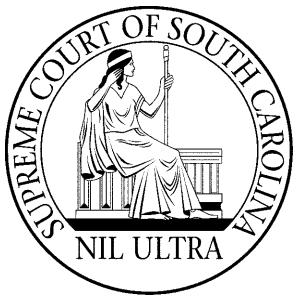

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25

June 25, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

26343 – Don Ray v. Melinda Ray 14

26347 – In the Matter of Garry Conway 24

26348 – Atwood Agency v. John Black 29

26349 – In the Matter of John A. Pincelli 36

26350 – E. Davis v. School District of Greenville 45

26351 – In the Matter of O. Doyle Martin 52

26352 – In the Matter of Samantha D. Farlow 55

26353 – Robert Lever v. Lighting Galleries 58

UNPUBLISHED OPINIONS

2007-MO-039 – Davenport Properties v. SCDOT
(Greenville County, Judge John C. Few)

2007-MO-040 – State v. Gary Bennett
(Horry County, Judge John M. Milling)

2007-MO-041 – Dana Tolen v. State
(Lexington County, Judge Marc H. Westbrook)

2007-MO-042 – Carolyn Chester v. SCDPS
(Dorchester County, Judge James C. Williams, Jr.)

2007-MO-043 – SCDSS v. Wanda McKinley
(Greenville County, Judge R. Kinard Johnson, Jr.)

2007-MO-044 – State v. Eric Castro
(Dorchester County, Judge Deadra L. Jefferson)

PETITIONS – UNITED STATES SUPREME COURT

26219 – In the Interest of Amir X.S. Pending

26253 – David Arnal v. Laura Fraser Pending

PETITIONS FOR REHEARING

26270 – James Furtick v. South Carolina Department of Corrections	Pending
26328 – Thomas J. Torrence v. SC Department of Corrections	Pending
26329 – State v. Frederick Antonio Evins	Denied 6/21/07
26333 – State v. John Marcus Stevens	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

Page

4259-The State v. Jeremy Avery 65

4260-Ashley River Properties I, LLC; Emerald Investments, LLC; and Stuart L. Longman v. Ashley River Properties II, LLC; and Kriti Ripley, LLC 76

UNPUBLISHED OPINIONS

2007-UP-316-James W. Williams v. Otis David Gould
(Colleton, Special Referee Benjamin Goldberg)

2007-UP-317-Brian E. Peltier v. Jobe C. Metts, M.D., et al.
(Charleston, Judge J.C. Buddy Nicholson, Jr.)

2007-UP-318-The State v. Shawn Wiles
(Saluda, Judge William P. Keesley)

2007-UP-319-The State v. Antjuan Tobias Green
(Laurens, Judge Roger L. Couch)

2007-UP-320-Marvin Brown v. The State
(Jasper, Judge John C. Few)

2007-UP-321-The State v. David Dillard
(Spartanburg, Judge Alexander S. Macaulay)

2007-UP-322-The State v. Leon Julius Broadwater
(Aiken, Judge Diane Schafer Goodstein)

2007-UP-323-The State v. Frankie Alan Dover
(Cherokee, Judge J. Mark Hayes, II)

2007-UP-324-Michael Kelley v. Debra Kelley
(Aiken, Judge C. David Sawyer, Jr.)

2007-UP-325-Allegiant, a division of Telerent Leasing v. S. Craig White
(Greenwood, Judge Wyatt T. Saunders, Jr.)

2007-UP-326-S.C. Department of Health and Environmental Control v. Shane Gould
(Administrative Law Court, Judge Ralph King Anderson, III)

2007-UP-327-Raphael Suber v. State of South Carolina
(Greenville, Judge Larry R. Patterson)

2007-UP-328-Jafar Hasseini v. Alicestine Hamilton, personal representative of the estate of Melvin Hamilton
(Charleston, Judge Mikell R. Scarborough)

PETITIONS FOR REHEARING

4208--State v. Christopher Pride	Pending
4233-State v. W. Fairey	Pending
4235-Collins Holding v. DeFibaugh	Pending
4237-State v. R. Lee-Grigg	Pending
4238-Hopper v. Terry Hunt Const.	Pending
4239-State v. Dicapua	Pending
4240-BAGE v. Southeastern Roofing	Pending
4242-State v. T. Kinard	Pending
4243-Williamson v. Middleton	Pending
4244-State v. Gentile	Pending
4245-Sheppard v. Justin Enterprises	Pending
4246-Duckett v. Goforth	Pending
4247-State v. L. Moore	Pending
2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-125-State v. M. Walker	Pending

2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-171-State v. K. Heidt	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-177-State v. H. Ellison	Pending
2007-UP-183-State v. G. Hernandez	Pending
2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-189-McMasters v. Charpia	Pending
2007-UP-190-Hartzler v. Hartzler	Pending
2007-UP-193-City of Columbia v. Assaad-Faltas	Pending
2007-UP-195-Doe v. Rojas (1)	Pending
2007-UP-196-Doe v. Rojas (2)	Pending
2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-201-State v. L. Shaw	Pending
2007-UP-202-Young v. Lock	Pending
2007-UP-215-American National v. Ramsey	Pending
2007-UP-216-State v. R. Jordan	Pending
2007-UP-221-SCDSS v. Tina N.	Pending
2007-UP-226-Butler v. SC Dept. of Education	Pending
2007-UP-241-State v. S. Martin	Pending
2007-UP-243-Jones v. SCDSS	Pending
2007-UP-249-Tedder v. Dixie Lawn Service	Pending

2007-UP-252-Buffington v. T.O.E. Enterprises Pending

2007-UP-255-Marvin v. Pritchett Pending

2007-UP-256-SCDSS v. Gunderson Pending

2007-UP-257-Green v. Morris Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

3949 – Liberty Mutual v. S.C. Second Injury Fund Pending

3968 – Abu-Shawareb v. S.C. State University Pending

3983 – State v. D. Young Pending

4014 – State v. D. Wharton Pending

4022 – Widdicombe v. Tucker-Cales Pending

4047 – Carolina Water v. Lexington County Pending

4060 – State v. Compton Pending

4071 – State v. K. Covert Pending

4089 – S. Taylor v. SCDMV Pending

4100 – Menne v. Keowee Key Pending

4107 – The State v. Russell W. Rice, Jr. Pending

4111 – LandBank Fund VII v. Dickerson Pending

4118 – Richardson v. Donald Hawkins Const. Pending
4119 – Doe v. Roe Pending

4120 – Hancock v. Mid-South Mgmt. Pending

4121 – State v. D. Lockamy Pending

4122 – Grant v. Mount Vernon Mills Pending

4127 – State v. C. Santiago Pending

4128 – Shealy v. Doe Pending

4136 – Ardis v. Sessions Pending

4139 – Temple v. Tec-Fab Pending

4140 – Est. of J. Haley v. Brown Pending

4143 – State v. K. Navy Pending

4144 – Myatt v. RHBT Financial Pending

4145 – Windham v. Riddle Pending

4148 – Metts v. Mims Pending

4156--State v. D. Rikard Pending

4159-State v. T. Curry Pending

4157– Sanders v. Meadwestvaco Pending

4162 – Reed-Richards v. Clemson Pending

4163 – F. Walsh v. J. Woods Pending

4165 – Ex Parte: Johnson (Bank of America) Pending

4168 – Huggins v. Sherriff J.R. Metts Pending

4169—State v. W. Snowdon Pending

4170--Ligon v. Norris Pending

4172 – State v. Clinton Roberson Pending

4173 – O'Leary-Payne v. R. R. Hilton Heard Pending

4175 – Brannon v. Palmetto Bank Pending

4176 – SC Farm Bureau v. Dawsey Pending

4178 – Query v. Burgess	Pending
4179 – Wilkinson v. Palmetto State Transp.	Pending
4180 – Holcombe v. Bank of America	Pending
4182 – James v. Blue Cross	Pending
4183 – State v. Craig Duval Davis	Pending
4184 – Annie Jones v. John or Jane Doe	Pending
4185—Dismuke v. SCDMV	Pending
4186 – Commissioners of Public Works v. SCDHEC	Pending
4187 – Kimmer v. Murata of America	Pending
4189—State v. T. Claypoole	Pending
4195--Rhoad v. State	Pending
4196—State v. G. White	Pending
4197—Barton v. Higgs	Pending
4200—Brownlee v. SCDHEC	Pending
4202-State v. A. Smith	Pending
4205—Altman v. Griffith	Pending
4206—Hardee v. W.D. McDowell et al.	Pending
4211-State v. C. Govan	Pending
4212-Porter v. Labor Depot	Pending
4216-SC Dist Council v. River of Life	Pending
4217-Fickling v. City of Charleston	Pending
4227-Forrest v. A.S. Price et al.	Pending

2005-UP-345 – State v. B. Cantrell	Pending
2005-UP-490 – Widdicombe v. Dupree	Pending
2005-UP-580 – Garrett v. Garrett	Pending
2006-UP-002 – Johnson v. Estate of Smith	Denied 06/20/07
2006-UP-037-State v. Henderson	Pending
2006-UP-043-State v. Hagood	Denied 06/20/07
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending
2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-243-Sun Trust Mortgage v. Gobbi	Pending
2006-UP-245-Gobbi v. People's Federal	Pending
2006-UP-246-Gobbi v. Simerman	Denied 06/20/07
2006-UP-247-State v. Hastings	Pending
2006-UP-256-Fulmer v. Cain	Pending
2006-UP-262-Norton v. Wellman	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-287-Geiger v. Funderburk	Denied 06/20/07
2006-UP-299-Kelley v. Herman	Denied 06/20/07
2006-UP-303-State v. T. Dinkins	Pending

2006-UP-304-Bethards v. Parex Pending

2006-UP-309-Southard v. Pye Pending

2006-UP-313-Uzenda v. Pittman Pending

2006-UP-314-Williams et. al v. Weaver et. al Pending

2006-UP-315-Thomas Construction v. Rocketship Prop. Pending

2006-UP-316-State v. Tyrelle Davis Pending

2006-UP-317-Wells Fargo Home Mortgage v. Thomasena J. Holloway and Albert Holloway Pending

2006-UP-320-McConnell v. John Burry Pending

2006-UP-323-Roger Hucks v. County of Union Pending

2006-UP-329-Washington Mutual v. Hiott Pending

2006-UP-332-McCullar v. Est. of Campbell Pending

2006-UP-333-Robinson v. Bon Secours Pending

2006-UP-350-State v. M. Harrison Pending

2006-UP-359-Pfeil et. al v. Walker et. al Pending

2006-UP-360-SCDOT v. Buckles Pending

2006-UP-367-Coon v. Renaissance Pending

2006-UP-372-State v. Bobby Gibson, Jr. Pending

2006-UP-374-Tennant v. Georgetown et al. Pending

2006-UP-377-Curry v. Manigault Pending

2006-UP-378-Ziegenfus v. Fairfield Electric Pending

2006-UP-385-York Printing v. Springs Ind. Pending

2006-UP-390-State v. Scottie Robinson	Pending
2006-UP-393-M. Graves v. W. Graves	Pending
2006-UP-395-S. James v. E. James	Pending
2006-UP-401-SCDSS v. Moore	Pending
2006-UP-403-State v. C. Mitchell	Pending
2006-UP-412-K&K v. E&C Williams Mechanical	Pending
2006-UP-413-Rhodes v. Eadon	Pending
2006-UP-416-State v. Mayzes and Manley	Pending
2006-UP-417-Mitchell v. Florence Cty School	Pending
2006-UP-420-Ables v. Gladden	Pending
2006-UP-426-J. Byrd v. D. Byrd	Pending
2006-UP-427-Collins v. Griffin	Pending
2006-UP-431-Lancaster v. Sanders	Pending
2007-UP-004-Anvar v. Greenville Hospital Sys.	Pending
2007-UP-010-Jordan v. Kelly Co. et al.	Pending
2007-UP-015-Village West v. Arata	Pending
2007-UP-023-Pinckney v. Salamon	Pending
2007-UP-048-State v. J. Ward	Pending
207-UP-056-Tennant v. Beaufort County	Pending
2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-062-Citifinancial v. Kennedy	Pending

2007-UP-063-Bewersdorf v. SCDPS	Pending
2007-UP-064-Amerson v. Ervin (Newsome)	Pending
2007-UP-066-Computer Products Inc. v. JEM Rest.	Pending
2007-UP-087-Featherston v. Staarman	Pending
2007-UP-090-Pappas v. Ollie's Seafood	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-098-Dickey v. Clarke Nursing	Pending
2007-UP-109-Michael B. and Andrea M. v. Melissa M.	Pending
2007-UP-110-Cynthia Holmes v. James Holmes	Pending
2007-UP-111-Village West v. International Sales	Pending
2007-UP-130-Altman v. Garner	Pending
2007-UP-133-Thompson v. Russell	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Don Allyn Ray, Appellant,

v.

Melinda Hodges Ray, Respondent.

Appeal From Richland County
Kellum W. Allen, Family Court Judge

Opinion No. 26343
Heard January 30, 2007 – Filed June 25, 2007

REVERSED AND REMANDED

Jean Perrin Derrick, of Lexington, for Appellant.

W. Joseph Isaacs, of Isaacs & Alley, of Columbia, for Respondent.

JUSTICE BURNETT: Don Allyn Ray (Appellant) brought this action to set aside the judgment of the family court pursuant to Rule 60(b), SCRCP. The family court granted Melinda Hodges Ray's (Respondent) motion to dismiss pursuant to Rule 12(b)(6), SCRCP. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Appellant and Respondent were divorced in 2000. In 2001, the family court issued a decree approving the settlement reached by Appellant and Respondent concerning the equitable division of their marital estate. In 2005, Appellant initiated the instant action, alleging an action for fraud upon the court and an independent action in equity arising from Respondent's deliberate concealment of $130,000 until after the marital property had been divided.

Prior to the divorce, Respondent entered an agreement to sell a pharmacy she owned jointly with her husband. At the same time, Respondent entered into a separate agreement not to compete with CVS, the purchaser of the pharmacy, for which she received $130,000 in consideration. Respondent made arrangements with CVS to receive payment after the divorce was finalized. Further, she deliberately concealed the aforementioned agreement in response to discovery requests and during depositions.

The family court addressed the issue of whether Appellant's allegations against Respondent rose to the level of extrinsic fraud or were simply intrinsic fraud. Respondent argued that her acts constituted only intrinsic fraud, *res judicata* applied, Appellant failed to exercise due diligence in discovering the fraud, and the complaint failed to state facts sufficient to constitute a cause of action. Thereafter, Respondent filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP.

The family court, citing Chewning v. Ford Motor Company, 354 S.C. 72, 579 S.E.2d 605 (2003), held Appellant's allegations did not rise to the level of extrinsic fraud because there were no allegations of "extraordinary, collateral matters which would justify the relitigation of issues concluded by judicial decree years ago." The family court granted Respondent's motion to dismiss. This appeal followed.

ISSUE

Does deliberate concealment of a marital asset constitute extrinsic fraud when the concealment is part of a deliberate scheme to defraud, involving an unknown third party not subject to discovery?

STANDARD OF REVIEW

In appeals from the family court, this Court has the authority to find facts in accordance with its view of the preponderance of the evidence. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). However, this broad scope of review does not require this Court to disregard the findings of the family court who saw and heard the parties, and is in a better position to evaluate their credibility. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981); Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

Appellant argues Respondent's deliberate concealment of $130,000 in proceeds generated from the sale of the couple's pharmacy constitutes extrinsic fraud based on this Court's opinion in Chewning v. Ford Motor Company, 354 S.C. 72, 579 S.E.2d 605. Appellant argues the family court erred in limiting extrinsic fraud, as defined in Chewning, to misconduct perpetrated by attorneys. We agree.

In Chewning, we noted:

> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the

> matter before it, will not ordinarily rise to the level of fraud on the court.

Id. at 78, 579 S.E.2d at 608 (citing Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978)). Extrinsic fraud "induces a person not to present a case or deprives a person of the opportunity to be heard." *Id*. at 81, 579 S.E.2d at 610 (citing Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). On the other hand, intrinsic fraud "is fraud which was presented and considered in the trial" and which "misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Id*. (citing Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000); Hilton Head Ctr., 294 S.C. at 9, 362 S.E.2d at 176)).

The essential distinction between intrinsic and extrinsic fraud is the ability to discover the fraud.[1] Equitable relief from a judgment "is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." *Id*.; see also Bryan v. Bryan, 220 S.C. 164, 167-68, 66 S.E.2d 609, 610 (1951) ("[N]ot every fraud is sufficient to move a court of equity to grant relief from a judgment. Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in

[1] See generally In re Marriage of Melton, 33 Cal. Rptr. 2d 761 (Cal. Ct. App. 1994) (no extrinsic fraud found where husband misrepresented value of pension benefits with the assistance of the benefit plan administrator where the plan was a party to the action and wife's counsel could have discovered the concealed information through discovery); Bankston v. Bankston, 251 S.W.2d 768 (Tex. Civ. App. 1952) (holding wife could not have judgment set aside on ground of fraudulent representations made to her concerning the market value of assets when wife was represented by able counsel and charged with the duty to make a full and careful investigation, yet neglected to exercise ordinary prudence and fully avail herself of the discovery process).

which the judgment was rendered: intrinsic fraud is not sufficient for equitable relief."); Bowman v. Bowman, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) ("South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial."); Mr. G. v. Mrs. G., 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995) ("Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments.").[2] Extrinsic fraud, as opposed to intrinsic fraud, is often difficult, if not impossible to discover during the litigation. For example, concealing assets through an unknown third-party not subject to discovery is extrinsic fraud in that it constitutes conduct or activities outside of the court proceedings which deprive the other party of the opportunity to fully exhibit and try his case. 24 Am. Jur. 2d Divorce and Separation § 435 (1998); Chewning, 354 S.C. at 81, 579 S.E.2d at 610.

In Chewning, we held "the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud." *Id*. at 82, 579 S.E.2d at 610. However, our holding in Chewning does not limit the finding of

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[2] Furthermore, we take this opportunity to remind the Bar that parties must avail themselves of the discovery process and be attentive to the warning signs of fraud.

> It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests. Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. A party must avail himself of the knowledge or means of knowledge open to him. The court will not protect the person who, with full opportunity to do so, will not protect himself.

King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984) (internal citations omitted).

extrinsic fraud to misconduct of an attorney or an officer of the court. As we noted in Evans, fraud upon the court has been defined as "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, **or** is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (1988) (quoting H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 408 (2nd ed. 1985)) (emphasis added).

In Evans, the former husband brought an action for relief from judgment under Rule 60(b), SCRCP, when he discovered his former wife had induced him to sign an affidavit waiving his right to plead or appear for the divorce action when he was extremely intoxicated. We noted that while the former wife's perjury would fall in the intrinsic fraud category, "her actions in inducing Evans to sign such a waiver form, denying him his opportunity to be heard were such as could be considered extrinsic fraud under Rule 60(b)." *Id*. at 529, 366 S.E.2d at 47. The fraud in Evans was not solely perjury or concealing documents, acts which alone would constitute intrinsic fraud. Evans involved an act of intrinsic fraud accompanied by an intentional act or scheme to defraud or mislead the court, making the fraud rise to the level of extrinsic fraud.

In the instant case, Respondent misrepresented the existence of the marital assets when ordered by the court to produce an accounting. This was intrinsic fraud. See Chewning, 354 S.C. at 81, 579 S.E.2d at 610 ("the failure to disclose to an adversary or court matters which would defeat one's own claim is intrinsic fraud") (quoting Hilton Head Ctr., 294 S.C. at 11, 362 S.E.2d at 177). However, in this case, as in Evans, there was "a showing that one has acted with an intent to deceive or defraud the court." Chewning, 354 S.C. at 78, 579 S.E.2d at 608 ("it [is] essential that there be a showing of conscious wrongdoing – what can properly be characterized as a deliberate scheme to defraud – before relief from a final judgment is appropriate."). In delaying the payment by CVS until after the divorce, Respondent engaged in "a deliberately planned and carefully executed scheme to defraud." *Id*. at

79, 579 S.E.2d at 609 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)). We hold an act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud. See, *e.g.*, Rozier, 573 F.2d at 1338 ("In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.") (internal citations omitted); Rathmell v. Morrison, 732 S.W.2d 6 (Tex. App. 1987) (holding a wrongful act coupled with misrepresentation of the value of companies in a property settlement agreement amounts to more than intrinsic fraud when former wife was prevented from having a fair opportunity to present evidence concerning the value of the companies); *cf.* Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003) (holding there was no extrinsic fraud absent a finding of a fraudulent intent).

CONCLUSION

Respondent's actions rose to the level of extrinsic fraud when she engaged in a fraudulent scheme to hide assets from the court and, in doing so, utilized an unknown third party, CVS, not subject to discovery during the litigation. Accordingly, we reverse the family court's dismissal of this action and remand for further proceedings consistent with this opinion.

REVERSED.

TOAL, C.J., and MOORE, J., concur. PLEICONES, J., dissenting in a separate opinion in which WALLER, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, appellant's complaint alleges a classic instance of intrinsic fraud which the family court properly dismissed. I would affirm.

A party may bring a suit in equity to set aside a judgment at law allegedly procured by fraud as appellant has, or may move to set the judgment aside under Rule 60(b), SCRCP. While there are certain procedural differences depending on the form of the action, the legal principles are identical: relief is available where the earlier judgment was procured by extrinsic fraud, but a judgment obtained through the use of intrinsic fraud is not subject to collateral attack. The majority and I agree on this point, as we do on the basic definition of intrinsic fraud: a fraud that goes to the merits of the earlier action, that is, to an issue of which the party had both notice and an opportunity to litigate in that prior suit. E.g., Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995).

Appellant alleges that respondent deliberately concealed a marital asset as part of a scheme to defraud appellant of his rightful share of the equitable division of marital property in the parties' divorce action. Appellant was undeniably aware that the identity and valuation of assets was at issue in that suit, and had the opportunity to litigate equitable distribution. Accordingly, appellant's present complaint alleges only intrinsic fraud. The policy reason underlying the bar to intrinsic fraud claims is predicated "on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable…." Bryan v. Bryan, 220 S.C. 164, 168, 66 S.E.2d 609, 610 (1951) (internal citation omitted). The need for finality of judgments, as well as the potential for endless relitigation, is especially strong in family court matters.

In Bryan, the Court was asked the then-novel question whether perjury or false swearing could form the basis for an action to set aside a judgment. The Court acknowledged the validity of criticisms leveled at the intrinsic/extrinsic fraud distinction, but ultimately adopted that rule. In deciding to adopt this rule, the Court recognized that "the

classic example of intrinsic as contrasted with extrinsic fraud is the commission of perjury by a witness. While perjury is a fraud upon the court [it is insufficient for attacking a judgment] because the materiality of the testimony and the opportunity to attack it, was open at the trial." Bryan at 268, 66 S.E.2d at 611 (internal citation omitted); but see Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605, fn.2 (2003)(stating that perjury or false swearing is not a fraud upon the court).

The Bryan Court did, however, leave open the possibility that exceptional circumstances involving intrinsic fraud may justify equitable relief. To date, the only time an exception has been made is in Chewning, where the Court held the subornation of perjury by an attorney, or the intentional concealment of documents by an attorney, is a sufficient fraud upon the court to allow a collateral attack on a judgment. In Chewning we were careful to reiterate that perjury by a party or witness, such as the failure of a party to disclose to its adversary or to the court matter which would defeat that party's claim, or a party's failure to disclose requested documents, is intrinsic fraud which cannot support a collateral attack on the judgment. Chewning at 82-83, 579 S.E.2d at 610-611; see also Raby Constr., LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004).

The fraud alleged by appellant here is classic intrinsic fraud. The majority's reliance on a federal case decided under Rule 60(b), FRCP,[3] and a Texas decision[4] is misplaced. In the federal case, the defendant's attorneys were responsible for the concealment of a document,[5] a Chewning situation. In the Texas case, the court concluded that the husband's threats to the wife which caused her to forego an appraisal

[3] Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978).
[4] Rahmell v. Morrison, 732 S.W.2d 5 (Tex. App. 1987).
[5] A month after stating in its written response to plaintiff's interrogatory that it could locate "no such report," "an in-house attorney for [defendant] involved in this case discovered [the report] but failed to disclose it or to amend its inaccurate response to [the] interrogatory…." Rozier at 1341-1342.

was "not only some evidence of **extrinsic** fraud, but … evidence … sufficient to support a jury finding thereon."[6] Here, the alleged concealment of an asset by a party, even one which should have been disclosed pursuant to court ordered discovery, is not extrinsic fraud. Chewning at 82, 579 S.E.2d at 610-611.

The majority's attempt to limit its new rule to situations where a party's perjury or concealment is intended to defraud the court does nothing more than restate the current definition of intrinsic fraud. As the Bryan Court recognized, all perjury and all document concealment by a party is an attempt to defraud the court. Furthermore, a person does not commit perjury unless the false testimony is given "willfully." S.C. Code Ann. § 16-9-10 (2003). If we are to overrule Bryan and eliminate the distinction between intrinsic and extrinsic fraud, then we should acknowledge that we are doing so, not couch it as a "new" definition of extrinsic fraud. In my opinion, however, the strong policy reasons favoring the finality of judgments, especially in family court, militate strongly in favor of retaining the extrinsic/intrinsic fraud distinction. Finally, the majority holds that "an act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud." I simply note that the present case was brought as an independent action, not as a motion under Rule 60(b), SCRCP.

For the reasons given above, I would affirm the trial court's dismissal of this suit.

WALLER, J., concurs.

[6] Rahmell at 14.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Garry Conway, Respondent.

Opinion No. 26347
Submitted May 14, 2007 – Filed June 25, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Assistant Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Garry Conway, of Mt. Pleasant, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. He requests that any suspension be made retroactive to the date of his interim suspension.[1] We accept the agreement and impose a definite suspension of nine (9) months from

[1] On July 1, 2005, respondent was placed on interim suspension. In the Matter of Conway, 365 S.C. 124, 616 S.E.2d 419 (2005).

the practice of law. The suspension shall not be made retroactive to the date of respondent's interim suspension.

FACTS

For purposes of the Agreement, respondent admits the material portions of the factual allegations and allegations of violations of specific portions of the Rules of Professional Conduct as set forth in the formal charges. The admissions are as follows.

Matter I

Southern Reporting, Inc., provided court reporting services to respondent in connection with the deposition of a client in January 2004. The court reporter submitted an invoice to respondent in January 2004.

When the court reporter did not receive payment, she issued a second notice in June 2004, a third notice in July 2004, and a fourth notice in August 2004. The court reporter made three follow-up telephone calls to respondent in July and August 2004. In January 2005, the court reporter sent respondent a letter indicating she had not received payment. Respondent did not respond. To date, respondent has not paid the court reporter for her services or the late charges.

Respondent did not timely respond to the initial inquiries of ODC regarding this complaint. Respondent failed to appear and respond to a subpoena pursuant to Rule 19(c), RLDE, Rule 413, SCACR.

Matter II

Respondent failed to respond to the initial inquiries of ODC in this matter. Respondent failed to fully cooperate with the investigation in this matter.

Matter III

Since his admission to practice law in 1999, respondent has appeared alone at hearings, depositions, and trials in the courts of this state. The Court has no record that respondent obtained Rule 403, SCACR, trial certification.

Matter IV

Client A retained respondent to represent him in connection with two personal injury claims, a divorce matter, and preparation and recording of a deed. Respondent failed to maintain files regarding Client A's legal matters, failed to safekeep Client A's documents, and failed to take adequate steps to protect Client A's interests.

With regard to one of the personal injury claims, respondent failed to file suit on Client A's behalf prior to the expiration of the statute of limitations. With regard to the divorce matter, respondent engaged in a conflict of interest because he concurrently represented Client A and his wife in one of the personal injury matters and in preparation of the deed. Respondent also represented Client A and his paramour in the other personal injury matter. With regard to the preparation of the deed for Client A and his wife, respondent failed to properly record the deed.

Respondent failed to turn over files related to Client A to the attorney appointed by this Court to protect the interests of respondent's clients upon his interim suspension. See Rule 31, RLDE, Rule 413, SCACR. Further, respondent did not cooperate or communicate with the appointed attorney. He failed to respond to the appointed attorney's letters and telephone calls and failed to turn over approximately 85 client files. In addition, after his interim suspension, respondent failed to cooperate or communicate with Client A's new attorney.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(3) (lawyer shall not knowingly fail to respond to a lawful demand from a disciplinary authority), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission to practice law), and Rule 7(a)(7) (lawyer shall not willfully violate a valid court order). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.7 (lawyer shall not represent client if representation will be directly adverse to another client); Rule 1.15 (lawyer shall safekeep property and funds belonging to clients and third parties); Rule 5.5 (lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction); Rule 8.1(b) (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of nine (9) months from the practice of law. Respondent's request the suspension be made retroactive to the date of his interim suspension is denied. Within thirty (30) days of the date of this opinion, respondent shall pay the Commission on Lawyer Conduct the costs it incurred in the investigation of this matter. Within fifteen days of the date of this opinion, respondent shall file an affidavit

with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

Prior to his reinstatement, respondent shall fully pay the court reporter's charges and applicable late fees in Matter I, fully reimburse the Lawyers Fund for Client Protection for any claims it has paid on respondent's behalf, complete the trial observations and obtain Rule 403, SCACR, certification, and demonstrate to the satisfaction of the Committee on Character and Fitness and this Court that his medical condition does not impair his fitness to practice law.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Atwood Agency, d/b/a
Atwood Vacations and d/b/a
RE/MAX Lowcountry Realty, Respondent,

v.

John T. Black, Jr., David
Lybrand, Elaine Shaw, and
Edisto Sales and Rental Realty,
Inc., Appellants.

Appeal from Charleston County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26348
Heard March 6, 2007 – Filed June 25, 2007

REVERSED

M. Dawes Cooke, Jr., and John A. Jones, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for appellants.

Lawrence E. Richter, Jr., and David K. Haller, both of Richter & Haller, LLC, of Mt. Pleasant, for respondent.

JUSTICE MOORE: This appeal is from a temporary injunction[1] issued in an action brought by respondent Atwood Agency (Atwood) alleging that appellant Elaine Shaw misappropriated trade secrets when she left its employ. We reverse.

FACTS

Atwood is a vacation rental business on Edisto Island that matches homeowners (rental property owners) with renters (those seeking vacation accommodations). Shaw worked for Atwood as a property manager from 1990 until August 26, 2005, when she left and began work for another vacation rental agency, Edisto Sales and Rental Realty, Inc. (Edisto Sales). Shaw's job as a property manager involved overseeing the rental of vacation homes in Edisto Beach, including contact with both renters and rental property homeowners.

After Shaw left its employ, Atwood commenced the underlying action alleging Shaw had misappropriated its homeowners list and its renters list and was using them to take business from Atwood to Edisto Sales. Atwood claimed it had lost more than fifty rental homes causing damages amounting to "hundreds of thousands of dollars" in revenue. It alleged, among other causes of action, a violation of the South Carolina Trade Secrets Act, S.C. Code Ann. § 39-8-10 *et seq.*

On December 1, 2005, the circuit court issued an ex parte temporary restraining order based on the affidavit of Mark Steedley, Atwood's president, restraining Shaw and the other appellants employed at Edisto Sales from "contacting and contracting with" any vacation renter or homeowner of Atwood's. Bond was set at $250. After a hearing, the circuit court issued an order granting Atwood's motion for a temporary injunction. The court found Atwood's renter list and homeowners list were trade secrets and reiterated the terms of

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[1] An order granting a temporary injunction is directly appealable. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2002).

the temporary restraining order. The circuit court refused to grant a supersedeas pending appeal.

ISSUE

1. Does the information regarding homeowners and renters qualify as a trade secret?

2. Is the amount of bond insufficient?

DISCUSSION

1. Temporary injunction

Appellants contend the circuit court erred in finding Shaw misappropriated trade secrets. They claim the information regarding renters and homeowners is not "secret" because it is available from other sources. We agree.

The South Carolina Trade Secrets Act authorizes an injunction against misappropriating a trade secret. S.C. Code Ann. § 39-8-30(C) (Supp. 2006). A "trade secret" is defined as information, including a compilation, that :

> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39-8-20(5) (Supp. 2006).

Temporary injunctive relief rests within the sound discretion of the trial judge and will not be overturned unless the order is clearly erroneous. Gilley v. Gilley, 327 S.C. 8, 488 S.E.2d 310 (1997); Transcontinental Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 167 S.E.2d 313 (1969). The facts alleged must be sufficient to support a temporary injunction and the injunction must be reasonably necessary to protect the rights of the moving party. Transcontinental, *supra.* The merits of the underlying case are to be considered only to the extent necessary to determine whether there has been a prima facie showing to support a temporary injunction. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001).

Here, the information that is the subject of the temporary injunction is readily ascertainable from other sources and therefore does not qualify for protection under § 39-8-20(5). It is undisputed that a list of all the homeowners in Edisto Beach and their contact information is a matter of public record available at Town Hall. The record also indicates the names of renters were available to Shaw through other proper means. According to Shaw, she was contacted directly by Atwood renters after Atwood sent out an announcement of her departure. In addition, although by contract Atwood attempted to restrict homeowners' personal contact with renters, there is evidence that homeowners sometimes knew their renters or kept a guestbook where renters provided personal contact information.

Because the information Atwood seeks to protect is available through other proper means, it is not protected as a trade secret. Accordingly, we find the temporary injunction restraining appellants from contacting or contracting with Atwood clients clearly erroneous.

2. Security Bond

The circuit court ordered a security bond in the amount of $250 reasoning that "since [appellants] have no right to the Atwood trade secrets, the damage which may be sustained by them as a result of this injunction is minimal." Appellants contend this amount of bond is inadequate. We agree.

Rule 65(c), SCRCP, provides that:

> no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The circuit court's order requiring only a nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper. In light of our finding that appellants were improperly enjoined, we remand to the circuit court to award the appropriate amount of costs and damages incurred as a result of the temporary injunction.

REVERSED.

TOAL, C.J., and Acting Justice Edward B. Cottingham, concur. PLEICONES, J., concurring in part in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I concur in the majority's ruling that Atwood's homeowners list is not a trade secret as defined by the South Carolina Trade Secrets Act, S.C. Code Ann. § 39-8-10 *et seq* ("Act"). Accordingly, I agree that the circuit court improperly enjoined Shaw and other appellants employed at Edisto Sales from "contacting and contracting" with any Edisto Island homeowner on Atwood's client list.

However, based upon the record before us, I cannot join the majority's holding that Atwood's renters list does not qualify as a trade secret. I would thus affirm the temporary injunction in regards to Atwood's renters list and allow Atwood's cause of action based on a violation of the Act to proceed to trial.

A vacation rental agency derives independent economic value from protecting the identity of its renters because the agency's renters list is not "readily ascertainable by proper means" by any other competing rental agency. *See* S.C. Code Ann. § 39-8-20(5)(i) (Supp. 2006). Atwood understandably attempts to prevent disclosure of its renters list in order to maintain clients, as repeat business is vital to its success.

The majority reasons that Atwood's renters list is not a trade secret because some of Atwood's renters contacted Shaw and because some renters provided personal contact information in guestbooks or directly to homeowners. While these facts may be relevant to Shaw's defense to Atwood's claim that Shaw misappropriated[2] the renters list,

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[2] Misappropriation of a trade secret is specifically defined in S.C. Code Ann. § 39-8-20(2) as:

> (a) acquisition of a trade secret of another by a person by improper means;
>
> (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (c) disclosure or use of a trade secret of another without express or implied consent by a person who:

i.e. received the identity of renters by improper means, they do not determine whether the renters list, taken as a whole, qualifies as a trade secret. Regardless, simply because some renters chose to contact Shaw or because the occasional renter left his contact information does not make Atwood's entire renters list "readily ascertainable."

Accordingly, I concur with the majority that Atwood's homeowners list is not a trade secret as defined under the Act. I also agree with the majority's holding that the security bond ordered in this case was inadequate to satisfy Rule 65(c), SCRCP, and the case should be remanded to the circuit court for a determination of the proper amount of the security bond. However, as to its renters list, Atwood has met the necessary criteria for a temporary injunction,[3] and I would allow Atwood's claim under the Act to continue to trial.

BURNETT, J., concurs.

(i) used improper means to acquire knowledge of the trade secret; or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
(A) derived from or through a person who had utilized improper means to acquire it;
(B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

[3] To obtain a preliminary injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 603 S.E.2d 905 (2004).

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John A. Pincelli, Respondent.

Opinion No. 26349
Submitted May 15, 2007 – Filed June 25, 2007

DEFINITE SUSPENSION

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

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a two year suspension from the practice of law. He requests the suspension be made retroactive to the date of his interim suspension.[1] We accept the Agreement and impose a two year suspension from the practice of law,

[1] On August 10, 2005, the Court placed respondent on interim suspension. See In the Matter of Pincelli, 365 S.C. 343, 618 S.E.2d 883 (2005).

retroactive to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent's legal practice was devoted to the area of mortgage foreclosures in which respondent represented mortgagees. The majority of respondent's mortgage foreclosures came from one client, hereafter referred to as Client A, and, to a lesser extent, foreclosures from several other clients, one of which is referred to as Client B.

Several assistants and a bookkeeper worked for respondent in his law office. A particular legal assistant (Legal Assistant) was responsible for managing the foreclosure operations of respondent's law firm. The bookkeeper was responsible for making deposits and writing checks as directed by others in respondent's office.

Respondent represents that in March 2005 he discovered that his office had not been handling money belonging to Client A in accordance with the net funding provisions of his retainer agreement and that the funds had been misdirected by someone in his office. According to respondent, when he made this discovery, he immediately contacted Professor Robert Wilcox for ethical advice and retained J. Steedley Bogan as his legal and ethics counselor. Shortly thereafter, respondent hired a CPA firm to audit his trust account concerning funds his law office handled for Client A. Within days of receiving the completed audit from the CPA firm which confirmed misapplication of Client A's funds, respondent reported the audit findings to Client A, promptly reimbursed Client A in the amount of $80,519.47 (which was the amount of funds the audit reported had been misdirected), and self-reported the matter to ODC.

Later, after ODC began reviewing records furnished by respondent, it was discovered additional funds (albeit in relatively smaller amounts) had also been diverted from Client A and that funds had also been diverted from Client B. Respondent represents that he

promptly paid the additional amounts to Clients A and B and believes no additional amounts are due Clients A and B.

More specifically, respondent's law firm (Pincelli & Associates) had a written agreement for services (the Retainer Agreement) with Client A which provided, among other things, that there would be no "net funding" (i.e., that all proceeds from foreclosure actions received by respondent as attorney for Client A would be forwarded to Client A along with respondent's statement for fees and costs which would then, if approved by Client A, be paid by Client A to respondent). In other words, under the terms of the Retainer Agreement, respondent was not permitted to retain any monies whatsoever for fees and costs in connection with the foreclosure actions and, instead, respondent was required to remit all funds received on behalf of Client A directly to Client A and then look to Client A for subsequent payment of approved fees and costs for respondent's services related to mortgage foreclosures.

It is now known that Client A and Client B failed to receive all funds due them from the sale of several properties foreclosed upon by respondent. In addition, Client A, Client B, and an unknown client were not timely paid some funds received by respondent or his law firm from the forfeiture of compliance deposits on properties where third parties were successful bidders at foreclosure sales.[2] Instead, there was a misapplication of net funds of some of these defaulting bids.

The Agreement details more than twenty occasions in which respondent did not forward funds to Client A, Client B, and an unknown client in accordance with the net funding provisions of the retainer agreements by either failing to remit all funds from the successful third party bidder on property where his clients had received

[2] These forfeitures occurred when a successful bidder on a parcel of property made a "good faith" deposit of 5% of the sales price and then failed to tender the balance of the sales price within thirty days of the sale.

foreclosure judgments in excess of the highest bid or failing to remit forfeited third party deposits to his clients.[3]

In each of the occasions detailed in the Agreement, respondent's bookkeeper wrote checks on respondent's trust account either upon respondent's own direction or that of Legal Assistant. Either respondent or Legal Assistant instructed the bookkeeper on the amount and payee for each check. All checks were signed by respondent. The checks from respondent's trust account were made payable to Legal Assistant, to respondent, to respondent's law firm, to others, and, on one occasion, to Bank of America for an amount owed by respondent.

Respondent represents he was unaware that the client funds were being withheld in contravention of the retainer agreements when he signed the trust account checks and, consequently, unaware that the checks he signed to himself, his law firm, and others were for funds belonging to Clients A and B and an unknown client. Respondent represents Legal Assistant withheld and caused to be disbursed the

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[3] For purposes of illustration, the Court sets forth one of those occasions. Respondent brought a foreclosure action on behalf of Client A against a mortgagor seeking to foreclose a mortgage on a parcel of property. Respondent obtained a judgment of foreclosure against the defendant in the amount of $82,893.44. Client A instructed respondent to bid $23,000 at the sale. A third party was the successful bidder with a bid of $23,100. After the deduction of statutory costs and disbursements, respondent received from the court hearing net sales proceeds of $22,857 which was deposited into respondent's trust account. Thereafter, respondent remitted only $22,400 of the sales proceeds to Client A, leaving a balance of $457 in respondent's trust account. The $457 was paid by check signed by respondent to Pincelli and Associates. Since the successful high bid by the third party was less than the judgment rendered to Client A, all net proceeds were the property of Client A and therefore $457 should have been paid to Client A.

monies so withheld on her own initiative without instructions from respondent.

As noted above, respondent represents that, when he became aware of the improper withholding of the client funds, he sought legal advice, had an audit completed, and promptly remitted the funds due to Client A. Thereafter, he submitted as self-report with ODC.

In the self-report, respondent represented as follows:

> When a property was foreclosed upon and sold at the Master's sale my bookkeeper received the sale proceeds from the Court. [The bookkeeper] had been instructed to forward to [Client A] the actual amount of their authorized bid and then retain in the trust account the excess which was actually paid by a third party. The amount retained was then to be disbursed in part to the law firm to pay costs and fees. Any remainder was to be disbursed to the client.
>
> Fortunately, the audit revealed that no funds were stolen by the bookkeeper. Instead, these funds were paid by the bookkeeper to my law firm general account and were used in our normal course of doing business.
>
> While I had no prior knowledge that this was the bookkeeper's practice, I now recognize, and should have recognized at the time, that the excess funds should have been sent to the client.
>
> I provided a copy [of that audit report] to the client and immediately forwarded [Client A] a check for $80,519.47 which was the amount that the audit determined that I owed.
>
> I am writing the Commission to let you know that I have failed to properly supervise the bookkeeper who was processing the trust account. It appears … that I have violated Rule 417 in that I did not operate my [trust] account in strict compliance with Rule 417

> by personally approving each foreclosure settlement sheet and by personally making sure that monthly reconciliations of the trust account were performed. I also admit that I violated Rule 1.15(b) in not safekeeping my client's money.

The self-report incorrectly indicates that the amounts then known due to Client A were the result of bookkeeper error. However, it is now known that the amounts so withheld from Client A were not in any way due to any fault, mistake, or wrongdoing on the part of the bookkeeper. Further, the self-report incorrectly states that the funds withheld were paid into respondent's law firm general account and used in the "normal course of doing business." However, it is now known that some of the funds were paid not only into respondent's general account but, on occasion, paid directly to respondent, his employees, and, at least in one instance, toward amounts due on respondent's credit card. Respondent represents the incorrect statements in his self-report were unintended. He readily acknowledged the inaccuracies of the initial information after reviewing additional information and bank records and discussing the matter with his own counsel and ODC.

Respondent acknowledges that he failed to properly supervise Legal Assistant in the handling of the foreclosure actions and the disbursement of the proceeds therefrom. He agrees he allowed Legal Assistant, a paralegal with considerable experience in foreclosure actions, to handle most all aspects of the foreclosures referenced in the Agreement with virtually no supervision or guidance. Respondent acknowledges telling Legal Assistant when he needed certain amounts of money paid to himself, his law firm, or others, but, again, represents he was unaware these amount were being paid from monies belonging to clients. ODC has no factual basis to dispute this representation and, in fact, Legal Assistant confirmed respondent's representation in a sworn interview.

Respondent further acknowledges that he failed to personally reconcile his trust account on a monthly basis as required by the provisions of Rule 417, SCACR, and that he failed to comply with

provisions of some retainer agreements, both of which facilitated the misapplication of the clients' funds. Furthermore, respondent now recognizes that allowing Legal Assistant to handle the mortgage foreclosure aspect of his law practice with almost no supervision by a licensed attorney caused him to assist Legal Assistant in the unauthorized practice of law.

Further, respondent recognizes that he provided incorrect information in his initial report to ODC and in his response to ODC's Notice of Full Investigation. However, respondent represents that these misrepresentations were unintentional and now acknowledges that a more careful review of his files and bank records prior to filing his self-report and response to the Notice of Full Investigation would have precluded these incorrect representations. In mitigation, but not as a defense, respondent points out that this incorrect information was not apparent from the audit report. ODC has no factual basis to dispute these representations, especially in view of Legal Assistant's sworn testimony supporting the representations made by respondent.

The audit report states respondent's law firm used the trust account to hold funds from fees earned by respondent as a lecturer. After respondent received the audit report, he removed the lecture fee funds from the trust account. Respondent recognizes that, in placing those lecture fees in his trust account, he commingled non-client funds with client funds.

Respondent asserts that all amount known due to Clients A and B have been repaid. He agrees that, should it be discovered that any additional amounts are due to any clients as a result of the misconduct herein, he shall pay the amounts as quickly as practical.

Respondent has not been previously sanctioned for professional misconduct nor found to have committed professional misconduct by the Commission on Lawyer Conduct, its predecessor entity, the Board of Grievances and Discipline, or this Court.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(6) (lawyer shall not violate oath of office). Respondent further admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.15 (upon receiving funds which belong to a client, lawyer shall promptly deliver the funds to the client); Rule 5.1 (lawyer shall charge reasonable fee); Rule 5.3 (lawyer having supervisory authority over non-lawyer employee shall make reasonable efforts to ensure non-lawyer's conduct is compatible with professional obligations of lawyer); and Rule 5.5 (lawyer shall not assist non-lawyer in performance of activity which constitutes unauthorized practice of law); Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). Finally, respondent admits that he has violated the recordkeeping provisions of Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a two year definite suspension from the practice of law, retroactive to the date of respondent's interim suspension. In addition, as stated in the Agreement, within thirty (30) days of the date of this opinion, respondent shall pay the costs of ODC's investigation into this matter to the Commission on Lawyer Conduct.[4] Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

[4] The Agreement provides that ODC's costs were $916.50.

DEFINITE SUSPENSION.

TOAL, C.J. MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eddie Christopher Davis, Respondent

v.

The School District of
Greenville County, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26350
Heard April 17, 2007 – Filed June 25, 2007

REVERSED AND VACATED

C. Wade Cleveland, of Greenville, for Appellant.

Matthew J. Kappel, of Greenville, for Respondent.

JUSTICE WALLER: This is a school discipline case where the hearing officer disciplined respondent Eddie Christopher Davis by transferring him from Wade Hampton High School to an alternative school. The Greenville County School Board ("the Board") affirmed the transfer, but the circuit court reversed. The School District of Greenville County ("the

District") directly appeals the circuit court's decision. We reverse and vacate.

FACTS

On August 24, 2004, respondent's teacher "smelled a peculiar odor" coming from the area of two students which she concluded was the smell of marijuana. The assistant principal, Terry Carnes, took respondent and the other student to his office where Carnes decided the odor was coming from respondent's clothes and hands. The principal, Bill Utsey, confirmed the smell of marijuana on respondent's hands and clothing.[1] As a result, respondent was suspended and, pursuant to the District's discipline policy, expulsion proceedings were initiated.[2]

That same day, respondent's mother was sent a letter informing them of the suspension and the fact that expulsion was being recommended. Prior to the hearing, another letter went out informing respondent's mother of respondent's rights, including the right to a hearing before a hearing officer, the right to be represented by counsel, and "all other regular rights" including the right to call and question witnesses.

The hearing was held on September 2, 2004, and respondent was represented by counsel. Principal Utsey testified he smelled marijuana on respondent's clothes and hands, and therefore was required to recommend that respondent be expelled. Respondent denied he had smoked marijuana the morning of August 24th but testified that he had smoked a Newport menthol cigarette before coming to school.

Respondent also presented evidence regarding drug screening tests he took on August 31, 2004, conducted by a company called Accurate

[1] It is undisputed that no one observed any visual signs respondent was under the influence of marijuana. The only evidence of marijuana use was the odor detected on respondent's hands and clothes.

[2] The District's Discipline Code provides that if a high school student comes onto school property after using an illegal drug, as "evidenced by scent, actions or admission," the result will be that the principal recommends expulsion.

Diagnostics. The urinalysis and hair tests for marijuana both came back negative. The office manager for Accurate Diagnostics testified that marijuana stays in a user's urine anywhere from 14 to 30 days, and respondent's hair sample would have shown marijuana use from the previous three months. However, in response to the hearing officer's question of "how little marijuana does one have to smoke to show up on a test," the witness stated that if a person "smoke[d] one joint, [then] that is supposed to show up…. If someone takes one puff, it is likely that it may not show up."

Based on the evidence that three people smelled marijuana on respondent, the hearing officer ruled the misconduct charge was supported by the evidence. Respondent, however, was not expelled; instead, the hearing officer assigned respondent to the District's alternative program. Respondent appealed to the Board which affirmed the hearing officer's decision.

Respondent then appealed to the circuit court. The circuit court ruled respondent had the right to appeal under S.C. Code section 59-63-240 and summarily reversed the Board's decision.

ISSUE

Did the circuit court have subject matter jurisdiction to review the Board's decision affirming respondent's transfer to the alternate program?

DISCUSSION

The District argues the circuit court lacked jurisdiction to review the Board's decision because the statute governing the transfer of a student does not provide for appeal beyond the Board. Respondent, on the other hand, asserts that because expulsion proceedings were initiated, this matter is governed by the expulsion statute which specifically allows for an appeal from the Board's decision. We agree with the District and find the circuit court lacked jurisdiction to hear respondent's appeal.

In Title 59 of the S.C. Code, Chapter 63, Article 3 specifically addresses the issue of student discipline. Section 59-63-240 states as follows, in relevant part:

> The board may expel for the remainder of the school year a pupil for any of the reasons listed in § 59-63-210.[3] If procedures for expulsion are initiated, the parents or legal guardian of the pupil shall be notified in writing of the time and the place of a hearing either before the board or a person or committee designated by the board. At the hearing the parents or legal guardian shall have the right to legal counsel and to all other regular legal rights including the right to question all witnesses. If the hearing is held by any authority other than the board of trustees, the right to appeal the decision to the board is reserved to either party.… The pupil may be suspended from school and all school activities during the time of the expulsion procedures. **The action of the board may be appealed to the proper court.**

S.C. Code Ann. § 59-63-240 (2004) (emphasis added). The statutory section governing the transfer of students provides:

> The board or a designated administrator may transfer a pupil to another school **in lieu of suspension or expulsion** but only after a conference or hearing with the parents or legal guardian. **The parents or legal guardian may appeal a transfer made by an administrator to the board.**

S.C. Code Ann. § 59-63-250 (2004) (emphasis added).

In Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996), this Court dealt with a similar situation. There, a student had been suspended for 10 days for coming to a high school football game after drinking alcohol.

[3] Section 59-63-210(A) sets forth the reasons a district board of trustees may authorize the expulsion, suspension, or transfer of a student, including "for violation of written rules and promulgated regulations established by the district board."

The student attempted to appeal the suspension to the circuit court which ruled it lacked jurisdiction over public school suspensions. We upheld the finding of no subject matter jurisdiction. Comparing the suspension statute[4] with the expulsion statute, we found that "there exists a qualitative difference in the appellate procedures granted to students being suspended and those being expelled." Id. at 433, 468 S.E.2d at 865. Specifically, the Byrd Court stated that "[b]ecause the expulsion provision expressly grants the student a right to appeal to 'the proper court,' and no such language exists in the suspension provision, it appears that the Legislature intended that suspended students not be entitled to a right to appeal beyond" the Board level.[5] Id. at 433-34, 468 S.E.2d at 865.

In the instant case, the section governing the transfer of a student is similar to the suspension statute at issue in Byrd: it does not provide for an

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[4] This section provides:

> When a pupil is suspended from a class or a school, the administrator shall notify, in writing, the parents or legal guardian of the pupil, giving the reason for such suspension and setting a time and place when the administrator shall be available for a conference with the parents or guardian. The conference shall be set within three days of the date of the suspension. After the conference the parents or legal guardian may appeal the suspension to the board of trustees or to its authorized agent.

S.C. Code Ann. § 59-63-230 (2004).

[5] In Floyd v. Horry County Sch. Dist., 351 S.C. 233, 569 S.E.2d 343 (2002), we clarified Byrd and held that a student may appeal to circuit court "for the sole purpose of challenging a temporary school suspension under" the United States Supreme Court's decision in Goss v. Lopez, 419 U.S. 565 (1975). Floyd, 351 S.C. at 237, 569 S.E.2d at 345. This Court further stated that "[i]f the minimal procedural standards of Goss v. Lopez are met, the suspension shall be affirmed." Id. Pursuant to Goss v. Lopez, the minimal process constitutionally due a student for a suspension of ten days or less is: (1) oral or written notice of the charges; (2) an explanation of the evidence; and (3) an opportunity to present his side of the story. 419 U.S. at 579. The instant appeal does not involve respondent's initial temporary suspension. We nevertheless note that minimal process standards clearly were met in this case.

appeal beyond the Board's decision. See § 59-63-250. Therefore, consistent with the plain language of section 59-63-250 and the reasoning of Byrd, we find the circuit court lacked subject matter jurisdiction to entertain respondent's appeal.

Respondent contends, however, that because the proceedings began as expulsion proceedings, and the procedure initially followed by the District was pursuant to the expulsion statute, see § 59-63-240, he retains the full appellate rights outlined in that statutory section. Respondent further maintains that because the statutory language provides that the "action of the board may be appealed to the proper court" – without regard to whether the action resulted in an actual expulsion – the circuit court properly found it had the power to review the Board's action in this case. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Furthermore, the "goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." Id. at 91, 533 S.E.2d at 584.

Section 59-63-250 expressly provides for discipline in the form of a transfer "in lieu of suspension or expulsion;" therefore, it plainly envisions the possibility that the student may be involved in expulsion proceedings prior to being transferred. The statute then specifically provides for only one level of appeal. Had the Legislature intended for a transferred student to have all the rights outlined in the expulsion statute, it could have provided specifically for that procedure in section 59-63-250. We therefore hold the Legislature intended that when a student is merely transferred, and not expelled, the review of the decision ends with the Board. See § 59-63-250; Hodges v. Rainey, supra (the cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature).

Indeed, a contrary interpretation would create a significant conflict between sections 59-63-240 and 59-63-250, allowing further appellate review of a transfer if the proceedings were initiated under the expulsion statute, but

not of a transfer initiated under the transfer statute. Hodges v. Rainey, supra (statutes should be harmonized whenever possible to prevent an interpretation that would lead to a result that is plainly absurd); see also Aledo Indep. Sch. Dist. v. Reese, 987 S.W.2d 953, 958 (Tex. App. 1999) (where the court held that a student's transfer to an alternative education program was not an expulsion, in part because the applicable statutes provided no district court review for alternative placements but allowed further court review for expulsions). Thus, once the hearing officer rejected expulsion and imposed the sanction of transfer, the transfer statute became applicable. That section's appellate procedure simply does not provide for appeal of the Board's decision to the circuit court. See § 59-63-250. Accordingly, the circuit court lacked subject matter jurisdiction to review the Board's decision.[6]

CONCLUSION

Based on the foregoing, we reverse the circuit court's decision and vacate the circuit court's order.

REVERSED AND VACATED.

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

[6] We decline to address the remaining issues raised on appeal. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (the appellate court need not address additional issues when resolution of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of O. Doyle Martin, Respondent.

Opinion No. 26351
Heard May 29, 2007 - Filed June 25, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Keith M. Babcock, of Lewis and Babcock, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits the allegations therein constitute violations of the Rules of Professional Conduct, Rule 407, SCACR, and the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, and consents to the imposition of a six month suspension pursuant to Rule 7(b), RLDE, Rule 413, SCACR. Respondent requests the suspension be made retroactive to the date of his interim suspension. See In the Matter of Martin, 371 S.C. 33, 637 S.E.2d 560 (2006). We accept the agreement and suspend respondent from the practice of law in this state for six months, retroactive to the date of his interim suspension.

FACTS

The facts as set forth in the agreement are as follows. Respondent was indicted in federal court on thirty counts of mail fraud. The indictment resulted from respondent's allocation, at the direction of an officer of an insurance company for which respondent did defense work, of time and charges to several of the company's files on which the time billed had not been spent. Following indictment, respondent was placed on interim suspension. See In the Matter of Martin, supra.

However, the indictment has since been dismissed. Moreover, respondent represents that all of the time he billed to the company was in fact spent by him and computed at approved rates. He further represents he did not bill the company for any amounts he or his firm were not due for legal services performed for the company. Respondent has consistently maintained preparation of the statements requested by the officer did not constitute misconduct because he was not charging the company for any amounts not due him or his firm by the company, and he was preparing the statements with the knowledge and at the direction of the officer.[1] However, in hindsight, respondent recognizes the pro rata allocation of fees on his firm's statements to the company, although at the direction of the officer, at least gave the appearance that the officer was seeking to mislead someone or some entity to the detriment of one party or to the advantage of another. Respondent states that, in the future, he will make every effort to have all of his statements accurately reflect the time and charges related to the referenced file.

LAW

Respondent admits that the above allegations constitute a violation of the strict requirements of Rule 1.5 of the Rules of Professional

[1] It is not clear why the officer wanted respondent's time and charges allocated to other files respondent handled for the company. The officer was terminated by the company based on alleged payments on fictitious claims generated by an adjuster in the State of Kentucky. He subsequently pled guilty in federal court to a criminal offense related to his activities, but not related to the activities of respondent nor the averments in the indictment against respondent.

Conduct, Rule 407, SCACR (a lawyer shall not charge or collect an unreasonable fee), which could be construed as a violation of Rules 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 8.4(e), RPC (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice) as well. Finally, respondent admits the allegation would constitute grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for six months, retroactive to the date of respondent's interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

Prior to the submission of the agreement to this Court, respondent filed a Petition to Reconsider or Vacate and for Reinstatement in which he asked the Court to reconsider or vacate the interim suspension order and permit respondent to resume the practice of law. We deny the request to reconsider or vacate the interim suspension order as moot. With regard to respondent's request to be reinstated to the practice of law, he will first have to comply with the requirements of Rule 32, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Samantha D. Farlow, Respondent.

Opinion No. 26352
Heard May 25, 2007 - Filed June 25, 2007

DEFINITE SUSPENSION

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

Jason B. Buffkin, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE. Respondent requests that if a suspension is imposed, it be made retroactive to the date of her interim suspension. See In the Matter of Farlow, 369 S.C. 48, 631 S.E.2d 75 (2006). We accept the agreement and find a two year suspension from the practice of law is the appropriate sanction. The suspension shall not be made retroactive to the date of respondent's interim suspension.

FACTS

The facts, as set forth in the agreement, are as follows. Respondent pled guilty to one count of accommodation distribution of marijuana with remuneration, in violation of 21 U.S.C. §§ 841(b)(1)(D) and 841(b)(4), and one count of possession of methylenedioxymethamphetamine hydrochloride, also known as "ecstasy," in violation of 21 U.S.C. § 844(a). Respondent was sentenced to six months' imprisonment on each count, to be served concurrently.[1] It was also ordered that, upon release, respondent be under supervision for one year, six months of which must include participation in the home confinement program with electronic monitoring.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent also admits her misconduct constitutes grounds for discipline under Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice, to bring the courts or legal profession into disrepute, or demonstrate an unfitness to practice law) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

[1] At the sentencing hearing, it was also determined respondent had given perjured testimony in the trial of another individual. The acts that gave rise to both the criminal charges against respondent and the finding of perjury occurred prior to respondent's admission to the practice of law.

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for two years. The suspension shall not be made retroactive to the date of respondent's interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR. In addition, as set forth in the agreement, respondent shall, within thirty (30) days of the date of this opinion, pay $861.88 for costs incurred in the investigation and prosecution of this matter by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert D. Lever d/b/a Leverage Builders, Inc., Respondent,

v.

Lighting Galleries, Inc. d/b/a Augusta Lighting and Design Center, Appellant.

Appeal From Aiken County
Robert A. Smoak, Jr., Master-In-Equity

Opinion No. 26353
Heard April 18, 2007 – Filed June 25, 2007

REVERSED

Weston Adams, III and Paul M. Koch, of McAngus, Goudelock & Courie, of Columbia, for Appellant.

Forrest Craig Wilkerson, Jr., of Rock Hill, and Marvin B. Poston, of Powell & Poston, of Aiken, for Respondent.

JUSTICE WALLER: Appellant, Lighting Galleries, Inc. d/b/a August Lighting and Design Center, appeals an order of the Master-in-

Equity holding that a mortgage given to it by respondent, Robert Lever f/k/a Leverage Builders, Inc., should be marked satisfied. We reverse.[1]

FACTS/ PROCEDURAL BACKGROUND

In April 1988, Leverage Builders was indebted to Lighting Galleries, Inc. in the sum of $36,256.97. To secure this debt, Lever signed an agreement in which he agreed to give Lighting Galleries a fourth mortgage in a one-third undivided interest it owned in property in Aiken County. The agreement provided that it was for a period of one year, and would accrue interest at the rate of 9% per annum. A mortgage on the property was recorded simultaneously with the above agreement. Thereafter, On June 14, 1988, Lever signed a Note agreeing to pay Lighting Galleries $36,256.97, to be paid per the terms of the agreement, at a rate of 9% interest, and subject to an attorney's fee of 15% if collection became necessary.

In April 1989, when Lever did not timely pay in accordance with the parties' one-year agreement, Lighting Galleries brought suit on the note in Aiken County, resulting in an order for judgment of $36,256.97, plus interest, as well as attorney's fees of $5437.00. The judgment was entered in Lancaster County. It is undisputed that despite attempts to collect the debt, Lighting Galleries was unable to collect on its judgment, which expired ten years later, in April 1999.[2] It is also undisputed that Lever has not paid the debt to date.

Lighting Galleries initially chose not to bring a foreclosure action on the mortgage because, in 1989 the property was worthless, having had an oil spill on it, and Lighting Galleries was only a fourth-mortgagee on a 1/3 interest in the property.

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[1] This matter was certified from the Court of Appeals pursuant to Rule 204(b), SCACR.

[2] Judgment liens on real estate continue for ten years. S.C. Code Ann. § 15-35-810 (1976).

After Lighting Galleries' judgment lien expired, Lever filed a petition and Rule to Show Cause in the circuit court,[3] seeking a ruling that the mortgage on the property should be extinguished, and contending that Lighting Galleries, Inc. had previously elected its remedy, such that it was prohibited from thereafter pursuing a foreclosure action.[4] Lever sought damages, costs and attorneys fees. The matter was referred to the Master-in-Equity who held that the judgment obtained by Lighting Galleries on the note rendered the note and mortgage inoperative, such that the mortgage should be marked satisfied. Lighting Galleries appeals.

ISSUE

Did the Master err in holding the mortgage should be marked satisfied?

DISCUSSION

The Master held that "at the moment [Lighting Galleries] obtained the judgment on the note against [Lever], the indebtedness was then evidence by the order for judgment and no longer by the note, which became inoperative and of no further substance. Since a mortgage is merely a security interest and must be based upon a note or other written evidence of an obligation, upon the entry of the judgment the mortgage likewise became inoperative since there is no provision in law for a mortgage to secure a judgment." This was error.

A mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action.

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[3] Pursuant to S.C. Code Ann. § 29-3-360, "[a]ny person who is indebted by mortgage on real estate may apply to the presiding judge or any court of general sessions and common pleas to be held in the county in which the mortgage on real estate is recorded for a rule to show cause why satisfaction must not be entered thereon."

[4] Lighting Galleries was not, at the time, seeking to foreclose on the property. However, the property has significantly increased in value recently due to SCDOT wishing to purchase the property at a price of $15,000 per acre. Another party has also recently expressed interest in purchasing the remainder of the mortgaged property. Additionally, although Lighting Galleries was initially a fourth mortgage holder, only two mortgages currently exist on the property.

See Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978) (It is not implicit in the taking of a mortgage that the creditor is to look only to the property for satisfaction of the debt. Indeed, he may ignore the security and bring an action at law on the indebtedness, or he may proceed by foreclosure to satisfy his lien); Platt v. Carroll, 125 S.C. 493, 119 S.E. 180 (1923) (The bond is not the debt, nor is the mortgage the debt; the debt is the borrowed money; the bond and the mortgage are simply separate securities for the same debt, and the creditor may pursue either security that his interest may dictate); Hatfield v. Kennedy, 1 Bay, 501 (1793) (Wherever a man has a bond and mortgage, he may pursue both at the same time, or either of them, as he thinks proper). See also Blackmon v. Patel, 302 S.C. 361, 363 396 S.E.2d 128, 130 (Ct. App. 1990) ("Seller had no duty to pursue foreclosure of his mortgage before suing on the note. A creditor, including mortgagees, has the option of ignoring the security and suing on the note." *citing* Edge v. Klutts Resort Realty, Inc., 276 S.C. 389, 278 S.E.2d 783 (1981); Perpetual Bldg. & Loan Ass'n v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978)).

As noted by 55 Am.Jur. 2d Mortgages § 524:

> The cases are uniform in holding that **until the mortgage debt is actually satisfied, the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien**, **does not merge it, and does not preclude its foreclosure in a subsequent suit** instituted for that purpose, or the exercise of the power of sale contained in the mortgage or deed of trust.

(emphasis supplied).

Lever contends the critical distinction **in this case** is because the judgment which Lighting Galleries obtained more than ten years ago has expired pursuant to S.C. Code Ann. § 15-35-810 (1976), the debt is now barred and the mortgage discharged. We disagree.

Lever cites Buist v. Dawes, 24 S.C. Eq. (3 Rich. Eq.) 281 (1851) for the proposition that Lighting Galleries, having elected to sue on the note and obtain a judgment, is bound thereby and may not now pursue a foreclosure action. Buist does not support Lever's contention. Buist held:

> Wherever two rights are alternatively created, or given, either in express terms, or by construction, the party to whom they are given is entitled to only one of the two, and must elect between them; but after he has made his election he is bound, and will not be allowed to elect again, unless he can shew some equitable circumstances entitling him to retract the choice he has made.

Buist involved a widow's acceptance of dower rights which was held to destroy her right to a distributive share of her husband's estate. Buist is inapposite to those cases which allow a creditor to pursue either an action at law on a note, or proceeding by foreclosure of a mortgage. Platt v. Carroll; Perpetual Bldg. and Loan Ass'n of Anderson v. Braun; Hatfield v. Kennedy, 1 Bay, 501 (1793); Blackmon v. Patel, Edge v. Klutts Resort Realty, Inc.

Lever also cites Gibbes v. Holmes, 31 S.C. Eq. (10 Rich. Eq.) 484 (1859) for the following proposition:

> [T]he debt must be presumed to be satisfied from the lapse of time. If this presumption prevails, the mortgage is as completely discharged as if the debt had been satisfied by actual payment. Where the statute of limitations applies, it is presumption *juris et de jure*. It cannot be rebutted. A debtor may admit that the debt has not been paid, and in the same breath insist upon the protection and bar of the statute. But **a presumption of satisfaction, arising from the lapse of time may be rebutted**.

(Emphasis supplied). We find the facts of this case amply support the rebuttal of any presumption that the debt has been satisfied; Lever concedes that he has not paid the debt.

Moreover, in Nichols v. Briggs, 18 S.C. 473 (1883), the Court held that the above-cited language in Gibbes was mere *obiter dictum*. The question before the Nichols Court, as stated therein, was as follows: "Assuming that recovery on the note considered by itself could not be had on account of the statute of limitations, must the mortgage of real property, given to secure the same debt, also be considered as barred?" The Court went on to hold that "**The note given is only evidence of the debt and one of the means of collecting it, and if there is a mortgage, that is only another security for the same debt. . . . A mortgage being given as a security for a debt, the general rule is that no mere change in the mode or time of payment, nothing short of an actual payment of the debt or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt.** 1 Hill. Mort., § 3. The mortgage would have been good as a security for the $500 even if the bond had never been given." (emphasis supplied). The Nichols Court went on to state:

> What effect did the bar of the note by the statute of limitations have upon the debt evidenced by the note and also secured by the mortgage? It is well settled that the effect of the statute is only to take away the remedy, and not to extinguish the debt. When a security is barred the debt is not thereby necessarily discharged. Wilson v. Kelly, 16 S. C. 216. The rule that the discharge of the debt is a discharge of the mortgage has no application when the debt is merely discharged by the statute of limitations or a discharge in bankruptcy. . .
>
> Though the debt be barred, the lien may be enforced. The fact that a debt secured by a mortgage is barred by a statute of limitations, does not necessarily, or as a general rule, extinguish the mortgage security or prevent the maintaining an action to enforce it." 2 Jones Mort., § 1204 and notes. This is the general rule, and we see no reason founded in principle why it should not be adopted here.

Nichols, 18 S.C. 473.

A creditor shall not have two satisfactions for the same debt, but there is no inconsistency in his pursuing two remedies. If one produces satisfaction, that is a bar to the other. A mortgage is a specific lien, and a judgment is a general lien. Both may be consistently pursued, until the debt is satisfied. Satterwhite v. Kennedy, 3 Strob. 459 (1849).

We hold that Lighting Galleries may pursue a foreclosure action notwithstanding its judgment against Lever was extinguished by virtue of the statute of limitations. The order of the Master-in-Equity is reversed.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent

v.

Jeremy Avery, Appellant.

Appeal From Sumter County
Thomas W. Cooper, Jr., Circuit Court Judge
George M. McFaddin, Jr., Family Court Judge

Opinion No. 4259
Submitted June 1, 2007 – Filed June 21, 2007

AFFIRMED

Graham L. Newman, of Columbia and Jack D. Howle, Jr., of Sumter, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William E. Salter, III, Office of the Attorney General, all of Columbia; and

Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

KITTREDGE, J.: Jeremy Avery appeals his convictions and sentences for murder, armed robbery, and car jacking. Avery argues the trial court erred in failing to grant his motions for change of venue and severance. He also argues the trial court erred in ruling his statements to law enforcement were admissible because they were given voluntarily. Finally, Avery asserts the family court erred in failing to consider the appropriate factors before transferring jurisdiction to the circuit court, and that the transfer was unconstitutional. We affirm.[1]

I.

On September 27, 2002, Avery and another man car-jacked, robbed, and murdered a man in Sumter County. Shortly thereafter, law enforcement took Avery to the Sumter County Law Enforcement Center, where they handcuffed him to a chair, and read him his Miranda rights.[2] Avery signed a waiver of his Miranda rights and verbally confessed to the car jacking, robbery, and murder. Law enforcement allowed Avery to talk to his mother, after which Avery signed a written statement memorializing his earlier verbal confession. The Department of Juvenile Justice assumed custody of Avery, and the case went before the family court.

The family court transferred jurisdiction of the case to the circuit court. Avery moved the trial court for (1) change of venue, (2) severance, (3) suppression of written statements Avery made to Sumter County law enforcement, and (4) remand back to the family court because the transfer violated the Eighth Amendment to the United States Constitution. The trial

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

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

court denied all motions. The jury convicted Avery of all charges and the trial judge sentenced him to thirty-five years imprisonment. Avery appeals.

II.

A. Change of Venue

Avery argues the trial court erred in refusing to grant his motion for change of venue because the members of the jury were exposed to extensive pretrial publicity. The trial court did not err.

"A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997). "An abuse of discretion occurs when the trial judge's ruling has no evidentiary support." Id.

> When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. When jurors have been exposed to pretrial publicity, a denial of a change of venue is not error when the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. Therefore, mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead, the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity.

Sheppard v. State, 357 S.C. 646, 655, 594 S.E.2d 462, 467 (2004) (citations omitted); see also State v. Evins, Op. No. 26329 (S.C. Sup. Ct. filed May 14, 2007) (Shearhouse Adv. Sh. No. 20 at 21). "Absent extraordinary circumstances, the ruling of the trial judge, developed through adequate voir dire examination of the jurors, that the objectivity of the jury panel has not been polluted with outside influence, will not be disturbed." State v. Fowler, 266 S.C. 203, 208, 222 S.E.2d 497, 499 (1976).

Here, the trial court thoroughly examined the venirepersons regarding pretrial publicity. The trial court informed the venirepersons:

> Now, ladies and gentlemen, I now need to know what knowledge you might have about this particular case, and ultimately what impact, if any, that knowledge may have upon your ability to serve as a juror in this case.
>
> I have read the indictment to you as I have said not because it is evidence nor is it proof of anything that it contains. It is simply a charging paper that tells you or me or anybody else who reads it what this case is all about.
>
> Because I need—now need to know if any of you all know anything about this case, if you have seen or heard or read anything about this case or if you have any knowledge about this case from any source at all, the first thing that I need to know is just simply to identify you by juror name and by number, and then we will go from that point on to the next level of inquiry in a slightly different setting.
>
> So the first thing that I need to know is if you have seen or heard or read anything about this case or if you have any knowledge about the case of any source at all, please stand at this time.

At this point, thirty-two venirepersons stood.[3] The trial court then related to these venirepersons:

> All right. Ladies and gentlemen, here's what we need to do now. We're going to need to inquire of you individually across the hall in the jury room about your knowledge about this case and as I have said, about what impact it will have on you, if any at all. It may not, but we need to know that.

The trial court then individually examined these venirepersons; the court inquired as to each venireperson's (1) exposure to the case, (2) formation of opinions about the case, and (3) ability to set aside those opinions in order to determine with impartiality whether the defendant was guilty beyond a reasonable doubt.

Of the thirty-two venirepersons who said they heard something about the case, a vast majority of them read about the crime in the local newspaper (at the time the crime occurred) and could not remember anything beyond the fact that the crime occurred. All but six venirepersons formed no opinion about the defendant's guilt or innocence, and of the six venirepersons who formed an opinion, all but two told the trial court they could set aside that opinion to judge the defendant's guilt or innocence with impartiality. The two venirepersons who could not set aside their formed opinions were excused by the trial court.

Avery then moved the trial court for a change of venue, which the trial court denied, stating:

> I think our system recognizes that it is practically impossible in the world that is fraught with . . . news coverage, as ours is, to find the type of informed juror that you would want to be on a jury panel in the

[3] The record does not disclose the total number of jurors in the venire.

> first place who has not read or heard or seen something about most high profile cases, and certainly this is one, and so it does not require disqualification on that basis alone.
>
> The question is whether or not they have formed an opinion. And then even beyond that, forming an opinion under the case law is not fatal to their qualification as a juror if they are able to set aside the opinion that they have formed and base their decision in the trial of the case on the evidence presented in court.
>
> And all the people who indicated that they have formed an opinion . . . all of them were . . . people who had the ability, the intellect, in some case the education, to be able to objectively analyze a situation and to base their decision on what they would hear in court, and they told me that.
>
> And there was no reason in my observation of them for me to believe that they were sandbagging us or that they were being disingenuous or whether they were being untruthful.
>
> So I respectfully note your motion, your renewal of your motion for change of venue, but must deny it on those basis.

The trial court did not abuse its discretion in denying Avery's motion for change of venue. If anything, the learned trial judge took a textbook approach in handling a defendant's motion for change of venue based on pretrial publicity. The trial court identified the venirepersons who were exposed to pretrial publicity, and individually examined them to determine whether they were so polluted by the pretrial publicity that they could not determine the defendant's guilt with impartiality. A vast majority of the

venirepersons who were exposed to pretrial publicity were not infected by it; that is, they were fully capable of objectively viewing the evidence to determine whether Avery was guilty beyond a reasonable doubt. As the trial court articulated, mere exposure to pretrial publicity is not enough to disqualify a venireperson. The venireperson must not only have a formed opinion of the defendant's guilt, but also be unable to set that opinion aside to view the evidence with impartiality. The trial court excused the two venirepersons who could not do so. The remaining venirepersons, the record demonstrates, could view the evidence impartially. The trial court is affirmed on this issue.

B. Severance

Avery argues the trial court erred in refusing to grant his motion for severance because Avery's co-defendant "placed Avery in a situation of fear and intimidation." Avery has not shown prejudice.

> A motion for severance is addressed to the sound discretion of the trial court. The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law.
>
> There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. An appellate court should not reverse a conviction achieved at a joint trial in the absence of a

> reasonable probability that the defendant would have obtained a more favorable result at a separate trial.
>
> A defendant who alleges he was improperly tried jointly must show prejudice before this court will reverse his conviction. The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime.

State v. Walker, 366 S.C. 643, 656-57, 623 S.E.2d 122, 128-29 (Ct. App. 2005) (citations omitted).

Avery has not shown how he was prejudiced by the joint trial. His first claim is that he could not confide in his attorney because his co-defendant intimidated him. To the extent this would even serve as a ground for severance, Avery put forth no proof of this intimidation, let alone proof of how, specifically, this intimidation hindered his attorney's ability to defend him. Avery's second claim is that the joint trial violated his right to confront the witnesses against him. In this case, all statements from Avery's co-defendant that referred to Avery were redacted precisely so Avery's right to confront his witness would not be impinged. See Bruton v. U.S., 391 U.S. 123 (1968). Because Avery has not demonstrated how he was prejudiced by the joint trial, the trial court is affirmed on this issue.

C. Confession

Avery argues the trial court erred in ruling his statements to law enforcement were admissible as voluntarily given because at the time they were given Avery was young, intoxicated, and tired. The trial court did not err.

"The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of 'the totality of the circumstances' surrounding the waiver." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). "On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." Id. "The South Carolina Supreme Court has rejected the position a minor's inculpatory statement obtained in the absence of counsel, parent, or other friendly adult is per se inadmissible." In the Interest of Christopher W., 285 S.C. 329, 330, 329 S.E.2d 769, 770 (Ct. App. 1985). "Instead, the court has adopted a totality of the circumstances test: 'While the age of the individual is a factor to be taken into consideration, the admissibility of a statement or confession of a minor depends upon its voluntariness, to be determined from the totality of the circumstances under which it is made.'" Id. at 330-31, 329 S.E.2d at 770.

Here, the trial court found that, under the totality of the circumstances, Avery's confession was voluntarily given. The record fully supports this finding. Avery was informed of his Miranda rights, and, after meeting with his mother, signed a written waiver of those rights. Further, Avery issued a written confession of the crime. The trial court thoughtfully considered Avery's age, intellect, and ability to understand his rights before deciding that Avery voluntarily confessed to the crime. The trial court is affirmed on this issue.

D. Transfer of Jurisdiction

Avery argues the family court erred in failing to consider the appropriate factors before transferring jurisdiction to the trial court. The family court did not err.

"The appellate court will affirm a transfer order unless the family court has abused its discretion." State v. Avery, 333 S.C. 284, 292, 509 S.E.2d 476, 481 (1999). "The serious nature of the offense is a major factor in the transfer decision." Id. "The best interests of the public or of the juvenile

may require the juvenile be held accountable as an adult for his criminal conduct." Id. at 293, 509 S.E.2d at 481.

Here, the family court carefully considered the eight factors enumerated by the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966), and condoned by our supreme court. See State v. Corey D., 339 S.C. 107, 118, 529 S.E.2d 20, 27 (2000) ("In evaluating whether the family court abused its discretion [in transferring jurisdiction to the trial court], we consider the Kent factors and emphasize that the serious nature of the offense is a major factor in the transfer decision."). The family court considered the Kent factors as well as the serious nature of the offense (Avery was charged with murder) before transferring jurisdiction to the trial court. The family court did not abuse its discretion.

E. Cruel and Unusual Punishment

Avery argues the transfer from the family court to the trial court violates the Eighth Amendment to the United States Constitution. The transfer was not unconstitutional.

Avery cites Roper v. Simmons, 543 U.S. 551 (2005), for the proposition that subjecting a minor to a potential life sentence without parole violates the Eighth Amendment to the United States Constitution. Roper held that the Eighth Amendment prevented states from executing minors under the age of eighteen. It had nothing to say about whether the Eighth Amendment prevents states from imposing a life sentence without parole on minors under the age of eighteen. In any event, Avery was sentenced to thirty-five years imprisonment, not life without parole. Thus, the issue is a non-starter, and Avery's Eighth Amendment challenge must fail.

III.

The trial court did not abuse its discretion in denying Avery's motion for change of venue, severance, and suppression of a written confession to law enforcement. The family court did not abuse its discretion in transferring

jurisdiction to the circuit court, and the transfer did not violate the Eighth Amendment to the United States Constitution. The judgments of the trial court and family court are

AFFIRMED.

HEARN, C.J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ashley River Properties I, LLC; Emerald Investments, LLC; and Stuart L. Longman, **Appellants,**

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC, **Respondents.**

Appeal From Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4260
Heard June 6, 2007 – Filed June 21, 2007

AFFIRMED

Richard S. Rosen and Daniel F. Blanchard, III, both of Charleston, for Appellants.

William C. Cleveland, III, and David B. McCormack, both of Charleston, for Respondents.

ANDERSON, J.: Ashley River Properties I, LLC, Emerald Investments, LLC, and Stuart Longman (collectively "Appellants") appeal

the dismissal of their action to vacate or modify an arbitration award previously rendered in New York and to judicially dissolve Ashley River Properties II, LLC, for lack of subject matter jurisdiction. Appellant Longman contends the circuit court erred in dismissing the causes of action as they pertain to him, because he avers he signed the operating agreement in a limited capacity. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On December 29, 2003, Longman, Emerald, and Kriti Ripley, LLC ("Kriti") entered into an operating agreement to form Ashley River Properties II, LLC, a South Carolina limited liability company. Emerald retained 70% ownership in the company while Kriti owned the remaining 30%. Longman signed the agreement as Emerald's manager. In addition, he signed personally but in a limited capacity with respect to sections 3.9 (Emerald Member's Representations) and 3.10 (Indemnification).

The cover page to the operating agreement states, "**THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, SECTION 15-48-10 ET SEQ. OF THE CODE OF LAWS OF SOUTH CAROLINA.**" The agreement contains the following pertinent provisions:

> 12.4 Governing Law. The Agreement shall be governed by and construed in accordance with the laws of the State of South Carolina regardless of the residence or domicile, now or in the future, of any party hereto and notwithstanding any conflicts of laws.
>
> 12.5 Consent to Jurisdiction. Except as otherwise required by law, **the parties to this Agreement hereby agree that the courts of the State of New York shall have sole and exclusive jurisdiction over any matter arising from the interpretation, purpose, effect, or operation of this Agreement**,

> and with regard to all matters associated with operation of the Company's business. Except as otherwise required by law, **the parties consent to venue in New York County, New York, and waive any rights they may have to assert jurisdiction or venue in any other court, administrative forum, or other adjudicative body**.
>
> . . . .
>
> 12.18 Arbitration. Any dispute or controversy arising under or in connection with this Agreement shall be submitted to binding arbitration in accordance with the requirements of the American Arbitration Association (or successor thereto) (the "AAA"). **All arbitration proceedings shall be conducted in New York County, New York**. . . . The arbitrators shall be directed to apply the governing law of this Agreement in rendering their decision.

(Emphasis added).

In March 2005, Kriti and Ashley River Properties II initiated arbitration proceedings against Longman and Emerald alleging breach of the operating agreement stemming from a development containing a marina and condominiums located in Charleston, South Carolina, known as Ripley Light Yacht Club Marina and Condominiums. Longman objected to his inclusion in the arbitration, asserting that he signed the agreement in limited joinder only.

On July 11, 2005, the New York arbitration panel issued a written order holding it had jurisdiction over Longman. On October 31, 2005, the arbitrators rendered their final arbitration decision, requiring, inter alia, that Emerald relinquish its voting rights in Ashley River Properties II and Kriti was to have the right to purchase Emerald's interest in Ashley River Properties II. The order stated: "This Award is in full settlement of all claims

and counterclaims submitted in this arbitration. All other claims and counterclaims in this proceeding are denied . . . except ones pertaining to a final accounting in connection with the use of Ashley River Properties II, LLC, funds by Emerald and Longman."

Pending the outcome of the arbitration proceeding, Kriti and Ashley River Properties II filed a lawsuit in the United States District Court for the Southern District of New York seeking to enforce the right to control Ashley River Properties II. After the first arbitration award was issued, Emerald filed its own lawsuit in the Southern District of New York contesting whether Kriti made a proper tender for the interest awarded in the first decision from the arbitrators. Both lawsuits were assigned to the same judge. Appellants' New York counsel filed a motion to dismiss the federal action for lack of subject matter jurisdiction. A few days later, Appellants' counsel informed the court the parties had agreed to dismiss the federal court actions with prejudice because of lack of subject matter jurisdiction.

Appellants filed the current action in the Court of Common Pleas for Charleston County on November 9, 2005. An amended complaint was filed on December 30, 2005, seeking to: (1) vacate or modify the arbitration award previously rendered in New York; and (2) judicially dissolve Ashley River Properties II. Additionally, Ashley River Properties I desired a declaration of rights under the operating agreement as a good faith third party purchaser, because it was not a party to the original contract.

The circuit court severed the claims of Ashley River Properties I from the remaining causes of action. Ashley River Properties II and Kriti (collectively "Respondents") moved to dismiss based primarily on the argument that South Carolina courts lack subject matter jurisdiction over the dispute. Respondents asserted that New York courts have exclusive jurisdiction over the dispute pursuant to the law of South Carolina and the operating agreement. The circuit court granted Respondents' motion to dismiss, finding the claims should have been brought in New York. Additionally, the circuit court found the claim to judicially dissolve Ashley River Properties II addressed an issue already decided by the arbitrators and was therefore not properly before the court.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move for dismissal based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003) (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." Doe v. Marion, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004), aff'd 2007 WL 1321978; accord Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (finding trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

"A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." Flateau, 355 S.C. at 202, 584 S.E.2d at 415; see Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); see also Baird, 333 S.C. at 527, 511 S.E.2d at 73 (declaring that if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (concluding a motion to dismiss cannot be sustained if the facts alleged in complaint and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case). In deciding whether the trial court properly granted the motion to dismiss, this court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523

S.E.2d 182 (Ct. App. 1999) (explaining that looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of S.C., 346 S.C. 194, 552 S.E.2d 18 (2001); see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) (stating motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

"Dismissal of an action pursuant to Rule 12(b)(6) is appealable." Williams, 347 S.C. at 233, 553 S.E.2d at 500. Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Id.

LAW/ANALYSIS

Appellants appeal the dismissal of their action for lack of subject matter jurisdiction. Appellant Longman contends the circuit court erred in dismissing his causes of action because he only signed the operating agreement in a limited capacity and did not consent to arbitration. We disagree.

I. Subject Matter Jurisdiction

Notwithstanding their agreement to arbitrate and litigate in New York, Appellants argue that because the parties' arbitration is governed by the South Carolina Uniform Arbitration Act (S.C. Ann. §§ 15-48-10 to -240 (2005)), they may, or must, apply to the courts of South Carolina to modify or vacate the arbitration award.

The South Carolina Uniform Arbitration Act ("the Act") states that agreements to arbitrate are "valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." S.C. Code Ann. § 15-48-10(a) (2005). Furthermore, South Carolina policy favors arbitrating disputes. Towles v. United HealthCare Corp., 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999).

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 236, 442 S.E.2d 598, 600 (1994). In support of their argument, Appellants cite section 15-48-180 of the South Carolina Code (2005), which states:

> The term 'court' means any court of competent jurisdiction of this State. The making of an agreement described in § 15-48-10 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder. Unless otherwise provided by the arbitration agreement, when a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact.

However, nothing in this section confers subject matter jurisdiction to South Carolina courts when, as in the case sub judice, the arbitration is held as agreed by the parties in New York. Appellants entered into an agreement unambiguously providing for arbitration in New York, yet now contend that section 15-48-180, by defining the word "court" to mean courts of competent jurisdiction of South Carolina, requires that an arbitration subject to the Act may be reviewed by South Carolina's courts. However, this is **not** what the Act requires. Courts in South Carolina are not courts of competent jurisdiction in the face of an arbitration agreement mandating arbitration in New York.

Agreements such as the one at issue are construed pursuant to the rules of contract interpretation. See generally McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501 (1945). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992). If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. See id. When a contract is unambiguous, a court must construe its provisions according to the terms the parties used as understood in their plain, ordinary, and popular sense. C.A.N. Enter., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The forum selection clause contained in section 12.5 of the operating agreement unambiguously provides that the courts of New York shall have sole and exclusive jurisdiction over any matter arising from the operating agreement, which includes those issues litigated in the instant case.

Additionally, section 15-48-230 of the South Carolina Code (2005) provides that the Act is to be interpreted so as to make its application uniform among the states that adopt it. Courts of other states applying the Uniform Arbitration Act to this issue have uniformly held a court's subject matter jurisdiction to consider motions related to arbitration is dependent upon, and arises from, the parties' agreement to conduct the arbitration proceedings in that state. See Government e-Mgmt. Solutions, Inc. v. Am Arbitration Ass'n, Inc., 142 S.W.3d 857, 861 (Mo. App. 2004); Atrip v. Samons Constr., Inc., 54 S.W.3d 169, 171 (Ky. App. 2001); Chicago Southshore & South Bend R.R. v. N. Indiana Commuter Transp. Dist., 703 N.E.2d 7, 9 (Ill. 1998); Tru Green Corp. v. Sampson, 802 S.W.2d 951, 953 (Ky. App. 1991). Accordingly, applying both the plain language of the Act and the cases of other states interpreting similar provisions, South Carolina courts do not have subject matter jurisdiction to consider a motion to review an arbitration award issued in a proceeding conducted in New York pursuant to the parties' written agreement.

Appellants contend section 15-7-120 of the South Carolina Code (2005) stipulates that contracts that purport to divest South Carolina courts of

jurisdiction over matters otherwise within their jurisdiction are unenforceable as a matter of law. Section 15-7-120(A) provides:

> Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.

However, to the extent that this section is construed to invalidate the parties' specification as to which court may vacate, modify, or confirm their arbitration award, such a construction would directly conflict with the Federal Arbitration Act, 9 U.S.C. § 9. The Federal Arbitration Act ("the FAA") expressly states that review of an award will be conducted by the court specified by the parties' agreement. As the Supreme Court of the United States noted in Volt Info. Sciences, Inc. v. Board of Trustees of Stanford University, 489 U.S. 468, 478 (1989), "[t]he FAA was designed to 'overrule the judiciary's long-standing refusal to enforce agreements to arbitrate.'" The FAA requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. Id. Furthermore, this court has held when section 15-7-120 and the FAA conflict, the FAA preempts and section 15-7-120 is unenforceable. Tritech Elec. v. Hall, 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000). Because the current lawsuit brought by Appellants clearly conflicts with the FAA's policy that review be conducted by the court specified in the agreement, section 15-7-120 is preempted. Accordingly, the parties' agreement designating New York as the forum in which the parties may litigate is valid and enforceable and requires Appellants to proceed in New York to modify, vacate, or confirm the arbitration award.[1]

[1] Additionally, Appellants argue Emerald's claims to judicially dissolve Ashley River Properties II should not have been dismissed because a South Carolina court must entertain a lawsuit to judicially dissolve a South Carolina

II. Longman's Claim

Longman contends that because he signed the operating agreement in limited joinder only as to Section 3.9 and 3.10, the circuit court erred in dismissing his causes of action. Longman argues the circuit court's severing of Ashley River Properties I's claims and allowing them to proceed supports his position that the circuit court should have found he was not a part of the operating agreement.

However, the circuit court's severing of Ashley River Properties I's claims is not inconsistent with its dismissal of Emerald and Longman's claims. There is no disputation that: (1) Emerald was a party to the arbitration proceeding and a signatory to the operating agreement; and (2) Longman signed the operating agreement and was specifically adjudicated by the arbitration panel to be subject to, and a party in, the arbitration proceeding. Ashley River Properties I did not sign the operating agreement and was not expressly ruled by the arbitration panel to be a party to the proceedings. Furthermore, by severing Ashley River Properties I's claims, the circuit court has not ruled on the claims; it simply has not dismissed them. The circuit court did not err in dismissing Longman's claims while severing and keeping Ashley River Properties I's claims.

CONCLUSION

We hold that South Carolina does **not** have subject matter jurisdiction of an arbitration appeal from a decision by a New York arbitration panel where the parties signed a written agreement consenting to jurisdiction for New York courts in all arbitration proceedings. Based upon the foregoing, the circuit court did not err in dismissing Appellants' cause of action for lack of subject matter jurisdiction. Additionally, Longman's claims were properly

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limited liability company. However, the arbitration award gave Kriti the right to acquire all of Emerald's interest in Ashley River Properties II. Therefore, unless the arbitration award is overturned, Emerald has no standing to seek judicial dissolution of the business.

dismissed as they too lacked subject matter jurisdiction. Accordingly, the circuit court's order is

AFFIRMED.

HUFF and BEATTY, JJ., concur.