); *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) (stating the admission of evidence is within the sound discretion of the trial court).

4. The trial court properly denied Lynch's motion for new trial *nisi additur* because there was evidence that the medical expenses Lynch incurred to treat her injury and her resulting noneconomic losses were not proximately caused by Carolina Self Storage's negligence. *See Todd v. Joyner*, 385 S.C. 509, 518, 685 S.E.2d 613, 618 (Ct. App. 2008) (upholding the denial of *additur* when the jury's verdict equaled the plaintiff's claimed medical expenses because there was evidence that the plaintiff's medical expenses or her resulting pain and suffering, or both, were not proximately caused by the defendant's tortious conduct); *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 473 (Ct. App. 2006) (stating a trial court acts within its discretion "in denying a motion for new trial *nisi additur* where there is evidence in the record to support the jury's verdict").

5. The cumulative error doctrine, if it applies in civil cases, is inapplicable in this case because Lynch failed to prove the court erred in any respect. *See State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (explaining the cumulative error doctrine applies when "a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial"); *State v. Nicholson*, 366 S.C. 568, 581, 623 S.E.2d 100, 106 (Ct. App. 2005) (refusing to apply the doctrine because "the trial [court] did not err in any of the particulars alleged in this appeal").

IV. Conclusion

We affirm the trial court's denial of Lynch's new trial motion because (1) the foreperson's affidavit was inadmissible under Rule 606(b) and thus no evidentiary basis existed to prove juror misconduct during deliberations; and (2) there is evidence to support the trial court's finding that no intentional concealment occurred during voir dire. As to the parties' additional issues on appeal, we affirm.

AFFIRMED.

KONDUROS, J., concurs.

PIEPER, J., dissenting.

I respectfully dissent because I believe sufficient information was presented to the trial court to warrant an evidentiary hearing to allow the parties to further develop the allegations of juror misconduct presented in the post-trial affidavits. *See McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 628 (2013) ("[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing."); *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) ("In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias."). Accordingly, I would remand for an evidentiary hearing on the issues raised in Lynch's motion for a new trial based upon juror misconduct.