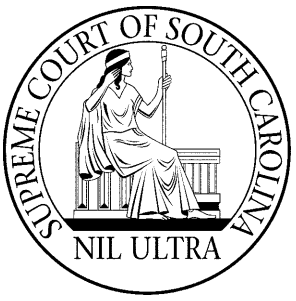

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 14, 2003

ADVANCE SHEET NO. 26

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former Sumter County Magistrate Warren Stephen Curtis, Respondent.

Opinion No. 25673
Submitted June 30, 2003 - Filed July 14, 2003

PUBLIC REPRIMAND

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

Elizabeth Van Doren Gray, of Columbia, for Respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. Respondent has also resigned his judicial position and has agreed never to apply for a judicial office in South Carolina without permission from the Supreme Court of South Carolina. We accept the agreement and publicly reprimand respondent, the most severe sanction we are able to impose under these circumstances. The facts as set forth in the agreement are as follows.

Facts

On June 12, 2002, respondent was arrested in connection with cocaine found in his possession.[1] Respondent pled guilty on November 14, 2002, to two counts of possession of cocaine and was sentenced to two years' imprisonment, suspended upon payment of a fine and service of two years of probation, with conditions for substance abuse counseling and random drug testing. At the time of the commission of the criminal acts admitted in the guilty plea, respondent was serving as a Sumter County Magistrate. Subsequent to his arrest, respondent resigned his judicial position and his resignation was accepted by the Governor of South Carolina.

Law

Respondent admits that these allegations constitute grounds for discipline pursuant to Rules 7(a)(1) and (3), RJDE, Rule 502, SCACR. Respondent also admits that he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A)(a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); and Canon 4(A)(2)(a judge shall conduct his extra-judicial activities so that they do not demean the judicial office).

Conclusion

We accept the agreement for a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek nor accept another judicial position in South Carolina without

[1] By orders of this Court dated June 17, 2002, respondent, who is licensed to practice law in this state, was placed on interim suspension with regard to his judicial position and the practice of law. See In the Matter of Curtis, 350 S.C. 277, 565 S.E.2d 309 (2002).

first obtaining permission from this Court.[2] As previously noted, this is the strongest punishment we can give respondent, given the fact that he has already resigned his duties as a magistrate. See In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996)("A public reprimand is the most severe sanction that can be imposed when the respondent no longer holds judicial office.") Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

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

[2] Respondent has agreed that, in the event he does seek such permission from this Court, he shall not do so without prior notice to Disciplinary Counsel and without allowing Disciplinary Counsel to disclose to this Court any information related to this matter and any information relevant to the issue of respondent holding judicial office.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Warren Stephen Curtis, Respondent.

Opinion No. 25674
Submitted July 1, 2003 - Filed July 14, 2003

DEFINITE SUSPENSION

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

Elizabeth Van Doren Gray, 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 misconduct and consents to a two year suspension from the practice of law, retroactive to June 17, 2002, the date he was placed on interim suspension.[1] We accept the agreement and suspend respondent from the practice of law for two years. The facts, as set forth in the agreement, are as follows.

[1] In re Curtis, 350 S.C. 277, 565 S.E.2d 309 (2002).

Facts

On June 12, 2002, respondent was arrested in connection with cocaine found in his possession. Respondent pled guilty on November 14, 2002, to two counts of possession of cocaine and was sentenced to two years' imprisonment, suspended upon payment of a fine and service of two years of probation, with conditions for substance abuse counseling and random drug testing. At the time of the commission of the criminal acts admitted in the guilty plea, respondent was serving as a Sumter County Magistrate. Subsequent to his arrest, respondent resigned his judicial position and his resignation was accepted by the Governor of South Carolina.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and Rule 8.4(e)(it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits that his actions constitute grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(4)(it shall be a ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime); 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 or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We find a two year suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for

Discipline by Consent and suspend respondent from the practice of law for two years, retroactive to the date of his interim suspension. Respondent shall not be eligible for reinstatement until he has successfully completed all conditions of his sentence, including, but not limited to, any period of probation. Rule 33(f)(10), RLDE. 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.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mitchell Lydia, Respondent,

v.

Steve C. Horton, Petitioner,

Lisa Mullinax Lydia, Respondent,

v.

Steve C. Horton, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Oconee County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25675
Heard December 4, 2002 - Filed July 14, 2003

REVERSED

Samuel W. Outten, John Patrick Riordan, both of Leatherwood Walker Todd & Mann, of Greenville, for Petitioner.

Andrew C. Barr, of Fulton & Barr, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: We granted certiorari to review the Court of Appeals' determination that Petitioner is liable on a first party negligent entrustment claim because he allowed an intoxicated person to borrow his car.

Factual/Procedural Background

According to the Complaint, Respondent, Mitchell Lydia ("Lydia"), was intoxicated on April 27, 1995, when Petitioner, Steve Horton ("Horton"), allowed Lydia to borrow his car. Lydia's Complaint alleges that Horton either knew or should have known that Lydia was not competent to operate the vehicle. Lydia then drove the car in his intoxicated state and wrecked the vehicle in a single-car accident that rendered him a quadriplegic.

Lydia brought an action against Horton for first party negligent entrustment. The trial court granted Horton's motion for judgment on the pleadings holding that Lydia's admitted negligence precluded any recovery on his part because, under South Carolina's modified comparative negligence system, his negligence outweighed Horton's negligence. The Court of Appeals reversed and remanded, holding that a first party negligence claim can be brought in this state. *Lydia v. Horton*, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000).

This Court granted Horton's petition for certiorari to review the Court of Appeals decision. Horton raises the following issue on appeal:

> Did the Court of Appeals err in recognizing a first party negligent entrustment cause of action brought by an adult who was intoxicated when injured?

Law/Analysis

Horton argues that the Court of Appeals erred in adopting a first party negligent entrustment cause of action asserted by an intoxicated party. We agree.

Whether South Carolina recognizes a first party negligent entrustment claim is a novel question of law. In finding that this state should recognize the cause of action, the Court of Appeals adopted the Restatement (Second) of Torts §§ 308 and 390 (1965).

Section 308 provides:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Section 390 provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

We conclude that the policy considerations which support the legal theory of third party negligent entrustment are undermined by applying them to a first party cause of action. The Restatement provides seven illustrations of when a negligent entrustment claim arises. Only one illustration, Illustration 7, refers to a first party claim, and we do not believe that a pure first party claim can be extrapolated from the illustration.[1] The example involves a lessee/lessor

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[1]The Restatement provides the following illustrations:

> 1. A gives a loaded gun to B, a feeble-minded girl of ten, to be carried by her to C. While B is carrying the gun she tampers with the trigger and discharges it, harming C. A is subject to liability to C.

2. A permits B, a boy of ten, who has never previously driven a motor car, to drive his motor car on an errand of B's own. B drives the car carelessly, to the injury of C. A is subject to liability to C.

3. A permits B, his chauffeur, who to his knowledge is in the habit of driving at an excessive speed, to use his car to take B's family to the seashore. While driving the car for this purpose, B drives at an excessive rate of speed and harms C. A is subject to liability to C.

4. A lends his car to his friend B for B to use to drive a party of friends to a country club dance. A knows that B has habitually become intoxicated at such dances. On the particular occasion B becomes intoxicated and while in that condition recklessly drives the car into the carefully driven car of C, and causes harm to him. A is subject to liability to C.

5. A rents an automobile to B, a young man who announces his purpose to drive it from Boston to New York on a bet that he will do so in three hours. A is subject to liability if the excessive speed at which the car is driven causes harm to travelers on the highway.

6. A sells or gives an automobile to B, his adult son, knowing that B is an epileptic, but that B nevertheless intends to drive the car. While B is driving he suffers an epileptic seizure, loses control of the car, and injures C. A is subject to liability to C.

7. A, who makes a business of letting out boats for hire, rents his boat to B and C, who are obviously so intoxicated as to make it likely that they will mismanage the boat so as to capsize it or to collide with other boats. B and C by their drunken mismanagement collide with the boat of D, upsetting both boats. B, C, and D are drowned. A is subject to liability to the estates of B, C, and D under the death statute, although the estates of B and C may also be liable for the death of D.

relationship where a third-party is injured, which is not analogous to the facts of this case.

We hold that Lydia cannot recover on a first party negligent entrustment cause of action for two reasons: (1) South Carolina's modified comparative negligence scheme would bar recovery for this type of claim, and (2) public policy considerations addressed by this Court in *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998).

Modified Comparative Negligence System

In South Carolina, a plaintiff is barred from recovery if his negligence outweighs the defendant's. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). We believe that this state's modified comparative negligence system also bars an intoxicated adult's recovery on a first party negligent entrustment cause of action. We cannot imagine how one could be more than fifty percent negligent in loaning his car to an intoxicated adult who subsequently injured himself.[2] We agree with the trial judge that Lydia's

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[2] Comment C to section 390 explains the interplay between the theory of negligent entrustment and the contributory and comparative negligence defenses:

> c. The rule stated in this Section sets out the conditions under which a supplier of a chattel is subject to liability. As always this phrase denotes that a supplier is liable if, but only if, his conduct is the legal cause of the bodily harm complained of *and if the person suffering the harm is not subject to any defense such as contributory negligence*, which will prevent him from recovering damages therefore. One who accepts and uses a chattel knowing that he is incompetent to use it safely or who associates himself in the use of a chattel by one whom he knows to be so incompetent, or one who is himself careless in the use of the chattel after receiving it, *is usually in such contributory fault as to bar recovery*. If, however, the person to whom the chattel is supplied is one of a class which is legally recognized as so incompetent as to prevent them from being responsible for their actions, the supplier may be liable for harm suffered by him, as when a loaded gun is

admission that he was "appreciably impaired" and that he lost control of the vehicle supports only one conclusion, that Lydia's negligence exceeded Horton's. *See Creech v. South Carolina Wildlife & Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997) (if the evidence supports only one conclusion, then the comparative fault of the plaintiff and defendant becomes a question of law for the trial judge).

Public Policy

Even in a situation where comparative negligence would not bar a claim for negligent entrustment, South Carolina's public policy prohibits a first party negligent entrustment action under this factual scenario. The public policy considerations which govern our decision as to whether to allow civil suits based on negligent entrustment grow out of South Carolina's regulation of the sale of alcohol.

South Carolina first criminalized the sale of alcohol to an intoxicated person in 1874. The state had no statutorily or judicially imposed civil liability. Nationally, in this era, many states were adopting "dram shop laws," imposing civil liability on tavern owners for injuries caused by intoxicated patrons to whom the tavern owner had sold alcohol. Meanwhile, in 1909, South Carolina enacted total prohibition, 10 years before federal Prohibition was adopted. The federal Prohibition amendment was repealed in 1933. Although alcohol sales were also legalized in South Carolina in 1933, this

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> entrusted to a child of tender years. So too, if the supplier knows that the condition of the person to whom the chattel is supplied is such as to make him incapable of exercising the care which it is reasonable to expect of a normal sober adult, the supplier may be liable for harm sustained by the incompetent although such person deals with it in a way which may render him liable to third persons who are also injured.

(emphasis added). While the analysis in Comment C is consistent with our position that Lydia's first party negligent entrustment claim is barred since his comparative fault outweighed Horton's, we decline to adopt the Comment or sections 308 and 390 of the Restatement based on these facts presented.

state did not permit full-blown sale of liquor by the drink until 1973.[3] Nationally, after Prohibition ended, many states with a more developed system of legalized bars began to repeal their dram shop laws.[4]

At common law in American courts, a tavern owner could not be held civilly liable for injuries caused by an over served, intoxicated patron. With the repeal of dram shop laws in all but 18 states, the majority of states did not impose liability upon tavern owners.[5] In the 1950s, several state supreme courts began to develop a theory of tavern owner civil liability based on violations of state criminal statutes forbidding the serving of alcohol to intoxicated patrons.[6]

By 1987, 41 states had some form of tavern liability.[7] South Carolina's General Assembly did not enact a dram shop law, but in 1985, the South Carolina Court of Appeals held that a bar owner's violation of the criminal statute forbidding service to intoxicated persons could support a civil suit against the bar for injuries caused by the intoxicated patron. *Christiansen v. Campbell*, 258 S.C. 164, 328 S.E.2d 351 (Ct. App. 1985). In *Christiansen*, the plaintiff was struck by an automobile as he stepped off the curb in front of a bar where he had consumed a number of beers. The bar owner had

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[3] 1973 S.C. Act No. 122.

[4] The history of the development of the law in this area nationally and in South Carolina is detailed in S.A. O'Connor's comprehensive and well written student note, *Last Call: The South Carolina Supreme Court Turns Out the Lights on First-Party Plaintiff's Causes of Action Against Tavern Owners*, 50 S.C.L. Rev. 1095 (Summer 1999). This article is the source of the Court's review of the development of tavern owner's liability.

[5] O'Connor, *Last Call*, 50 S.C.L. Rev. 1095, 1098.

[6] *See, e.g., Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th. Cir. 1959).

[7] O'Connor, *supra* n.3, at 1100 (citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987)).

continued to serve Christiansen after he became intoxicated. Christiansen sued the automobile driver and the bar owner. The Court of Appeals held that Christiansen had a private right of action against the bar owner based on the violation of a penal statute. The Court of Appeals found that the statute existed both to protect the public and to protect intoxicated persons. *Id*.

In *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), this Court expressly overruled *Christiansen* holding that we would not permit an intoxicated adult to bring a first party cause of action against a tavern proprietor predicated on a violation of the dram shop statutes. This Court stated, "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Id.* at 90, 504 S.E.2d at 320. Our Court noted that its decision did not preclude a third party from bringing a cause of action under the statutes. *Id*. at 90, 504 S.E.2d at 319.

We apply these same public policy considerations to this case. We disagree with the Court of Appeals' conclusion that *Tobias* public policy considerations only have bearing in comparing fault but have no bearing on whether or not to impose an outright bar to a first party negligent entrustment cause of action. The essence of this case and the *Tobias* case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another. Just as this plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor.

Conclusion

We **REVERSE** the Court of Appeals and conclude that Lydia's first party negligent entrustment claim is barred because his negligence outweighed Horton's and because of the public policy considerations we set forth in *Tobias*. We also decline to adopt sections 308 and 390 of the Restatement based on this set of facts.

MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I concur in the result reached by the majority, but would ground the decision solely in public policy. I write separately because I am not willing to hold, as the majority does, that in all events the fault of the entrustor is outweighed by the fault of the intoxicated adult. I would hold only that public policy precludes a voluntarily intoxicated adult from bringing such a first party negligent entrustment action.

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Tommy Lee James, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 25676
Heard February 20, 2003 - Filed July 14, 2003

REVERSED

Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Robert M. Ariail, for Respondent.

CHIEF JUSTICE TOAL: Petitioner argues that the Court of Appeals erred in failing to grant him a new trial. *State v. James,* 346 S.C. 303, 551 S.E.2d 591 (Ct. App. 2001).

FACTUAL / PROCEDURAL BACKGROUND

On the afternoon of April 5, 1997, Ramona and Richard Granger observed Petitioner, Tommy Lee James ("James"), on the front porch of the home of Edyth Richards and Frances Gilbert. The Grangers cared for Ms. Richards and Ms. Gilbert's lawn and knew that the ladies were not at home on that day. While Mrs. Granger was mowing the lawn, her husband ran several errands.[1] When Mr. Granger returned from the last errand, he and Mrs. Granger noticed that a bicycle was propped against the fence. Soon after they noticed the bicycle, they testified that they saw James on the porch of the home.[2]

Mrs. Granger asked James if she could help him with anything. James responded that he was looking for the "rent man." Mrs. Granger told James there was no such man at that address. James continued walking off the porch to his bike and began riding away. Mrs. Granger checked the front door and found it was ajar. She told her husband, and he pursued James in his truck, and called the police from his cell phone. Mr. Granger testified that he lost James more than once as he followed him, but quickly found him again each time. Finally, James dismounted from his bike and attempted to hide behind a tree. Bystanders pointed James out to Mr. Granger and helped Mr. Granger hold James until the police arrived soon thereafter.

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[1] Mr. Granger returned to the house in between errands.

[2] Apparently, Mrs. Granger saw James first, three or four feet away from the front door, and Mr. Granger saw him a little further out on the porch. Both testified that the front screen door was closed when they saw James. Mr. Granger signed a statement on the night of the burglary that he saw James coming out of the door, but, at trial, he claimed that was incorrect.

James had a screwdriver in his pocket and admitted to being on Ms. Richards and Ms. Gilbert's porch, but claimed he was looking for the "rent man" and that he did not steal anything from the residence.[3] Both of the Grangers identified James at trial as the man they saw on the porch. Additionally, a neighbor testified that James knocked on his door the same day. When the neighbor answered the door, James asked whether a camper parked in the neighbor's driveway was for sale.[4] After James left his house, the neighbor testified that he saw James enter the gate of Ms. Richards and Ms. Gilbert's home.

James was indicted for first-degree burglary in violation of South Carolina Code section 16-11-311, which provides:

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
>
> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
>
> (a) is armed with a deadly weapon or explosive; or
> (b) causes physical injury to a person who is not a participant in the crime; or
> (c) uses or threatens the use of a dangerous instrument; or
> (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

[3] Several items were missing from the home including thirteen rolls of quarters and some antique coins. The police recovered all of the stolen items, but the jury heard no testimony regarding where the police recovered the items because of a search and seizure violation.

[4] The camper was not advertised for sale.

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

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

(B) Burglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court in its discretion may sentence the defendant to a term of not less than fifteen years.

S.C. Code Ann. § 16-11-311 (Supp. 2002) (emphasis added). The burglary in this case was committed during the day without a weapon. The State based James's indictment for first-degree burglary on James's prior convictions for burglary. The State submitted certified copies of seven of James's prior convictions for burglary over James's objection.[5]

James was convicted of first-degree burglary and sentenced to imprisonment for life without the possibility of parole.[6] The Court of Appeals affirmed his conviction and sentence. *State v. James,* 346 S.C. 303, 551 S.E.2d 591 (Ct. App. 2001). The Court of Appeals denied James's petitions for rehearing and rehearing *en banc*. This Court granted James's petition for certiorari to address the following issue:

> Did the Court of Appeals err in upholding the trial court's decision to allow evidence of *seven* prior burglary convictions pursuant to S.C. Code Ann. § 16-11-311(A)(2) when that statute

---

[5] The prior convictions admitted were for first-degree burglary, which was charged in each case based on James's prior convictions for burglary.

[6] S.C. Code Ann. § 16-11-311 (B) makes life without parole a sentencing option, but the State served notice that it also sought life imprisonment under S.C. Code Ann. § 17-25-45(A). The trial judge noted that the life sentence he imposed was appropriate under both section 16-11-311(B) and section 17-25-45(A) because burglary in the first-degree is a most serious offense.

only requires the State to establish two prior burglary convictions?

LAW /ANALYSIS

James argues that the Court of Appeals erred in affirming the trial court's decision to allow evidence of *seven* of James's prior burglary convictions. We agree.

The admission of evidence is left to the discretion of the trial judge, and will not be disturbed on appeal absent an abuse of discretion by the trial judge. *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991).

This Court addressed the constitutionality of S.C. Code Ann. § 16-11-311(A)(2) in *State v. Benton,* 338 S.C. 151, 526 S.E.2d 228 (2000). In *Benton*, the defendant offered to stipulate that he had two prior burglary convictions in lieu of the State introducing evidence of the burglary convictions. *Id.* The State refused to accept the stipulation, and the trial judge declined to require the State to accept it based on the Court of Appeals' decision in *State v. Hamilton,* 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997) (upholding trial court's refusal to accept defendant's offer to stipulate to two prior convictions for purposes of section 16-11-311(A)(2) in lieu of prosecution's introduction of evidence of the two prior convictions).[7] *Benton,* 338 S.C. at 154, 526 S.E.2d at 229. The *Benton* Court agreed that the State could not be forced to accept the defendant's stipulation, and thereby affirmed *Hamilton* and upheld the validity of section 16-11-311(A)(2). *Id.* at 155, 526 S.E.2d at 230.

In upholding section 16-11-311(A)(2), the *Benton* Court discussed the impact of *Old Chief v. United States,* 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). In *Old Chief,* the defendant was charged with three crimes: (1) assault with a dangerous weapon, (2) using a firearm in relation to a crime of violence, and (3) violation of 18 U.S.C. § 922(g)(1) (possession

[7] *Benton* had not been decided at the time of James's trial, but *Hamilton* had been decided by the Court of Appeals and was the law of this state at the time of James's trial.

of a firearm by anyone with a prior felony conviction). *Id.* In *Old Chief,* the prosecution relied on the defendant's prior indictment for "assault causing serious bodily injury" to establish a violation of 18 U.S.C. § 922(g)(1), and introduced the order of judgment and commitment for the defendant's prior assault conviction. *Id.* The Supreme Court found that, although *relevant* under Rule 402, FRE, the evidence of the name and nature of the crime was unnecessary to prove the gun charge, and was highly prejudicial to the defendant as it was similar to the current assault charges pending against the defendant. *Id.* Weighing the probative value of the name and nature of the crime against its prejudicial impact, the Court held that introducing these details was unduly prejudicial under Rule 403, FRE. *Id.* The Court found that the defendant's admission that he committed a qualifying crime to be sufficient for purposes of proving a violation of 18 U.S.C. § 922(g)(1) under these circumstances.[8] *Id.*

In *Benton,* this Court applied Rule 403, SCRE, and concluded that the "probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect." 338 S.C. at 156, 526 S.E.2d at 230. Through this statement we recognized the potential for improper conviction resulting from the introduction of a defendant's prior burglary convictions under section 16-11-311(A)(2). We even established steps for the trial judge to take to avoid such an improper conviction:

> [t]o ensure a defendant is not convicted on an improper basis while allowing the State to prove the elements of first-degree burglary, the trial court should limit the evidence to the prior burglary and/or housebreaking convictions as it did here. Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered.

[8] Violation of 18 U.S.C. § 922(g)(1) is triggered by prior convictions for many different crimes. S.C. Code Ann. § 16-11-311(A)(2) requires proof of prior convictions for only two specific crimes: burglary and housebreaking.

Id. at 156, 526 S.E.2d at 231.

In *Benton,* the State offered evidence of *two* prior convictions, the minimum number required by section 16-11-311(A)(2) to establish first-degree burglary. Thus, our Court's statement that the probative value of the defendant's prior convictions is not outweighed by their prejudicial effect was specific to that factual scenario. We recognized the interplay of Rule 403 and section 16-11-311(A)(2) in *Benton*, and after conducting a Rule 403 analysis, found introduction of the two prior convictions to be more probative than prejudicial.

In this case, the trial court did not weigh the probative value of the seven prior convictions against their prejudicial impact. The trial judge expressed dislike for the structure of the statute generally, and gave appropriate limiting instructions to the jury, but he did not conduct a Rule 403 balancing analysis. The trial judge had reservations about the propriety of admitting seven convictions, but was compelled to follow existing precedent in the absence of any direction from this Court to the contrary. The following discussion took place regarding the number of convictions the State could admit:

> THE COURT: You can put certified copies of his prior record in.
>
> [THE STATE]: Okay
>
> THE COURT: As to two prior burglaries, is that what you're relying on?
>
> [THE STATE]: There's actually, I think, about a total of ten. And I was not going to submit the ones that are most serious offenses.
>
> THE COURT: All you've got to do is put two in.
>
> [THE STATE]: You want me to go with a minimum of two, then?
>
> THE COURT: Pick any two you want, as long as they qualify.
>
> [THE STATE]: Well, it says two or more, so I thought about admitting them all. If you prefer, I understand.

THE COURT: I think that is a little bit of a problem. I mean –

[THE STATE]: Okay. I realize – I'll submit two.

THE COURT: Well, let's see how you do. Two or more. Are you talking about burglaries, Mr. Seay?

[THE STATE]: Burglaries and housebreakings. He has both.

THE COURT: Well, I'm not going to – [Defense Counsel], have you a position about that? Obviously, you don't want it?

[DEFENSE]: I would object to more than two going in.

THE COURT: I'm going to let you put as many as you want in, because if it's a problem with two, it's a problem with ten.

[DEFENSE]: Then I'd like to know which ones he's putting in.

THE COURT: Show him which ones you're going to offer.

The Court of Appeals upheld the trial court's decision on the ground that section 16-11-311(A)(2) does not limit the number of prior convictions and specifically states that evidence of "*two or more"* convictions will satisfy the statute. *James,* 346 S.C. 303, 551 S.E.2d at 591. The Court of Appeals placed great weight on the *"two or more"* language in the statute, reasoning that "had the General Assembly intended to limit the use of prior convictions the State may use to two in order to prevent the possibility of undue prejudice to the defendant, it could have easily done so." *Id.* at 309, 551 S.E.2d at 593. The Court of Appeals found that the trial judge had avoided prejudice in this case by "instructing the jury to limit its consideration of James' convictions to the particular purpose for which the convictions were offered." *Id.* at 309, 551 S.E.2d at 594 (citing *Benton; Hamilton*).

In a concurring opinion, Judge Shuler agreed with the majority's decision to affirm, but wrote separately to express his view that the admissibility of prior convictions under section 16-11-311(A)(2) should be examined in light of traditional rules of evidence. *Id.* at 310, 551 S.E.2d at 594. Judge Shuler noted, "*Hamilton* and *Benton* do not dispense with the

requirement that all evidence be more probative than prejudicial. Instead, these cases merely hold that *two* prior convictions for burglary, where necessary to prove an essential element of the crime charged, are inherently more probative than prejudicial." *Id.* at 310-11, 551 S.E.2d at 595. (emphasis added).

We agree with Judge Shuler. *Hamilton* stands for the proposition that the State cannot be forced to accept a defendant's stipulation to prior convictions because that would interfere with the State's right to prove its case with "evidence of its own choosing." 327 S.C. at 445, 486 S.E.2d at 514 (citing *Old Chief*). *Benton* upheld the constitutionality of the statute as applied in *Hamilton* and *Benton*, and found that the probative value of the two prior convictions was not outweighed by prejudicial effect. Nothing in *Hamilton*, however, suggests that *any* number of prior convictions would be admissible in a first-degree burglary prosecution. Further, none of the relevant authorities nullify the trial judge's traditional role in weighing the probative value of evidence versus its prejudicial effect or suggest that Rule 403 is displaced by operation of section 16-11-311(A)(2).

In our opinion, the Court of Appeals' observation that the General Assembly could easily have limited the number of prior convictions the State may enter to two in order to prevent the possibility of undue prejudice if it had so intended, ignores the judiciary's traditional role in determining the admissibility of evidence. The admissibility of prior convictions is always limited by the traditional rules of evidence. Accordingly, we find the probative value of James's seven convictions should have been weighed against their likely prejudicial effect under Rule 403. In balancing these interests, "'[t]he probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point.'" *Old Chief*, 519 U.S. at 185, 117 S.Ct. at 652, 136 L.Ed.2d at 590 (quoting 22 C. Wright & K. Graham, Federal Practice & Procedure, § 5250, pp. 546-47 (1978)). Although the State is entitled to submit evidence of "its own choosing," it must do so within the confines of the established rules of evidence.

If the State had submitted evidence of two of James's prior burglary convictions, the jury would have had sufficient evidence to convict James of

first-degree burglary without the prejudice accompanying admission of seven prior convictions. Under the rule of *Old Chief,* the probative value of the convictions entered beyond the two required by the statute decreases because of the already sufficient evidence submitted to prove that element. *Old Chief,* 519 U.S. at 185, 117 S. Ct. at 652, 136 L.Ed.2d at 590. Although there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial and therefore proper, the potential for undue prejudice - for the impermissible interpretation of such evidence as propensity or character evidence - warrants great caution.

We believe the probative value of all seven prior convictions was outweighed by the very great potential for prejudice to James, and crossed the line established in *Old Chief,* regardless of the judge's limiting instructions to the contrary.

CONCLUSION

For the foregoing reasons, we **REVERSE** the Court of Appeals and **REMAND** for a new trial.

WALLER, BURNETT and PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

The Supreme Court of South Carolina

In the Matter of Dennis J. Rhoad, Respondent.

ORDER

Petitioner has been charged with possession of cocaine in violation of S.C. Code Ann. § 44-53-370(d)(3) (2002). The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension because he has been charged with a serious crime. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that Capers G. Barr, III, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office

account(s) respondent may maintain. Mr. Barr shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Barr may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Capers G. Barr, III, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Capers G. Barr, III, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Barr's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Jean H. Toal_____C. J.
FOR THE COURT

Pleicones, J., not participating

Columbia, South Carolina
July 8, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James R. Swindler,
Marshalene S. Frady,
and Rebecca Spears, Respondents,

v.

Nancy W. Swindler
and Commercial Credit
Corporation, Defendants,

Of whom Nancy W.
Swindler is Appellant.

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 3658
Heard March 11, 2003 – Filed July 7, 2003

REVERSED and REMANDED

David Randolph Whitt, Henry Guyton Murrel, and Pearce W. Fleming, all of Columbia, for Respondents.

Howard S. Sheftman and J. Alton Bivens, both of Columbia, for Appellant.

HOWARD, J.: In this foreclosure action, we are asked to determine whether a promissory note secured by a real estate mortgage is a negotiable instrument governed by Article 3 of the South Carolina Uniform Commercial Code ("UCC"). James R. Swindler, Marshalene S. Frady, and Rebecca Spears (collectively, "the Swindler Family") brought this action against their sister-in-law, Nancy Swindler ("Nancy"), to foreclose a mortgage encumbering a 54.5-acre tract of land Nancy purchased from their mother, Margaret Swindler ("Margaret"). Nancy asserted various defenses, including that Margaret had renounced the underlying debt by giving Nancy possession of the original Note. The master-in-equity concluded Article 3 of the UCC did not govern the transaction, and therefore, the defense of renunciation under South Carolina Code Annotated section 36-3-605(1) (1976)[1] was not applicable. The master entered a judgment of foreclosure and sale in favor of the Swindler Family. Nancy appeals. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Margaret had four children – the three Respondents to whom we refer as the Swindler Family and a son, Timothy. Timothy was married to Nancy. During Timothy's lifetime, Margaret conveyed a 54.5-acre tract of land to Nancy to be Nancy and Timothy's residence. In return, Nancy executed a note, agreeing to pay Margaret $200,000.00 for the property. The Note was secured by a mortgage covering the property.

After both Margaret and Timothy died, James Swindler attempted to transfer a one-quarter interest in the Note and Mortgage to each member of the Swindler Family in his capacity as personal representative of Margaret's estate. The Swindler Family then demanded payment of $150,000.00 from

[1] Much of the statutory authority governing notes and security interests has been amended since the inception of this litigation. However, in deciding this case we must apply "the law in effect at the time the cause of action accrued [because it] controls the parties' legal relationships and rights." Stephens v. Draffin, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997).

Nancy, representing three-quarters of the amount due on the Note, and brought this foreclosure action.

Nancy asserted as a defense that Margaret had renounced the debt by delivering the original Note to her. In support of her position, Nancy cited section 36-3-605(1), which states in applicable part: "The holder of an instrument may even without consideration discharge any party . . . (b) by renouncing his rights . . . *by surrender of the instrument to be discharged*." (Emphasis added). During the trial, only Nancy testified and presented witnesses. Nancy established the Note and Mortgage had been sent to Margaret before execution, and Margaret delivered the original Note and Mortgage to Nancy and Timothy before her death. The Swindler Family admitted Nancy has possession of the original Note and Mortgage.

The master declined to apply section 36-3-605. He construed South Carolina Code Annotated section 36-3-103(2) (1976),[2] governing negotiable instruments under Article 3, to superimpose the limitations of Article 9 onto Article 3. Because Article 9 of the UCC, specifically South Carolina Code Annotated section 36-9-104(j) (Supp. 2000), excludes from its application "the creation or transfer of an interest in or lien on real estate[,]" the master ruled Article 3 did not apply to notes secured by mortgages on real estate. He also found no evidence existed to prove how Nancy obtained the original Note and Mortgage or to establish Margaret intended Nancy's obligation to be discharged. Therefore, he ruled the Swindler Family was a proper holder of the Note and $150,000.00 was due. The master entered a judgment of foreclosure and sale in favor of the Swindler Family. Nancy filed a motion to alter or amend the judgment, which the master denied. Nancy appeals.

STANDARD OF REVIEW

"An action to foreclose a real estate mortgage is an action in equity." BB&T of South Carolina v. Kidwell, 350 S.C. 382, 387, 565 S.E.2d 316, 319 (Ct. App. 2002). On appeal from an action in equity, this Court may "find

[2] Section 36-3-103 (2) provides: "The provisions of this chapter are subject to the provisions of the chapter on bank deposits and collections (Chapter 4) and secured transactions (Chapter 9)."

facts in accordance with its views of the preponderance of the evidence." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Furthermore, this Court is not bound by the trial court's legal determinations. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

DISCUSSION

Among the issues raised on appeal, Nancy asserts the master erred by ruling Article 3 of the UCC does not govern a note secured by a mortgage on real property. Furthermore, pursuant to section 36-3-605(1), Nancy argues a presumption arose that Margaret renounced the debt because Margaret delivered the Note to Nancy prior to her death, and the Swindler family failed to present any evidence to overcome the presumption. We agree with both assertions and reverse the master's order.

I. Applicability of Article 3

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). Moreover, "[w]here the terms of the statute are clear, [this Court] must apply those terms according to their literal meaning." Brown v. S.C. Dep't of Health & Envtl Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); see also Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) (holding when "interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation").

Article 3 applies to negotiable instruments. Thus, as an initial matter, we must determine whether the Note is a negotiable instrument and a "note" as defined by Article 3 of the UCC. If not, then Article 3 would clearly not apply and our inquiry would end.

South Carolina Code Annotated section 36-3-104 (1976) provides:

(1) Any writing to be a negotiable instrument within this chapter must

(a) be signed by the maker or drawer; and
(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
(c) be payable on demand or at a definite time; and
(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

. . .

(d) a "note" if it is a promise other than a certificate of deposit.

Clearly each of these requirements is met in this case. Furthermore, neither party asserts the instrument fails to satisfy the above criteria.

Having determined the Note is a negotiable instrument and a "note," we next consider the master's conclusion Article 3 does not apply to a note secured by a real estate mortgage. In this regard, it appears the master misread section 36-3-103(2). This section states "[t]he provisions of this chapter are subject to the provisions of the chapter on . . . secured transactions [(Article 9)]." The master construed this statute to act as a limitation on the application of Article 3 so as to exclude from coverage a note secured by a real estate mortgage. He bolstered his decision by noting "the existence of S.C. Code § 29-3-330, which expressly provides methods for satisfying a mortgage of real estate."

We conclude the master erred. No provision in Article 3 exists which distinguishes an unsecured note from a note secured by a real estate mortgage. Moreover, no provision in Article 9 excludes a note secured by a real estate mortgage from the application of Article 3. The negotiability of a note is not altered by the execution of a related real estate mortgage. See S.C. Code Ann. § 36-3-119(2) (1976) (stating a note remains subject to the terms of Article 3 irrespective of the occurrence of any other transaction); cf. Int'l Minerals & Chem. Corp. v. Matthews, 321 S.E.2d 545, 547 (N.C. Ct. App. 1984) (holding "incorporating into a note the liens that secure its payment" does not affect the applicability of Article 3).

The Official Comment to section 36-3-119(2) states:

> 5. Subsection (2) rejects decisions which have carried the rule that contemporaneous writings must be read together to the length of holding that a clause in a mortgage affecting a note destroyed the negotiability of the note. The negotiability of an instrument is always to be determined by what appears on the *face of the instrument alone* . . . . [If the note] merely refers to a separate agreement or states that it arises out of such an agreement, it is negotiable.

(Emphasis added). Furthermore, any "contemporaneous writing[,] e.g., a chattel mortgage given to *secure* a negotiable note[,] is not read into the note to destroy its negotiability." Id. reporter's cmt (emphasis added); cf. Burch v. Ashburn, 295 S.C. 274, 278, 368 S.E.2d 82, 84 (Ct. App. 1988) ("[T]he contemporaneous execution of the two writings does not affect the note, which is enforceable according to its tenor without regard to any breach of the" other agreement.). Thus, even when executed simultaneously with a mortgage, a note remains subject to the provisions of Article 3. See Northwestern Bank v. Neal, 271 S.C. 544, 546-47, 248 S.E.2d 585, 586 (1978).

Furthermore, we do not agree with the master's construction of sections 36-3-103(2) and 36-9-104(j). We conclude these provisions are unambiguous and clearly state Article 3 governs a note even when secured by a mortgage on real property.

First, the master misquoted section 36-3-103(2) to state Article 3 was subject to the "limitations" of Article 9. However, this section states "[t]he provisions of this chapter are subject to the *provisions* of the chapter on . . . secured transactions [Article 9]" not "limitations of Article 9" as stated in the master's order. (Emphasis added). Article 9 provides it does not apply "to the creation or transfer of an interest in or lien on real estate." S.C. Code Ann. § 36-9-104(j). However, nothing in Article 9 provides a limitation on the applicability of Article 3 to notes secured by mortgages on real estate.

Moreover, the Official Comment to section 36-3-103 explains the interaction between Articles 3 and 9.

> 2. Instruments which fall within the scope of this Article may also be subject to other Articles of the [UCC]. Many items in the course of bank collection will of course be negotiable instruments, and the same may be true of collateral pledged as security for a debt. In such cases this Article, which is general, is, in case of *conflicting provisions*, subject to the Article[] which deal[s] specifically with the type of transaction or instrument involved: . . . Article 9 (Secured Transactions). In the case of a *negotiable instrument* which is subject to . . . Article 9 because it is collateral, the provisions of [Article 3] *continue to be applicable except insofar as there may be conflicting provisions* . . . .

(Emphasis added).

Reading sections 36-3-103(2) and 36-9-104(j) in conjunction, especially in light of the Official Comment to section 36-3-103, we conclude

Article 3 controls the Note. This interpretation reflects the clear intent of the UCC; Article 9 controls over Article 3 only where some conflict between the applicable provisions of Articles 3 and 9 exists. Here, no conflict exists because Article 9 does not address the underlying indebtedness of a security interest. See Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F.Supp. 1304, 1312-13 (D.S.C. 1994) (interpreting South Carolina law, holding the inapplicability of Article 9 to a negotiable instrument does not affect the application of Article 3); First Valley Bank v. First Sav. & Loan Ass'n of Cent. Indiana, 412 N.E.2d 1237, 1240-41 (Ind. Ct. App. 1980) (rejecting the argument "that mortgage notes, which are secured by liens on real estate, lie entirely outside the coverage of the [UCC]" and adopting the view that Article 3 applies "to promissory notes secured by mortgages").

We also conclude the master's reliance on South Carolina Code Annotated section 29-3-330 (1991), governing the satisfaction of real estate mortgages, is misplaced. In his order, the master noted section 29-3-330 requires written satisfaction of a mortgage. The master found this language supported his ruling that renunciation of the debt under Article 3 of the UCC was not intended by our Legislature to apply to a note secured by a real estate mortgage.

South Carolina Code Annotated section 29-3-310 (Supp. 2000) states a mortgagee "who has received . . . *satisfaction* . . . *of his debts* . . . secured by a mortgage on real estate shall . . . enter satisfaction . . . on the mortgage." (Emphasis added). This section clearly contemplates the satisfaction of a debt, the note, and the satisfaction of the security interest for that debt, the mortgage, as separate actions. Pursuant to this section, the debtor must first satisfy the note, and then the mortgagee must enter satisfaction of the mortgage. Thus, the master's conclusion that section 29-3-330 supports his ruling with respect to Articles 3 and 9 is incorrect.

In this case, when Nancy made the Note, she executed a document subject to the provisions of Article 3, not Article 9. Her subsequent or simultaneous creation of the Mortgage did nothing to change the nature of the Note itself. Thus, the Note remained subject to the provisions of Article 3.

II. Renunciation of Note

Having determined the Note is a negotiable instrument governed by Article 3 of the UCC, we next address Nancy's argument that Margaret renounced the debt by giving Nancy possession of the original Note. We find Nancy's possession of the original Note gave rise to the presumption that Margaret renounced the debt prior to her death. Moreover, the Swindler Family failed to produce any evidence to rebut this presumption. Thus, we conclude Nancy's debt was discharged.

As noted above, section 36-3-605(1) provides: "The holder of an instrument may even without consideration discharge any party . . . (b) by renouncing his rights . . . *by surrender of the instrument to be discharged*." (Emphasis added). "When the obligor has possession [of the instrument], the party suing on the instrument has to *overcome a presumption* that the instrument was *discharged*." 2 James J. White & Robert S. Summer, Uniform Commercial Code § 16-13 at 134-35 (4th ed. 1995) (emphasis added); see also Winkel v. Erpelding, 526 N.W.2d 316, 319 (Iowa 1995) ("The debtor's possession of the instrument creates a rebuttable presumption of discharge."); Columbia Sav. v. Zelinger, 794 P.2d 231, 234 (Colo. 1990) ("Possession of the instrument by the debtor . . . is normally sufficient to create a rebuttable presumption of discharge."). Therefore, only if the obligee can show the obligor is in possession of the instrument "'unintentionally, or under a mistake, or without [] authority'" can the presumption be overcome and the discharge proven to be without effect. Peoples Bank of S.C. v. Robinson, 272 S.C. 155, 158, 249 S.E.2d 784, 785 (1978) (quoting 11 Am. Jur. 2d Bills & Notes § 906 (1964)).

At trial, Nancy testified that prior to Margaret's death, Margaret delivered the original Note to her. Further, Nancy testified that she was never informed her possession of the Note was by mistake or that she had the Note without authority. Moreover, the Swindler Family admitted Nancy has possession of the original Note and provided no evidence or testimony to indicate Margaret made a mistake by delivering the Note to Nancy or did not intend for Nancy to be discharged from her obligation.

Therefore, we conclude Nancy's testimony is sufficient to create the presumption Margaret intended to discharge Nancy from her obligations under the Note. Because the Swindler Family did not produce any evidence or argument to the contrary, they have failed to rebut this presumption. Thus, we conclude Nancy's original obligation to pay $200,000.00 for the 54.5-acret tract of land is discharged.

CONCLUSION[3]

For the foregoing reasons, the master's order finding Article 3 of the UCC inapplicable to a note secured by a mortgage on real property and ruling Margaret did not renounce her rights in the Note by surrendering it to Nancy is reversed and this case is remanded with instructions to enter satisfaction of the mortgage in accordance with section 29-3-310.

REVERSED and REMANDED.

CURETON and STILWELL, JJ., concur.

[3] Because of our holdings with respect to the applicability of Article 3, and the Note's renunciation, we need not address Nancy's other issues on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Paul Thompson,

Appellant.

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 3659
Submitted April 18, 2003 – Filed July 7, 2003

REVERSED AND REMANDED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Jay E. Hodge, Jr., of Darlington, for Respondent.

ANDERSON, J.: Paul Thompson was tried in absentia and without counsel. He was convicted of discharging a firearm into a dwelling and malicious injury to personal property over $1000 but less than $5000. The trial judge sentenced him to five years on each count to run concurrently. We reverse and remand.[1]

FACTS/PROCEDURAL BACKGROUND

Vanessa Pearson was at home with her adult daughter, Najwa, on October 30, 1999 when a man named Derrick came to her door and asked for "Junior." Pearson told him that no one by the name of "Junior" lived there. Thirty minutes later he came to her door again and asked for "Junior." She reiterated to him that no one by the name of "Junior" lived there. Pearson testified that Derrick, Paul Thompson, and Michael Graham then started shooting at her car and into her house. The damage to her car was about $4000. Pearson identified Peggy Wright as sitting in the backseat of the vehicle that the men drove during the occurrence.

Graham, Wright, and Thompson were tried together for discharging a firearm into a dwelling and malicious injury to personal property over $1000 but less than $5000. The same counsel represented Graham and Wright. Thompson was not present nor did he have counsel present. The judge told the bailiff to call Thompson's name three times at the courthouse door before the jury selection began. After Thompson did not respond, he was tried in his absence. Graham and Wright presented alibi evidence, which resulted in their acquittals. Thompson was found guilty as charged.

A sealed sentence was given as required by law. The sealed sentence is NOT opened until the defendant is arrested and before the court. After his arrest, Thompson was brought before the court for the opening of the sealed sentences. Pursuant to State v. Smith, 276 S.C.

[1] This case was decided without oral argument pursuant to Rule 215, SCACR.

494, 280 S.E.2d 200 (1981), the circuit judge opening the sealed sentence is under the law the sentencing judge. Exercising his discretion, the judge sentenced Thompson to five years on each count, concurrently.

At sentencing, Thompson's attorney professed that Thompson appeared at four or five roll calls after his arrest on November 15, 1999. During that time, Thompson requested through the Clerk of Court representation from the Public Defender's Office. Thompson contends he was told he did not meet the cut-off amount of money to qualify for a public defender. He explained to them that he had child support arrearage payments that virtually consumed his salary and offered to produce documentation. According to Thompson's attorney, no one would listen to him regarding his child support payments. The court refuted Thompson's assertion, explicating that if Thompson had said he did not have an attorney, one would have been appointed for him.

A Bench Warrant was issued for Thompson on September 11, 2000 and another was issued on May 17, 2001. During September 2001, Thompson went to a rehabilitation facility in Maryland for cocaine and alcohol addiction. He left the facility on November 19, 2001. He went to High Point, North Carolina and then to his uncle's house in Bennettsville. Thompson was tried on November 28, 2001. Thompson's brother testified that the family was only given fourteen hours notice of trial.

The judge determined that a lawyer would have been appointed for him if he had presented himself at trial:

> THE COURT: Well, I can say here for the record if he would have been here like the other two defendants were, didn't have a lawyer, we would have appointed one for him.
>
> [THOMPSON'S COUNSEL]: Yes, sir, Your Honor.

THE COURT: But you can't appoint one for him if he runs and doesn't even come to court.

LAW/ANALYSIS

Thompson argues the judge erred in denying his motion for a new trial because he was denied the right to counsel at trial.

I. RIGHT TO COUNSEL

It is well established that a defendant may be tried in his absence. Rule 16, SCRCrimP ("Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.").[2] However, to try a defendant without counsel is a completely different matter. Pennsylvania v. Ford, 715 A.2d 1141, 1143 (1998) (citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)).

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562, 566 (1975); accord Gideon v. Wainwright, 372 U.S. 335, 339-40, 83 S.Ct. 792, 794, 9 L.Ed.2d 799, 802-03 (1963). Moreover, an indigent criminal defendant may request the court to appoint an attorney to represent him. Gideon, 372 U.S. at 344, 83 S.Ct. at 796-97, 9 L.Ed.2d at 802; see Scott v. Illinois, 440 U.S. 367, 367, 99 S.Ct. 1158, 1159, 59 L.Ed.2d 383, 389 (1979) ("The Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of

[2] Thompson's waiver of his right to be present at trial is not at issue on appeal.

imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense . . .").

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657, 664 (1984). The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is per se reversible error. State v. Boykin, 324 S.C. 552, 555, 478 S.E.2d 689, 690 (Ct. App. 1996) (citing Chapman v. California, 386 U.S. 18, 23 n.8, 87 S.Ct. 824, 828 n.8, 17 L.Ed.2d 705 (1967)). "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) (quoting Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 696 (1984)).

II. RELINQUISHMENT OF RIGHT TO COUNSEL

A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture. State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996).

A. Waiver

A defendant may waive his Sixth Amendment right to counsel. A waiver is an intentional and voluntary relinquishment of a known right. United States v. Goldberg, 67 F.3d 1092, 1099 (3d Cir. 1995); Maxwell v. Genez, 350 S.C. 563, 571, 567 S.E.2d 496, 500 (Ct. App. 2002). The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938); Pitts v. North Carolina, 395 F.2d 182, 188 (4th Cir. 1968).

1. Waiver by Affirmative, Verbal Request

Waiver is most commonly understood as an affirmative, verbal request. United States v. Goldberg, 67 F.3d 1092, 1099 (3d Cir. 1995); State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). To effectuate a valid waiver of the right to counsel, the two-pronged Faretta test must be met in which the accused is (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). If the trial judge fails to address the disadvantages of appearing pro se, as required by the second prong of Faretta, "this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463; accord Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. Gardner v. State, 351 S.C. 407, 411-12, 570 S.E.2d 184, 186 (2002); Wroten, 301 S.C. at 294, 391 S.E.2d at 576. If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied. Id.

Pellucidly by his absence, Thompson did not make an affirmative, verbal request to waive counsel.

2. Waiver by Conduct

A defendant may waive his right to counsel through his conduct. United States v. Goldberg, 67 F.3d 1092, 1100 (3d Cir. 1995); State v. Jacobs, 271 S.C. 126, 128, 245 S.E.2d 606, 608 (1978); State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). Most

courts have held that the defendant must first be warned that his misconduct will thereafter be treated as a waiver. Boykin, 324 S.C. at 556, 478 S.E.2d at 691. "[T]o the extent that the defendant's actions are examined under the doctrine of 'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings." Goldberg, 67 F.3d at 1100. Any subsequent misconduct will be treated as a "waiver by conduct." Boykin, 324 S.C. at 556, 478 S.E.2d at 690.

In State v. Cain, 277 S.C. 210, 284 S.E.2d 779 (1981), the appellant was tried in absentia and without counsel. Cain was represented by counsel at a preliminary hearing and both he and his attorney were aware the case was coming up for trial. Id. at 210, 284 S.E.2d at 779. The court found Cain was cognizant of his duty to keep in contact with his attorney and the court. Id. The court held a waiver of the right to counsel was inferable from his omissions. Id. at 211, 284 S.E.2d at 779.

Although in the present case Thompson was tried in absentia and without counsel, the facts in Cain are quite different. Unlike Thompson, Cain was represented by counsel at a preliminary hearing. Cain edifies:

> The appellant was released on a general appearance bond and was represented by counsel at a preliminary hearing. Both the appellant and his attorney knew the case was coming up for trial. The appellant knew he had a duty to stay in touch with his attorney and with the court.
>
> We held in State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978) that a waiver of the right to counsel can be inferred from a defendant's actions. In this case, the appellant failed to fulfill the conditions of his appearance bond and neglected to keep contact with his attorney, although he knew his trial was imminent. We think a waiver of the right to counsel is inferrable [sic] from these omissions.

Id. at 210-11, 284 S.E.2d at 779 (footnote omitted).

The case of State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978), analyzes a trial scenario where the appellant participated at trial, but did not have counsel. The appellant was not indigent. The trial judge urged him on several occasions to retain a lawyer. The case was continued at least once to enable the appellant to hire an attorney. Id. at 127, 245 S.E.2d at 607. The judge asked an attorney with the Public Defender's Office to sit with him at trial to offer him advice and assistance. Id. Although the appellant never expressly waived his right to counsel, the court held the appellant waived his right to counsel by his conduct because he was given reasonable time to secure counsel, he was financially capable of retaining counsel, and the court had done all it could to advise him to seek counsel. Id.

The facts in Jacobs are dissimilar to the case sub judice. Jacobs was present in the courtroom, he was financially capable of retaining counsel, the judge had repeatedly encouraged him to get an attorney, the judge continued the case at least on one occasion for him to retain an attorney, and he had the assistance of a public defender at trial. Jacobs is enlightening:

> Appellant never expressly waived his right to counsel but the trial judge found that he was very capable of retaining counsel, that the court had done all it could do to urge him to do so, and that he had still not employed a lawyer. The trial judge asked an attorney from the Public Defender's Office to sit with him during his trial to give him advice and assistance. The attorney advised the court that he was totally unprepared for trial but the trial judge said that appellant's inaction had caused the situation. Appellant agreed to allow the attorney to sit with him but indicated that he wanted him to do nothing further in the case. The trial then proceeded.
>
> . . . .

> On the facts of this case, we feel that the trial judge allowed appellant, a non-indigent, a reasonable time in which to retain counsel and that appellant did not make a sufficient showing of reasons for his failure to have counsel present. He was on several occasions urged to retain counsel and a phone was made available to him and additional time was given him in order for him to make arrangements. When, on the day of trial, counsel was not present, appellant did not name his attorney, if one had been retained, nor did he indicate when counsel would be available. He gave no reasons for the absence of counsel other than that he had been expecting his brother to bring a lawyer.
>
> We conclude that, by his conduct, appellant waived his right to counsel.

Id. at 127-28, 245 S.E.2d at 607-08.

An excellent academic explication of an appellant tried in absentia and without representation is Pennsylvania v. Ford, 715 A.2d 1141 (Pa. Super. Ct. 1998). The appellant was originally appointed counsel. Id. at 1143. He requested a continuance in order to find private counsel. Id. The court then approved the withdrawal of the court-appointed counsel. Id. Two weeks before jury selection was initiated, the appellant fled the jurisdiction after violating his probation in a prior unrelated case. Id. When the appellant did not appear for jury selection, his private counsel filed a motion to withdraw, arguing that the appellant had not paid a large portion of his fee and his absence impeded trial preparation. Id. The court granted the motion and proceeded to try the appellant in absentia and without counsel. Id. The court found the appellant did not validly waive his right to counsel because there was no inquiry on the record as to whether the appellant was aware of his rights or whether he knowingly waived them. Id. at 1144. The court observed that this type of inquiry is "quite obviously impossible" when a defendant fails to appear in court. Id. However,

the court ruled that "[f]ailure to appear . . . is not tantamount to a knowing waiver." Id. The appellant's fugitive status was not a per se waiver nor could it be punished by the "negation of constitutional rights." Id. His fugitive status was a separate wrong with its own consequences. Id.

While Thompson did not have counsel withdraw at the brink of trial, he similarly was not queried on the record as to whether he was aware of his rights or whether he knowingly waived them. The Ford court acknowledged the impracticability of asking the defendant on the record when he does not appear in court, but still found that a failure to appear does not equate a knowing waiver. Likewise, Thompson's failure to appear does NOT rise to the level of waiver.

The Indiana Court of Appeals thoroughly analyzed a trial in absentia involving a defendant unrepresented by counsel. Slayton v. Indiana, 755 N.E.2d 232 (Ind. Ct. App. 2001). Slayton appeared in court three times before trial in which the court mentioned counsel but never advised him of the dangers and disadvantages of self-representation. Id. at 234. The State argued that Slayton never requested the court to appoint counsel and that his failing to appear at trial "prevented the trial court from providing him with counsel or from even determining his intention to have counsel." Id. at 235. Hence, the State maintained Slayton waived his right because he never clearly exercised it one way or another. Id. The court found the State's argument was flawed. First, the court determined that Slayton wanted "standby" counsel. Id. at 236. Next, the court acknowledged the failure to advise Slayton of the dangers and disadvantages of self-representation relating to the Faretta two-prong test. Id. Finally, the court recognized the presumption against a waiver of the right to counsel. Id. The court ruled "[t]he State's argument for 'waiver' would turn this presumption on its head, requiring a defendant to clearly exercise rights that were never explained to him." Id. Based upon the record being void of any implication that Slayton understood the dangers and disadvantages of self-representation, the court held the facts and circumstances of the case did not warrant a finding of a knowing and intelligent waiver of counsel. Id.

The case at bar is most similar to the facts in Slayton. Both defendants were tried in absentia, unrepresented by counsel, and had appeared in court several times before trial. Neither of the defendants was advised of the dangers and disadvantages of self-representation under Faretta. Furthermore, the record in the instant case does not reveal any inference that Thompson understood the dangers and disadvantages of self-representation. Thompson did not have a prior record which would have familiarized him with the criminal court system. Abiding by the presumption against a waiver of the right to counsel, we conclude Thompson did not waive his right to counsel through his conduct when he never was apprised of his right nor the dangers and disadvantages of self-representation.

B. Forfeiture

Some courts recognize forfeiture as a means to waive the Sixth Amendment right to counsel. A defendant can forfeit his right to counsel irrespective of his knowledge of either the consequences of his actions or the dangers of self-representation. United States v. Goldberg, 67 F.3d 1092, 1100 (3d. Cir. 1995). "[B]ecause of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a 'waiver by conduct' could be based on conduct less severe than that sufficient to warrant a forfeiture." Id. at 1101. Situations where a defendant's own conduct forfeits his right to counsel are unusual, typically involving a manipulative or disruptive defendant. State v. Coleman, 644 N.W.2d 283, 288 (Wis. Ct. App. 2002).

The Eleventh Circuit Court of Appeals in United States v. McLeod identified methods in which a defendant could forfeit counsel:

> The Sixth Amendment right to counsel, for example, may be forfeited by a defendant's failure to retain counsel within a reasonable time, even if this forfeiture causes the defendant to proceed pro se. See Fowler, 605 F.2d at 183. Additionally, a defendant who misbehaves in the courtroom

> may forfeit his constitutional right to be present at trial. See e.g., Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Foster v. Wainwright, 686 F.2d 1382, 1388-89 (11th Cir. 1982), cert. denied 459 U.S. 1213, 103 S.Ct. 1209, 75 L.Ed.2d 449 (1983). A defendant who causes a witness to be unavailable for trial forfeits his right to confrontation. See United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B 1982), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). A defendant who escapes from custody during his trial waives his Sixth Amendment rights to be present and to confront witnesses during the trial. See Golden v. Newsome, 755 F.2d 1478, 1481 (11th Cir. 1985).
>
> By analogy, we conclude that under certain circumstances, a defendant who is abusive toward his attorney may forfeit his right to counsel.

53 F.3d 322, 325 (11th Cir. 1995) (footnotes omitted). McLeod had verbally abused and threatened to harm counsel in a telephone conversation, at least four times had threatened to sue him, and had attempted to persuade counsel to engage in unethical conduct. Id. at 325. His behavior was "repeatedly abusive, threatening, and coercive." Id. at 326. Consequently, McLeod forfeited his right to counsel.

Misconduct by a defendant directed toward counsel is the quiddity of State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996). Boykin verbally abused and physically threatened defense counsel. The judge granted the request of counsel to be relieved. Id. at 554-55, 478 S.E.2d at 689-90. Boykin elucidates:

> Although we do not condone Boykin's actions, we do not believe they were so severe as to permanently deprive him of appointed counsel. Both cases which have held a defendant forfeited his right to counsel involved a course of conduct more egregious than the single incident alleged here. Accordingly, we need not decide whether South

> Carolina should embrace the doctrine of forfeiture because we find that Boykin's conduct in the one event related by Padgett was not sufficient to constitute forfeiture. While the trial judge was certainly justified in granting Padgett's motion to be relieved as counsel, substitute counsel should have been appointed for Boykin. Therefore, the decision of the trial court is reversed and the case remanded for a new trial.

We decline to place our imprimatur upon Thompson's conduct or absence. Our declination of approval of Thompson's activities does NOT mandate forfeiture of counsel.

CONCLUSION

Forfeiture of counsel is a drastic consequence, requiring more than absence from trial. We rule Thompson did NOT relinquish his right to counsel through forfeiture.

Based on the record in its entirety, we hold Thompson did NOT waive his right to counsel.

He was erroneously deprived of his fundamental right to assistance of counsel. This denial is per se reversible error. Therefore, the decision of the circuit court is

REVERSED AND REMANDED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Venture Engineering, Inc. Appellant,

v.

Tishman Construction Corporation of South Carolina; Timberland Properties, Inc.; The South Carolina Public Service Authority (Santee Cooper); and High Point Capital, LLC, Defendants,

Of whom The South Carolina Public Service Authority (Santee Cooper) is Respondent.

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

Opinion No. 3660
Heard May 13, 2003 – Filed July 7, 2003

AFFIRMED

G. Michael Smith, of Conway; Julio E. Mendoza, of Columbia; and Mark A. Brunty, of Myrtle Beach; for Appellant.

Elizabeth Warner, of Moncks Corner; Francis B.B. Knowlton, of Columbia; John Hamilton Smith and Stephen P. Groves, both of Charleston; and John Samuel West, of Moncks Corner; for Respondent.

HOWARD, J.: Venture Engineering, Inc. ("Venture") appeals the master-in-equity's order, finding Venture's mechanic's lien did not encumber property owned by the South Carolina Public Service Authority ("Santee Cooper"). We affirm.

FACTS/PROCEDURAL HISTORY

In 1995, Timberland Properties, Inc. ("Timberland") purchased approximately 422 acres of real property owned by the State of South Carolina but managed by Santee Cooper. As part of the sale, Timberland agreed to begin construction of a "theme park" within 12 months from the date of the purchase. This provision was later amended, extending the time limit by 90 days. If Timberland failed to begin construction within the prescribed period, Santee Cooper had the right to repurchase the property together with all improvements for the original sale price. The original deed and contract, along with the subsequent amendment were properly recorded in the Horry County Register of Deeds.

Subsequently, Timberland hired Venture to perform civil engineering services in connection with Timberland's development of the property. However, Timberland failed to pay for Venture's services, and Venture filed a mechanic's lien on the property for $127,786.74 on May 6, 1997. In addition, Timberland failed to begin construction on the theme park as required by its contract with Santee Cooper, and Santee Cooper repurchased the property on May 16, 1997.

In June 1997, Timberland sought Bankruptcy protection under Chapter 7 of the Bankruptcy Code. Several months later, Venture sought to foreclose on its mechanic's lien. In February 1999, the Bankruptcy Court issued a Notice of Settlement and Sale, in which it advised all Timberland creditors that Timberland's bankruptcy trustee intended to submit a proposed settlement to the Bankruptcy Court for its approval. Among other things, the proposed settlement indicated the trustee would sell the property to Santee Cooper free and clear of all liens and encumbrances. In addition, the notice indicated any party objecting to the proposed settlement had to submit a written objection within twenty days, pursuant to Rule 9014, District of South Carolina Bankruptcy Rules. Venture received a copy of the notice, but did not file any objection.

Subsequently, the Bankruptcy Court issued an Approval Order, approving the proposed settlement and sale. The property was then transferred to Santee Cooper, "free and clear of all liens and encumbrances in accordance with 11 U.S.C. § 363."

Following the conclusion of the bankruptcy proceedings, Venture's foreclosure action was referred to a master. The master dismissed Venture's claim with prejudice, finding Venture's claim was barred because Venture failed to object to the sale of the property by the bankruptcy trustee free and clear of all liens and encumbrances. Venture appeals.

DISCUSSION

Among other things, Venture argues the master erred in finding its claim was barred because it failed to object in Bankruptcy Court to the proposed settlement. We disagree.

The United States Bankruptcy Code provides, in relevant part: "(b)(1) The trustee, after notice and a hearing, may . . . sell . . . property of the [bankruptcy] estate . . . (f) free and clear of any interest in such property of an entity . . . if . . . (2) such entity consents . . . ." 11 U.S.C. § 363 (1999); see also In re Collins, 180 B.R. 447, 450 (Bankr. E.D. Va. 1995). South

Carolina's local bankruptcy rules provide the specific notice procedures the trustee must follow before the trustee may sell the property. SC LBR 6004-1(b) states: "Motions to sell property free and clear of liens pursuant to . . . 11 U.S.C. § 363 must be made using the passive notice procedure prescribed by SC LBR 9014-2 . . . and must be served on all parties in interest." See SC LBR 9014-2 (stating, when giving notice of a proposed settlement and sale, parties must adhere to South Carolina's local clerk's instructions).

The local clerk's instructions provide, in relevant part, "the moving party must serve on . . . any other interested party . . . (1) The motion; (2) The notice of hearing of the motion; [and] (3) A proposed order . . . ." SC CI 9014-2(b). Furthermore, SC CI 9014-2(c) provides "Any response, return and/or objection to the motion *must* be served no later than twenty (20) days following the service date of the motion . . . . (2) If the objection time expires without the filing of an [sic] response, return and/or objection or other request, the *proposed order will be promptly submitted to the judge for his consideration*." (Emphasis added); cf. In re Parrish, 171 B.R. 138, 140 (Bankr. M.D. Fla. 1994) (indicating a hearing need only be held when, after having received notice, a creditor objects to the proposed settlement).

Venture received notice pursuant to the rules and clerk's instruction noted above and was given an opportunity to object within twenty days. Venture did not object, but argues on appeal it was not required to do so. Venture bases this argument on its misplaced belief that because both the bankruptcy trustee and Santee Cooper claimed title to the same property, Venture was not required to make its claim until after the Bankruptcy Court determined which entity owned the property.

However, a bankruptcy trustee "has the rights and powers of a hypothetical creditor possessing a judicial lien which attaches upon commencement of the case; the law treats a trustee as a hypothetical lien creditor. See 11 U.S.C. § 544." In re Parrish, 171 B.R. at 141 (internal quotations omitted). Once Timberland filed for bankruptcy, the bankruptcy trustee took a judicial lien on the property. Thus, notwithstanding the adversarial position taken by Santee Cooper, the property remained subject to the trustee's judicially created lien until the date of the sale. See id. (holding

"[o]nce the property is sold and relinquished by the Trustee, the property ceases to belong to the estate, and the Trustee's fictional hypothetical lien terminates on the date of sale"). As such, we find Venture was required to timely object to the trustee's Notice of Proposed Settlement and Sale if it wished to protect its interest in the property itself or the proceeds of the sale of the property.

Having failed to object to the sale, Venture consented to having its lien extinguished. See FutureSource, LLC v. Reuters Ltd., 312 F.3d 281, 284 (7th Cir. 2002), cert. denied, 123 S. Ct. 1769 (2003) (holding, although Futuresource was not a party to the bankruptcy proceeding, it was a party in interest, and thus, it had a right to raise and appear to be heard on any issue in the case. Moreover, "it was notified of [the sale and the purchase agreement] and had access to a copy of the agreement yet it did not object to the sale or challenge the bankruptcy court's order."); see also In re Elliot, 94 B.R. 343 (E.D. Pa. 1988) (holding section 363(f)(2) permitted the bankruptcy trustee "to sell the property free and clear of all liens because [the creditor] consented to the sale . . . by failing to make any timely objection after receiving notice of the sale"). Therefore, we find the master did not err in dismissing Venture's mechanic's lien foreclosure action.

CONCLUSION[1]

For the foregoing reasons, the master's order dismissing Venture's claim with prejudice is

AFFIRMED.

ANDERSON, J., and BEATTY, Acting Judge, concur.

[1] Because of our holding with respect to Venture's failure to object to the proposed settlement, we need not reach Venture's other issues on appeal.

STATE OF SOUTH CAROLINA
In The Court of Appeals

Lyle Neely and
Gloria Russel Ballard,
as Personal Representative
of the estate of Rita Russell, Respondents,

v.

Nancy Thomasson,
individually and as Personal
Representative of the Estate
of John Thomas Neely, and
Josephine Morgan Wells, of
whom, Nancy Thomasson,
individually and as Personal
Representative of the Estate
of John Thomas Neely is Appellant.

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

Opinion No. 3661
Heard April 10, 2003 – Filed July 14, 2003

VACATED IN PART and
REVERSED AND REMANDED IN PART

Carolyn W. Rogers, of Rock Hill, for Respondents.

S. Jackson Kimball, III, of Rock Hill, for Appellant.

STROM, Acting Judge: Nancy Thomasson appeals the circuit court's affirmance of the probate court's order, which determined Thomasson was not a child of John Thomas Neely, and therefore, not an heir of his estate. We vacate in part and reverse and remand in part.

FACTS/PROCEDURAL HISTORY

Thomasson was born on December 1, 1943. Her birth certificate lists her name as Nancy Jane Neely and her parents as John Thomas Neely and Josephine Morgan. Thomasson's parents, unmarried at the time of her birth, married seven months later. They separated approximately six months after their marriage, but did not immediately seek a divorce.

In 1963, Morgan brought an action, seeking a divorce from Neely. She alleged one child was born to her and Neely. Neely never answered Morgan's Complaint and was held in default. The matter was referred to a special master, who was to conduct a hearing, take evidence, and issue a report to the circuit court, which would then enter a final order. Pursuant to the order of reference, the special referee issued a report in which he stated the evidence adduced during the hearing proved one child was born to the parties and the child was emancipated at the time of the hearing. This finding was incorporated by the circuit court in its final order granting Morgan a divorce. Neither party appealed this final decree.

In 1998, Neely died intestate. Subsequently, Thomasson asserted a claim in probate court, alleging she was Neely's daughter, and therefore, an heir to his estate. Thomasson was appointed as the estate's personal representative. Thereafter, Neely's brother and sister, Lyle Neely and Rita Russell (collectively, "Neely's Siblings"), commenced this action, alleging

Thomasson was not Neely's child and seeking judicial determination of Neely's heirs.[1]

During the contested proceeding, the probate court admitted blood-type evidence, indicating Thomasson had a blood type that could not have been produced from the blood types of Neely and Morgan. Additionally, the probate court admitted DNA evidence, showing a 0.00% probability Thomasson was Neely's daughter.

Following the hearing, the probate court found Thomasson was neither Neely's natural nor adopted child and no adjudication of paternity occurred prior to Neely's death. Thus, the probate court ruled Thomasson was not Neely's heir for purposes of intestate succession. Thomasson appealed the probate court's order to the circuit court, which affirmed the order. Thomasson appeals.

LAW/ANALYSIS

I. Subject Matter Jurisdiction

For the first time, Thomasson argues the probate court lacked subject matter jurisdiction to adjudicate the issue of paternity. Therefore, Thomasson argues this Court should vacate the probate court's entire order. We agree the probate court did not have subject matter jurisdiction to adjudicate the issue of paternity. However, we do not agree this Court must vacate the entire order.

Initially we note, our rules of error preservation do not bar Thomasson's argument because she asserts a defect in the probate court's subject matter jurisdiction. See Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) ("The issue of subject matter jurisdiction

[1] During the course of these proceedings, Rita Russell died, but her estate's personal representative has continued in the same posture on her behalf. Thus, the parties to the action remain the same and this change does not affect the outcome of the case.

may be raised at any time including when raised for the first time on appeal to this Court.").

Our Court recently decided an almost identical case in Simmons v. Bellamy, 349 S.C. 473, 562 S.E.2d 687 (Ct. App. 2002) (per curiam). We find Simmons controlling in the current situation. In Simmons, the probate court, relying on its jurisdiction to determine heirs during an intestacy proceeding, issued an order in which it determined an infant born after the decedent's death was the child of the decedent, and thus, his heir. 349 S.C. at 475, 562 S.E.2d at 688. The circuit court affirmed the probate court's order in its entirety. Id. This Court *sua sponte* raised the issue of whether the probate court had subject matter jurisdiction to adjudicate paternity and held it did not. Id. at 476-77, 562 S.E.2d at 689.

When rendering its decision, the Simmons court considered the jurisdiction of both the family court and the probate court. This Court specifically considered whether the probate court could adjudicate paternity as part of its inherent jurisdiction to determine heirs during an intestacy proceeding. However, after reviewing the applicable statutory authority, specifically South Carolina Code Annotated section 20-7-420 (1976) (stating "[t]he family court shall have exclusive jurisdiction: . . . (7) To hear and determine actions to determine the paternity of an individual"), this Court unequivocally found the family court is vested with exclusive subject matter jurisdiction to adjudicate matters of paternity even when the question of a decedent's heirs is properly pending before the probate court. Simmons, 349 S.C. at 476-77, 562 S.E.2d at 689.

We find both the reasoning and result reached in Simmons to be compelling. The probate court's jurisdiction extends to all matters "related to . . . [the] determination of heirs" "except as otherwise specifically provided." S.C. Code Ann. § 62-1-302(a) (Supp. 2002). However, section 20-7-420(7) of the Children's Code reserves to the family court exclusive jurisdiction for the adjudication of paternity. Therefore, we find the probate court's jurisdiction is limited by section 20-7-420(7). Moreover, section 20-7-420(7) expressly provides the family court is to adjudicate paternity in intestacy cases that have already been or will be commenced in probate court. See

S.C. Code Ann. § 20-7-420(7) (stating "[t]he [paternity] action may be brought . . . , if the father is deceased, in the county in which proceedings for probate of his estate have been or could be commenced").

Thus, having reviewed the applicable statutory authority and relevant case law, we see no reason for this Court to depart from our decision in Simmons. However, although we agree with Thomasson's contention that the probate court lacked subject matter jurisdiction to determine her paternity, we do not agree we must vacate the probate court's *entire* order. As noted above, the probate court has jurisdiction to determine heirs in an intestacy proceeding. See S.C. Code Ann. § 62-1-302(a)(i). Thus, we find it necessary to vacate only that portion of the probate court's order in which it purported to adjudicate Thomasson's paternity.

II. Prior Adjudication of Paternity

Having determined the probate court lacked subject matter jurisdiction to adjudicate Thomasson's paternity, we must next decide whether the court erred in finding the Neely-Morgan divorce decree was not a final adjudication of Thomasson's paternity.

In relevant part, South Carolina Code Annotated section 62-2-109 (Supp. 2002) states "[i]f . . . a relationship of parent and child must be established to determine succession . . . (2)(ii) the paternity is established by an adjudication commenced before the death of the father." Thus, we must determine whether the Neely-Morgan divorce decree, clearly issued prior to Neely's death, was a final adjudication of Thomasson's paternity.

> "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined [is not final]; *but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final*."

Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1884) (alteration and emphasis added) (quoting Freeman Judgments § 12), cited with approval in

Mid-State Distribs., Inc. v. Century Imports, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). A decree of divorce is generally a final judgment of the court. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); cf. Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) ("The final written order contains the binding instructions which are to be followed by the parties.").

Forty years ago, Morgan brought an action against Neely. Morgan sought a divorce and asserted Thomasson was the parties' only child. Neely never answered Morgan's Complaint and was held in default. The matter was referred to a special master, who conducted a hearing, took evidence, and issued a report to the circuit court. In the special referee's report, he stated the evidence adduced during the hearing proved one child was born to the parties and the child was emancipated at the time of the hearing. This finding was incorporated by the circuit court in its final order granting Morgan a divorce. Neither party appealed.

Having reviewed the record, including the original documents involved in the Neely-Morgan divorce action, we find the probate court erred in concluding the divorce decree was not a final adjudication of Thomasson's paternity. Morgan alleged Thomasson was Neely's child and Neely did not respond. Neely had the opportunity to contest Thomasson's paternity at the hearing and did not do so. This Court need not speculate why Neely did not contest Thomasson's paternity during the divorce proceedings, but rather must only confirm Neely was given the opportunity to do so. Cf. Sub-zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 191, 417 S.E.2d 569, 571 (1992) (indicating by analogy, "claims [that] were either litigat[ed] in the prior actions or could have been so litigated" may not be relitigated in a subsequent action).

In this case, the court's order, granting Morgan a divorce and finding the parties had one child, clearly "disposed of every issue in the case, directed judgment" and contained binding instructions for the parties. See Adickes, 21 S.C. at 259; Corbin, 351 S.C. at 621, 571 S.E.2d at 97. Because Neely never appealed the final decree it is the law of the case and cannot now be challenged or ignored. See ML-Lee Acquisition Fund, L.P. v. Deloitte &

Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling is the law of the case and cannot be later challenged). Thus, we find the divorce decree was a final adjudication of Thomasson's paternity prior to Nelly's death as contemplated by section 62-2-109(2)(ii).

We believe our holding supports the important public policy interest of upholding the finality of judgments rendered by the courts of this State, particularly when those judgments involve issues relating to children. Cf. Chewning v. Ford Motor Co., Op. No. 25627 (S.C. Sup. Ct. filed Apr. 14, 2003) (Shearouse Adv. Sh. No. 13 at 51, 63) (stating South Carolina courts have long "recognize[d] that important benefits are achieved by the preservation of final judgments"). Were we to hold otherwise, we would be permitting Neely's Siblings to assert challenges to Thomasson's paternity that Neely chose not to assert.

Thus, because we find the divorce decree was a final adjudication of Thomasson's paternity, we find the probate court erred further in its determination of Neely's heirs. Therefore, based on our holding that Thomasson is Neely's child for purposes of intestacy proceedings, we remand the case for the probate court to redetermine the heirs of Neely's estate and redistribute his estate in accordance with this opinion.

CONCLUSION[2]

Because the probate court did not have subject matter jurisdiction to adjudicate Thomasson's paternity and erred in deciding the Neely-Morgan divorce decree was not a final adjudication of Thomasson's paternity, the probate court's order is

VACATED IN PART and REVERSED AND REMANDED IN PART.

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[2] Because of our holdings with respect to the probate court's lack of subject matter jurisdiction and error in determining the Neely-Morgan divorce decree was not a prior adjudication of paternity, we need not reach Thomasson's other issues on appeal.

HOWARD, J., concurs.

STILWELL, J., concurs in part and dissents in part in a separate opinion.

STILWELL, J.: (concurring in part and dissenting in part): I agree fully with the majority's discussion and conclusion regarding Issue I, the subject matter jurisdiction of the probate court to determine paternity. However, I disagree with the majority's view on Issue II and respectfully dissent therefrom.

Although neither res judicata nor claim or issue preclusion is strictly involved here because of the intervention of the statute, much of the same analysis that would be required under those doctrines should be utilized here. See generally Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 216-17, 493 S.E.2d 826, 834-35 (1997). There is, however, one significant difference. The statute requires an adjudication of paternity, not merely an opportunity for an adjudication. In the final analysis, I do not believe the divorce decree constituted an adjudication of paternity within the contemplation of the statute.

A review of the divorce proceeding is revealing. The action was commenced by a complaint containing six brief factual paragraphs together with two even more brief paragraphs setting forth the relief requested. The only factual paragraph related to paternity alleged that to the union one child, Nancy Jane Neely Wells, was born "who is now married and no longer dependent on the plaintiff for support." No relief was requested of the court relating to this child, the prayer being limited to a divorce and "any other and further relief as to the court may seem just and proper." The defendant, John Thomas Neely, defaulted. A reference was held before a special referee. In the minutes of the reference, one question was asked about the child, as follows:

Q: I believe there was one child born to this union and that child is now grown and married?

A: Yes, sir.

That is the sum and substance of the testimony as to paternity. The referee then issued his report, which contains only one sentence related to the child: "The evidence further showed that the parties to this action are the parents of one child, who is now grown and married, and that since this child is now married, there is no question of custody or support." None of the findings and recommendations by the special referee relate to the child or the question of paternity. There followed a perfunctory decree of the court adopting in full the recommendations of the special referee and awarding the plaintiff a divorce, without even mentioning the existence of a child.

Under these circumstances, it is clear that this action established only that the parties were entitled to a divorce from one another. However, the issue of the paternity of the child was not necessary to that conclusion. Paternity was never actually litigated, nor did it have to be.

I would, therefore, affirm the probate court on this issue.