The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(2), SCACR, since April 1, 2009. This list is being published pursuant to Rule 419(d)(2), SCACR. If these lawyers are not reinstated by the Commission by June 1, 2009, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(2), SCACR.

Columbia, South Carolina
May 12, 2009

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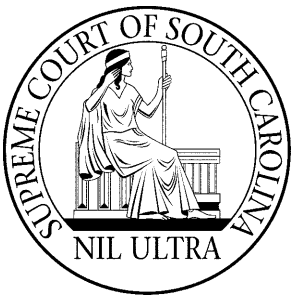

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 12, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Virgil Jones, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Richland County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26647
Submitted March 18, 2009 – Filed May 12, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Brian T. Petrano, all of Columbia, for Petitioner.

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: In this post-conviction relief (PCR) case, this Court granted the State's petition for a writ of certiorari to review the PCR judge's grant of a belated direct appeal to Virgil Jones (Respondent) for his plea of guilty to murder, financial transaction card theft, and two counts of financial transaction card fraud. We reverse.

FACTS

On November 19, 1993, Respondent pled guilty to murder, financial transaction card theft, and two counts of financial transaction card fraud. The plea judge sentenced Respondent to life imprisonment for murder, three years imprisonment for financial transaction card theft, and one year imprisonment for each count of financial transaction card fraud. Respondent did not appeal his guilty plea or sentences.

On October 8, 1996, Respondent filed a PCR application in which he alleged: (1) his guilty plea was not knowingly, intelligently, and voluntarily made; and 2) his plea counsel was ineffective in that counsel "misadvised" him to plead guilty. The State moved to dismiss the PCR application on the ground it was barred by the one-year statute of limitations as provided by the Uniform Post-Conviction Procedure Act.[1] By order dated September 15, 1997, the PCR judge dismissed Respondent's application. Respondent did not file a petition for a writ of certiorari to review this dismissal.

On July 9, 2003, Respondent filed a second PCR application in which he alleged: (1) he did not knowingly and intelligently waive his right to a direct appeal, (2) the existence of newly-discovered evidence, and (3) the plea court lacked subject matter jurisdiction for the murder charge.

The State filed a Return and moved to dismiss the PCR application on the following grounds: (1) the application was barred by the statute of limitations, (2) the application was barred by the doctrine of laches, (3) the claim of newly-discovered evidence was not

[1] S.C. Code Ann. § 17-27-45 (2003).

cognizable in a PCR application, and (4) the lack of subject matter jurisdiction allegation was without merit.

The PCR judge held a hearing on the State's motion to dismiss. By order dated November 28, 2005, the judge dismissed all of Respondent's claims as barred by the statute of limitations with the exception of his claim that he did not knowingly waive his right to a direct appeal. The judge ordered a merits hearing on Respondent's remaining claim.

Subsequently, the State filed an amended Return and a motion to dismiss Respondent's remaining PCR allegation on the grounds the PCR application was barred as successive and by the doctrine of res judicata.

At the merits hearing, Respondent testified that at the time of his plea, counsel did not inform him of his right to appeal his guilty plea. Respondent claimed he became aware of this right after he was incarcerated for the offenses to which he pled guilty. Respondent stated he would have requested an appeal had he been informed of this right at the time he pled guilty. On cross-examination, Respondent acknowledged he never asked for a direct appeal until the PCR proceedings.

Respondent's plea counsel testified he tells "all of [his] clients that they have a right to an appeal, if the judge does not follow the [sentencing] recommendation." He claimed Respondent knew he had ten days after the plea to appeal if the judge did not accept the recommendation. Had Respondent requested an appeal, counsel stated he would have filed one.

Because the plea judge followed the solicitor's sentencing recommendation with regard to Respondent's guilty plea, counsel believed there was no reason to appeal the negotiated plea. Therefore, plea counsel testified he would not have advised Respondent about an appeal given that "advice would have already taken place." Additionally, counsel stated he knew he did not advise Respondent

after the plea proceeding regarding his right to appeal because he did not speak with the Respondent after the plea.

By order filed on September 15, 2006, the PCR judge granted Respondent a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The judge directed Respondent to "Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) for the procedure to follow in light of the Court's ruling."

On September 22, 2006, the State sent its motion for reconsideration to the Richland County Clerk of Court. The State, however, did not serve the circuit court judge with the motion until March 14, 2007. The PCR judge dismissed the State's motion for reconsideration on the ground the State failed to comply with the ten-day service requirement of Rule 59(g)[2] of the South Carolina Rules of Civil Procedure.

This Court granted the State's petition for a writ of certiorari to review the PCR judge's order.

STANDARD OF REVIEW

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty

[2] Rule 59(g) provides, "A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." Rule 59(g), SCRCP.

plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases- i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58 (1985)).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith, 369 S.C. at 138, 631 S.E.2d at 261. This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

DISCUSSION

The State contends the PCR judge erred in granting Respondent a belated direct appeal.[3] In support of this contention, the State avers:

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[3] We note that Respondent did not file for review as required by the Appellate Court Rules. Thus, there is no belated direct appeal issue before the Court. See Bennett v. State, 371 S.C. 198, 203 n.4, 638 S.E.2d 673, 675 n.4 (2006) (granting State's petition for a writ of certiorari to review PCR judge's decision regarding finding that plea counsel was ineffective and noting that there was no belated direct appeal issue before the Court given respondent did not file for review pursuant to Rule 227(i)(1), SCACR (now known as Rule 243(i)(1)), and Davis); Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986) ("When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the applicant may petition for a writ of certiorari pursuant to Supreme Court Rule 50, § 9 . . . Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review." (emphasis added)); Rule 243(i)(1), SCACR ("Where the petition seeks review under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), the following procedure shall be followed: (1) When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other post-conviction relief issues petitioner seeks to have reviewed.

(1) Respondent did not reasonably demonstrate to plea counsel his desire to appeal, and (2) no rational defendant would have sought an appeal given the plea judge's sentence did not deviate from the recommended sentence submitted by the solicitor in exchange for Respondent's plea of guilty to murder. We agree.

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

"Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). "One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). However, "[t]he bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Id. "Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal." Id.

For several reasons, we conclude the circuit court erred in finding that Respondent was entitled to a belated direct appeal on the ground that Respondent did not knowingly and intelligently waive his right to appeal from his plea.

At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues . . . .").

First, plea counsel testified and Respondent did not dispute that the plea judge accepted the sentencing recommendation for Respondent's plea of guilty. Respondent also failed to offer evidence that there were any meritorious or viable issues for appeal. Therefore, Respondent failed to establish the first prong of Roe in that there is no evidence that a rational defendant would have wanted to appeal from the guilty plea and sentence.

Secondly, Respondent specifically acknowledged at the PCR hearing that he did not ask plea counsel to file a direct appeal. Plea counsel confirmed that Respondent never made this request despite informing Respondent prior to the plea of his appellate rights. Thus, other than Respondent's bare assertion that he was not advised of his appellate rights, Respondent offered no evidence which reasonably demonstrated an interest in appealing. Without this evidence, Respondent failed to satisfy the second prong of Roe.

Because Respondent did not produce evidence of extraordinary circumstances which would have required plea counsel to advise him of the right to a direct appeal, we hold the PCR judge erred in finding Respondent was entitled to a belated appellate review of his guilty plea. See Turner, 380 S.C. at 225, 670 S.E.2d at 374 (reversing order of PCR judge which found the petitioner entitled to a belated appellate review of his guilty plea where "petitioner did not allege he asked counsel to file a direct appeal, he had viable issues for appeal, or there were other extraordinary circumstances which would require him to be advised of his right to a direct appeal from his guilty plea"). Accordingly, we reverse the PCR judge's order.

In light of our conclusion, we decline to address the State's remaining argument that the PCR judge erred in not dismissing Respondent's second PCR application as successive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing an appellate court need not address additional issues if the resolution of another issue is dispositive).

CONCLUSION

Because Respondent failed to establish that extraordinary circumstances existed which required that his plea counsel advise him of his right to a direct appeal of his guilty plea, we hold the PCR judge erred in granting Respondent a belated direct appeal.

REVERSED.

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

JUSTICE PLEICONES: I agree that the post-conviction relief (PCR) order should be reversed, but write separately because I believe the case should be decided solely on the successive claim made by the State rather than on the claim of constitutionally ineffective assistance of counsel. Cf., Morris v. Anderson County, 356 S.C. 459, 564 S.E.2d 649 (2002)(Court has well established policy of declining to rule on constitutional claims where they are unnecessary to the result). Here, respondent did not raise the claim that his plea counsel rendered ineffective assistance in failing to advise him of his right to a direct appeal until his second PCR application. The State argues, persuasively in my view, that this claim was barred as successive. Graham v. State, 378 S.C. 1, 661 S.E.2d 337 (2008). I would reverse in a memorandum opinion citing Graham.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lexington Law Firm, Respondent,

v.

South Carolina Department of Consumer Affairs, Appellant.

Appeal From Richland County
Marvin F. Kittrell, Administrative Law Court Judge

Opinion No. 26648
Heard March 4, 2009 – Filed May 12, 2009

REVERSED

Carolyn Grube Lybarker and Danny Raymond Collins, both of South Carolina Department of Consumer Affairs, of Columbia, for Appellant.

Desa Ballard, of West Columbia, for Respondent.

JUSTICE KITTREDGE: This direct appeal requires the Court to construe an exemption to the licensing requirements of the South Carolina Consumer Credit Counseling Act. S.C. Code Ann § 37-7-101 to -122 (Supp. 2008). Specifically, we must determine legislative intent concerning the

"attorney at law" exemption in section 37-7-101(2)(b)(i). We hold that the South Carolina General Assembly intended to limit the "attorneys at law" exemption to attorneys authorized to practice law in this State when the attorney is "acting in the regular course" of his or her profession as an attorney. We reverse the contrary holding of the administrative law court.

I.

The South Carolina Consumer Credit Counseling Act (Act) was enacted by the General Assembly in 2005. The Act's purpose was to bring regulation and supervision to the world of credit counseling in South Carolina. Under the Act a person may not engage in credit counseling in South Carolina unless properly licensed. S.C. Code Ann. § 37-7-102 (Supp. 2008). This enactment was part of a national trend among states to protect their citizens from deceptive conduct by unscrupulous credit counseling organizations preying on individuals unfamiliar with credit repair. Mary Spector, *Taming the Beast: Payday Loans, Regulatory Efforts, and Unintended Consequences*, 57 DEPAUL L. REV. 961, 985 n.174 (Summer 2008).

An integral feature of the Act is the need for licensure of those who engage in credit counseling. The Act further defines credit counseling organizations but excludes certain professions and businesses, thus exempting them from licensure requirements. Specifically, the Act provides:

> (2) "Credit counseling organization" means a person providing or offering to provide to consumers credit counseling services for a fee, compensation, or gain, or in the expectation of a fee, compensation, or gain, including debt management plans.
>
> (a) The business of credit counseling is conducted in this State if the credit counseling organization, its employees, or its agents are located in this State or if the credit counseling organization solicits or contracts with debtors located within this State.
>
> (b) This term does not include the following when acting *in the regular course of their respective businesses and professions*:

(i) *attorneys at law*;

(ii) banks, fiduciaries, credit unions, savings and loan associations, and savings banks as duly authorized and admitted to transact business in the State of South Carolina;

(iii) a certified public accountant providing credit counseling advice pursuant to an accounting practice;

(iv) title insurers and abstract companies doing escrow business;

(v) judicial officers or others acting pursuant to court order;

(vi) nonprofit faith-based organizations;

(vii) counselors certified by the South Carolina Housing Authority to the extent engaged in counseling pursuant to Chapter 23, High-Cost and Consumer Home Loans. These counselors must be certified by the Housing Authority pursuant to Section 37-23-40;

(viii) mortgage brokers, real estate brokers, salesmen, and property managers licensed pursuant to Title 40; and

(ix) consumer reporting agencies as defined by 15 U.S.C. Section 1681(a) (f) and any person or agency, or any affiliate or subsidiary of a consumer reporting agency, that obtains consumer reports from the agency under a certification pursuant to 15 U.S.C. Section 1681(e)(a) for the purpose of reselling the report, or information contained in or derived from the report, to a consumer, or monitoring information in the report on behalf of a consumer.

S.C. Code Ann. § 37-7-101(2) (Supp. 2008).

The Legislature delegated to the Department of Consumer Affairs (Department) responsibility for administering the Act. S.C. Code Ann. § 37-7-106 (Supp. 2008).

The Department learned that a law firm based in Utah was providing credit counseling services to South Carolina citizens. The Department advised the Utah law firm of the Act and the need for credit counseling organizations to obtain licensure. The Utah law firm, styling itself as Lexington Law Firm, responded to the Department: "[f]or purposes of this letter only, Lexington [Law Firm] agrees that it is a credit counseling organization and provides consumer credit counseling as that term is defined at [section 37-7-101] (3)(b)." However, the Utah law firm asserted the attorney at law exemption in section 37-7-101(2)(b)(i).

Before the Department could take action, Lexington Law Firm filed the underlying declaratory judgment action in the administrative law court (ALC) seeking a declaration that the Department lacks authority to issue exemptions, and moreover, a declaration that the law firm is entitled to the Act's attorney at law exemption.

The Department sought discovery from Lexington Law Firm in the ALC, including names, addresses, and bar admittances of Lexington Law Firm's attorneys. Lexington Law Firm objected stating:

> Objection. [Lexington Law Firm] objects to this Request on the grounds that it does not comply with the scope of Rule 34, SCRCP, in that it does not request any "designated documents" or "tangible things." In addition, this Request is not reasonably calculated to lead to the discovery of admissible evidence. Further, this Request seeks information which is not relevant to this action, and the Request is intended to harass [Lexington Law Firm].

The Department narrowed its request in a motion to compel production stating:

> The Department will revise the question to ask for state certificates, licenses or registrations pertaining to the states in which attorneys who service/have serviced South Carolina consumers are admitted to practice law. This item is relevant as

> the Petition states [Lexington Law Firm] engages in the practice of law.

Lexington Law Firm echoed its earlier response stating the request was "not relevant."

It is apparent from the ALC's grant of summary judgment for Lexington Law Firm that the trial court believed the nature of the law firm's legal/credit counseling practice was irrelevant, for its nominal status as "attorneys at law" automatically entitled the law firm to avail itself of the attorney exemption. The ALC rejected the Department's contention that the statutory exemptions are conditioned on section 37-7-101's limiting language, "when [the party seeking the exemption is] acting in the regular course of their respective businesses and professions." The ALC ruled:

> Department does not have authority to grant or deny exemptions under the South Carolina Consumer Credit Counseling Act . . . and because the [L]egislature has already provided an exemption to attorneys at law under the Act, Lexington Law [Firm] is exempt from application of the Act and not subject to regulation by the Department . . . .

The Department's appeal is before us pursuant to Rule 204(b) certification, SCACR.

II.

The Department contends it has the authority, in the first instance, to determine if a credit counseling organization is exempt from the Act's licensing requirements. The Department additionally asserts that Lexington Law Firm is not entitled to the attorney at law exemption under the Act. We agree with the Department on both counts.

A.

The Department's Authority

The Department has authority over licensing under the Act, and that authority encompasses the initial determination, subject to judicial review, of whether a credit counseling organization satisfies a statutory exemption.[1] S.C. Code Ann. § 37-7-106 (Supp. 2008).

Section 37-7-106 empowers the Department to "refuse to license an applicant or suspend or revoke a license or refuse to renew a license issued pursuant to this chapter if it finds, after notice and a hearing pursuant to the Administrative Procedures Act," the applicant was convicted of a felony or fraud; violated a provision of the Act; used fraud to obtain a license; participated in continuous unfair conduct; went bankrupt; or violated a reasonable rule or regulation made by the Department. Additionally, as Lexington Law Firm conceded at oral argument, the statute provides a two-step test to determine if a business is exempt. First, the business must qualify as one of the exempt categories and second, the organization must be acting in the regular course of its business. S.C. Code Ann. § 37-7-101(2)(b).

Therefore, as the Department is charged by the Legislature with issuing licenses and is in the best position to implement the statutory test, we hold the Department is authorized to determine if a party is exempt from obtaining a license. *See City of Rock Hill v. S.C. Dep't of Health and Envtl. Control*, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) ("As creatures of statute, regulatory bodies . . . possess only those powers which are specifically delineated. By necessity however, a regulatory body possesses not only the

[1] At oral argument, Lexington Law Firm contended the Department's appropriate course of action would be to issue a cease and desist order under section 37-7-119. Under normal circumstances, we would agree, but Lexington Law Firm preempted the normal course of these actions by the filing of its declaratory judgment action. Lexington Law Firm may not now complain that the Department failed to follow the preferred statutory course.

powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged.") (citing *City of Columbia v. Bd. of Health and Envtl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987)). Furthermore, this Court should defer to the Department's findings where there is no compelling reason to reject it. *Faile v. S.C. Employment Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) ("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons.").

B.

The Attorney at Law Exemption

Lexington Law Firm, as a matter of law, is not entitled to the "attorneys at law" exemption. As previously discussed, section 37-7-101(2) provides:

> (2) "Credit counseling organization" means a person providing or offering to provide to consumers credit counseling services for a fee, compensation, or gain, or in the expectation of a fee, compensation, or gain, including debt management plans.
>
> (a) The business of credit counseling is conducted in this State if the credit counseling organization, its employees, or its agents are located in this State or if the credit counseling organization solicits or contracts with debtors located within this State.
>
> (b) This term does not include the following *when acting in the regular course of their respective businesses and professions*:
>
> (i) *attorneys at law*;

(emphasis added).

None of the attorneys in Lexington Law Firm is authorized to practice law in South Carolina. The position of Lexington Law Firm is manifestly without merit. To accept Lexington Law Firm's view of the statute, we must

accept the premise that the Legislature has sanctioned the unauthorized practice of law. The Legislature has done no such thing.

"There is a presumption that the [L]egislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). Thus, when enacting the Act, the General Assembly knew of South Carolina's laws and policies addressing the unauthorized practice of law, including section 40-5-310 of the South Carolina Code (2001) which makes it a crime to engage in the unauthorized practice of law. We therefore hold the General Assembly would not create an exemption condoning the unauthorized practice of law.[2]

Moreover, section 37-7-101(2)(b)'s conditional "regular course of . . . business" language is unambiguous. The language indicates a clear legislative intent to limit the exemption to a listed business (or profession) when the credit counseling service is part of the regular course of that business. If a statutorily enumerated business provides credit counseling services not in the regular course of its business, the exemption is unavailable. *McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.") (citation omitted); *First Baptist Church of Mauldin v. City of Mauldin*, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992) ("In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.") (citation omitted).

Further, the statute's plain language indicates the Legislature intended to exempt professions and businesses that are otherwise regulated. Other

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[2] The authority to practice law in South Carolina arises in three circumstances: (1) a license to practice law from this Court; (2) authorization *pro hace vice* under Rule 404, SCACR; or (3) a limited certificate of admission under Rule 405, SCACR.

exemptions located in this section are of other professions and businesses subject to other licenses (such as certified public accountants, counselors certified by the South Carolina Housing Authority, and real estate brokers licensed pursuant to Title 40) as well as non-profit, faith-based organizations and judicial officers. Therefore, the Legislature expressed its intent to exempt businesses otherwise licensed in South Carolina and non-profit organizations.

Lexington Law Firm's final argument is that the providing of credit counseling services does not constitute the practice of law, and as such, its actions cannot constitute the unauthorized practice of law. The untenable dichotomy Lexington Law Firm advances is they fall under the attorney exemption but do not commit the unauthorized practice of law in South Carolina because they are conducting a business. Lexington Law Firm cannot have it both ways. As discussed, the statutory scheme limits the listed exemptions to those professions or businesses "when acting in the regular course of their respective businesses and professions." S.C. Code Ann. § 37-7-101(2)(b) (Supp. 2008). If Lexington Law Firm is, in fact, acting in the regular course of the practice of law in South Carolina, then it is engaging in the unlawful unauthorized practice of law. Conversely, if Lexington Law Firm is merely conducting a credit counseling business, then it may not gain relief from the statutory compliance requirements through the "attorneys at law" exemption.

III.

In sum, we are not barring Lexington Law Firm from providing credit counseling services to South Carolinians, we are simply requiring Lexington Law Firm comply with the statutes enacted by our Legislature. Lexington Law Firm may not avail itself of an exemption for which it is not statutorily entitled.

We hold Lexington Law Firm is not exempt under section 37-7-101(2)(b) from licensure requirements and the Department of Consumer Affairs is statutorily empowered to determine if a business qualifies for an exemption. The judgment of the ALC is

REVERSED.

TOAL, C.J., WALLER, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Thomas E. Ruffin, Jr., Respondent.

Opinion No. 26649
Heard February 18, 2009 – Filed May 12, 2009

DISBARRED

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

George Hunter McMaster of Tompkins & McMaster, of Columbia, and Irby E. Walker, Jr., of Conway, for respondent.

PER CURIAM: This attorney disciplinary action arises out of multiple allegations of misconduct including misappropriation of funds. Following a hearing, the Commission on Lawyer Conduct recommended Thomas E. Ruffin, Jr., be disbarred. The Office of Disciplinary Counsel joined in the recommendation. After thorough review of the record, we agree and disbar Ruffin effective from the date of this opinion.

In this attorney disciplinary case, Ruffin is accused of multiple acts of misconduct including misappropriation of trust account funds and failure to pay a client his settlement. Ruffin was placed on interim suspension on July 28, 2004. *In the Matter of Ruffin*, 360 S.C. 339, 600 S.E.2d 909 (2004).

Subsequently, in an unrelated matter, this Court indefinitely suspended Ruffin. *In the Matter of Ruffin*, 363 S.C. 347, 359-60, 610 S.E.2d 803, 809 (2005). In the case at hand, the Commission on Lawyer Conduct panel found misconduct occurred and recommended Ruffin be disbarred without retroaction, required to pay costs, and required to make full restitution. We hold disbarment without retroaction, costs, and restitution are warranted sanctions.

Matter I

Ruffin conducted a refinancing for Client A on or about April 16, 2004. On April 21, 2004, $137,896.51 was wired to Ruffin's trust account to be used to pay off the first mortgage. Ruffin failed to pay off the first mortgage, and the balance of his trust account on April 30, 2004 was $9,109.97, far short of the amount necessary to pay off the first mortgage.

The title insurance company insuring the closing dispatched an auditor to review Ruffin's trust account. The auditor found the payoff never occurred and a pattern of late payoffs using one closing to fund a previous closing. For instance, Ruffin conducted a closing for Client B on or about March 26, 2004. The $114,406.27 payoff check was dated March 26, 2004, but did not clear until April 26, 2004, after the above mentioned Client A's funds were deposited in Ruffin's trust account. Additionally, Ruffin conducted a closing for Client C on January 15, 2004, but the payoff check did not clear until February 24, 2004. In the interim, Ruffin's trust account balance dipped to approximately $7,000, well below the necessary amount to cover Client C's payoff.

Matter II

Ruffin represented a client in a personal injury claim. The claim was settled for $3,500.00. Ruffin's trust account showed the funds were deposited on May 6, 2004. Ruffin never issued a check to his client. The trust account's balance at the end of May 2004 was $309.97, which was again too depleted to cover Ruffin's financial obligation.

In his answer, Ruffin admitted he failed to pay his client. Ruffin argued in his brief that he was owed $2,500 by another party and once he placed that in his trust account he would be able to pay his client. This is a prime example of Ruffin's misunderstanding of the sanctity of a trust account.

Matter III

When this Court ordered Ruffin's interim suspension in 2004, the Court appointed an Attorney to Protect Clients' Interests. *In the Matter of Ruffin*, 360 S.C. at 340, 600 S.E.2d at 909. As part of his service, the appointed attorney reported an item for $100.00 was returned for insufficient funds in one of Ruffin's trust accounts in March 2004. However, the insufficient funds notice stated, "Notice of Returned Deposited Item." Therefore, we find the bank notified Ruffin that a $100 check he deposited had insufficient funds, not that he wrote a check with insufficient funds. Accordingly, no misconduct occurred in this matter.

Matter IV

The appointed attorney also reported this matter, which involves Ruffin's representation of a client in a personal injury case. The client's medical insurer notified the client and Ruffin that it believed it had a right to recover its costs if the client settled the claim. The case settled for $17,500, which was deposited in Ruffin's trust account. In October 2003, the client authorized the disbursement of $5,523.53 to the medical insurer, and Ruffin sent the client a check for the remainder less attorneys' fees. Ruffin, however, never paid the medical insurer, and his trust account had a balance of $93.50 on January 30, 2004.

Ruffin admitted the client signed the disbursement authorization but denies any misappropriation. Ruffin argued he determined the medical insurer was not entitled to this money, contacted the client, and reached an agreement with the client to put the $5,523.53 towards legal fees owed by the client. Upon review of the record, we hold Ruffin failed to fulfill his agreement with the medical insurer. Further, Ruffin provided no evidence to

substantiate his assertion he and the client reached an agreement to apply the withheld funds to attorney's fees. Instead, the record only includes the disbursement agreement signed by the client indicating a $5,523.53 payment should be issued to the medical insurer. We find unpersuasive Ruffin's effort to explain this gross misconduct.

Matter V

Ruffin sent evidence related to a motor vehicle accident to a retired civil engineering professor to review. Ruffin asked the professor to render an opinion related to the motor vehicle accident. The professor did so and submitted his bill of $250 to Ruffin but was never paid for his services. In his answer, Ruffin admitted he never paid the professor because Ruffin sent the bill to his clients for payment. We find this argument meritless. Ruffin contacted the professor to review documents, and despite the professor's repeated contact with Ruffin regarding payment, Ruffin never paid the professor. Having contracted with the professor, without the client's knowledge or consent, Ruffin's failure to pay the professor constitutes misconduct.

Matter VI

A homeowners' association retained Ruffin to collect dues from two delinquent homeowners. The association paid Ruffin a total of $3,559.30. Ruffin wrote a letter to each of the delinquent homeowners but did not file the liens against their property after delinquent homeowners failed to pay. Ruffin admitted that he failed to refund the fee. Ruffin further agreed a portion of his payment should be repaid.

Matter VII

In his answer, Ruffin conceded he failed to respond timely to the Notices of Full Investigation/Supplemental Notices of Full Investigation in these cases.

Panel Report

The panel found multiple violations of the Rules of Professional Conduct (RPC) contained in Rule 407, SCACR. Specifically, the panel found the following RPC violations in Matter I, Matter II, Matter IV, and Matter VI: Rule 1.1, Competence; Rule 1.2, Scope of Representation; Rule 1.3, Diligence; Rule 1.4, Communication; and Rule 1.15, Safe Keeping of Property. Additionally, in Matters V and VI, the panel found a violation of Rule 4.1, RPC, Rule 407, SCACR, Truthfulness in Statements to Others.

As for Ruffin's admitted failure to cooperate, the panel found a violation of RPC Rule 8.1(b), Failure to Respond to a Lawful Demand for Information from a Disciplinary Authority. Further, the panel found a violation of Rule 7(a)(3), Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413, SCACR, because Ruffin failed to respond to a disciplinary authority's lawful demand.

Lastly, the panel found with regards to all matters, that Ruffin violated RPC Rule 8.4 in his violation of Rules of Professional Conduct, inability to account for funds entrusted to him, and perpetration of conduct prejudicial to the administration of justice.

The panel recommended Ruffin be disbarred effective on the date of this Court's opinion, required to pay costs of the proceedings, and required to make full restitution. The panel suggested Ruffin make the following restitution payments: $116,703.36 to the title insurance company in Matter I, $1,803.24 to Ruffin's client in Matter II, $5,523.53 to the medical insurer in Matter IV, $313.54 to the professor in Matter V, and $2,000 to the gentleman who repaid the homeowners' association in Matter VI.

Law/Analysis

"This Court is not bound to accept the recommendations of the Panel or the Executive Committee. The duty of adjudging the professional conduct of members of the Bar and taking appropriate disciplinary action rests

exclusively with this Court." *In the Matter of Hines*, 275 S.C. 271, 273, 269 S.E.2d 766, 767 (1980).

We hold no misconduct occurred in Matter III as the insufficient notice dealt with an item deposited in Ruffin's account, not a check written on the account. Regarding the remaining matters, we agree with the panel report and find misconduct. We further require restitution as set forth by the panel.

Due to the clear and convincing evidence of misconduct, Ruffin's disciplinary history, and this Court's precedent, we hold nonretroactive disbarment is appropriate. *In the Matter of Ruffin*, 363 S.C. at 359-60, 610 S.E.2d at 809 (indefinitely suspending Ruffin for matters unrelated to this case); *see also In the Matter of Wilmeth*, 373 S.C. 631, 636, 647 S.E.2d 185, 188 (2007) (disbarring attorney, not retroactively, for multiple acts of misconduct including misappropriation of funds); *In the Matter of Morehouse*, 330 S.C. 205, 206-07, 499 S.E.2d 208, 209 (1998) (disbarring attorney without retroaction for wire fraud).

Under Rule 7(b), RLDE, Rule 413, SCACR, we further require Ruffin to contact ODC immediately regarding setting up a restitution plan. Ruffin shall agree on a restitution payment plan with ODC within sixty days of the filing of this opinion, complete restitution prior to petition for reinstatement, pay the costs associated with the disciplinary proceedings within ninety days of the filing of this opinion, and take the Legal Ethics and Practice Program sponsored by ODC and the Professional Responsibility Committee of the South Carolina Bar prior to any petition for reinstatement. Failure to comply with the restitution plan may result in the imposition of civil or criminal contempt by this Court.

Conclusion

For the foregoing reasons, we disbar Ruffin effective upon the filing date of this opinion. Within fifteen days of the date of this opinion, Ruffin shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR, and shall also surrender his Certificate of Admission to Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey Harbit, Thomas L. Harbit, Plaintiffs,

of whom

Jeffrey Harbit is Appellant,

v.

City of Charleston, City of Charleston Planning Department, Respondents.

Appeal from Charleston County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4511
Heard January 21, 2009 – Filed February 25, 2009
Amended May 4, 2009

AFFIRMED

Thomas R. Goldstein, of North Charleston; for Appellant.

Timothy Alan Domin, of Charleston; for Respondents.

GEATHERS, J.: In this appeal, Jeffrey Harbit (Harbit) argues that the circuit court improperly granted summary judgment in favor of the City of Charleston (the City) on several claims stemming from the City's refusal to rezone Harbit's single family residential property for limited commercial use. We affirm.

FACTS

Harbit is the owner of property located at 7 Wesley Drive, which is within the City's limits. The property is on the corner of Wesley Drive and Stocker Drive. The house at 7 Wesley Drive faces Wesley Drive with a rear entrance and driveway accessible only from Stocker Drive. Wesley Drive is a five-lane thoroughfare, connecting Folly Road to Highways 17 and 61. Stocker Drive is a purely residential street, which may be accessed from the heavier-traveled Wesley Drive.

At all times pertinent to this appeal, this property has been zoned for single family residential purposes. Harbit purchased this property in 2003 for $180,000 from Truett Nettles (Nettles). Prior to selling the property to Harbit, Nettles attempted to rezone the property for limited commercial use as an attorney's office, but the City denied his request. Harbit was aware of the City's denial of Nettles' request for rezoning when he purchased the property from Nettles in 2003.

In 2005, Harbit applied for rezoning of the Wesley Drive property based on its location within the Savannah Highway Overlay Zone (the Zone). The Zone was created as a result of a comprehensive study of land surrounding the Ashley River Bridge in Charleston.[1] Based on this study, the

[1] City of Charleston Zoning Ordinance § 54-202(e) (1996) states: "Savannah Highway SH Overlay Zone. The SH Overlay Zone is intended to allow office and neighborhood service uses in addition to the uses allowed in the base zoning district. Existing structures in the SH zone that are used for a non-residential use shall retain their residential appearance. . . . Parking shall be restricted to the side or rear of the principal buildings and buffering from adjoining residential lots shall be required."

City developed the "Ashley Bridge District" plan, which identified the need to maintain residential communities in the Zone, despite increased commercialization. While highlighting the need to maintain residential uses in the Zone, the plan allows certain properties along Savannah Highway and Wesley Drive to be used for limited commercial purposes, including professional office use. Under the Ashley Bridge District plan, the other properties on Harbit's side of Wesley Drive within the Zone have been rezoned for limited commercial use.

On June 15, 2005, the City of Charleston Planning Commission (the Planning Commission) reviewed Harbit's application, at which time Harbit's counsel presented Harbit's position for rezoning the Wesley Drive property. The Planning Commission, however, voted to recommend denying Harbit's rezoning application, finding the request was in contradiction to the Ashley Bridge District plan and the overall neighborhood sentiment to retain the residential use of the structures within the area. On September 27, 2005, Charleston City Council (City Council) received the Planning Commission's recommendation and held a public hearing to address local zoning issues, including Harbit's application. Harbit's counsel was present for the City Council meeting. City Council denied Harbit's request, citing a concern over increased commercialization, loss of residential use, and the special location of the property at the entrance of a residential neighborhood, particularly its frontage on a purely residential street.

After City Council's denial of his application, Harbit appealed the zoning decision to the circuit court and asserted additional grounds for relief, including a request for a writ of mandamus and causes of action for due process and equal protection violations. The City filed a motion for summary judgment on all claims, which the circuit court granted. In its order, the circuit court found a writ of mandamus was inappropriate because zoning is not a ministerial act and thus cannot be mandated by the court.[2] In dismissing Harbit's claims for procedural and substantive due process, the circuit court found Harbit was provided with sufficient notice to satisfy his procedural due process rights, and because he had no prior property interest in commercial zoning, his substantive due process rights were not violated.

[2] Harbit does not appeal the circuit court's decision on this issue.

Regarding Harbit's equal protection claim, the circuit court found City Council had a rational basis for denying Harbit's application such that Harbit was afforded equal protection of the law. It is from this order that Harbit now appeals.

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008).

ISSUE ON APPEAL

Do genuine issues of material fact exist on Harbit's claims such that the circuit court erred in granting summary judgment to the City as a matter of law?

LAW/ANALYSIS

A. "Fairly Debatable" Standard in Zoning Decisions

Harbit asserts that viewing the evidence in his favor, City Council's refusal to rezone Harbit's property is so unreasonable that this Court should invalidate City Council's decision. We disagree.

Rezoning is a legislative matter. Lenardis v. City of Greenville, 316 S.C. 471, 471, 450 S.E.2d 597, 597 (Ct. App. 1994). The legislative body's decision in zoning matters is presumptively valid, and the property owner has the burden of proving to the contrary. Rushing v. City of Greenville, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975). The authority of a municipality to enact zoning ordinances that restrict the use of privately owned property is founded in the municipality's police power. Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 530-31 (1965). The governing bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens. Id. As in this case, the determinative question is whether the city council's refusal to change the zoning of the owner's property is so unreasonable as to impair or destroy the owner's constitutional rights. Rushing, 265 S.C. at 288, 217 S.E.2d at 799. We cannot insinuate our judgment into a review of the city council's decision but must leave that decision undisturbed if the propriety of that decision is even "fairly debatable." Knowles v. City of Aiken, 305 S.C. 219, 223, 407 S.E.2d 639, 642 (1991).

Additionally, there is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and when the planning commission and the city council of a municipality have acted after reviewing all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or in clear abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy

constitutional rights is one which will be exercised carefully and cautiously, as it is not the court's function to pass upon the wisdom or expediency of municipal ordinances or regulations. Id.

We find that City Council's decision is "fairly debatable" because the City proffered several reasonable grounds for the denial of Harbit's rezoning application. First, the Planning Commission and City Council concluded that rezoning Harbit's property would not be in the community's best interests because the City has a vested interest in preserving the area's residential character and in minimizing commercialization. As stated in the Ashley Bridge District Plan, one of the major concerns in this area was increased commercialization due to rezoning. Further, both the Planning Commission and City Council cited concerns of neighborhood residents who feared loss of residential use in the area and the possibility that continued rezoning would create a domino effect. While all of the residents' concerns might not be well-founded, City Council's response to public opposition does not rise to the level of a constitutional violation. See Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F.3d 322, 329 (4th Cir. 2005) (in finding the state court of appeals' decision was not res judicata of the developers' § 1983 due process and equal protection claims, the Fourth Circuit Court of Appeals determined the city council's improper denial of the zoning application in response to public opposition did not rise to the level of a constitutional violation because "matters of zoning are inherently political, and [] it is a zoning official's responsibility to mediate disputes between developers[] and local residents").

Additionally, City Council specifically cited the unique location of Harbit's property as opposed to other properties on Wesley Drive that were zoned for limited commercial use, noting that two of its sides are situated on the interior of the neighborhood. Moreover, because it is a corner lot, the property effectively serves as a buffer between the heavier-traveled Wesley Drive and the purely residential Stocker Drive. See Hampton v. Richland County, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App. 1987) (finding the city council's refusal to rezone property from an office and industrial classification to a general commercial classification was "fairly debatable" because the property lay between commercial and residential properties thus creating a buffer between the two zones).

While other similarly situated properties on Wesley Drive are zoned for limited commercial use, the record does not indicate that Harbit was the subject of purposeful, invidious discrimination. See Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 825 (4th Cir. 1995) (internal citations omitted) ("If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim."). For instance, there are other properties on Harbit's side of Wesley Drive that are currently zoned residential, and with the exception of one property cornering on Savannah Highway and Wesley Drive, all of the properties on the other side of Wesley Drive are zoned residential. The properties on his side of Wesley Drive that are zoned for limited commercial use are distinguishable in that they either also front on Savannah Highway or are not accessed by a purely residential street.

Based on the evidence in the record, the City properly denied Harbit's rezoning application in an effort to hold the line on commercial development in the area and protect its residential nature. We will not invalidate City Council's decision as its propriety is at least "fairly debatable" based on the facts and is not "so unreasonable as to impair or destroy constitutional rights." See Knowles, 305 S.C. at 224, 407 S.E.2d at 642. As such, it is not this Court's function to pass upon the wisdom or expediency of City Council's decision. See Bob Jones Univ., Inc., 243 S.C. at 360, 133 S.E.2d at 847.

B. Due Process

Harbit contends the circuit court erred in dismissing his procedural and substantive due process claims. We disagree.

1. Procedural Due Process

Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. U.S. Const. amends. V and XIV, §1; Mathews v. Eldridge, 424 U.S. 319, 331 (1976). The fundamental requirements of due

process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review. U.S. Const. amends. V and XIV, §1; S.C. Const. art. 1, § 22; Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). Further, due process is flexible and calls for such procedural protections as the particular situation demands. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).

We are of the opinion that Harbit received due process, both procedural and substantive, thus entitling the City to judgment as a matter of law. First, Harbit was afforded procedural due process because he was provided with notice of both public hearings as evidenced by the rezoning application that he completed and signed.[3] He also had a meaningful opportunity to be heard as he was allowed to present his arguments at both the Planning Commission and City Council levels. While Harbit chose not to be present, his attorney represented Harbit's interests by presenting exhibits and arguing Harbit's position for rezoning his property in both instances.

Further, Harbit has received three levels of review, in each of which he was allowed to present his position.[4] The existence of review is an indication of the presence of procedural due process, rather than its absence. See Sunrise, 420 F.3d at 328 (finding district court properly granted city's motion for summary judgment on developers' claims for due process violations after city denied building permit as developers received four levels of state review which was "an indication of the existence of procedural due process, rather than its absence"). Because Harbit was provided with both predeprivation

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[3] The rezoning application that Harbit signed states, "The Planning Commission will hold **a public hearing** and make a recommendation to City Council for approval, approval with conditions, disapproval or deferral of the rezoning. . . . After the Planning Commission makes its recommendation, the application will be forwarded to City Council where **another public hearing** will be held approximately one month later." (emphasis added).

[4] The Planning Commission's recommendation was reviewed by City Council, whose decision was then reviewed by the circuit court, and is now before this Court.

and postdeprivation remedies, his procedural due process rights were not violated.

2. Substantive Due Process

In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency. Sunrise, 420 F.3d at 328. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property. Bear Enters. v. County of Greenville, 319 S.C. 137, 141, 459 S.E.2d 883, 886 (Ct. App. 1995). In reviewing a substantive due process challenge to a zoning ordinance, we must determine whether the ordinance bears a reasonable relationship to any legitimate government interest. See Sunset, 357 S.C. at 430, 593 S.E.2d at 470 (stating that the standard of review for all substantive due process challenges to state statutes, including municipal ordinances, is whether the statute bears a reasonable relationship to any legitimate interest of government).

The City did not violate Harbit's substantive due process rights when it denied his rezoning application. First, Harbit did not have a prior property interest in commercial zoning. While Harbit may have purchased the property with the expectation that City Council would grant his application, this alone is insufficient to establish a violation of his constitutional rights. See Rush, 246 S.C. at 280-81, 143 S.E.2d at 533 (citing to 62 C.J.S., Municipal Corporations, § 227(11)) ("Although it is an element in the situation which is entitled to fair and careful consideration, mere disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions ordinarily does not warrant relaxation in his favor . . . ."); Hampton, 292 S.C. at 503-04, 357 S.E.2d at 465 (holding a property owner is not entitled to have his property zoned for its most profitable use).

Furthermore, Harbit was aware at the time of purchasing 7 Wesley Drive that the prior owner's application had been denied based on the same zoning restrictions and that his efforts might likely share the same fate. See id. at 281, 143 S.E.2d at 533 (internal citation omitted) (in denying the plaintiff's variance request, the supreme court found that the plaintiff who purchased property after a zoning restriction was in effect must have contemplated potential hardships, financial or otherwise, resulting from the existing conditions at the time of purchase). Because the City's decision was reasonably founded and rationally related to its stated interests of preserving the area's residential character in the face of continuing commercialization, whether it be strictly commercial or limited commercial use, the City's actions did not rise to the level of being arbitrary or capricious and thus did not violate Harbit's substantive due process rights.

C. Equal Protection

Harbit also asserts the circuit court erred in dismissing his equal protection claim. We disagree.

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; see S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."). This clause requires that "the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose." Sylvia Dev. Corp., 48 F.3d at 818. It does not prohibit different treatment of people in different circumstances under the law. Town of Iva ex rel. Zoning Adminsitrator v. Holley, 374 S.C. 537, 541, 649 S.E.2d 108, 110 (Ct. App. 2007). Instead, "'the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Id. In a case such as this, the rational basis standard, rather than strict scrutiny, applies because the classification at issue does not affect a fundamental right and does not draw

upon inherently suspect distinctions such as race, religion, or alienage. Sunset Cay, 357 S.C. at 428-29, 593 S.E.2d at 469.

Further, one seeking to show discriminatory enforcement in violation of the Equal Protection Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced. See State v. Solomon, 245 S.C. 550, 574, 141 S.E.2d 818, 831 (1965). "[E]ven assuming [a governmental entity] is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation." Denene, Inc. v. City of Charleston, 359 S.C. 85, 96, 596 S.E.2d 917, 922 (2004).

The City had a rational basis to deny Harbit's application, despite the fact that other properties on Wesley Drive were zoned for limited commercial use. As the circuit court notes in its order, Harbit's property is the only one of those properties which has frontage on Stocker Drive. Further, unlike the other properties, Harbit's property effectively serves as a buffer between the purely residential Stocker Drive and the heavier-traveled Wesley Drive. In contrast to Harbit's property, the other corner property on his side of Wesley Drive that is zoned for limited commercial use has frontage on Savannah Highway and abuts other commercial property. Consequently, because the record does not indicate that Harbit was the subject of purposeful, invidious discrimination, the circuit court did not err in granting summary judgment on his equal protection claim. See Sylvia Dev. Corp., 48 F.3d at 825 (internal citations omitted) ("While an equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals, a showing of such disparate treatment, even if the product of erroneous or illegal state action, is not enough by itself to state a constitutional claim."). Consequently, the circuit court appropriately granted summary judgment on Harbit's claims stemming from the denial of his rezoning application.

CONCLUSION

Based on the foregoing, the circuit court did not err in granting the City's motion for summary judgment.

Accordingly, the circuit court's order is

AFFIRMED.

WILLIAMS AND PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jennifer Bryant, Appellant.

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

Opinion No. 4539
Heard February 18, 2009 – Filed May 5, 2009

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

John Benjamin Aplin, of Columbia, for Respondent.

LOCKEMY, J.: Jennifer Bryant appeals the trial court's revocation of her probation based on her failure to pay restitution. Bryant alleges the trial court erred in: (1) failing to obtain a valid waiver of her right to counsel at the probation revocation hearing and (2) failing to find Bryant willfully failed to pay restitution. We affirm.

FACTS AND PROCEDURAL BACKGROUND

An Orangeburg County grand jury indicted Bryant for passing stolen lottery tickets, and Bryant pled guilty to the charges. The trial court sentenced her to five years of probation and ordered her to pay $11,822.51 in restitution and $643.75 in fines. The trial court ordered Bryant to pay $500 on the day of the sentence, $2,500 in six months, and make monthly payments afterwards as set by probation. Bryant failed to pay any of the restitution by the original due date, and a trial judge restructured the restitution payment plan. Bryant made sporadic payments towards her fines and restitution for the next year and a half, but made no payments thereafter.

Subsequently, the Department of Probation, Parole and Pardon Services issued a probation violation citation and served Bryant with a "Notice of Probation Violating Hearing and Acknowledgment of Notice" (Probation Notice). At the probation hearing, Bryant was not represented by counsel. The probation court proceeded with the hearing, inquiring into Bryant's failure to pay restitution. Bryant testified she was employed at two different jobs. In her first job, she was placed in the Restitution Center and worked at McDonald's for six months, enabling her to pay $300 towards restitution. At her second job, she worked at Dawn Pet Care but stopped working there and was not able to make the restitution payments since.

Ultimately, the probation court found Bryant waived her right to counsel and revoked two years of her probationary sentence. Specifically, the probation court stated:

> Ms. Bryant, I don't think you take probation very seriously. The court is going to revoke two years of her sentence, continue her on probation – toll probation while incarcerated, and we'll continue probation after her release from incarceration. You've got to learn that you're either going to do the time or you're going to pay the money.

This appeal followed.

ISSUES ON APPEAL

A. Did the probation court fail to obtain a valid waiver of the right to counsel from Bryant during the probation revocation hearing?

B. Did the probation court err in failing to find Bryant willfully failed to pay restitution?

LAW/ANALYSIS

A. Waiver of the Right to Counsel

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before [s]he can be validly convicted and punished by imprisonment." State v. Thompson, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003) (citing Faretta v. California, 422 U.S. 806, 807 (1975)). "The right to counsel attaches in probation revocation hearings." Salley v. State, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991). The erroneous deprivation of this right constitutes per se reversible error. Thompson, 355 S.C. at 261, 584 S.E.2d at 134.

One can waive her right to counsel. It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier by the accused. Id. at 261-62, 584 S.E.2d at 134-35. To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation. State v. McLauren, 349 S.C. 488, 493-94, 563 S.E.2d 346, 348-49 (Ct. App. 2002). In Faretta, the United States Supreme Court requires a defendant to be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what [s]he is doing and h[er] choice is made with eyes open." 422 U.S. at 835 (internal citation omitted). A specific inquiry by the trial court expressly addressing the disadvantages of appearing pro se is preferred. Thompson, 355 S.C. at 262-63, 584 S.E.2d at 135. However, when the trial court fails to expressly make this inquiry, this court will examine the record to determine whether the accused had sufficient background or was apprised

of her rights by some other source. McLauren, 349 S.C. at 494, 563 S.E.2d at 349.

This court can consider the following ten factors to determine if an accused has the sufficient background to understand the dangers of self-representation:

> (1) the accused's age, educational background, and physical and mental health;
> (2) whether the accused was previously involved in criminal trials;
> (3) whether [s]he knew of the nature of the charge and of the possible penalties;
> (4) whether [s]he was represented by counsel before trial or whether an attorney indicated to h[er] the difficulty of self-representation in h[er] particular case;
> (5) whether [s]he was attempting to delay or manipulate the proceedings;
> (6) whether the court appointed stand-by counsel;
> (7) whether the accused knew [s]he would be required to comply with the rules of procedure at trial;
> (8) whether [s]he knew of legal challenges [s]he could raise in defense to the charges against h[er];
> (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and
> (10) whether the accused's waiver resulted from either coercion or mistreatment.

Id. When looking at the entire record and considering these ten factors, we believe Bryant had sufficient background or was apprised of her rights by some other source.

In its final ruling, the probation court found Bryant waived her right to counsel. Specifically, the probation court stated Bryant "underst[ood] the

nature of these proceedings, [and] she[] freely and voluntarily waived her right to counsel." In determining whether Bryant validly waived her right, we first note the exchange between the probation court and the probationer during the probation hearing. There, the probation court noted Bryant was not represented by counsel, and engaged in the following colloquy with Bryant:

> Q: Do you understand that you have a right to have a lawyer represent you in connection with these proceedings?
>
> A: Yes, sir.
>
> Q: Do you wish for the court to inquire as to whether you would be entitled to a court appointed lawyer or do you wish to go forward today?
>
> A: I want to go forward.
>
> Q: Okay. Do you understand that an attorney may be of benefit to you, for example, there may be things I need to be told that you do not know to tell me, and that if you talk with a lawyer you and the lawyer would learn these things, do you understand that?
>
> A: Yes, sir.
>
> Q: Understanding that, do you still wish to waive your right to counsel and go forward?
>
> A: Yes, sir.
>
> Q: Alright. At anytime before I make a determination in this matter, if you desire to talk to a lawyer all you have to do is tell me

> and I'll stand aside and give you a chance to talk to a lawyer, do you understand?
>
> A: Yes, sir.

The probation court's colloquy adequately informed Bryant of her right to counsel and informed Bryant of the benefits of retaining counsel. Further, the probation court indicated Bryant could invoke her Sixth Amendment right at any point prior to a final ruling. However, the probation court did not expressly address the dangers and disadvantages of appearing pro se as required by Faretta v. California, 422 U.S. at 835.

However, prior to her hearing, Bryant signed a Probation Notice with her probation officer. The Probation Notice stated, in pertinent part:

> You may have an attorney represent you at the hearing. If you cannot afford any attorney and you desire the representation of the Orangeburg County Public Defender, you must apply for an appointed attorney with that office. If you choose to appear at the hearing without an attorney, you may be required to represent yourself. You are hereby advised that there are dangers and disadvantages to self representation. An attorney may better understand courtroom procedure and may be better able to think of and present defenses to your probation violations. By appearing without an attorney you are acknowledging these dangers but are knowingly and voluntarily choosing to proceed without counsel . . . . This directive has been read to me and I have been provided with a copy. I was also given an opportunity to ask questions about this directive before it was signed.

(emphasis added)

Furthermore, this was Bryant's third appearance before the probation court for violations. Bryant first appeared before the probation court for failing to follow the advice and instructions of her supervising agent, failing to make payments, and falling in arrears. As a result, the probation court extended Bryant's time to pay and placed her on the restitution center waiting list, which she later entered. Bryant appeared before the probation court a second time for the same violations and there, the probation court reduced her payments and ordered her to pay restitution within thirty days. Additionally, we note Bryant had previously been represented by counsel for her charges.

Based on Bryant's previous experience in the criminal justice system, her previous representation by counsel, the signed Probation Notice, and the probation court's colloquy with her, we believe Bryant had both a sufficient background and was apprised of her rights by some other source. Accordingly, we recommend affirming the probation court's finding that Bryant validly waived her Sixth Amendment right to counsel.

B. Finding of Willfulness

Because we find Bryant validly waived her Sixth Amendment right to counsel, she was required to comply with our preservation requirements. See State v. Burton, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003) ("A pro se litigant who knowingly elects to represent h[er]self assumes full responsibility for complying with substantive and procedural requirements of the law."). Here, Bryant did not argue she did not willfully fail to pay. Because Bryant failed to raise this issue to the probation court, it is not preserved for our review. An issue must be raised and ruled upon in the circuit court in order to be preserved for appellate review. State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (stating an issue must be raised and ruled upon in the trial court in order to be preserved for appellate review); State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 96-97 (Ct. App. 1999) (stating the failure to raise the issue of willfulness at a probation revocation hearing can waive the right to appeal). The probation court's revocation is therefore

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

C. Steve Clardy and Michael S. Clardy, Respondents,

v.

Jack Bodolosky and United Land-Magnolia, LLC, Appellants.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4540
Heard February 4, 2009 – Filed May 5, 2009

AFFIRMED IN PART AND REVERSED IN PART

Fred B. Newby and C. Leigh Andrew, both of Myrtle Beach, for Appellants.

David B. Miller and Robert S. Shelton, both of Myrtle Beach, for Respondents.

LOCKEMY, J.: In this breach of contract action, Jack Bodolosky and United Land-Magnolia, LLC (collectively Bodolosky) appeal the trial court's judgment in favor of C. Steve Clardy and Michael S. Clardy. Specifically, Bodolosky argues the trial court erred by ordering him to carry out the terms of his real estate contract with the Clardys and deliver title of real property to them. Bodolosky maintains there was no "meeting of the minds" between the parties to warrant enforcement of the contract. Finally, Bodolosky contends the trial court erred in awarding attorney's fees to the Clardys. We affirm in part and reverse in part.

FACTS/PROCEDURAL BACKGROUND

This appeal involves a real estate contract dispute over the Southerner Motel and the Tradewinds Motel (the Motels) in Myrtle Beach. Prior to the present action, Bodolosky was under contract to purchase the Motels from Johnny Elvington and Landis Elvington. Bodolosky had not closed on his contract when Steve and Jack Clardy approached him about purchasing the Motels. The Clardys owned the Boardwalk Hotel, which is adjacent to the Motels at issue.

The Clardys received a contract from Bodolosky for the purchase of the Motels for $2.4 million on April 28, 2005. Under the terms of the contract, the Clardys had to pay $150,000 in nonrefundable earnest money and negotiate other contract terms with Scott Long, Bodolosky's attorney. The offer to purchase expired on May 2, 2005; however, Bodolosky extended the deadline to 5:00 p.m., May 12, 2005. Once the extended deadline expired, the Clardys received a letter which indicated Bodolosky had withdrawn the contract.

Mike Clardy then contacted Bodolosky directly and expressed his continued interest in purchasing the Motels. Bodolosky indicated he would go through with the sale but increased the purchase price to $2.5 million and increased the earnest money to $200,000. Additionally, the Clardys had to accept the new offer and send in earnest money by 5:00 p.m. on May 18,

2005. According to Mike Clardy's testimony, Bodolosky indicated he would make the corrections and initial them on the existing contract. Bodolosky left the amended contract at Long's office. Subsequently, Steve Clardy signed the amended contract at Long's office on May 18, 2005. Pursuant to the amended contract terms, the Clardys paid $200,000 in earnest money by writing a check to Bodolosky's attorney, rather than Bodolosky. According to Michael Clardy's testimony, Long instructed the Clardys to make the check out to his trust account, and the Clardys issued a check to "J. Scott Long Trust Account."

After the Clardys tendered the earnest money, Bodolosky negotiated and entered into an Operating Agreement forming United Land-Magnolia, LLC (Land-Magnolia). Land-Magnolia took title to the Motels, and Bodolosky testified he formed Land-Magnolia for the express purpose of purchasing and developing the Motels he had just sold to the Clardys. Accordingly, he attempted to rescind his contract with the Clardys. Thus, on June 2, 2005, Bodolosky sent Michael Clardy a letter claiming no purchase agreement was in effect between the parties, and he had instructed his attorney to return the earnest money. Since his attempt to rescind the contract, Land-Magnolia abandoned plans to develop the property and sold the property to Cypress Bay, LLC.

The Clardys filed suit against Bodolosky seeking declaratory judgment, specific performance, breach of contract, and breach of contract accompanied by a fraudulent act. Additionally, the Clardys sought attorney's fees and costs. In his answer, Bodolosky counterclaimed for malicious prosecution and abuse of process; however, upon consent of the parties, the trial court dismissed the counterclaims.

The trial court found the Clardys complied with the terms of the real estate contract "as they understood them to be" and "simply performed as they were instructed." Thus, the trial court held there was a meeting of the minds between the parties, and the Clardys performed their pre-closing obligations. Additionally, the trial court granted the Clardys' request for specific performance and ordered Bodolosky to deliver title of the real

property to the Clardys. Finally, the trial court found the Clardys were entitled to $42,849.42 in attorney's fees and costs.

After the trial, Bodolosky filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, where he asked the trial court to reconsider its ruling in favor of the Clardys and instead find no contract existed between the parties and find that there had not been a meeting of the minds. In his motion, Bodolosky requested the trial court specifically rule on whether the hand-written provisions in the agreement were controlling over the pre-printed provisions. Additionally, Bodolosky asked the trial court to reconsider its ruling awarding attorney's fees and argued the amount of attorney's fees awarded was unreasonable. The trial court denied Bodolosky's motion to reconsider but, in its order, specifically ruled the hand-written provisions in the agreement were controlling. This appeal followed.

STANDARD OF REVIEW

An action for specific performance is one in equity. Campbell v. Carr, 361 S.C. 258, 262-63, 603 S.E.2d 625, 627 (Ct. App. 2004). "In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence." Greer v. Spartanburg Technical College, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). "This broad scope of review does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses." Id. "An action to construe a contract is an action at law." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "A legal question in an equity case receives review as in law." Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "Questions of law may be decided with no particular deference to the trial court." S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008). "This court may correct errors of law in both legal and equity actions." Id.

LAW/ANALYSIS

I. Meeting of the Minds

Bodolosky contends the trial court erred in finding there was a meeting of the minds and finding the contract was enforceable as a matter of law. We disagree.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original); see also Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987) ("It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms."). "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). In Player v. Chandler, the South Carolina Supreme Court asserted:

> The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.

299 S.C. at 105, 382 S.E.2d at 894.

Here, the trial court found there was a clear meeting of the minds between the parties to the contract. Further, the trial court held the Clardys complied with the requirements of the contract as they understood them to be and simply performed as they were instructed. We believe there was a

meeting of the minds between Bodolosky and the Clardys regarding the material terms of the contract. Furthermore, evidence demonstrates the necessary terms of the contract existed: Bodolosky made and initialed a new offer; the Clardys accepted the new offer; and the Clardys provided $200,000 in earnest money as valuable consideration. If writing an earnest money check directly to Bodolosky was material to him, Bodolosky should have made it known to the Clardys. Id. at 105, 382 S.E.2d at 894 (stating the "meeting of minds" requirement is not based on secret purpose or intention on the part of one of the parties). Accordingly, we affirm the trial court's determination that a meeting of the minds occurred between the parties.

II. Specific Performance

Bodolosky next argues the trial court erred in finding the Clardys were entitled to specific performance because the contract was clear on its face. Specifically, Bodolosky contends the contract required the Clardys pay him directly rather than write a check to his attorney's trust account because the parties did not intend to use an escrow agent. Additionally, Bodolosky maintains the handwritten provisions in the contract took precedence over the pre-printed provisions. We disagree.

The trial court should only grant specific performance if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. Ingram v. Kasey's Assocs., 340 S.C. 98, 105-06, 531 S.E.2d 287, 291 (2000). The Ingram court stated:

> In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

Id. at 106, 531 S.E.2d at 291. "Mere inadequacy of consideration is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud." Campbell v. Carr, 361 S.C. 258, 264, 603 S.E.2d 625, 628 (Ct. App. 2004) (citing Ingram, 340 S.C. at 106, 531 S.E.2d at 291).

"The doctrine of substantial performance was conceived for the case where a plaintiff's partial performance has already given to a defendant substantially all that he bargained for and is of such a nature that it cannot be returned." Coastal Seafood Co., Inc. v. Alcoa S.C., Inc., 298 S.C. 466, 467-68, 381 S.E.2d 502, 503 (Ct. App. 1989) (citing Diamond Swimming Pool Co. v. Broome, 252 S.C. 379, 384, 166 S.E.2d 308, 311 (1969)). In Elliott v. Snyder, the seller under an installment land sale contract brought an action for rescission and cancellation thereof. 246 S.C. 186, 143 S.E.2d 374 (1965). The buyer tendered an installment check which was returned marked "drawn against uncollected funds." Id. at 190, 143 S.E.2d at 376. The court held the seller was on notice that the check was not worthless but that the funds drawn upon had not been collected at that time. Id. at 191, 143 S.E.2d at 376. Further, the court found there was substantial compliance with the terms of the contract sufficient to prevent forfeiture, and the seller was not entitled to rescind. Id.

We find the Clardys satisfied the elements of the Ingram test: there is evidence of a valid agreement, the Clardys performed their part of the contract with Bodolosky's consent, and the Clardys remain able and willing to buy the real estate. Additionally, the Clardys substantially performed their part of the contract and gave Bodolosky substantially all that he bargained for even if we assume the contract required the Clardys write the earnest money check directly to Bodolosky rather than to Long's trust account. Furthermore, the express provisions of the contract do not make strict compliance essential; therefore, substantial compliance is sufficient. See Coastal Seafood, 298 S.C. at 468, 381 S.E.2d at 503 ("Where a contract, by its express provisions, makes strict compliance essential, substantial performance is not sufficient.").

Additionally, the trial court found Mike Clardy's testimony provided "the most credible explanation of the events surrounding the execution and delivery of the earnest money check." Mike Clardy testified he called Long to find out how to make out the earnest money check, and Long instructed him to make the earnest money check out to Long's trust account. Under our standard of review, this court can give deference to the trial court's credibility determinations. See Greer v. Spartanburg Technical College, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999) ("This broad scope of review does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses."). Therefore, we affirm the trial court's decision to grant the Clardys specific performance based on the Ingram test, the Clardys' substantial compliance, and the trial court's credibility determination.

III. Attorney's Fees

A. Decision to Award and Amount

Finally, Bodolosky alleges the trial court erred in awarding attorney's fees and in finding the attorney's fees were reasonable as a matter of law. We disagree.

A party cannot recover attorney's fees unless authorized by contract or statute. Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997); see also Hegler v. Gulf Ins. Co., 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute."). The Jackson court asserted: "[C]ourt[s] should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Id. at 308, 486 S.E.2d at 760. "On appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor." Id.

Here, no statute authorizes an award of attorney's fees; therefore, we must look to the contract for such remedy. See Hegler, 270 S.C. at 549, 243 S.E.2d at 444 ("No right to recover is here asserted under any statute. Appellant then must recover, if at all, upon some contractual right."). Attorney's fees were authorized under the default clause of the contract. Specifically, the default clause provides: "If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred . . . or terminate this Agreement with a five day written notice."

The trial court awarded the Clardys attorney's fees and costs for having to initiate suit in order to carry out the terms of their contract. Further, the trial court took the six factors of Jackson into account, and noting the current action was for specific performance, considered: 1) the nature, extent, and difficulty involved in the action; 2) the reasonableness of attorney's fees and costs; 3) affidavits outlining specific hours spent prosecuting the case; and 4) the customary hourly rates charged in the area. Additionally, the trial court found the attorney's fees sought were well within the custom of our practice area and reasonable under the specific facts of the present matter. Finally, the trial court noted the professional standing of the Clardys' counsel, and found counsel's experience in similar matters was influential in securing the Clardys' beneficial results. Accordingly, the trial court properly considered the six factors set forth in Jackson in awarding $42,849.42 in attorney's fees and costs, and we affirm the award.

B. Land-Magnolia's Obligation to Pay

As a final matter, Bodolosky argues the trial court erred in ordering Land-Magnolia be responsible for the award of attorney's fees and costs because Bodolosky, not Land-Magnolia, entered into the land sale contract with the Clardys. Bodolosky maintains there is no privity of contract because Land-Magnolia was not a party to Bodolosky's real estate contract with the Clardys. We agree.

"Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from

the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (citing Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)). However, with proof of a valid assignment of contract, an assignee can be bound to certain equities of the contract. See Welling v. Crosland, 129 S.C. 127, 137, 123 S.E. 776, 780 (1924) (internal citation omitted) ("The assignee of a contract is bound by the same equities which existed between the original parties to the contract, having purchased with a full knowledge of the state of things.").

Here, Land-Magnolia took title to the Motels; however, Bodolosky never assigned Land-Magnolia his real estate contract with the Clardys. Though Land-Magnolia was a necessary party to the present action, it was not a party to the real estate contract at issue. Consequently, Land-Magnolia cannot now be responsible for attorney's fees given there is no privity of contract. Rather, Bodolosky alone should incur attorney's fees and costs. Moreover, the trial court had the authority to award attorney's fees and costs based on the language of the Clardy contract, and Land-Magnolia did not have the benefit of participating in the negotiation of the contract at issue. Therefore, the trial court erred in finding Land-Magnolia was obligated to pay attorney's fees pursuant to Bodolosky's contract with the Clardys even though Land-Magnolia was an active participant in the events and decisions leading to the present action. Accordingly, the trial court's finding that Land-Magnolia is responsible for attorney's fees and costs is therefore reversed.

CONCLUSION

We find the trial court did not err in ordering Bodolosky carry out the terms of his real estate contract with the Clardys and deliver title of real property to them. Additionally, we find there was a "meeting of the minds" between the parties to warrant enforcement of the contract. Finally, we believe the trial court properly awarded attorney's fees but find the trial court erred in holding Land-Magnolia responsible for any portion of attorney's fees and costs. The decision of the trial court is therefore

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ferris Geiger Singley, Appellant.

Appeal From Charleston County
Honorable R. Knox McMahon, Circuit Court Judge

Opinion No. 4541
Submitted March 4, 2009 – Filed May 6, 2009

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R.J. Shupe; all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

SHORT, J.: Ferris Geiger Singley appeals his first-degree burglary conviction and sentence of life without parole, arguing the trial court erred in denying his directed verdict motion because one cannot commit the offense of burglary by breaking into one's own dwelling. We affirm.

FACTS

In late August 2001, Singley's father passed away. As a result, his father's ownership interest in Singley's childhood home passed intestate to Singley, his mother, and his brother.[1] Singley grew up in the home and lived there until his early twenties. Singley returned and resided in the home briefly in 2005, but his mother requested he leave the home in April of the same year. His mother testified Singley did not have permission to enter the house after April 2005. She also stated Singley did not return his key, but informed her he had lost it.

In October 2005, Singley's mother returned home from a night out when Singley jumped her from behind, put a knife to her throat,[2] and demanded money. His mother gave him all the money she had at the time. Then, Singley forced his mother into the bedroom and tied her to the bed. After he left, Singley's mother untied herself and went to a neighbor's house for help.

Singley was charged with kidnapping, armed robbery, and first-degree burglary. At trial, Singley moved for a directed verdict on the first-degree burglary charge, arguing he was part owner of the house and could not be found guilty of burgling his own home. The trial court denied Singley's motion. The jury convicted Singley of armed robbery and first-degree

[1] Singley and his brother each owned 12.5% of the house, and his mother owned 75% of the house.

[2] Singley's mother testified at trial that he told her he entered the house by crawling through a bedroom window.

burglary. Singley was sentenced to two concurrent sentences of life without parole pursuant to statute.[3] This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. Id. at 292-93, 625 S.E.2d at 648.

LAW/ANALYSIS

First-degree burglary is defined in section 16-11-311 of the South Carolina Code of Laws (2003):

> A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
>
> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
>
> (a) is armed with a deadly weapon or explosive; or

[3] S.C. Code Ann. § 17-25-45 (2003).

(b) causes physical injury to a person who is not a participant in the crime; or

(c) uses or threatens the use of a dangerous instrument; or

(d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

(3) the entering or remaining occurs in the nighttime.

Entering a building without consent is defined as entering "without the consent of the person in lawful possession" or entering "using deception, artifice, trick, or misrepresentation to gain consent to enter from the person in lawful possession." S.C. Code Ann. § 16-11-310 (2003).

While "lawful possession" has not been defined by South Carolina statutes or case law, burglary has historically developed as a crime against the possession of the dwelling. For instance, State v. Brooks, 277 S.C. 111, 112, 283 S.E.2d 830, 831 (1981), defines burglary as "a crime against possession, not against property." See also State v. Miller, 225 S.C. 21, 26, 80 S.E.2d 354, 356 (1954) ("The offense of housebreaking is an offense against possession.") (citing State v. Alford, 142 S.C. 43, 44, 140 S.E. 261, 261 (1927) ("Burglary and arson are crimes against possession and not against property.")). Furthermore, "[t]he law of burglary is primarily designed to secure the sanctity of one's home, especially at nighttime when peace, solitude[,] and safety are most desired and expected." Brooks, 277 S.C. at 112, 283 S.E.2d at 831. "Thus, at the heart of burglary law is protection of the individual and family from unlawful intrusion while home at night." Id. at 113, 283 S.E.2d at 831.

Moreover, an early discussion of the possessory interest rather than ownership interest with regards to a burglary indictment is found in State v. Trapp, 17 S.C. 467 (1882). Trapp was convicted of burglary and challenged his conviction on the ground that the indictment listed a woman as the owner of the house he burglarized, rather than her husband, the legal owner. Id. at 469. Our supreme court stated there are two reasons for requiring the ownership of the house to be stated in the indictment for burglary: (1) "For the purpose of showing on the record that the house alleged to have been broken into, was not the dwelling house of the accused, inasmuch as one cannot commit the offense of burglary by breaking into his own house" and (2) "For the purpose of so identifying the offence, as to protect the accused from a second prosecution for the same offence." Id. at 470. The court went further to say:

> It is true that burglary is an offence against the habitation of some other person, but it is very clear that it is not essential that such habitation shall be alleged to be that of the person who actually occupies-inhabits-the house at the time it is broken into, for there are quite a number of cases in which indictments alleging ownership in the master have been sustained, where the house was, at the time, not occupied by the master, but by some other person as his servant or agent.

Id. at 471. Likewise, Trapp discussed an earlier case from Michigan, Snyder v. The People, 26 Mich. 106 (1872), where the element "dwelling of another" was at issue. Trapp, 17 S.C. at 472. There, the court determined even when the perpetrator of the property crime of arson is married to the individual with sole legal ownership, the arsonist may be found guilty of arson if the property is not his abode. Id.

Additionally, a few South Carolina cases have addressed burglary in the context of a person with either permission to be in the dwelling, or a person who formerly had permission to be in the dwelling. For example, State v. Bee, 29 S.C. 81, 83, 6 S.E. 911, 912 (1888), provided a servant,

sleeping in an adjacent room, can commit burglary in the dwelling house by "unlatching his master's door, and entering his apartment" with the intent to commit a felony. Id. Additionally, in State v. Howard, 64 S.C. 344, 348-49, 42 S.E. 173 (1902), our court stated while one cannot commit burglary of his own dwelling house, when a servant enters a latched or fastened door at night for the purpose of committing a felony, it amounts to burglary. Id., 42 S.E. at 175.

Most recently, the South Carolina Supreme Court affirmed the denial of a directed verdict in State v. Coffin, 331 S.C. 129, 132, 502 S.E.2d 98, 99 (1998). In Coffin, the defendant was convicted of first-degree burglary[4] after entering his girlfriend's home and stabbing her to death. Id. at 132, 502 S.E.2d at 98. The victim's roommate testified the victim was the only other person with a key to the residence, her name was the only one signed on the lease, and Coffin's identification was "affixed pursuant to a clause requiring that 'visitors' be approved." Id. at 132, 502 S.E.2d at 99. The Court affirmed the trial court's denial of Coffin's directed verdict motion, finding the evidence "supports the inference [Coffin] was a guest in [the victim's] home and she was entitled to terminate [his] lawful possession by evicting him as she did before the stabbings occurred." Id. at 132, 502 S.E.2d at 99. The Court held the evidence presented a jury question as to whether Coffin "was in lawful possession of the mobile home at the time of the stabbings."[5] Id.

Courts in other states have made similar conclusions when interpreting the issue of lawful possession. See State v. Harold, 325 S.E.2d 219, 222 (N.C. 1985) ("The defendant's emphasis on the issue of ownership is misplaced . . . the inquiry relevant to this element of the crime is whether the premises is the dwelling of another, not whether it is owned by another.") (emphasis in original); Murphy v. State, 234 S.E.2d 911, 914 (Ga. 1977) ("'Ownership', as that term is used in property law, is not an essential

[4] Coffin was also convicted of murder, assault and battery with the intent to kill, and two counts of possession of a knife during the commission of a violent crime. Coffin, 331 S.C. at 129-30, 502 S.E.2d at 98.

[5] Coffin also stabbed his girlfriend's roommate. Coffin, 331 S.C. at 131, 502 S.E.2d at 98.

ingredient to proving that the premises entered were 'the dwelling house of another' within the meaning of our burglary law . . . [a]ll that is required was that . . . it was occupied.").

Here, while Singley lawfully owned 12.5% of the dwelling, we do not believe his ownership of title gave him a possessory interest recognized under the burglary statute. Under the statute, it is clear that Singley's mother, not Singley, was the person in lawful possession. This is most notably evidenced by Singley's acknowledgement of his mother's right to occupancy and possession by his acquiescence to her demand for him to vacate the house in April 2005. Additionally, Singley's mother owned 75% of the dwelling, and Singley's mode of entrance through a window implies his entry was without consent.

Thus, we believe the trial court did not err in denying Singley's directed verdict motion because the State offered sufficient evidence to prove all the elements of burglary, including establishing Singley's mother as the sole lawful possessor of the dwelling when the burglary occurred. Additionally, the State proved Singley entered unlawfully and without his mother's consent.

CONCLUSION

Accordingly, Singley's conviction is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Padgett, Appellant,

v.

Colleton County, Respondent.

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

Opinion No. 4542
Heard February 4, 2009 – Filed May 6, 2009

REVERSED AND REMANDED

Michael Davis Moore, of Ridgeville, for Appellant.

J. Reaves McLeod, of Walterboro, for Respondent.

THOMAS, J.: This is an appeal of a directed verdict in a premises liability lawsuit. Plaintiff James Padgett alleged he sustained injuries after stepping into a hole on the Colleton County Courthouse grounds. After Padgett presented his case, the County moved for a directed verdict, which

the trial judge granted, holding (1) the dangerous condition causing Padgett's injuries was open and obvious, and (2) there was no proof of an agency relationship between the County and the party who had allegedly created the hazard. Padgett appeals. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On December 9, 2003, Padgett went to the Colleton County Courthouse to check on a deed. Upon arriving, Padgett walked down a cement walkway to the back door of the Courthouse, where he saw Richard Jenkins, who had come to the Courthouse to make a child support payment. Padgett and Jenkins did not know each other.

Upon discovering the back door was locked, Padgett followed Jenkins around the side of the Courthouse. Instead of taking the sidewalk, the two took a shorter well-worn path on the grounds that had been made by other visitors to the Courthouse. Although Jenkins "noticed the ground was kind of messed up," he continued walking. When he reached the side door of the Courthouse, he noticed Padgett had fallen.

Padgett testified he fell when he suddenly stepped into a hole that was about eight inches deep. He landed on his backside, initially feeling disoriented. Jenkins helped Padgett up and informed Courthouse security about the accident.

On January 23, 2004, Padgett filed this action against Colleton County seeking damages under the South Carolina Tort Claims Act. In his complaint, Padgett alleged the County was negligent, grossly negligent, willful and wanton in (1) failing to warn the public about the hazard causing his injuries, (2) failing to place warning signs, (3) failing to fence off the holes on the Courthouse grounds, (4) failing to supervise its employees, and failing to use the degree of care and caution that a reasonably prudent person would have used under similar circumstances. He also maintained the County, by and through its employees, created and maintained a dangerous condition.

In its answer filed April 27, 2004, the County denied liability and by way of affirmative defense alleged (1) Padgett's own negligence was the sole cause of his injuries; and (2) under the Tort Claims Act, the County was not liable for losses resulting from acts or omissions of anyone other than its own employees.

The matter was tried before a jury from December 11 through December 13, 2006.

At trial, Jenkins testified that, although the area in which Padgett fell was not barricaded, it was "pretty rough," with "soil turned upside down" and "roots sticking up." Nevertheless, Jenkins also stated that, even though there was a sidewalk, the path they took was shorter and well-worn. Furthermore, Padgett maintained they were unable to take the walkway because cement had been freshly poured; therefore, he had no choice but to walk on the grounds. He also testified that he did not see any holes and the terrain was smooth.

Jenkins did not actually see Padgett fall and at trial did not give definitive information as to the cause of the accident. While on the stand, however, he acknowledged stating in a deposition that the hole in which Padgett had stepped was a "nice size for a foot to fall in, just enough for a foot" and about the depth of a flower pot. In addition, Padgett testified that he had fallen into a hole that was "about the size of post hole diggers . . . and . . . full of soft sand and straw. He further testified that the ground where he fell was smooth and perfectly level."

According to Patricia Grant, the Colleton County Clerk of Court, shrubbery was being removed from the Courthouse grounds in 2003 for security reasons. Grant could not recall seeing any signs prohibiting pedestrian traffic on the grass. She also testified that she did not notice any of the walkways were disabled.

Karla Daddieco, the Administrative Services Director for Colleton County in 2003, testified that in October 2003 the County entered into a contract with Jeffrey Simmons Lawn Care for general lawn maintenance. Simmons also agreed to an addendum to the contract under which he would provide for removal of stump shrubbery at the Courthouse for $400. Daddieco stated the County considered the agreement to be a small contract and did not require Simmons to be bonded or have liability insurance. At the prompting of counsel for the County, the court admonished Padgett's attorney out of the jury's presence that references to liability insurance was inappropriate. When the jurors returned to the courtroom, the judge again instructed them to disregard the reference to insurance.

Consistent with Grant's testimony, Daddieco also maintained none of the sidewalks were closed down on December 9, 2003. Daddieco further testified that she had no personal knowledge that Simmons had used any caution tape in connection with the landscaping work. She had no opinion as to whether Simmons would have been responsible for doing this if it had been required; however, she acknowledged giving deposition testimony that it was her assumption that caution tape would be used in connection with landscaping projects undertaken by Simmons. She also admitted to having seen people on the lawn of the Courthouse and testified that the facilities director would have had the responsibility for making sure Simmons used caution tape. Daddieco further acknowledged the Courthouse was a place of public accommodation for all individuals.

At the close of Padgett's case-in-chief, the County moved for a directed verdict, arguing (1) there was no actionable negligence on its part that was the proximate cause of Padgett's injuries and Padgett's own negligence was the proximate cause of his injuries; (2) the alleged hazard causing Padgett's injuries was an obvious defect; and (3) to the extent that the hole was a latent defect, the County could not be liable for Padgett's injuries because it could not have discovered it through reasonable inspection.

The trial judge directed a verdict for the County, finding (1) the condition causing Padgett's injuries was an open and obvious defect for

which no warning was necessary from the County; and (2) there was no evidence connecting the County to Simmons in terms of any kind of agency liability. Padgett then made a motion to alter or amend the judgment and a motion for a mistrial or in the alternative for a new trial. Following the denial of these motions, Padgett filed this appeal.

ISSUES

I. Did Padgett present sufficient evidence to create a jury issue as to whether the condition causing him to fall was open and obvious?
II. Notwithstanding evidence that the condition causing Padgett's fall was open and obvious, was the County subject to liability based on evidence that it should have anticipated the harm that resulted from the condition?
III. Did the trial judge err in basing his decision to direct a verdict for the County on the fact that Simmons was an independent contractor?

STANDARD OF REVIEW

A court should deny a directed verdict motion "when the evidence yields more than one inference or its inference is in doubt." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "When reviewing the trial court's ruling on a motion for a directed verdict, we must employ the same standard as the trial court—that is, we must consider the evidence in the light most favorable to the non-moving party." Fickling v. City of Charleston, 372 S.C. 597, 603, 643 S.E.2d 110, 113 (Ct. App. 2007), cert. denied, October 31, 2007. In reviewing a directed verdict, the appellate court "must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." Pye v. Estate v. Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006).

LAW/ANALYSIS

I. The Open and Obvious Nature of the Hazard

Padgett argues the trial judge, in finding the hole in which he fell was an open and obvious hazard, improperly weighed competing evidence on this issue. We agree.

"Reasonable care on the part of [a] possessor [of land] . . . does not ordinarily require precautions, or even warning, against dangers which are known to [a] visitor, or so obvious to him that he may be expected to discover them." Restatement (Second) of Torts § 343A cmt. e (1965) (quoted in Creech v. S.C. Wildlife and Marine Res. Dep't, 328 S.C. 24, 31, 491 S.E.2d 571, 574 (1997)).

As the County pointed out in its brief, the trial judge, in granting its directed verdict motion, found that no reasonable juror could dispute the physical evidence presented, namely, a photograph of the area that was taken shortly after the accident occurred. In ruling on the motion, the trial judge described his observations in detail, noting as follows:

> As you move on over toward those steps, you can see that the land is not perfectly smooth and level. It is disturbed. There are roots out. It does appear very clearly as if the ground had recently been disturbed. There are some leaves on the ground, but it's hard for me to imagine that the leaves that I see there are enough to cover up the hole that Mr. Padgett says he stepped in. But more importantly, there's no way that those leaves covered up the hole that I can see that's about four feet past the place where Mr. Padgett stepped.
>
> So considering all of the testimony and all of the evidence that related to Mr. Padgett's version of the way that ground looked, in

> my view the property out there is – the fact that there are holes there and are dangerous places to walk is open and obvious.

The County also cites Legette v. Piggly Wiggly, Inc., 368 S.C. 576, 629 S.E.2d 375 (Ct. App. 1996), for the proposition that "[t]estimony that contradicts undisputed physical evidence generally lacks probative value." Id. at 580, 629 S.E.2d at 377. Legette, however, is distinguishable from the present case. Whereas testimony from the plaintiff in Legette as to whether she had seen mats and warning signs about moisture on the floor of the defendant's store was equivocal at best, Padgett never wavered in his statements that the ground on which he fell was smooth and the sidewalk was unavailable for pedestrian traffic.

Furthermore, we do not agree with the finding that the photograph conclusively established the defect was open and obvious. Although Padgett submitted the photograph, he also asserted in his brief the photograph showed the hole was partially covered, and we find it significant that the County did not respond to this assertion. See Patterson v. I.H. Servs., Inc., 295 S.C. 300, 304, 368 S.E.2d 215, 218 (Ct. App. 1988) (noting that, notwithstanding the circumstances suggesting that the respondent's testimony was implausible, "neither objective nor scientific evidence offered by [the appellant] nor common knowledge render inherently incredible [the respondent's] testimony").

II. The County's Anticipation of the Danger

Padgett further contends that even if the hole was open and obvious, the County was still subject to liability based on evidence that it should have anticipated that harm that could be caused by the defect. We agree.

In Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991), the supreme court noted: "The traditional 'no duty to warn of the obvious' rule has been modified in many jurisdictions to hold that an owner is liable for injuries to an invitee, despite an open and obvious defect, if the owner should anticipate that the invitee will nevertheless encounter the

condition, or that the invitee is likely to be distracted." Id. at 125, 406 S.E.2d at 362. Following this trend, the court adopted the Restatement (Second) of Torts § 343(A) (1965), which provides that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Callander, 305 S.C. at 126, 406 S.E.2d at 362. Quoting comment (f) to this section, the court further explained that "an owner may be required to warn the invitee, or take other reasonable steps to protect him, if the 'possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, . . . or fail to protect himself against it.' " Id., 406 S.E.2d at 362-63 (quoting Restatement (Second) of Torts § 343(A) cmt. (f).

Similarly, in the recent case of Hancock v. Mid-South Management Co., the supreme court, in reversing the grant of summary judgment in a premises liability action arising from the plaintiff's fall in the defendant's parking lot, stated: "While a parking lot's state of disrepair may be considered open and obvious, a jury could determine that Respondent should have anticipated that such a condition may cause an invitee to fall and injure themselves." Hancock v. Mid-South Management Co., ___ S.C. ___, ___, 673 S.E.2d 801, 803 (2009). Although the present case concerns a directed verdict, we see no reason why the evidence Padgett presented, especially (1) Jenkins' testimony that the path he and Padgett took was well-worn, (2) Daddieco's acknowledgement that she had seen people on the lawn of the Courthouse grounds, and (3) Padgett's testimony that the sidewalk was unavailable, cannot give rise to a reasonable inference that the County should have anticipated that individuals using the services at the Courthouse could be harmed by the ongoing landscaping operations.

III. Simmons' Status as an Independent Contractor

Finally, Padgett argues the trial judge incorrectly ruled the County could not be held liable for his injury because the individual who created the dangerous condition resulting in his injury was an independent contractor. It was Padgett's position at trial and on appeal that the County was ultimately responsible for ensuring the caution tape was used where active landscaping was taking place, regardless of who was supposed to put it up. We agree.

Under the South Carolina Code Tort Claims Act, a governmental entity is not liable for a loss resulting from "an act of or omission of a person other than an employee." S.C. Code Ann. § 15-78-60(20) (2005). This section, however, "would not operate to exonerate [a governmental entity] of liability for its own conduct." Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 247, 391 S.E.2d 546, 548 (1990).

The County's sole argument in response to this assertion is that Padgett did not include this issue in his post-trial motions and therefore failed to preserve this issue for appeal. A review of the trial judge's ruling on this issue and the colloquy immediately preceding it, however, indicates Padgett's argument regarding agency liability was both raised to and ruled upon by the trial court. See Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon.").[1]

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[1] In directing a verdict for the County, the trial judge ruled in pertinent part: "Certainly the County has some duty to oversee the work that its contractors do, but the situation here is distinguishable from the situations that you have pointed out to me in some of the other cases." The "other cases" cited by Padgett's attorney in opposition to the County's directed verdict motion included Madison v. Babcock Center, 371 S.C. 123, 638 S.E.2d 650 (2006) (holding the defendants owed a common law duty to supervise a mentally retarded resident and provide her with appropriate care) and Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006) (concerning the liability of a governmental entity for a trip and fall on a sidewalk that had

At trial, Padgett argued the County's common law duty to supervise Simmons "does not end because they signed a contract with Mr. Simmons." He further correctly pointed out that Daddieco acknowledged that the County facilities director would have been responsible for making sure caution tape was in place when and where it was necessary. There was also evidence that the County was responsible for removing caution tape when it was no longer required in an area and an acknowledgment that the Courthouse was a place of public accommodation for all individuals. The evidence, then, when construed in Padgett's favor, could have supported a finding by the jury that even if the County was not liable for any act of omission on Simmons' part, the County was negligent in discharging its own duties to adequately maintain the Courthouse premises and this negligence created a reasonably foreseeable risk of injury resulting from Simmons' landscaping operations. Cf. Greenville Mem'l Auditorium, 301 S.C. at 247, 391 S.E.2d at 549 (holding the defendant could not successfully assert the plaintiff's injuries resulted from the wrongful criminal act of a third party "where by very basis upon which appellant is claimed to be negligent is that appellant created a reasonably foreseeable risk of such third party conduct").

CONCLUSION

We agree with Padgett that the trial judge erred in directing a verdict for the County in this action; therefore, we reverse the directed verdict and remand the matter to the trial court for further proceedings.

REVERSED AND REMANDED.

SHORT and GEATHERS, JJ., concur.

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become broken over time by overgrown tree roots), and Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990) (upholding a judgment against a governmental entity for an injury resulting from criminal acts of third persons on the ground that the entity and its employees were negligent).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Guinan, Appellant,

v.

Tenet Healthsystems of Hilton Head, Inc.; Hilton Head Healthsystems, P.A. d/b/a Hilton Head Regional Medical Center; Dr. H. Kohli; and, Dr. Phillip Zitello, Respondents.

Appeal From Beaufort County
Curtis L. Coltrane, Special Circuit Court Judge

Opinion No. 4543
Heard February 18, 2009 – Filed May 7, 2009

AFFIRMED

H. Woodrow Gooding, of Allendale, and James H. Moss, of Beaufort, for Appellant.

Andrew F. Lindemann, of Columbia, Hutson S. Davis, Jr., of Hilton Head Island, Joesph O. Brennan and Marvin W. McGahee, both of Savannah, Georgia, Lindsay K. Smith-Yancey, and Daniel S. McQueeney, Jr., of Charleston, for Respondents.

SHORT, J.: In this medical malpractice action, Robert Guinan appeals the master-in-equity's[1] grant of defendants' summary judgment motion, arguing substantial issues of discovery remained unresolved and Dr. Avinash Gupta's (Gupta) testimony implicated the defendants in deviations from the standard of care. We affirm.

FACTS

Guinan suffered from neck, shoulder, and other pain, and received epidural injections of pain medication in his cervical spine on March 13, 2002, from Dr. Philip James Zitello (Zitello). After the injection, Guinan began experiencing chest pains and weakness in his legs. As a result, Guinan contacted Dr. Gaston O. Perez (Perez), his family physician. Perez examined Guinan, administered some medications, and instructed Guinan to go to the emergency room at Hilton Head Regional Medical Center (Hilton Head Regional).[2] Perez contacted the emergency room and explained Guinan's relevant medical history. Additionally, Perez contacted Zitello, and Zitello agreed to meet Perez and Guinan at the emergency room.

Perez admitted Guinan into the emergency room and ordered a neurology consult. Dr. Harvinder Kohli (Kohli) performed the neurology consult and ordered the administration of a blood thinner to treat a suspected spinal cord occlusion or clot. Kohli called Memorial Health University Medical Center (Memorial Health) in Savannah, Georgia, to discuss the case with a neurosurgeon and spoke with Dr. James Lindley (Lindley).[3] Lindley

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[1] The master-in-equity was sitting as a special circuit judge.

[2] Tenant HealthSystems of Hilton Head, Inc., and Hilton Head HealthSystems, P.A., d/b/a Hilton Head Regional Medical Center.

[3] Kohli called Lindley on or about the time the blood thinner was being administered. The exact timing and duration of the administration of the blood thinner is highly debated between Guinan and the defendants. However, while the administration of a blood thinner to a person with internal bleeding could cause problems, there is no evidence the blood thinner had a negative effect on Guinan. Coagulation studies of his blood

suspected Guinan's symptoms were related to a hematoma (or a bleed), rather than a clot. As a result, the blood thinner was discontinued, and Guinan was transported to Memorial Health. Upon arrival, Guinan was given a MRI, which revealed the presence of a hematoma in Guinan's cervical and thoracic spine. Lindley successfully evacuated the hematoma.

Guinan brought a medical malpractice action against Hilton Head Regional, Kohli, and Zitello. Guinan alleged Hilton Head Regional: (1) failed to properly diagnose the hematoma; (2) failed to properly administer drugs; (3) administered drugs known to be or should have known to be dangerous to Guinan; (4) failed to warn Guinan of the danger presented by the drugs; (5) failed to require Zitello to be present in the emergency room; (6) failed to obtain a neurological consult; (7) failed to exercise the degree of care required of physicians in an emergency room setting; (8) failed to have proper diagnostic equipment available; and (9) failed to immediately transfer Guinan to Memorial Health for emergency care. As to Kohli, Guinan asserted he: (1) failed to properly diagnose the hematoma; (2) failed to properly treat Guinan; (3) increased the harm to Guinan by administering drugs he knew or should have known would harm Guinan; (4) failed to consult a neurosurgeon prior to administering the blood thinner; (5) failed to exercise the degree of care required by the circumstances; and (6) failed to immediately transfer Guinan to Memorial Health for emergency care. Lastly, Guinan claimed Zitello: (1) failed to properly administer the epidural injection; (2) failed to recognize the symptoms of a failed epidural injection; (3) failed to warn and inform Guinan of the symptoms of an epidural injection and warn Guinan of possible paralysis; (4) failed to attend to Guinan at the emergency room; (5) failed to see that Guinan was immediately sent to surgery; (6) failed to exercise the degree of care required of physicians in the profession; and (7) failed to warn and inform Guinan of the risks of an epidural hematoma and other risks of the epidural injection.

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both before and after the administration of the blood thinner indicate Guinan's blood was normal. Additionally, Guinan's expert witness, Gupta, did not testify to the contrary. Accordingly, the exact amount of blood thinner actually administered is without consequence.

The first scheduling order in this case was dated September 7, 2005, and provided an April 15, 2006, discovery deadline. On May 26, 2006, an amended scheduling order was issued extending the deadline to June 1, 2006. After a motions hearing on July 12, 2006, a final scheduling order was issued extending the deadlines for another forty days. The scheduling order also stated the defendants could not file motions for summary judgment until the expiration of the discovery deadlines.

On October 2, 2006, after the discovery deadlines had expired, the master heard the defendants' motion for summary judgment. Sixteen days later, the master issued an order granting the defendants' motion. The master found Gupta testified he was not an expert in the field of neurology or emergency medicine; had never been involved in the diagnosis and treatment of a patient with spinal hematoma; had no criticisms of the nursing staff at the emergency room, or of Kohli; stated Kohli administered the standard of care relative to the care and treatment of Guinan; did not have any material experience in an emergency room in the United States; was unwilling to comment on the performance of emergency room physicians; and did not offer any opinion that any act of the defendants was the proximate cause of any of Guinan's injuries.

Additionally, the master found the time for discovery had expired, and Guinan had a full and fair opportunity to complete discovery. Accordingly, the master granted defendants' motion for summary judgment because Guinan was without expert testimony to create a genuine issue of material fact with respect to his claims of medical negligence against the defendants. This appeal followed.

STANDARD OF REVIEW

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting Watson v. S. Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975)). An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v.

McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David, 367 S.C. at 250, 626 S.E.2d at 5. Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a "fishing expedition."'" Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting Baughman, 306 S.C. at 112, 410 S.E.2d at 544) (internal citation omitted).

LAW/ANALYSIS

I. Incomplete Discovery

Guinan contends discovery was incomplete because Hilton Head Regional failed to produce x-rays until the day of the summary judgment hearing and he had not received the emergency telephone records from Hilton Head Regional or the phone company.[4] We disagree.

[4] Hilton Head Regional asserts in its respondent's brief that the discovery issue of whether Guinan could name an additional expert is unpreserved for review because it was not raised to the master. However, the issue was raised to the master during the summary judgment motion hearing, and ruled upon in the master's order. While this issue is preserved for our review, it appears to be waived on appeal. See Rule 208(b)(1)(D), SCACR (stating an issue on

In Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003), our supreme court rejected Dawkins' "argument that summary judgment was premature because they did not have a full and fair opportunity for discovery." A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. Id. at 71, 580 S.E.2d at 439-40.

Here, Guinan alleges the phone records would reveal how long the blood thinner was administered, and the x-rays would prove Guinan did not have any vascular problem early on, leaving epidural hematoma as the only possible diagnosis. However, the length of time the blood thinner was administered had no adverse effect on Guinan's condition. Accordingly, we believe the master did not err in hearing the defendants' summary judgment motion because the discovery deadlines had expired and Guinan was afforded a full and fair opportunity to conduct discovery. Moreover, on appeal, Guinan fails to demonstrate further discovery would uncover additional relevant evidence or create a genuine issue of material fact.

II. Gupta's Testimony

Guinan maintains the master erred in granting the defendants' general summary judgment motion when Gupta's testimony "clearly implicated" the defendants in deviations from the standard of care. We disagree.

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appeal must be argued in the appellate brief). Guinan does not argue discovery was incomplete because he was not allowed to name an additional expert witness in his appellate brief. The only specific arguments regarding incomplete discovery revolve around the phone records and x-rays. However, if the court were to determine the additional expert witness testimony was not abandoned on appeal, we believe the argument would ultimately fail because the discovery deadlines had expired, Guinan was afforded a full and fair opportunity to conduct discovery, and Guinan failed on appeal to demonstrate further discovery would uncover any additional relevant evidence or create a genuine issue of material fact.

> A physician commits malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances. Additionally, medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist. Specifically, a plaintiff alleging medical malpractice must provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendants' field of medicine under the same or similar circumstances, and (2) that the defendants departed from the recognized and generally accepted standards. Also, the plaintiff must show that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages. The plaintiff must provide expert testimony to establish both the required standard of care and the defendants' failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants.

David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247-48, 626 S.E.2d 1, 3-4 (2006) (internal citations omitted).

Additionally, "[o]nce employed, a physician must attend the case as long as it requires attention, unless the relation of physician and patient is ended by mutual consent or is revoked by the dismissal of the physician. A physician cannot abandon a case without reasonable notice to the patient." Johnston v. Ward, 288 S.C. 603, 610, 344 S.E.2d 166, 170 (1986) (internal

citations omitted), overruled on other grounds by Spahn v. Town of Fort Royal, 330 S.C. 168, 172-174, 499 S.E.2d 205, 207-208 (1998).

Dr. Gupta testified he was an expert in anesthesiology and pain management, but stated he did not consider himself an expert in emergency medicine or neurology. Additionally, Gupta asserted he did not have much exposure to emergency rooms in the United States. Gupta stated the only issue in the case was the delay in diagnosis. Instead of indicating which doctor was at fault for the delay in diagnosis, Gupta discusses the course of action he would have taken, but does not state any of the defendants deviated from the standard of care. However, Gupta stated every minute is critical to a patient developing paralysis, and the prognosis is better if surgery is performed eight to twelve hours after the onset of symtoms. When asked directly who caused the delay in diagnosis, Gupta responded:

> Dr. Perez did call Dr. Zitello prior to him sending [Guinan] to the emergency room. In fact, as far as I know, he called either immediately after seeing the patient in his office, or he called even before. I do not exactly know the sequence of events. But if Dr. Zitello is – or anybody who is performing this particular procedure is told that a patient is having weakness in the legs and is having severe pain in the chest radiating to the upper extremities, that itself is enough to immediately flag – put a red flag in the injectionist that this is cervical hematoma. And Dr. Zitello should have picked up the diagnosis even on the telephone itself.

However, Gupta next stated he had never been involved with diagnosing spinal hematoma.

With regard to Hilton Head Regional's vicarious liability through its emergency room nursing personnel, Gupta testified he did not have any criticisms. Additionally, during direct examination at his deposition, Gupta stated he had no criticisms of Kohli's performance. On cross-examination,

Kohli's attorney asked: "Can I take it then that Dr. Kohli, in so far as you're concerned, adhered to the standard of care relative to the care and treatment he rendered to Mr. Guinan?" Dr. Gupta responded: "That's correct."

Gupta testified he did not have any criticisms of how Zitello administered the cervical epidural steroid injection. However, when asked what he would have done if he had been in Zitello's position, he replied:

> A: If I get a call from a physician regarding just the chest pain itself, I would rather tell them to go ahead with the cardiac even to work. But I would certainly ask him if the patient is having any shooting pain in the upper extremities, or is he developing any weakness in the leg. In that event, I would tell the physician who's calling me that I will be right over, and I will see the patient myself.
>
> Q: And that would be the standard of care?
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> A: That would be my standard of care.
>
> Q: You think that would be the standard of care for someone in your profession that's doing this?
>
> A: I think so.

We find summary judgment was proper because Guinan failed to provide evidence, through his expert witness, showing the defendants departed from the recognized and generally accepted standards of average, competent practitioners in their field of medicine under the same or similar circumstances. The most damaging portion of Gupta's testimony is his statement that Zitello deviated from Gupta's personal standard of care; however, we do not find that testimony sufficient to withstand summary judgment because it does not state Zitello deviated from **the generally accepted standard** of care. More importantly, Guinan failed to show

defendants' alleged departure from the generally recognized practices and procedures was the proximate cause of his injuries.

CONCLUSION

Accordingly, the master-in-equity is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.