The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

In the Matter of James C. Sexton, Jr.

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 12, 2012 beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 9, 2012

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

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N O T I C E

In the Matter of William H. Jordan

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 12, 2012 beginning at 11:00 a.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
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N O T I C E

In the Matter of Kenneth L. Edwards

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 12, 2012 beginning at 12:30 p.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 9, 2012

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N O T I C E

In the Matter of Ivan James Toney

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on September 12, 2012 beginning at 2:00 p.m., in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

August 9, 2012

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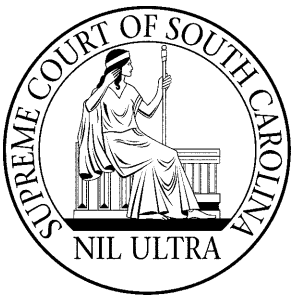

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
August 15, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RFT Management Co., L.L.C., Appellant,
v.
Tinsley & Adams L.L.P. and Welborn D. Adams, Individually, Respondents.

Appellate Case No. 2010-175606

Appeal From Greenwood County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 27157
Heard May 23, 2012 – Filed August 15, 2012

AFFIRMED

Harry A. Swagart, III, of Columbia, for Appellant.

Matthew Holmes Henrikson, of Clarkson Walsh Terrell & Coulter, of Greenville, for Respondents.

JUSTICE BEATTY: Appellant RFT Management Co., L.L.C. (RFT) brought this action against respondents Tinsley & Adams, L.L.P. and attorney Welborn D. Adams (collectively, Law Firm) based on their legal representation of RFT during the closing of its purchase of two real estate investment properties in Greenwood County. RFT alleged claims for (1) professional negligence (legal malpractice), (2) breach of fiduciary duty, (3) violation of the South Carolina Unfair Trade Practices Act[1] (UTPA), and (4) aiding and abetting a securities

[1] S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2011).

violation in contravention of the South Carolina Uniform Securities Act of 2005 (SCUSA).[2] The trial court granted a directed verdict in favor of Law Firm on RFT's causes of action regarding the UTPA and SCUSA, and it merged RFT's breach of fiduciary claim with its legal malpractice claim. The jury returned a verdict in favor of Law Firm on RFT's remaining claim for legal malpractice. RFT appealed, and this Court certified the case from the Court of Appeals for its review pursuant to Rule 204(b), SCACR. We affirm.

I. FACTS

RFT is a limited liability company, with David Roatch (Roatch) as its managing member. This action arises out of RFT's purchase of two parcels of property in a residential community near Lake Greenwood known as Planters Row at Palmetto Crossing.

Planters Row was developed by Lake Greenwood Developers, L.L.C. (Developer), which was managed by William Gilbert (Gilbert). The subdivision had 65 lots, and in order to generate sales activity, Developer initially offered "discounts" of from five to ten percent of the purchase price to some buyers, as well as buy-back options in which it agreed to repurchase the lots. The repurchase option was to be exercised within a specified timeframe at a set price that exceeded the purchase price.

On September 25, 2007, RFT entered into agreements to purchase lots 28 and 31 in Planters Row from Developer, for a total purchase price of $570,000 ($290,000 for lot 28 and $280,000 for lot 31). At the time of the sales agreements with RFT, Developer did not own lots 28 and 31. Developer had previously sold lot 28 to Christopher and Susan Grimshaw and had sold lot 31 to Douglas Robertson.

In conjunction with these sales to the Grimshaws and Robertson, Developer had executed contemporaneous agreements to buy back the lots within a specified time period, and the Grimshaws and Robertson had notified Developer that they wished to exercise their options to sell their properties back to Developer. Developer, however, advised the buyers shortly before the scheduled closings that

[2] S.C. Code Ann. §§ 35-1-101 to -703 (1987 & Supp. 2011).

it did not have the funds to repurchase the properties, and it negotiated an extension of time.

Meanwhile, on October 30, 2007, RFT and Developer signed a buy-back agreement regarding lots 28 and 31 in conjunction with RFT's purchase of the two lots. RFT had retained Joe Maddox, a Spartanburg attorney, to review the agreements concerning the purchase of the lots and the buy-back. Maddox negotiated directly with Gilbert and, at the suggestion of Maddox, RFT additionally obtained a second mortgage on the 21 unsold lots in the subdivision in order to secure payment in the event RFT exercised its rights under the buy-back agreement.

Law Firm handled the majority of the real estate closings for Developer, and the closings were usually the responsibility of attorney Welborn D. Adams (Adams). Adams was the closing attorney for the transaction with RFT. Adams coordinated the scheduling of the closings in order to accomplish the repurchases of the two lots from the prior owners and the sale to RFT. RFT's contract for legal services with Law Firm stated Law Firm was being retained solely to perform the ministerial acts associated with the closing:

> The undersigned acknowledge that they have not retained the law firm to negotiate the terms of their contract nor are they relying on the law firm to provide substantive advice about how or whether to proceed with this transaction. Rather, the undersigned acknowledge that the law firm has been retained to close the transaction, prepare a deed of conveyance and perform the ministerial act[s] associated with real estate closings.

The closing with RFT took place on October 30, 2007.[3] Thereafter, Developer allegedly did not have sufficient capital to complete the amenities in the community.

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[3] At the closing, Adams provided Roatch a letter dated October 30, 2007 advising that he had examined the real estate records of Greenwood County for a period of 40 years with reference to lots 28 and 31 and that he was "of the opinion that RFT . . . will acquire a good and marketable title in fee simple," subject to (1) proper execution of a deed from Douglas W. Robertson vesting fee simple title in lot 31 to

RFT filed a complaint against Law Firm on October 20, 2008, in which RFT asserted claims for legal malpractice, breach of fiduciary duty, and violations of the UTPA and SCUSA. At trial, RFT's claims centered on its allegations that it was unaware of the status of the lots, that Law Firm engaged in deceptive acts regarding the true owners of the property, and that it suffered damages because its investment properties had a markedly lower value than anticipated.[4] Specifically, RFT alleged it was unaware Developer did not own the two lots when it contracted to sell them to RFT. Further, RFT claimed it did not know that the lot owners, the Grimshaws and Robinson, exercised their rights under buy-back agreements, and that Developer was financially unable to perform. RFT maintained Law Firm assisted Developer in selling the two lots to RFT as a "flip transaction," in which the money Developer received from RFT from the sale of the lots would be used to simultaneously close the repurchase from the Grimshaws and Robinson and enable Developer to deed the two lots to RFT.[5] RFT asserts none of these facts regarding the simultaneous closing, the "flip transaction," or the uses of RFT's funds were disclosed to RFT.

At the close of all the evidence, the trial court "merged" RFT's breach of fiduciary duty claim into its claim for legal malpractice and granted Law Firm's motions for a directed verdict on RFT's UTPA and SCUSA claims. Thus, only the

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Developer, (2) proper execution of a deed from Christopher W. and Susan M. Grimshaw vesting title in lot 28 to Developer, (3) proper execution of a deed from Developer vesting title to the property to RFT, and (4) the payment of county taxes due on lots 28 and 31. According to Roatch, he did not read this letter at the closing as he was given only the documents that required his signature at that time.

[4] RFT obtained appraisals of the lots in May 2010, in which it was indicated that lot 28 then had an estimated value of $55,500 and lot 31 had an estimated value of $54,000. Roatch testified that at the time of trial, he was of the opinion the lots were only worth around $25,000 each, as lots of comparable size in the development had sold for that amount at foreclosure.

[5] *See In re Barbare*, 360 S.C. 560, 602 S.E.2d 382 (2004) (describing flip transactions and finding the closing attorney acted improperly in furnishing inaccurate information on the HUD-1 Settlement Statements, which misled lenders regarding the underlying financial transaction, and that the buyer, seller, and others must have accurate records).

claim of legal malpractice went to the jury, which returned a verdict in favor of Law Firm. The trial court denied RFT's post-trial motions.

On appeal, RFT contends the trial court erred in (1) failing to grant its motion for judgment notwithstanding the verdict (JNOV) or a new trial on the issue whether Law Firm engaged in malpractice by representing both RFT and the seller at the closing since there was an unwaivable conflict of interest; (2) failing to grant its motion for JNOV or a new trial on the issue whether Law Firm engaged in malpractice by failing to disclose materials facts, submitting false and misleading documents, and/or arranging the closing as an unlawful "flip transaction"; (3) failing to charge the jury on breach of fiduciary duty and merging this cause of action with its first cause of action for legal malpractice; (4) directing a verdict in favor of Law Firm on RFT's UTPA claim; and (5) directing a verdict in favor of Law Firm on RFT's claim for aiding and abetting a SCUSA violation.

II. LAW/ANALYSIS

A. Legal Malpractice Claim

RFT first contends the trial court erred in denying its motion for a JNOV on its claim of legal malpractice because Law Firm committed malpractice as a matter of law. Alternatively, RFT argues the trial court erred in denying its request for a new trial on this claim.

RFT asserts Law Firm committed legal malpractice, as a matter of law, in two ways. First, by representing both RFT and Developer at the closing, Law Firm committed legal malpractice because there was an unwaivable conflict of interest. Second, Law Firm committed legal malpractice by failing to disclose material information to RFT, providing false and misleading documents to RFT, and closing a deceptive "flip transaction."

A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996).

A party making a motion for a directed verdict must state the specific grounds relied upon therefor, and the trial court may grant the motion when the case presents only issues of law. Rule 50(a), SCRCP. If the motion is denied, the party may thereafter move for a JNOV in order to have the verdict and judgment set aside and a judgment entered in accordance with the party's directed verdict motion. Rule 50(b), SCRCP. A motion for a new trial may be joined with the JNOV motion or prayed for in the alternative. *Id.*

"When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). Moreover, only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion. *In re McCracken,* 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov't Emps. Ins. Co. v. Mackey*, 260 S.C. 306, 195 S.E.2d 830 (1973). A motion for a JNOV is merely a renewal of the directed verdict motion. *Wright*, 372 S.C. at 20, 640 S.E.2d at 496.

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy,* 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

We find RFT's argument that it is entitled to a judgment as a matter of law on its claim for legal malpractice to be without merit. As noted above, a motion for JNOV must be based on the same grounds as those raised in a motion for a directed verdict motion made at the close of all the evidence.

In reviewing the record, as an initial matter we agree with Law Firm that RFT did not move for a directed verdict on the legal malpractice claim based on the second ground it now urges on appeal, i.e., that this was an improper flip transaction and Law Firm gave misleading information while failing to make required disclosures. Thus, this argument is not properly before the Court. *See Roland v. Palmetto Hills,* 308 S.C. 283, 286 & 287 n.2, 417 S.E.2d 626, 628 & n.2 (Ct. App. 1992) (stating "[a] motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict" motion, and additionally noting that the burden was on the appellant to furnish a sufficient record on appeal to allow review).

As to RFT's first ground concerning whether there was an unwaivable conflict as a matter of law, RFT and Law Firm initially agreed this issue concerned a question of law, but then later during the parties' discussion Law Firm stated it had found authority now indicating that the matter presented a question of fact, and RFT did not contest this authority. In its order denying RFT's post-trial motion for a JNOV, the trial court specifically found that the parties had agreed at trial that the legal malpractice claim involved questions of fact that required submission of the claim to a jury. There is nothing in the excerpt of this discussion in the record that is inconsistent with the trial court's finding. Thus, RFT may not now complain that it was entitled to a judgment as a matter of law. *See generally Shearer v. DeShon*, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962) ("Ordinarily, one cannot complain of an error which his own conduct has induced."). Moreover, the existence of an unwaivable conflict would not establish all of the remaining elements of the legal malpractice claim as a matter of law.

To the extent RFT further argues on appeal that the trial court erred in denying its post-trial motion for a new trial on its legal malpractice claim, RFT has shown no error. RFT re-asserts the same grounds in its new trial request as for the JNOV and also asserts the trial court should have granted a new trial pursuant to the thirteenth juror doctrine.[6]

The trial court denied RFT's request for a new trial on the legal malpractice action without specifying its grounds. *See Miller v. Atl. Coast Line R.R. Co.,* 95 S.C. 471, 79 S.E. 645 (1913) (stating where an order denying a new trial motion

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[6] RFT does not argue the other grounds it raised in its post-trial motion for a new trial. Therefore, they are not before this Court.

does not specify the grounds for the decision, it will be affirmed on appeal if the record presents any grounds upon which the motion could have been properly refused).

In denying the JNOV on this claim, however, the trial court noted, inter alia, that the parties had agreed there were questions of fact regarding the legal malpractice claim and that the jury had properly considered the issue and reached a unanimous verdict. Since the trial court found there were questions of fact as to this claim and that RFT had not challenged this point, RFT has shown no error in the trial court's failure to grant its new trial motion based on the grounds asserted in its request for a JNOV and its allegation that the evidence does not support the verdict. *See McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 632, 578 S.E.2d 746, 747 (Ct. App. 2003) (stating a directed verdict motion is a prerequisite to a motion for JNOV or a new trial motion on the ground the evidence does not support the verdict).

As for RFT's new trial motion made pursuant to the thirteenth juror doctrine, the thirteenth juror doctrine is a vehicle by which the trial court may take its own view of the evidence and grant a new trial if it disagrees with the jury's verdict. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). This is also called granting a new trial upon the facts, and the judge is not required to give the reasons for its ruling. *Id.* at 254, 387 S.E.2d at 267. The effect is the same as if the jury had failed to reach a verdict. *Id.* A trial court's order granting or denying a new trial upon the facts will not be disturbed unless the decision is wholly unsupported by the evidence or the conclusion reached is controlled by an error of law. *Id.* at 254-55, 387 S.E.2d at 267.

"The granting of a new trial upon the facts is not the equivalent of granting a directed verdict." *McEntire*, 353 S.C. at 632, 578 S.E.2d at 748. The question of whether the evidence is legally sufficient to sustain a verdict, a question of law, is distinguishable from the question of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion. *Id.* at 632-33, 578 S.E.2d at 748. Stated another way, a party's evidence might make a case one for the jury, but the evidence might be so outweighed by the countervailing evidence that, in the exercise of its discretion, a trial court could choose to set aside the verdict under the thirteenth juror doctrine. *Id.* at 633, 578 S.E.2d at 748 (citing *Russell v. Pilger*, 37 A.2d 403, 414 (Vt. 1944)).

We hold RFT has shown no abuse of discretion. The scope of representation offered by Law Firm was strictly limited in the retainer agreement Law Firm had with RFT, and RFT's own real estate agent had knowledge of the October 30th title letter outlining the status of the properties. Thus, a jury could have properly found there was no deceitful action by Law Firm.

One of the most significant areas of conflict was the competing experts offered by RFT and Law Firm as to whether Law Firm had met the requisite standard of care in the legal malpractice claim. Although RFT introduced the testimony of its expert in support of its claim that Law Firm had breached the requisite standard of care in handling the closing, Law Firm countered with its own expert, an attorney who had practiced as both a closing attorney and a trial attorney litigating real estate matters for over thirty years. Law Firm's expert testified that, in his experience, most residential property closings were handled by only one lawyer. The expert also examined the retainer agreement that was executed by the parties in this case and stated it was his professional opinion that the standard of care for a real estate attorney had been met and that the document signed by RFT limited the scope of Law Firm's representation and its obligation to RFT (to deliver marketable title). Consequently, we hold RFT has failed to establish the trial court abused its discretion in denying its new trial motion.

B. Remaining Claims

Having upheld the jury's determination that RFT failed to establish its claim of legal malpractice, we find RFT's remaining claims are precluded as a matter of law under the circumstances present here.

(1) Breach of Fiduciary Duty

RFT contends the trial court erred in "merging" its second cause of action for breach of fiduciary duty with its first cause of action for legal malpractice. RFT asserts the trial court erroneously determined the breach of fiduciary claim was redundant.

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65,

68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. *See generally Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements comprising a breach of fiduciary duty claim). "Our courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship." *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011).

A claim for breach of fiduciary duty, as a general matter, is distinguishable from a claim for legal malpractice because it can arise in contexts other than one involving an attorney-client relationship. *See, e.g., In re Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999) (finding a fiduciary relationship existed where a son held his mother's power of attorney and managed all of her finances). In the current matter, however, RFT's claim for breach of fiduciary duty arose out of the duty inherent in the attorney-client relationship and it arose out of the same factual allegations. Thus, RFT's claim for legal malpractice necessarily encompassed a breach of the fiduciary duty an attorney has to his or her client. RFT specifically acknowledged at trial that it could not provide any circumstances differentiating the two claims.

Although RFT now argues a breach of fiduciary claim *could* be distinguishable from legal malpractice, RFT does not set forth any specific facts that demonstrate its breach of fiduciary duty claim *is* distinguishable because it arises out of a duty *other than* one created by the attorney-client relationship or because it is based on different material facts.[7] Consequently, we hold the breach

[7] RFT argues for the first time on appeal that one difference between its two claims was that malpractice normally requires expert testimony on the attorney's standard of care and breach, while the breach of fiduciary duty claim requires no expert testimony, so the jury could have not believed RFT's experts and still found for it on a breach of fiduciary duty claim. It additionally argues evidence of a violation of the Rules of Professional Conduct, such as was allegedly present here, could support a verdict for legal malpractice, but not necessarily constitute evidence of a breach of fiduciary duty. These arguments were not made at the time of the trial court's ruling and are not properly reviewable here. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue

of fiduciary duty claim is duplicative. Moreover, it is clear RFT could not have prevailed on its breach of fiduciary duty claim since the jury rejected RFT's factual allegations when it returned a verdict in favor of Law Firm on the allegation of legal malpractice. Accordingly, we find no error in the trial court's ruling in this regard. *See Aller v. Law Office of Carole C. Schriefer*, 140 P.3d 23 (Colo. App. 2005) (stating when a legal malpractice claim and a breach of fiduciary duty claim arise from the same material facts, the breach of fiduciary duty claim should be dismissed as duplicative); *Oehlerich v. Llewellyn*, 647 S.E.2d 399 (Ga. Ct. App. 2007) (holding the plaintiff's claim for legal malpractice was based on the fiduciary attorney-client relationship and the breach of fiduciary duty claim was, therefore, duplicative since it was based on allegations that the attorney failed to fully investigate the claims and failed to properly advise the plaintiff, all of which called into question the degree of professional skill exercised by the attorney); *cf. Se. Hous. Found. v. Smith*, 380 S.C. 621, 647 n.18, 670 S.E.2d 680, 694 n.18 (Ct. App. 2008) (noting that the dismissal of a party's legal malpractice claim would extinguish the breach of fiduciary duty cause of action in one action, but whether the defendant breached a fiduciary duty *in other capacities* could be a jury question).

(2) UTPA

RFT next argues the trial court erred in granting a directed verdict to Law Firm on its UTPA claim on the basis the UTPA does not apply to the legal profession.

The UTPA declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commence are . . . unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

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cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

The UTPA exempts certain practices and transactions from coverage; the burden of proving an exemption is upon the party claiming the exemption. S.C. Code Ann. § 39-5-40 (1985 & Supp. 2011). The trial court found the exemption for matters subject to regulatory authority was applicable here. This exemption provides the UTPA does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." S.C. Code Ann. § 39-5-40(a) (1985).

This Court has "interpreted this exemption to exclude from the UTPA those actions or transactions which are allowed or authorized by a regulatory agency or other statutes." *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (citing *Ward v. Dick Dyer & Assocs.*, 304 S.C. 152, 403 S.E.2d 310 (1991)). In *Ward*, the Court observed the purpose of the exemption is to avoid subjecting a business to a lawsuit for doing something required by law or allowed by a statute or a regulation; it is intended to avoid a conflict between laws, not to exclude coverage for every act that is authorized or regulated by another statute or agency, as virtually every activity is regulated to some degree. *Ward*, 304 S.C. at 156, 403 S.E.2d at 312 (citing *Skinner v. Steele*, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987)).

We find the trial court erred in relying upon the regulated industries exception. *See* S.C. Code Ann. § 39-5-10(b) (1985) (defining "trade" and "commerce" in the UTPA as including the "sale or distribution of any services"); *Taylor*, 324 S.C. at 217, 479 S.E.2d at 44 (citing the statutory definitions in section 39-5-10(b) and holding "[t]he provision of *any* service constitutes commerce within the meaning of the UTPA"; the Court observed that "[t]he statute does not exclude professional services from its definition"); *Camp v. Springs Mortgage Corp.*, 307 S.C. 283, 285, 414 S.E.2d 784, 786 (Ct. App. 1991) ("There is no question but what legal services come within the definition of this [UTPA] statute."), *aff'd in part, rev'd in part*, 310 S.C. 514, 426 S.E.2d 304 (1993) (finding UTPA claim failed on the basis no unfair act was alleged); *see also Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1024-25 (Alaska 2009) (holding the legal profession is not exempt from UTPA coverage simply because a state supreme court has the authority to discipline attorneys for misconduct as the Rules of Civil Procedure and the Rules of Professional Conduct are not the type of ongoing, careful regulation required to trigger an exemption; the court concluded "that the attorney disciplinary system and consumer protection laws can coexist as long as

the legislature does not purport to take away this court's exclusive power to admit, suspend, discipline, or disbar" attorneys).

Despite the trial court's error in finding the UTPA is not available against the legal profession, RFT has shown no reversible error in this regard. Because RFT alleged the same facts for its UTPA claim as in the legal malpractice claim, i.e., the deceptive acts of Law Firm, which the jury has already rejected, RFT has not shown it could have established all of the necessary elements of this claim. *Cf. Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (Ct. App. 2012) (holding even if the circuit court erred in directing a verdict on the plaintiff's UTPA claim based on the regulated industries exemption in the UTPA, the plaintiff failed to demonstrate sufficient evidence on all of the elements of the claim, in particular, the plaintiff failed to demonstrate the defendant's actions adversely affected the public interest; thus, the circuit court's grant of a directed verdict on this claim was affirmed).

(3) SCUSA

RFT's challenge to the trial court's grant of a directed verdict on its claim for aiding and abetting a securities violation similarly fails. In its complaint, RFT alleged its purchase of two investment lots with accompanying buy-back agreements constituted a "security" for purposes of the South Carolina Uniform Securities Act of 2005. RFT further alleged Law Firm was civilly liable for damages under S.C. Code Ann. § 35-1-509 (Supp. 2011) for not disclosing that the two lots were subject to pre-existing buy-back agreements with prior owners and that Developer did not actually own the two lots at the time it arranged for the sale to RFT. RFT also alleged Law Firm did not exercise the reasonable due care owed to RFT as an investor because it allowed Developer's untruths about the financial stability of Planters Row, as expressed by William Gilbert, to go undiscovered.

The trial court granted Law Firm's motion for a directed verdict on its claim for aiding and abetting a SCUSA violation on the basis the transaction did not involve a security. *See* S.C. Code Ann. § 35-1-102(29) (Supp. 2011) (The South Carolina Uniform Securities Act of 2005 defines a "security" to mean, inter alia, "any . . . evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; . . . investment contract; . . . or, in general, an interest or instrument commonly known as a 'security' . . . .").

Even assuming, without deciding, that the transaction qualified as a security, the securities claim was based on the same factual allegations that were ultimately rejected by the jury when it returned a verdict in favor of Law Firm on the legal malpractice claim. In addition, RFT absolved Law Firm of any potential liability resulting from an allegation of aiding and abetting a securities violation when RFT signed the retainer agreement with Law Firm that expressly limited the scope of its representation. In that agreement, RFT acknowledged that it was retaining Law Firm to close the transaction, prepare a deed of conveyance, and perform ministerial acts associated with the closing. RFT further acknowledged that it had not retained Law Firm to negotiate the contract and that it was not relying on Law Firm to provide substantive advice about the transaction. Consequently, there could be no liability, so we find no error in the granting of a directed verdict on this claim.

III. CONCLUSION

Based on the foregoing, we affirm the rulings of the trial court.

AFFIRMED.

PLEICONES, ACTING CHIEF JUSTICE, KITTREDGE, HEARN, JJ., and Acting Justice Clifton Newman, concur.

Even assuming, without deciding, that the transaction qualified as a security, the securities claim was based on the same factual allegations that were ultimately rejected by the jury when it returned a verdict in favor of Law Firm on the legal malpractice claim. In addition, RFT absolved Law Firm of any potential liability resulting from an allegation of aiding and abetting a securities violation when RFT signed the retainer agreement with Law Firm that expressly limited the scope of its representation. In that agreement, RFT acknowledged that it was retaining Law Firm to close the transaction, prepare a deed of conveyance, and perform ministerial acts associated with the closing. RFT further acknowledged that it had not retained Law Firm to negotiate the contract and that it was not relying on Law Firm to provide substantive advice about the transaction. Consequently, there could be no liability, so we find no error in the granting of a directed verdict on this claim.

III. CONCLUSION

Based on the foregoing, we affirm the rulings of the trial court.

AFFIRMED.

PLEICONES, ACTING CHIEF JUSTICE, KITTREDGE, HEARN, JJ., and Acting Justice Clifton Newman, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Koatesworth Swope,
Respondent.

Appellate Case No. 2012-212392

Opinion No. 27158
Submitted July 16, 2012 – Filed August 15, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Charlie Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John P. Freeman, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed thirty (30) days. Respondent further agrees to complete the Legal Ethics and Practice Program Ethics School within twelve (12) months of the imposition of a sanction. We accept the Agreement and issue a public reprimand. In addition, respondent shall complete the Legal Ethics and Practice Program Ethics School within twelve (12) months of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

In 2004, respondent was retained to handle a refinance closing for Complainant A and his business partner. Subsequent to the closing, respondent received a telephone call from the lender requesting Complainant A sign an assignment of rents form and record it with the mortgage.

Respondent represents he contacted Complainant A on at least two occasions to sign the document requested by the lender. Complainant A failed to respond to respondent and the document was not signed.

Respondent's closing file was placed in "the post-closing cabinet" at respondent's office, as though the mortgage had been recorded. In fact, the mortgage had not been recorded.

Approximately ten (10) months later, after receiving a call from Complainant A about a potential problem with the closing, respondent discovered the mortgage had never been recorded. Respondent renewed his attempts to have Complainant A sign the assignment of rents form, but his attempts were of no avail. Eventually, respondent recorded the mortgage without the assignment form.

Complainant A maintained that respondent owed him damages for the delay in the recording of the mortgage. Respondent reported the matter to his malpractice carrier.

Respondent admits he failed to respond to ODC in a timely manner about this matter.

Matter II

Complainant B hired respondent to represent her in a civil action. At some point, Complainant B terminated the attorney/client relationship and requested respondent provide a copy of her client file.

On September 9, 2005, Complainant B's daughter picked up the client file on her mother's behalf. The daughter indicated that certain documents seemed to be missing from the file. The daughter believed that respondent would communicate with her about the allegedly missing documents.

Approximately two months went by without any further response from respondent or his staff. Complainant B elicited the assistance of the Client Assistance Program with the South Carolina Bar in an attempt to mediate the situation with respondent.

Respondent acknowledges that he failed to punctually communicate with his client. He also admits he failed to respond in a timely manner to ODC about this matter.

Matter III

Respondent handled a real estate closing for Complainant C in 2000 and, again, in 2001, when Complainant C refinanced his mortgage. In January 2006, Complainant C attempted to again refinance his mortgage. Complainant C engaged the services of another attorney. During this process, the other attorney discovered a problem with the title requiring the deed(s) from 2000 and 2001 to be corrected.

At the end of January 2006, Complainant C contacted respondent's office. He spoke with respondent's paralegal who indicated respondent would correct the problem.

Respondent acknowledges he was not as diligent as he should have been in correcting this matter. Further, respondent acknowledges he failed to respond to ODC about this matter in a timely manner.

Matter IV

Respondent represented the plaintiff in a civil action. However, respondent believed that his representation was limited to writing and filing a single memorandum on plaintiff's behalf with the circuit court.

Respondent's client filed a Notice of Appeal with the South Carolina Court of Appeals. By letter dated July 22, 2005, the Clerk of the South Carolina Court of

Appeals notified respondent that, according to the South Carolina Appellate Court Rules, the trial attorney is deemed to be the attorney of record on appeal until he has been relieved by the Court and, if respondent was choosing not to represent his client, then he must petition the Court to be relieved as required by Court Rules. The Clerk requested the status of respondent's representation within ten (10) days. Respondent failed to respond to the request.

By letter dated August 15, 2005, the Clerk informed respondent that since the Court had not received any response from respondent to the July 22 letter, the Court would continue to list respondent as counsel for the plaintiff. The Clerk informed respondent that he was to notify the Court when he had received the transcript and timelines would be set accordingly.

By letter dated November 8, 2005, the Clerk informed respondent that, according to its information, the time for the transcript to be delivered had expired and that no extension had been requested. The Clerk informed respondent that the Court wished to be advised of the status of the transcript within ten (10) days or the appeal might be dismissed. Respondent failed to respond to this request.

By letter dated April 21, 2006, the Clerk informed respondent that the Court had not received the information it had requested in the November 8, 2005, letter. Once again, the Clerk reiterated that it was necessary for respondent to notify the Court of the status of the transcript within ten (10) days. The Clerk notified respondent that failure to comply with the Court's instruction would result in further action by the Court. Respondent failed to respond to this letter.

By letter dated June 23, 2006, the Clerk reminded respondent that he was still listed as counsel for the plaintiff. The Clerk informed respondent that the Court had not received a response from him regarding its previous letters. The Clerk advised respondent that he was to provide a response to the letter within ten (10) days. Respondent failed to respond to this letter.

Respondent represents that, based on a previous telephone conversation with the Clerk's office, he mistakenly believed the plaintiff's appeal had been dismissed. Respondent regrets and apologizes for the misunderstanding and his failure to respond to the Clerk's letters. Respondent represents he filed a Motion to be Relieved as Counsel for the plaintiff and the motion was granted.

Matter V

Complainant D retained respondent in 2003 to represent her in two separate actions involving her homeowner's association. Respondent acknowledges that he was not diligent in representing Complainant D. In addition, respondent acknowledges that he failed to communicate with Complainant D in a timely manner regarding requests for information and/or updates about her cases. Respondent apologizes for his conduct.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act diligently in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about the status of matter and promptly comply with reasonable requests for information); Rule 1.16(c) (lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation); Rule 8.1 (lawyer shall not knowingly fail to respond to demand for information from disciplinary authority); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent also admits he has violated the following Rule for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall complete the Legal Ethics and Practice Program Ethics School within twelve (12) months of the date of this order and provide certification of completion of the program to the Commission on Lawyer Conduct within ten (10) days of the conclusion of the program.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Petitioner,

v.

State of South Carolina, Alan Wilson in his capacity as South Carolina Attorney General, and Mark Keel, in his capacity as Chief of SLED, Respondents.

Appellate Case No. 2011-194686

Opinion No. 27159
Heard June 20, 2012 – Filed August 15, 2012

DECLARATORY RELIEF GRANTED IN PART

Desa A. Ballard and Stephanie N. Weissenstein, both of Ballard Watson Weissenstein, of West Columbia for Petitioner John Doe.

Attorney General Alan M. Wilson, Assistant Attorney General Jared Quante Libet, and J. Emory Smith, Jr., all of Columbia, for Respondent State.

JUSTICE KITTREDGE: This is a declaratory judgment action in the Court's original jurisdiction. Petitioner, who was adjudicated as a juvenile for sex crimes, seeks removal of his name from the sex offender registry. We grant relief in part, holding that a juvenile "adjudication" is the equivalent of a "conviction" under S.C. Code Ann. section 24-21-940 (2007), for purposes of entitlement to seek a pardon from the South Carolina Department of Probation, Parole and Pardon Services (PPP). We dismiss without prejudice the balance of Petitioner's complaint.

Petitioner was adjudicated delinquent by the family court in 2003 of criminal sexual conduct (CSC) with a minor in the second degree and two counts of lewd act upon a child under sixteen. As a result, Petitioner was required to register as a sex offender. *See* S.C. Code Ann. § 23-3-430(A), (C)(2), (C)(11) (Supp. 2011) (requiring a person adjudicated delinquent for the offenses of second-degree CSC and lewd act upon a child under sixteen to register on the sex offender registry).

Petitioner seeks removal of his name from the sex offender registry, which, under South Carolina's statutory scheme, requires that one receive a pardon.[1] It is stipulated by the State that Petitioner's request for a pardon was declined without consideration because PPP construed section 24-21-940 as not permitting his request because his juvenile adjudication did not constitute a conviction. *See* S.C. Code Ann. § 24-21-940(A) ("'Pardon' means that an individual is fully pardoned from all the legal consequences of his crime and of his *conviction* . . . .") (emphasis added)). The State's position in this regard is manifestly without merit, for there is no evidence that the legislature intended section 24-21-940(A) to allow only adult offenders the ability to ask for a pardon.[2] For purposes of section 24-21-940(A), a conviction includes a family court adjudication. Thus, Petitioner is entitled to have his request for pardon considered by PPP. Because it would be premature to consider the balance of Petitioner's complaint, it is dismissed without prejudice.

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[1] We note that section 23-3-430(F)(2) contemplates an offender's removal from the sex offender registry by way of a pardon only if the pardon is based on a finding of not guilty specifically stated in the pardon.

[2] Petitioner correctly asserts that the State's construction of section 24-21-940(A), if accepted, would render the statute, in conjunction with section 23-3-430, unconstitutional as an equal protection violation—that is, those convicted as an adult may seek a pardon whereas those adjudicated delinquent as a juvenile may not. We acknowledge that the legislature has recognized the distinction between a juvenile adjudication and an adult conviction in certain statutes unrelated to pardon eligibility. This distinction, consistent with longstanding policy concerning juveniles, has been implemented purposefully to shield juveniles from certain consequences that apply to those with an adult conviction. *See* S.C. Code Ann. § 63-19-1410 (Supp. 2011) ("No adjudication by the [family] court of the status of a child is a conviction, nor does the adjudication operate to impose civil disabilities ordinarily resulting from conviction . . . ."). Today's holding does not disrupt that distinction in any context aside from this specific one we address here.

DECLARATORY RELIEF GRANTED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward Mims, by and through his legal guardian, Margaret Mims, Appellant,

v.

Babcock Center, Inc., Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus, Respondents.

Appeal From Richland County
Joseph M. Strickland, Circuit Court Judge

Opinion No. 27160
Heard March 21, 2012 – Filed August 15, 2012

REVERSED AND REMANDED

Patricia Logan Harrison, of Columbia, and Peter D. Protopapas and Brian D. Newman, of Rikard & Protopapas, of Columbia, for Appellant.

Christian Stegmaier, Joel W. Collins, Jr., and Amy L. Neuschafer, of Collins & Lacy, of Columbia, and

William H. Davidson, II and Kenneth P. Woodington, of Davidson & Lindemann, of Columbia, for Respondents.

JUSTICE BEATTY: Margaret Mims (Mims), as guardian ad litem for her son, Edward Mims (Edward), filed a complaint against the Babcock Center and others alleging Edward sustained physical injuries and was mistreated while under their care. The circuit court dismissed the complaint based on issues related to timeliness of service and the application of S.C. Code Ann. § 15-3-20(B) (2005). Mims appeals. We reverse and remand.

I. FACTS

Edward, an adult, has severe mental and physical disabilities. On May 29, 2007, Mims, as guardian ad litem for Edward, filed a summons and complaint with the Richland County Court of Common Pleas against eight defendants.[1] Mims asserted various claims arising from the mistreatment, including a sexual assault, which Edward allegedly endured while under the care and supervision of the Babcock Center and the South Carolina Department of Disabilities and Special Needs (DDSN).

It is undisputed that this complaint was never served. However, an attorney from Collins & Lacy wrote to Mims's counsel on July 5, 2007 and stated the firm was the general counsel for the Babcock Center, that they had received a copy of the summons and complaint filed with the Court of Common Pleas, and that they "will be defending [the] Babcock Center, Dr. Johnson, Ms. Bradford, Mr. Stoxen, and Ms. Slater in this action." Counsel stated the letter was to memorialize a phone conversation with Mims's attorney on June 29, 2007, in which it was confirmed there had been no service of the pleading to date.

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[1] The eight named defendants were the Babcock Center, Inc., Judy Johnson, Tonya Bradford, Craig Stoxen, Sue Slater, Stanley Butkus, Susan Bowling, and the South Carolina Department of Health and Human Services.

On May 7, 2008, almost one year later, Mims filed a summons and an "Amended Complaint" against five defendants: the Babcock Center, Inc., Judy Johnson, DDSN, Kathi Lacy, and Stanley Butkus (Defendants). The new complaint retained three of the eight original defendants (Babcock Center, Johnson, and Butkus) while adding two new ones (DDSN and Lacy).

Mims re-alleged in the amended complaint that Edward had been physically injured and mistreated while under the care of Defendants, and she asserted claims for the violation of 42 U.S.C. §§ 1983, 1985, and 1988; negligent supervision; violation of the Americans with Disabilities Act and the Rehabilitation Act; and unjust enrichment. Defendants were all served a few days later, on May 12, 2008.

Defendants filed two separate motions to dismiss the amended complaint on or about June 9, 2008. One motion was filed by the Babcock Center and Johnson; the other was filed by DDSN, Lacy, and Butkus. A hearing was held on the motions on March 30, 2009, at which time the trial court indicated from the bench that the motions were denied. Defendants DDSN, Lacy, and Butkus filed an answer dated April 10, 2009 in response to the amended complaint. Defendants Babcock Center and Johnson thereafter filed their answer dated April 17, 2009.

By order filed June 4, 2009, the trial court formally denied Defendants' motions to dismiss Mims's amended complaint. Upon Defendants' motions to alter or amend, the trial court held another hearing on September 4, 2009 and thereafter granted Defendants' motions to dismiss, without prejudice, by order filed November 23, 2009. The trial court's primary finding was that Mims had failed to serve her summons and complaint within 120 days of filing as required by section 15-3-20(B) of the South Carolina Code.

In the order granting a dismissal, the trial court explained that it had initially denied Defendants' motions to dismiss based on judicial economy, as Mims could simply re-file her complaint. The trial court stated Mims had filed her original complaint in May 2007, but did not serve it, and the

amended complaint was filed under the same file number, 07-CP-40-3365 almost a year later, in May 2008. The trial court concluded neither the original complaint nor the amended complaint was served within 120 days of the filing of the action denominated 07-CP-40-3365 *in May 2007*; therefore, the civil action was not commenced within 120 days in accordance with S.C. Code Ann. § 15-3-20(B).

The trial court stated, "As a result of the Plaintiff's failure to accomplish service within 120 days and commence the civil action, there was no suit in existence in which an Amended Complaint could be filed. Therefore, the filing and service of the Plaintiff's Summons and Amended Complaint in May 2008 bearing case action number 07-CP-40-3365 constituted a legal nullity."

The trial court additionally found dismissal of the case was warranted for "insufficien[c]y of process under Rule 12(b)(4) and insufficiency of service of process under Rule 12(b)(5)" of the South Carolina Rules of Civil Procedure because service of the original complaint was never attempted and service of the amended complaint was "ineffective." The trial court further found that, "[a]s an additional result" of Mims's failure to accomplish service within 120 days and to properly commence a civil action, "subject matter and personal jurisdiction have not properly attached, and as such this case is also being dismissed under Rule 12(b)(1) and Rule 12(b)(2)." Finally, the trial court found the failure to prosecute the case additionally justified dismissal of the action under Rule 41(b), SCRCP. Mims's motion to alter or amend was denied. Mims appeals.

II. LAW/ANALYSIS

On appeal, Mims asserts (1) the South Carolina General Assembly intended S.C. Code Ann. § 15-3-20 to extend the time for service of a complaint by 120 days after the end of the statute of limitations, as provided by Rule 3(a), SCRCP, and it does not impose additional, more restrictive requirements for service within 120 days of filing, a process which would effectively shorten the statute of limitations; (2) equitable or statutory tolling for persons with disabilities prevents dismissal of the complaint; (3) the

circuit court erred in relying upon Rule 41(b), SCRCP, regarding dismissal for failure to prosecute; and (4) Rule 15(a), SCRCP allows a party to amend his or her pleadings any time before a responsive pleading is filed without leave of court, and it does not require a plaintiff to serve the original complaint in cases where the amended complaint was filed and served before an answer to the original complaint was ever served.

In contrast, Defendants argue that, reading Rule 3(a), SCRCP and section 15-3-20 together, to properly commence a civil action, actual service must be accomplished in *all* cases within one hundred twenty days of filing the summons and complaint. They contend that, because Mims did not serve her original or her amended summons and complaint within 120 days of filing the original summons and complaint in *May 2007*, the amended complaint was a nullity under section 15-3-20. Therefore, the trial court properly dismissed the action pursuant to Rules 12(b)(1), (2), (4), and (5) and the failure to prosecute under Rule 41(b).

Section 15-3-20 of the South Carolina Code governs the commencement of actions. In 2002, the General Assembly amended the statute to its current form, and it now provides:

> (A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.
>
> (B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

S.C. Code Ann. § 15-3-20 (2005).

In 2004, in direct response to the legislative change in section 15-3-20(B), this Court amended Rule 3(a) of the South Carolina Rules of Civil Procedure to read as follows:

> **(a) Commencement of civil action.** A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
>
> (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.[2]

As stated in the official notes to the rule, this Court amended Rule 3, SCRCP in 2004 "to reflect the legislative intent expressed in § 15-3-20 as amended by 2002 S.C. Act No. 281, § 1." Note to 2004 Amendment, Rule 3, SCRCP. The 2004 amendment to Rule 3 "rewrote subsection (a), deleted subsection (b) ["Tolling of Statute of Limitations"], and renumbered subsection (c) ["Filing of In Forma Pauperis"] as subsection (b)." *Id.*

In the current appeal, the trial court read section 15-3-20(B) to require actual service to be made within 120 days of filing in *all* cases. However, under this interpretation, an action filed and served within the statute of limitations could be deemed untimely and subject to dismissal. In amending Rule 3(a), SCRCP, this Court recognized that the legislative intent in amending section 15-3-20(B) in 2002 was to provide a safety net for cases where filing of the summons and complaint occurs near the end of the statute of limitations and service is made after the limitations period has run. The statute and the rule, read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of *filing*.

[2] Rule 3 was again amended in 2011, but the change did not affect subsection (a). *See* Note to 2011 Amendment, Rule 3, SCRCP (noting the addition of Rule 3(b)(2), which allows the waiver of filing fees in certain instances).

We note this differs from both (1) the trial court's and Defendants' interpretation (that service must be made in *all* cases within 120 days of filing) and (2) Mims's position (that service must be made within 120 days after the expiration of the statute of limitations). The legislative intent must prevail, and in amending Rule 3(a), SCRCP, this Court has interpreted and applied the statute in a manner that furthers that legislative intent.

In amending Rule 3(a), SCRCP, this Court clearly stated the 120-day period begins running from the *filing* of the complaint, not after the end of the statute of limitations period as argued by Mims. The 120-day period only has relevance if service is accomplished outside of the statute of limitations. When service occurs outside of the statute of limitations it must occur within 120 days of filing the complaint.

Applying these provisions to the case before us, we conclude the trial court erred in finding Mims's amended complaint should be dismissed for failure to serve it within 120 days of filing the original complaint. *See* S.C. Code Ann. § 15-3-20(B); Rule 3(a), SCRCP. Moreover, we agree with Mims that, contrary to Defendants' assertion, Rule 15(a), SCRCP does allow the filing and service of an amended complaint without leave of court, even if the original complaint has not been served, because a party may amend her pleadings once without leave of court before a responsive pleading is served, and no responsive pleading had been served by Defendants prior to Mims's service of the amended complaint. *See* Rule 15(a), SCRCP ("A party may amend his pleading once as a matter of course *at any time before* or within 30 days after *a responsive pleading is served* or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served." (emphasis added)).

To the extent the trial court further found the alleged absence of proper service resulted in a lack of personal and subject matter jurisdiction and a failure to prosecute, we reverse these findings as they are premised on the perceived error regarding service. Moreover, we note the failure of proper service does not impact the court's subject matter jurisdiction, in any event.

Cf. Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) (observing subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong" and holding the circuit court erred in ruling it lacked subject matter jurisdiction where the alleged error concerned the failure to properly serve a notice of appeal on the South Carolina Workers' Compensation Commission (quoting *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994))).

III. CONCLUSION

Based on the foregoing, we reverse the trial court's dismissal of Mims's complaint and remand this matter for further proceedings consistent with this opinion.[3]

REVERSED AND REMANDED.

TOAL, C.J., and HEARN, J., concur. KITTREDGE, J., concurring in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

[3] This Court need not reach Mims's remaining argument that the pleadings were not subject to dismissal based on Edward's disability. The trial court stated in its final order that a ruling on the applicable statute of limitations "is premature"; therefore, no ruling was made in this regard that is subject to this Court's review.

JUSTICE KITTREDGE: I join Justice Beatty's excellent majority opinion save the Rule 15, SCRCP, analysis. I agree with Justice Pleicones' view of Rule 15's inapplicability to this case, which does not affect the disposition of this appeal. I further note this procedural morass stems from Appellant's desire to avoid the payment of a filing fee when she filed the "Amended Complaint" under the 2007 civil action number. Under the circumstances, I do not view the 2008 complaint as a nullity. Because that complaint was filed and served within the statute of limitations, dismissal is not warranted. I would merely require the payment of a filing fee and a new civil action number.

JUSTICE PLEICONES: I respectfully dissent and would affirm the appealed order finding that because appellant failed to actually serve the complaint within 120 days of filing, the 2007 action ended, and thus no action was commenced to which the 2008 amended complaint could attach. S.C. Code Ann. § 15-3-20 (2005).

Section 15-3-20(B) provides "A civil action is commenced when the Summons and Complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." Appellant's complaint was filed on May 29, 2007, and never served. Under the plain language of § 15-3-20(B), the action identified as 07-CP-40-3365 was never commenced.

As explained below, nothing in Rule 3, SCRCP, can affect this conclusion regarding the May 2007 complaint. Rule 3(a) provides that "A civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law." The May 2007 complaint has never been served, and accordingly, even pursuant to Rule 3(a), SCRCP, the action identified as 07-CP-40-3365 has never been commenced. Moreover, appellant's service in May 2008 of a document denominated "Amended Complaint" in action 07-CP-40-3365 was a nullity. Rule 15, SCRCP, governs amended pleadings. Rule 15(a) permits a party to "amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed on the trial roster, he may so amend it at any time within 30 days after it is served." The plain language of Rule 15(a) allows an amendment only of a pleading which has been served. *See also* Rule 15(c), "Relation Back of Amendments." Nothing in our Rules or statutes recognizes an amended pleading where no other pleading has been served. This is especially so when the pleading relates to an action which has not even been commenced.

The majority suggests that we should read § 15-3-20(B) and Rule 3(a), SCRCP, together, and conclude that (1) an action is commenced upon filing of the summons and complaint, if service is accomplished within the statute

of limitations, but (2) that if filing but not service is done within the statue, then actual service must be made within 120 days of filing. I agree with the second statement, but find the first statement ignores the plain language of § 15-3-20(B).

Section 15-3-20(B) establishes the date of commencement as the date of filing with the clerk if actual service occurs within 120 days after filing. Since § 15-3-20(A) provides that an action must be commenced within the statute of limitations, read together, subsections (A) and (B) compel the same result as Rule 3(a)(2) when the complaint is filed near the end of the limitations period: so long as an action is filed within the statute of limitations, and actual service is accomplished within 120 days after filing, the action is deemed to have been commenced within the statute of limitations.

Where, as here, the action is sought to be commenced more than 120 days before the expiration of the statute of limitations, there is an irreconcilable conflict between Rule 3(a) and § 15-3-20. Rule 3(a) permits a complaint filed more than 120 days before expiration of the statute of limitations to be served at any time before the statute expires. Where, for example, there is a three-year statute, Rule 3(a) would find the action commenced where the complaint was filed on January 1, Year One but not served until December 31, Year Three. On the other hand, § 15-3-20(B) requires that a complaint filed January 1, Year One be actually served by May 1 (April 30 in a leap year), Year One, that is, within 120 days of filing, in order for the action to be properly commenced. Where the question is one of practice and procedure in the courts, a court rule is subordinate to the statutory law. *Stokes v. Denmark Emerg. Med. Serv.*, 315 S.C. 263, 433 S.E.2d 850 (1993), citing S.C. Const. art. V, § 4. Where the mandate of § 15-3-20(B), requiring actual service within 120 days of filing, is not met, the action cannot be saved by application of Rule 3(a)(1). *Stokes*, *supra*.

I respectfully dissent, and would affirm the appealed order dismissing this suit without prejudice.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Southern Glass & Plastics Company, Inc., Appellant,

v.

Kemper, A Unitrin Business, Respondent.

Appeal From Richland County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5021
Heard May 24, 2012 – Filed August 15, 2012

AFFIRMED

Robert L. Jackson, of Columbia, for Appellant.

Ashley Berry Stratton, of Columbia, for Respondent.

KONDUROS, J.: This appeal arises from window replacement services performed for insureds of Kemper, an automobile insurance company, by Southern Glass & Plastics Company, Inc., an automobile glass

repair and replacement business. Southern Glass contends the trial court erred in granting summary judgment to Kemper on Southern Glass's action to recover additional payments, determining the parties entered into an enforceable contract. We affirm.

FACTS/PROCEDURAL HISTORY

Southern Glass performed twelve automobile glass replacements for insureds of Kemper. Southern Glass submitted invoices to Kemper, but Kemper only paid part of the amount requested for each automobile. Southern Glass brought an action in magistrate's court against Kemper for breach of contract, alleging it was owed $2,301.98. Southern Glass contended it had submitted invoices to Kemper for replacing the auto glass in twelve vehicles but Kemper had only paid part of the amount submitted for each vehicle. Kemper filed an amended answer and counterclaim, which caused the amount in controversy to exceed $7,500, and the case was transferred to the court of common pleas.

Kemper filed a motion for summary judgment, contending Southern Glass was not entitled to full payment because it had billed for more than the parties agreed to and thus Kemper had not breached the contract. Kemper attached to its memorandum in support of its motion for summary judgment an affidavit from Brad Boardman. Boardman stated, "I oversee the national glass program for automobile coverage for Kemper . . . ." He further stated, "Kemper handles automobile glass claims through a third-party administrator, Safelite Solutions." He also indicated, "Kemper reviews industry data for glass claims several times each year and determines whether rates are fair and reasonable for given areas." Boardman explained:

> When Kemper revises its rates, it notifies network and non-network glass shops in advance of the fair and reasonable rates it approves for glass claims. Kemper does not dictate what the shops should charge a customer, Kemper merely informs the shops

> what it is paying based on the insured's automobile policy and law.

Additionally, Boardman's affidavit stated:

> Rates are also shared with insured's [sic] and shops when the insured contacts Kemper, via Safelite, to report the glass claim. A customer service representative at Safelite contacts the shop of the claimant's choice during the claim call to inform them of the rates before the shop begins working on the claimant's vehicle.

The affidavit further stated, "After the shop agrees or understands what the rates are being paid by Kemper via Safelite on the phone, the shop receives a referral sheet once again confirming the rates Kemper will pay before [the] shop begins work on the claimant's vehicle." Boardman provided, "When the glass work has been completed, Kemper pays the claim based on the rate pre-notified and usually agreed upon by the glass shop."

Kemper also attached a document dated March 25, 2009, from Safelite Solutions addressed to Southern Glass and referencing Matthew Keefe as the customer. The document listed the following prices:

> W/S LIST: -37.0% LABR: $41.00 PER HOUR
> C/T LIST: -37.0% LABR: $41.00 PER HOUR
> KIT: $15.00 2KIT: $30.00
> H/M KIT: $25.00 H/M 2KIT: $45.00

Additionally, the document provided, "KEMPER has determined the maximum amount of such work is : $ 483.82 [sic] less any applicable deductible amount." The document also stated, "Performance of services constitutes acceptance of the communicated price and billing instructions." Kemper attached an auto insurance policy as well. The policy stated, "Our limit of liability for loss will be the lesser of the: 1. Actual cash value of the

stolen or damaged property; or 2. Amount necessary to repair or replace the property with other property of like kind and quality." The policy also stated, "We will pay . . . for loss to safety glass on 'your covered auto' without applying a deductible."

Southern Glass filed a memorandum in opposition to Kemper's motion for summary judgment and submitted an affidavit by its president, Alan S. Epley, stating, "Each time Safelite calls to inform us of the rates, we tell the employee of Safelite that Southern Glass does not accept the quoted rates." He further stated, "I have informed Safelite on more than one occasion that no contract is created when my company does the work." Epley also provided, "I have also notified Kemper and other insurance companies, directly or through Safelite, that our only contract is with our customer, the insured[,] and the customer has assigned to Southern Glass its right to receive payment pursuant to the terms of the policy."

At the hearing on the motion, Kemper stated it had recordings of all the telephone conversations from when Southern Glass and the insured called Safelite and had brought copies to the hearing. Kemper stated it had not attached the transcripts to its memorandum as an exhibit because it did not come up until Southern Glass's response memorandum, filed two days before the hearing. The trial court took a break to give Southern Glass the opportunity to review the transcripts. After Southern Glass had reviewed the transcripts, Kemper began to address the transcripts, and Southern Glass stated, "I would object to the introduction --" The court responded, "I note your objection. I'm going to accept it anyway." Southern Glass asked, "You want to hear the grounds?" and the court responded, "Go ahead and put them on the record." However, Kemper then began describing the content of the transcripts and the objection was not discussed any further.

Kemper submitted a transcript from a recorded telephone call between an employee of Southern Glass and Safelite, as well as customer Luther McDaniel. In that conversation, Safelite stated, "I just need to know if you accept the job at the following pricing. . . . NAGS list minus thirty[-]seven percent, labor is $41.00 hourly and $15.00 per kit." The employee of

Southern Glass stated, "We accept the job." Safelite stated, "Thank you. Your acceptance of the job also indicates that you have accepted these rates and these prices do not include tax or the cost of molding."

The trial court granted the motion for summary judgment, finding "[t]he existence of a binding enforceable contract is evidenced by transcripts of telephone conversations between [Southern Glass's] representative (a shop employee), [Southern Glass's] customer ([Kemper's] insureds), and [Kemper's] third[-]party administrator (Safelite Solutions) wherein the glass claim was reported and express offer was made by Safelite on behalf of [Kemper]." The court determined "the telephone transcript evidences not only an express offer on behalf of [Kemper], but also an express acceptance on behalf of [Southern Glass]." The trial court found "[t]he offer was further confirmed in a fax sent by [Kemper's] third[-] party administrator to [Southern Glass] prior to the work being performed on the customer's vehicle," which "also stated: 'Performance of services constitutes acceptance of the above price and billing instructions.'" The court noted:

> After [Southern Glass] verbally agreed to [Kemper's] rates over the telephone and received the work order confirming the rates, it performed the glass work without objection or further communication with [Kemper's] third[-]party administrator. Thereafter, [Southern Glass] further confirmed its acceptance of [Kemper's] rates when it accepted and negotiated checks in the amount specified by the work order.

Southern Glass filed a motion to alter or amend pursuant to Rules 52(b) and 59(e), SCRCP. In regards to the telephone transcript, Southern Glass stated in a footnote in the motion, "[Southern Glass] objected to introduction of the transcript into evidence on the grounds that it had not been presented to counsel prior to the hearing. It was a surprise to counsel and prejudiced [Southern Glass's] case." The trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

LAW/ANALYSIS

I. Summary Judgment

Southern Glass argues the trial court erred in granting the motion for summary judgment because there was a genuine issue of material fact as Southern Glass disputed the existence of a unilateral contract by Epley's affidavit and its argument at the summary judgment hearing. We disagree.

"The purpose of all rules of construction is to ascertain the intention of the parties to the contract." Hansen ex rel. Hansen v. United Servs. Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002) (internal quotation marks omitted). "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be

properly disposed of at summary judgment." Id. at 67, 565 S.E.2d at 116 (internal quotation marks omitted). When the terms of a contract are ambiguous, the question of the parties' intent must be submitted to the jury. Id. at 68, 565 S.E.2d at 116.

> A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Id. at 68, 565 S.E.2d at 116-17 (internal quotations marks omitted). Additionally, a contract is only ambiguous when it may fairly and reasonably be understood in more than one way. Id. at 68, 565 S.E.2d at 117. "[I]n construing an insurance contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity." Id. (alteration by court) (internal quotations marks omitted).

"The necessary elements of a contract are an offer, acceptance, and valuable consideration. A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'" Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003) (quoting Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993)). "A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance. A bilateral contract, on the other hand, exists when both parties exchange mutual promises." Id. at 405, 581 S.E.2d at 165-66 (citation omitted).

The elements for a breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is

that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id.

A few courts across the country have considered a similar issue to the present case. In a North Carolina case:

> [T]he trial court based its judgment on three grounds: (1) GMAC[, an insurance company,] complied with the terms of its insurance contract; (2) GMAC paid defendant[, a glass company,] in accordance with unilateral contracts GMAC entered into with defendant; and (3) defendant's actions in cashing checks sent to it by GMAC, knowing that GMAC considered those payments "final," constituted an accord and satisfaction of any potential claim defendant might assert.

CIM Ins. Corp. v. Cascade Auto Glass, Inc., 660 S.E.2d 907, 910 (N.C. Ct. App. 2008). The North Carolina Court of Appeals recognized, "A unilateral contract is formed when one party makes a promise and expressly or impliedly invites the other party to perform some act as a condition for making the promise binding on the promisor." Id. The court provided that GMAC communicated through Safelite the prices it was willing to pay to defendant for services rendered to its insureds. Id. The court found the prices were communicated "(1) via letter to defendant's shops, (2) via telephone when initial claims were made, (3) via confirmation fax after claims were made but before work was performed, and (4) via eventual payment of invoices at the GMAC rate rather than defendant's rate." Id. "The confirmation faxes stated, '[p]erformance of services constitutes acceptance of the above price. . . .'" Id. (alterations by court). "Although defendant protested the stated prices, these protests admitted that the confirmation faxes constituted offers-'The purpose of this letter is to address [the confirmation faxes] and to dispel any notion that we are in agreement with the offered pricing.'" Id. (alteration by court).

The court noted, "It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed." Id. (internal quotations marks omitted). "Here, the offer stated that acceptance was by performance. Because defendant performed the requested repairs or replacements, it accepted the terms of GMAC's offers, forming valid unilateral contracts at GMAC's stated prices." Id. "GMAC paid defendant pursuant to the terms of the unilateral contracts entered into between the parties. Defendant has not been 'underpaid' and is due no further payments. Therefore, summary judgment was properly granted against defendant." Id.

The Idaho Supreme Court has also considered a similar issue, finding Farm Bureau Insurance Company clearly stated it would pay the amount it agreed to and it had notified Cascade, a glass company, in advance the rates it would pay for glass repair and replacement. Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 115 P.3d 751, 755 (Idaho 2005). The court found:

> Cascade had one of three options available to it upon receiving Farm Bureau's notice: it could simply do the work and accept the amount Farm Bureau had stated it would pay; it could accept the insurance payment and collect the difference from the insured; or it could refuse to perform services for Farm Bureau insureds unless the customer paid it for the work, leaving the customer to seek reimbursement from Farm Bureau.

Id. The court determined, "Cascade was unquestionably on notice of the amount Farm Bureau would pay and, nevertheless, proceeded with the work, knowing there was a limit on the amount it would receive. Farm Bureau paid the amount it had agreed to pay and has fulfilled its obligations under the policy." Id. The court further found:

> [T]he provisions of the insurance policy clearly provide that Farm Bureau can make a unilateral agreement about what amounts it will pay for windshield replacement or repair services. There is no issue of fact that once it made that determination, it provided notice in advance to all of the glass companies. The facts are also undisputed that Cascade accepted these Farm Bureau insured customers, agreed to provide the work, provided materials of like kind and quality, and was paid in full in the amount Farm Bureau had previously indicated it would pay. Therefore, Cascade has been paid all the money to which it was entitled under the policy and there is no breach of the insurance contract.

Id.

The Washington Court of Appeals has also considered a comparable case, which examines a somewhat different issue. Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 145 P.3d 1253 (Wash. Ct. App. 2006). In that case, Cascade argued Safelite could not terminate the agreement between Cascade and Progressive because it was not a party to it. Id. at 1255. The court found, "Progressive presented unrebutted evidence that Safelite had authority to act as its agent in the price setting correspondence." Id. Cascade also argued, "Progressive's superseding letters were simply an attempt to unilaterally modify the terms of the pricing agreement, which Progressive could not do." Id. Cascade asserted the termination notice was deficient for two reasons: (1) "because the letters were unsigned and mass-mailed, they failed to give adequate notice to any particular glass shop that Progressive was terminating its pricing agreement" and (2) "the letters purported to unilaterally modify the terms of the pricing agreement rather than terminate the agreement altogether." Id. at 1256.

The Washington Court of Appeals found, "Progressive's superseding letters clearly signaled that it was no longer willing to pay according to the pricing agreement. Instead, Progressive offered to pay according to its new pricing standards. Cascade accepted Progressive's offer by performing glass work for Progressive's insureds." Id. at 1257-58. "A unilateral contract exists when one party offers to do a certain thing in exchange for the other's performance, and performance by the other party constitutes acceptance." Id. at 1258. The court held, "Cascade created binding unilateral contracts each time it repaired or replaced auto glass for Progressive's insureds after receiving Progressive's new offer. Progressive owes the amounts it promised to pay in the superseding letters; Cascade is entitled to no more than those amounts." Id.

The Connecticut Supreme Court has also looked at a similar situation but with differing results. Auto Glass Express, Inc. v. Hanover Ins. Co., 975 A.2d 1266 (Conn. 2009). In that case, the court found:

> According to the plain language of the pricing letters, the only exchange proposed by the defendant is its promise to pay bills timely in exchange for the submission of bills that do not exceed its proposed pricing structure: "Bills that are accurate and are not more than this pricing structure will be paid promptly as submitted." In fact, the pricing letters, read as a whole, reinforce this interpretation. . . . The very first paragraph of the pricing letters sets forth the purpose of the letters, namely, "[t]o facilitate timely payment of invoices and avoid misunderstandings. . . ."

Id. at 1273 (emphases added by court).

The court determined:

> [N]othing in the language of the pricing letters, either expressly or impliedly, suggests that the mere

> performance of glass repairs on automobiles insured by the defendant was sufficient to bind the plaintiffs to the defendant's prices. The pricing letters also do not indicate how the defendant intended to address invoices that did not conform to its pricing standards. The defendant's statement that its pricing structure represented what it believed to be "fair and reasonable prices for the market" failed to convey any intent that higher prices were unfair or unreasonable and would not be paid. Thus, we agree with the Appellate Court's observation that "[t]he [pricing] letters, therefore, do not evidence an intention on the part of the defendant not to pay a greater amount, but rather an intention not to pay a greater amount 'promptly.'" Further, the statement in the pricing letter that "[t]he prices listed [superseded] any prior pricing agreements," sheds no light on what performance was required in order to accept the defendant's new price terms. Because the plain language of the pricing letters clearly and unambiguously required the plaintiffs to submit invoices that reflected the pricing standards set forth in those letters in order to accept the defendant's offer of timely payment, and did not restrict the plaintiffs from submitting invoices reflecting higher prices, we need not look beyond the pricing letters to ascertain the defendant's intent.

Id. at 1273-74 (alterations by court) (footnote and citation omitted). The court held, "In light of the clear and unambiguous language of the pricing letters, we conclude that, in order for unilateral contracts to have been formed, the plaintiffs would have been required to accept the prices stated in those letters by submitting invoices that conformed to those prices." Id. at 1274. "The plaintiffs did not submit conforming invoices, and, therefore, the trial court improperly concluded that the parties had formed a series of

unilateral contracts that supplied the amounts due from the defendant under the assigned insurance policies." Id. at 1275.

The Eighth Circuit Court of Appeals has also undertaken an analysis of an analogous scenario. Alpine Glass, Inc. v. Ill. Farmers Ins. Co., 643 F.3d 659 (8th Cir. 2011). In that case, "Farmers contend[ed] that the district court erred in granting summary judgment in favor of Alpine[, a glass company,] on Farmers's breach-of-contract counterclaim. Farmers argue[d] that the price lists it faxed to Alpine constituted offers and that Alpine accepted the offers when it performed auto-glass work on behalf of Farmers's insureds." Id. at 666. The court noted, "To form a unilateral contract, Minnesota law requires a definite offer, communication of the offer, acceptance, and consideration. An offer must contain sufficiently definite terms to enable the fact-finder to interpret and apply them." Id. (footnote, citation, and internal quotation marks omitted). "Acceptance must be unequivocal and comply exactly with the requirements of the offer. If the purported acceptance changes the terms of the offer, it is not positive and unequivocal, and constitutes a rejection of the offer and a counteroffer." Id. (citation and internal quotation marks omitted).

The court found:

> Even if the blast faxes constituted offers to enter into unilateral contracts, Alpine rejected the offers when its actions failed to conform to the terms of the offer. The June 2002 fax informed the "Shop Owner/Manager" that Farmers had updated its pricing standards. The fax read, "To facilitate timely payment of invoices and avoid misunderstandings, please be sure to price all Farmers Insurance transactions in accordance with the prices indicated below." After listing the pricing structure and noting that it superseded previous pricing agreements, the document explained how to submit invoices and stated that "[b]ills that are accurate and are not more

> than this pricing structure will be paid promptly as submitted." Given the language of the document, mere performance of auto-glass work on the vehicles of Farmers's insureds did not constitute acceptance because the terms of the purported offer required that Alpine submit invoices in accordance with Farmers's pricing structure. There is no dispute that Alpine's invoices did not conform with Farmers's pricing structure.

Id. at 666-67 (alteration by court). The court further provided:

> The February 2005 fax included the same information as the June 2002 fax and went on to advise Alpine that it "may consider refusing the job if you are unwilling to provide service at the prices Farmers Insurance has offered above." The fax also provided that Alpine's rejection of the pricing terms would not "be binding on us or otherwise require us to pay you additional sums for services rendered" and that if Alpine desired to charge more than the pricing structure permitted, it "must advise our policyholders prior to initiating glass repair/replacement so that they can determine whether they are willing to pay the additional costs for your services."

Id. at 667. The court determined "mere performance of auto-glass work did not constitute acceptance, and Alpine did not comply with the pricing requirements or the additional terms set forth in Farmers's purported offer." Id.

The present case can be distinguished from the Connecticut and the Eighth Circuit cases. In those cases, the courts noted that the company had merely stated that billing at those rates would result in timely payment. The present case is more in line with the North Carolina, Idaho, and Washington

cases. In this case, Kemper notified Southern Glass of the rates and stated "performance of services irrevocable constitutes acceptance of the above price and billing instructions." Additionally, Southern Glass accepted the prices in the phone conversation. By proceeding with the work after receiving notice of the prices via phone conversation and fax, Southern Glass accepted the prices. Southern Glass argues that the court only considered one telephone transcript in making its decision. However, at the hearing, Kemper stated that it had transcripts for all of the conversations between Southern Glass and Safelite. Kemper read to the court one of those transcripts, and that transcript is in the record. Southern Glass made no argument at the hearing that the transcript only represented one of the claims. Further, Southern Glass put up no evidence to show it had contacted Safelite or Kemper after receiving the fax to reject the prices in it. Accordingly, because the evidence does not create a genuine issue of material fact that Kemper breached its contract with Southern Glass, the trial court did not err in granting Kemper summary judgment.

II. Introduction of the Transcript

Southern Glass argues the trial court erred in allowing Kemper to submit copies of alleged transcripts of telephone conversations as its introduction was a surprise and extremely prejudicial because it had no opportunity to refute the fact that the employee had no authority to bind the company. It also argues the transcript was not signed or certified. We disagree.

Southern Glass's memo opposing summary judgment was filed two days before the hearing, and Epley's affidavit, which is the first time Southern Glass asserted that it had informed Kemper that it rejected its pricing, was also filed two days before the hearing. The court gave Southern Glass a short time to review the documents, and Southern Glass did not request a continuance. Therefore, the trial court did not err in allowing the transcript. Additionally, a unilateral contract was created by Southern Glass's performing the work on Kemper's insureds, not by Southern Glass's verbal response. Thus, the transcript of the conversation did not prejudice Southern

Glass. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Further, the argument pertaining to the transcript not being certified or signed is abandoned because Southern Glass makes only a passing reference to it in its brief and cites no case law for the argument. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

CONCLUSION

The trial court did not err in finding no genuine issue of material fact existed and granting summary judgment. Further, any admission of the transcript was not in error. Therefore, the grant of summary judgment is

AFFIRMED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory A. Collins (Deceased), Employee, Claimant, Respondent,

v.

Seko Charlotte and Nationwide Mutual Insurance Co., Respondents,

v.

West Expedited & Delivery Service, Inc., Defendant,

v.

Seko Worldwide and Federal Insurance Co., Defendants,

v.

South Carolina Workers' Compensation Uninsured Employers' Fund, Appellant.

Appellate Case No. 2011-184326

Appeal From The Workers' Compensation Commission

Opinion No. 5022
Heard May 8, 2012 – Filed August 15, 2012

REVERSED

Timothy B. Killen, of Columbia, for Appellant.

Weston Adams, III, and Helen F. Hiser, both of McAngus Goudelock & Courie, LLC, of Columbia, for Respondents Seko Charlotte and Nationwide Mutual Insurance Co.

Linda Byars McKenzie, of Bowen McKenzie & Bowen, LLP, of Greenville, for Respondent Gregory Collins.

SHORT, J.: The dependents of Gregory Collins (deceased) filed this workers' compensation claim against West Expedited & Delivery Service, Inc. (West), Seko Worldwide, Federal Insurance Co., Seko Charlotte (Seko), Nationwide Mutual Insurance Co., and the South Carolina Workers' Compensation Uninsured Employers' Fund (the Fund). The Fund appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission), arguing it erred in: (1) finding Collins was not Seko's statutory employee; (2) finding the "going and coming rule" barred Collins' recovery as to West, but not as to Seko; (3) finding Collins was a "traveling employee" as to West, but not as to Seko; (4) finding the method of payment was dispositive in determining the statutory employment relationship; (5) applying Georgia law; and (6) finding Collins would have been a gratuitous worker if considered a statutory employee of Seko at the time of his accident. We reverse.

FACTS

Collins, a South Carolina resident, was hired by West, a South Carolina expedited delivery company, to drive a delivery van. Seko Charlotte (Seko) contracted with West for a delivery of parts from Ina Bearing Company in Spartanburg, South Carolina, to Wauwatosa and Menomonee Falls, Wisconsin. On September 7, 2007, Collins picked up the parts and delivered them to Seko's customers in Wisconsin. While driving back to South Carolina on September 8, Collins was killed in an automobile accident. This claim was filed. At the time of the accident, West's workers' compensation coverage had lapsed, and the Fund participated in the case.

Ronald Burks, Seko's general manager, testified that Seko is a transportation logistics company providing regional, national, and international transportation services. Seko employed three drivers among its sixteen employees. These drivers made deliveries within a hundred miles of Charlotte. Seko subcontracted longer trips to companies such as West.

Burks testified West provided "express hot deliver[y]" services, which are required when a customer needs immediate delivery and cannot wait for a full truck load to deliver in their area. As he explained, West provided services for cargo that "needs to get . . . somewhere faster than an LTL [less than a truck load] truck would" be able to deliver.

Burks testified Seko did not have a written contract with West. Seko paid West $1.20 per loaded mile, one way. Seko utilized West's services approximately two to three times per month and contracted with four or five companies comparable to West, similarly paying them per mile, one way. Seko's contention was that once a delivery was made, its agreement with West ceased. In this case, Collins had no cargo in the van during the return trip to South Carolina, and Seko accordingly maintained he was no longer its statutory employee.

Burks admitted that if Collins had been Seko's employee at the time of the injury, he would have a valid workers' compensation claim against Seko. He conceded that the Seko drivers were covered by Seko's workers' compensation insurance on their entire trips, rather than just on the way to the delivery site. Burks admitted he knew West's drivers would return to South Carolina because they were based here, but insisted Seko's relationship with Collins ceased after he made his deliveries in Wisconsin. Burks conceded such deliveries were an important and necessary part of Seko's business.

West's president, Morris West, testified the drivers generally do not have cargo on their return trips to South Carolina, and in Collins' case, he did not have cargo on his return trip. Morris also testified West was free to contract with another company for return loads, and Seko had no relationship with his drivers once a delivery was made.

The single commissioner found Seko was Collins' statutory employer. Seko appealed to the Commission. At the hearing before the Commission, Seko

conceded it was Collins' statutory employer for the trip from South Carolina to Wisconsin. It maintained Collins was West's employee during the return trip. Seko argued it no longer had control over Collins after his delivery in Wisconsin, and its status as a statutory employer thus ceased upon delivery. The Fund argued the issue of control was not relevant to a determination of statutory employment.

The Commission found Collins was Seko's statutory employee during his trip to Wisconsin, but Seko did not maintain the degree of control over Collins during the return trip to continue the employment relationship. Furthermore, the Commission found Collins was no longer Seko's employee within the "going and coming rule." Finding this a case of first impression in South Carolina, the Commission relied on Georgia and North Carolina law to conclude Collins was no longer Seko's statutory employee at the time of the accident. Therefore, the Commission found the Fund was liable for the claim. The Fund appealed.

STANDARD OF REVIEW

Coverage under the Workers' Compensation Act (the Act) depends on the existence of an employment relationship. *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 398 (Ct. App. 2008). "Whether or not an employer-employee relationship exists is a jurisdictional question." *Id.* Where the issue involves jurisdiction, the appellate court can take its own view of the preponderance of the evidence. *Id.* at 216-17, 661 S.E.2d at 399. "It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." *Id.* at 217, 661 S.E.2d at 399; *see Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009) (rejecting the analytical framework of distinguishing between an employee and an independent contractor that "most assuredly skews the analysis to a finding of employment" while "remain[ing] sensitive to the general principle sanctioned by the Legislature that workers' compensation laws are to be construed liberally in favor of coverage").

LAW/ANALYSIS

The Fund argues the Commission erred in finding Collins was no longer Seko's statutory employee at the time of his accident. We agree.

Statutory employment is an exception to the general rule that coverage under the Act requires the existence of an employer-employee relationship. *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008). "The statutory employee doctrine converts conceded non-employees into employees for purposes of the Workers' Compensation Act. The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997). "The effect of these [statutory employment] provisions when brought into operation is to impose the absolute liability of an immediate employer upon the owner and/or general contractor although it was not in law the immediate employer of the injured workman." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 72, 267 S.E.2d 524, 527-28 (1980).

The statutory employment section of the Act provides:

> When any person, in this section . . . referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section . . . referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (1985).

The Commission found Collins was not Seko's statutory employee based primarily on Seko's lack of control over Collins at the time of his accident. *See Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702 (recognizing the four-factor test to determine whether a worker is an employee or an independent contractor: (1) right to, or exercise of, control; (2) furnishing of equipment; (3) method of payment; and (4) right to fire).[1] The Commission also relied on case law from Georgia and North

[1] In discussing the going and coming, gratuitous worker, and traveling employee doctrines, the Commission likewise focused on Seko's method of payment or

Carolina to find no statutory employment relationship. In *Farmer v. Ryder Truck Lines, Inc.*, 266 S.E.2d 922 (Ga. 1980), the Georgia Supreme Court began its analysis of control stating the statutory employment statute was inapplicable in that case. *Farmer*, 266 S.E.2d at 924. In *Lewis v. Barnhill*, 148 S.E.2d 536 (N.C. 1966), the North Carolina Supreme Court employed the borrowed servant doctrine[2] without mentioning a statutory employment statute in Lewis' tort action. *Lewis*, 148 S.E.2d at 543.

We find the Commission erroneously utilized the "employee/independent contractor" test to determine whether Collins was Seko's statutory employee. We also find neither the Georgia nor North Carolina case relied on by the Commission is dispositive.

In *Voss v. Ramco, Inc.*, 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct. App. 1997), this court found that whether the employee was an independent contractor of the alleged statutory employer was irrelevant. The court concluded that "section 42-1-

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control over Collins at the time of the accident. *See Whitworth v. Window World, Inc.*, 377 S.C. 637, 641, 661 S.E.2d 333, 336 (2008) ("Under the going and coming rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment. Therefore, an injury sustained by accident at such time is not compensable under the Workers' Compensation Act because it does not arise out of and in the course of his employment."); *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994) (holding gratuitous workers are not employees); *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 357, 656 S.E.2d 753, 762 (Ct. App. 2007) ("It is well settled that 'traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.'") (quoting Arthur Larson, *Larson's Worker*[*s*]' *Compensation Law*, § 14.01 (Lexis-Nexis 2004)).

[2] Under South Carolina's borrowed servant doctrine, "when a general employer lends an employee to a special employer, that special employer is liable for workers' compensation if: (1) there is a contract of hire between the employee and the special employer; (2) the work being done by the employee is essentially that of the special employer; and (3) the special employer has the right to control the details of the employee's work." *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 175, 624 S.E.2d 439, 443 (Ct. App. 2005).

400 imposes liability on an upstream employer if the injured worker is an employee of the *subcontractor*, but not if the worker is an independent contractor of the *subcontractor*." 325 S.C. at 566-67, 482 S.E.2d at 585. The Fourth Circuit Court of Appeals likewise stated that whether the statutory employer exercised control over the employee is not the issue in South Carolina:

> Suffice it to say that no South Carolina case has been found involving this statute in which an owner's liability either for payment of compensation or tort damages has been made to rest upon the degree of control retained by the owner over the injured employee of a subcontractor. On the contrary, once it is established that the work being done by the subcontractor is a part of the owner's general business, the employees of the subcontractor become statutory employees of the owner even though their immediate employer is an independent contractor.

Corollo v. S. S. Kresge Co., 456 F.2d 306, 311 (4th Cir. 1972).

Once the Commission determined Collins was an employee of Seko's subcontractor, West, which the parties in this case did not dispute, the Commission should have looked to whether Collins' activities were part of Seko's trade, business, or occupation. *See* S.C. Code Ann. § 42-1-400 (1985) (providing statutory employment requires the claimant to be engaged in an activity that "is a part of [Seko's] trade, business[,] or occupation"). South Carolina has applied three tests and concludes the statutory requirement is met if the activity (1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; or (3) has previously been performed by the owner's employees. *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). If the activity meets any of these three criteria, the injured employee qualifies as a statutory employee. *Id.* In this case, Burks admitted deliveries like the one Collins made were an important and necessary part of Seko's business. We agree that Seko's utilization of West's services two to three times per month for "express hot deliveries" is an important part of Seko's delivery business. Accordingly, we find Collins was Seko's statutory employee during the entire trip. *See Voss*, 325 S.C. at 568, 482 S.E.2d at 586 (finding a manufacturer of small equipment was the statutory employer of field salespeople because selling the equipment was an essential part of the manufacturer's business); *Marchbanks v.*

Duke Power Co., 190 S.C. 336, 351, 2 S.E.2d 825, 837-38 (1939) (affirming the trial court's finding that maintenance of Duke Power's transmission lines and utility poles was an important and essential part of its trade or business and, therefore, finding Duke Power the statutory employer of the employee of a subcontractor hired to paint utility poles).

CONCLUSION

Based on the foregoing, we find the Commission employed improper analyses in reversing the single commissioner. Under our own view of the preponderance of the evidence, we find Collins was Seko's statutory employee. Accordingly, we reverse the Commission and reinstate the single commissioner's order.

REVERSED.

HUFF, J., concurs.

FEW, C.J., concurring: I concur in the majority opinion. I write separately to further explain why it was error for the commission to use the independent contractor test to determine whether Collins was Seko's statutory employee. There is no reason to consider whether a claimant is a statutory employee unless the claimant or his direct employer has an independent contractor relationship with the defendant. Therefore, it is nonsensical to determine Collins was not the statutory employee of Seko because of the independent contractor relationship between Seko and West. Rather, Collins can be a statutory employee of Seko only if there is an independent contractor relationship between Seko and West.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robin M. Holmes, Appellant,

v.

Rita Kay Holmes, Respondent.

Appellate Case No. 2011-191470

Appeal From Spartanburg County
Usha J. Bridges, Family Court Judge

Opinion No. 5023
Heard May 23, 2012 – Filed August 15, 2012

AFFIRMED AS MODIFIED

Richard H. Rhodes, Murray Noel Turner, III, and Ryan Frederick McCarty, all of Burts Turner & Rhodes, of Spartanburg, for Appellant.

Kenneth Philip Shabel, of Campbell & Shabel, LLC, of Spartanburg, for Respondent.

LOCKEMY, J.: In this appeal from the family court, Robin Holmes (Husband) appeals the family court order requiring he pay Rita Kay Holmes (Wife) $600 per month in alimony. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

Husband and Wife were married in 1978 and had two children. The parties separated in 2006, and on October 5, 2007, the family court found Wife was entitled to a divorce from Husband based on one year's continuous separation. The divorce decree incorporated a November 2006 settlement agreement entered into by the parties, which addressed child custody, child support, division of property, and alimony. Pursuant to the settlement agreement, the parties agreed to joint custody of their one minor child, with Wife as the primary custodian.[1] At the time of the settlement, Husband's income was $72,000 per year, and he received a $16,500 bonus.[2] Wife's annual income was $34,000. Based upon these figures, Husband agreed to pay Wife alimony in the amount of $600 per month plus 20% of his gross annual bonus.[3] Additionally, Husband agreed to pay Wife $400 per month in child support.

In May 2009, Husband lost his job with Milliken & Company through no fault of his own after his position was eliminated. On March 4, 2010, Husband filed a complaint seeking a termination or reduction in his alimony payment, as well as discovery and attorney's fees.[4] Wife subsequently filed an answer and counterclaim denying Husband's request for termination or reduction in alimony, agreeing to discovery, and denying Husband's request for attorney's fees. The family court issued a temporary order on April 1, 2010, reducing Husband's alimony payment from $600 per month to $150 per month. The family court also required Husband to continue to pay Wife 20% of any bonuses he received. Husband held several jobs between August 2009 and October 2010, and has been employed by American Credit Acceptance since November 2010.

The parties submitted updated financial declarations during a final hearing before the family court in February 2011. In the declarations, Husband reported a gross

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[1] The parties' daughter was sixteen-years-old at the time of the settlement agreement, and their son was eighteen-years-old.

[2] Husband testified he received a bonus every year, but it is unclear from the record whether he received the same amount every year.

[3] After the divorce decree, the parties orally agreed to modify the terms of the alimony payment. Husband began paying Wife $875 per month in lieu of $600 plus bonuses.

[4] Husband's child support obligation terminated in May 2009 when the parties' minor child turned eighteen.

monthly income of $3,418[5] ($41,016 per year), and Wife reported a gross monthly income of $3,508[6] ($42,096 per year). In an April 1, 2011 final order, the family court reinstated Husband's $600 per month alimony payment, but removed the requirement that Husband pay Wife 20% of his gross bonuses each year. The family court found that at the time of the divorce decree, Husband's child support and alimony obligations equaled 16.7% of his gross income, excluding bonuses. The court further found, based on Husband's current gross monthly income, a $600 monthly alimony payment would constitute 17.6% of Husband's gross income. The court noted this was an increase of 0.9%. If the January 2011 bonus was not included in Husband's income, the family court found a $600 monthly payment would constitute 19.6% of Husband's gross income. The court noted this was an increase of 2.9%. Based on the above calculations, the family court held these increases were not substantial and Husband should be required to pay Wife $600 per month in alimony. The family court further found Husband failed to show he was unable to pay Wife $600 per month. Husband subsequently filed a Rule 59(e), SCRCP, motion to reconsider arguing a $600 per month alimony payment would create an undue hardship. The family court denied Husband's motion, and this appeal followed.

STANDARD OF REVIEW

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

[5] Husband's gross monthly income included $468 in overtime and a $350 January 2011 bonus.

[6] Wife has an associate's degree in medical lab technology and is employed by Spartanburg Regional Hospital.

contrary factual findings by this court. *See Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55.

LAW/ANALYSIS

Husband argues the family court erred in requiring him to pay Wife $600 per month in alimony. We agree in part.

Generally, the purpose of alimony is to place the supported spouse, to the extent possible, in the position she enjoyed during the marriage. *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). However, upon a change in circumstances, the family court may modify an alimony obligation. *See Miles v. Miles*, 355 S.C. 511, 516, 586 S.E.2d 136, 139 (Ct. App. 2003). Section 20-3-170 of the South Carolina Code provides in pertinent part as follows:

> Whenever any husband or wife, pursuant to a judgment of divorce from the bonds of matrimony, has been required to make his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments and the court, after giving both parties an opportunity to be heard and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the supporting spouse, decreasing or increasing or confirming the amount of alimony provided for in such original judgment or terminating such payments.

S.C. Code Ann. § 20-3-170 (1985). Changes in circumstances must be substantial or material to justify modification or termination of an alimony award. *Miles*, 355 S.C. at 519, 586 S.E.2d at 140. Moreover, the change in circumstances must be unanticipated. *Penny v. Green*, 357 S.C. 583, 589, 594 S.E.2d 171, 174 (Ct. App. 2004). "The party seeking modification has the burden to show by a

preponderance of the evidence that the unforeseen change has occurred." *Kelley v. Kelley*, 324 S.C. 481, 486, 477 S.E.2d 727, 729 (Ct. App. 1996).

"Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse." *Miles*, 355 S.C. at 519, 586 S.E.2d at 140. Per statute, the complete list of factors the family court can consider in setting alimony includes: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses and needs of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2011).

Here, the family court found Husband's child support and alimony payments constituted 16.7% of his gross income excluding bonuses in 2007, and Husband's alimony payment constituted 19.6% of his gross income excluding bonuses in 2011. The family court determined this increase in the amount of support compared to Husband's gross income was not substantial, and therefore, Husband should be required to pay Wife $600 per month. We find the family court erred in calculating alimony by failing to consider the relevant statutory factors. The family court failed to consider the parties' relevant circumstances, including, but not limited to, their expenses, Husband's financial ability and earning capacity, and whether Husband's change in circumstances was unanticipated. The family court focused only on the percentage of Husband's income constituting alimony.

We find, based upon a consideration of the statutory alimony factors, Husband has demonstrated an unanticipated substantial change in circumstances that justifies a reduction in his alimony payment. After being laid off and finding other employment, Husband's annual income decreased from $88,500 to $41,016. In addition, according to his 2011 financial declaration, Husband's monthly expenses totaled $4,078.79 while his gross monthly income was $3,418. At the family court hearing, Husband testified that even after the court reduced his alimony obligation to $150 in its temporary order, it was still a "strain" to meet his expenses. Although normal decreases in income may not be enough to warrant a decrease in alimony, here, Husband's change in financial situation is material enough to

warrant a decrease in his alimony obligation, especially considering Husband is making less than half of his income from 2007. We note that while Husband's financial situation has worsened since 2007, Wife's financial situation has improved. Pursuant to her 2011 financial declaration, Wife's annual income increased from $34,000 to $42,096. Additionally, Wife's monthly expenses totaled $4,629, and she saved $866 per month. The purpose of alimony is to place the supported spouse, to the extent possible, in the position she enjoyed during the marriage, and the record contains no evidence that Wife was saving over $800 per month during the parties' marriage. *See Allen*, 347 S.C. at 184, 554 S.E.2d at 424 (holding the purpose of alimony is to place the supported spouse, to the extent possible, in the position she enjoyed during the marriage). In that regard, we find Husband should not have to exhaust his resources so Wife can save $866 per month. *See Johnson v. Johnson*, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988) ("Alimony is a substitute for the support which is normally incident to the marital relationship."); *see Butler v. Butler*, 385 S.C. 328, 340, 684 S.E.2d 191, 197 (Ct. App. 2009) (holding the family court did not err in considering Wife's expenses in calculating Husband's alimony obligation where Wife testified as to the parties' history of spending during their marriage).

After careful consideration of the facts of this case along with the statutory alimony factors, we find Husband is entitled to a reduction in his alimony payment from $600 per month plus 20% of his annual bonus to $275 per month.

CONCLUSION

We affirm the family court's order requiring Husband pay Wife alimony and removing the 20% bonus provision. However, we find Husband is entitled to a reduction in his alimony payment from $600 per month as ordered by the family court to $275 per month.

AFFIRMED AS MODIFIED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cheryl DiMarco, Respondent,

v.

Brian A. DiMarco, Appellant.

Appellate Case No. 2008-101649

Appeal From Greenville County
Rochelle Y. Conits, Family Court Judge

Opinion No. 5024
Heard October 6, 2011 – Filed August 15, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. Falkner Wilkes and Nathalie M. Morgan, both of Greenville, for Appellant.

C. Grant Varner and Kim R. Varner, of Varner & Segura, of Greenville, for Respondent.

LOCKEMY, J.: In this domestic action, Brian DiMarco (Father) argues the family court erred in including rental income and capital gains in its child support calculation, and in awarding excessive attorney's fees and costs to Cheryl DiMarco (Mother). We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

Father and Mother were divorced in September 1998. Following their divorce, Mother retained custody of the parties' four children and Father was ordered to pay child support. In January 2003, Father filed a motion seeking, among other relief, a modification of the parties' child support agreement. In March 2004, the family court approved an agreement reached by the parties. The parties agreed child support would be based on Father's gross income of $8,333 per month and Mother's gross income of $2,500 per month. Father agreed to pay $1,439 per month in child support for the parties' three minor children.[1]

In August 2006, the family court held a temporary hearing after Mother filed a motion requesting discovery, an increase in child support, and attorney's fees. In a temporary order, the family court noted Father's income was highly contested and it "could not make any type of merits hearing or determinative analysis on a Motion basis." The family court, relying on the financial affidavits and declarations of the parties, found Father's income was $4,733.40 per month and Mother's income was $2,500 per month. The family court set child support for the parties' remaining two minor children at $835 per month. The family court also held the issue of attorney's fees in abeyance pending a final hearing on the merits and ordered Father to advance Mother $7,000 for the cost of discovery.

On March 11-12, 2008, a trial was held before the family court. In an April 21, 2008 order, the family court determined an increase in Father's income, and a change from three to two minor children requiring support, necessitated a child support recalculation. The family court determined Father's income was $10,255 per month and Mother's income was $3,416 per month. In calculating Father's annual income, the family court included $11,263 per year in rental income and an average capital gain of $7,133 per year. The family court ordered Father to pay $1,226 per month in child support, and awarded Mother $25,000 in attorney's fees.[2] Thereafter, Father filed a Rule 59(e), SCRCP, motion to alter or amend the judgment, requesting the court reconsider its finding as to Mother's income. In a June 23, 2008 supplemental order, the family court determined Mother's gross income was $4,293 per month. The family court recalculated Father's child support obligation and ordered he pay $1,216 per month. The family court denied

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[1] At the time of their agreement, the parties' oldest child was emancipated and attending college.

[2] In support of her request for attorney's fees, Mother submitted an affidavit from her attorney showing she incurred $33,910.37 in attorney's fees and costs.

Father's request to reconsider its inclusion of rental income and capital gains in its calculation of his income. This appeal followed.

STANDARD OF REVIEW

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

LAW/ANALYSIS

I. Rental Income

Father argues the family court erred in calculating his rental income for child support purposes. We agree.

The Child Support Guidelines (the Guidelines) "define income as the actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." S.C. Code Ann. Regs. 114-4720(A)(1) (Supp. 2011). "Gross income includes income from any source including salaries, wages, commissions, royalties, bonuses, rents (less allowable business expenses), dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits . . . , workers' compensation benefits, unemployment insurance benefits, Veterans' benefits and alimony . . . ." S.C. Code Ann. Regs. 114-4720(A)(2) (Supp. 2011). "Ordinarily, the court will determine income from verified financial declarations required by the Family Court rules. However, . . . where the amounts reflected on the financial declaration may be an issue, the court

may rely on suitable documentation of current earnings . . . ." S.C. Code Ann. Regs. 114-4720(A)(6) (Supp. 2011).

At the hearing before the family court, Father's accountant testified the rental properties were operating at a loss. Father testified that high interest rates, evictions, and trouble finding tenants with decent credit contributed to the losses on the rental properties. Father also testified as to the specific expenses spent for maintaining the rental property of 6 Grey Leaf Court. Father explained that all the expenses were represented in the 2006 tax return and that he had receipts to support the tax returns. Father asked the court if he should go through the expenses for each rental property, and the court responded that if the expenses were included in the 2006 tax return, there was no need to go through the expenses. Father's 2006 tax return included all the expenses for each rental property and represented that the rental properties were operating at a loss.

In calculating Father's income for child support purposes, the family court found Father earned $11,263 per year in net rental income, which constituted his gross rental income less mortgage interest, taxes, and insurance. While the court did not specifically state in its order that it relied on the rental income amounts listed in Father's 2006 tax returns in making its determination, it appears the court arrived at $11,263 per year in rental income by subtracting mortgage interest, taxes, and insurance from the gross rental income listed on Father's 2006 tax returns.[3] The family court did not deduct the ordinary and necessary expenses of the rental properties referenced in Father's tax returns. Specifically, the family court did not deduct expenses for cleaning and maintenance, legal fees, supplies, and association dues.

We find Father should be given the opportunity to present evidence of the expenses related to his rental income for the court's consideration. Accordingly, we reverse the family court's calculation of Father's rental income and remand for a recalculation.[4]

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[3] Pursuant to Father's 2006 tax returns, he received $66,315 in gross rental income. Less mortgage interest, taxes, and insurance, Father received $11,264 in rental income. This is a one dollar difference from the family court's finding of $11,263 in net rental income.

[4] We note Father also argues the family court erred in relying on his 2005 loan application in calculating his rental income. We disagree. In its order, the family court specifically stated it chose not to rely on the amounts listed on the loan application.

II. Wife's Rental Income

Father argues the family court erred in failing to exclude his current wife's (Wife) rental income from its calculation of his income. We decline to address this argument on the merits. In his brief, Father failed to cite any case law or authority to support his argument, and therefore, we find it is abandoned on appeal. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but is not supported by authority); *Shealy v. Doe*, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) (declining to address an issue on appeal when appellant failed to cite any supporting authority and made conclusory arguments).

III. Capital Gains

Father argues the family court erred in including capital gains in its income calculation. This argument is not preserved for our review. Relying on Father and Wife's joint 2004, 2005, and 2006 tax returns, the family court determined Father received an average capital gain of $7,133 per year.[5] In his rule 59(e), SCRCP, motion, Father argued the family court erred in including Wife's capital gains in its calculation of his income. Father also argued the court erred in failing to consider his investment losses. On appeal, Father contends the family court erred in including any capital gains in its income calculation. Father argues a capital gain is a "one-time event" and should not be considered for child support purposes. Because Father failed to raise this argument to the family court, it is not preserved. *See King v. King*, 384 S.C. 134, 142, 681 S.E.2d 609, 614 (Ct. App. 2009) (holding issues must be raised to and ruled upon by the family court to be preserved for appellate review).

IV. Attorney's Fees

Father argues the family court erred in awarding Mother excessive attorney's fees. Given our disposition of Father's first issue on appeal, we remand to the family court for reconsideration of attorney's fees. *See Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (where the substantive results achieved by

[5] Pursuant to the Father's tax returns, he received $11,821 in capital gains in 2004, $11,344 in capital gains in 2005, and $8,144 in capital gains in 2006.

counsel were reversed on appeal, the issue of attorney's fees was remanded for reconsideration).

CONCLUSION

Based on the foregoing, the family court's decision is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and PIEPER, JJ., concur.