Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E
July 13, 2009

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629

The Commission will not accept applications after **Noon on Thursday, August 13, 2009.**

The term of office currently held by the Honorable Donald W. Beatty, Justice of the Supreme Court, Seat 5, will expire July 31, 2010.

A vacancy will exist in the office currently held by the Honorable Kaye G. Hearn, Chief Judge of the Court of Appeals, Seat 5, upon her election to the Supreme Court, Seat 5, on May 13, 2009. The successor will fill the unexpired term that expires June 30, 2015.

The term of office currently held by the Honorable Diane Schafer Goodstein, Judge of the Circuit Court for the First Judicial Circuit, Seat 2, will expire June 30, 2010.

The term of office currently held by the Honorable Doyet A. Early, III, Judge of the Circuit Court for the Second Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Ralph Ferrell Cothran, Jr., Judge of the Circuit Court for the Third Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Paul M. Burch, Judge of the Circuit Court for the Fourth Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Brooks P. Goldsmith, Judge of the Circuit Court for the Sixth Judicial Circuit, Seat 1, will expire June 30, 2010.

A vacancy will exist in the office currently held by the Honorable Wyatt T. Saunders, Jr., Judge of the Circuit Court for the Eighth Judicial Circuit, Seat 1, upon his retirement on or before June 30, 2010. The successor will fill the subsequent full term that expires June 30, 2016.

The term of office currently held by the Honorable G. Edward Welmaker, Judge of the Circuit Court for the Thirteenth Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable D. Garrison Hill, Judge of the Circuit Court for the Thirteenth Judicial Circuit, Seat 4, will expire June 30, 2010.

The term of office currently held by the Honorable Steven H. John, Judge of the Circuit Court for the Fifteenth Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable John C. Hayes, Judge of the Circuit Court for the Sixteenth Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Lee S. Alford, Judge of the Circuit Court for the Sixteenth Judicial Circuit, Seat 2, will expire June 30, 2010.

A vacancy exists in the office formerly held by the Honorable Kenneth G. Goode, Judge of the Circuit Court, At-Large, Seat 8, upon his retirement on July 1, 2009. The successor will fill the subsequent full term that expires June 30, 2015.

The term of office currently held by the Honorable William J. Wylie, Jr., Judge of the Family Court for the First Judicial Circuit, Seat 2, will expire June 30, 2010.

The term of office currently held by the Honorable Nancy Chapman McLin, Judge of the Family Court for the First Judicial Circuit, Seat 3, will expire June 30, 2010.

A vacancy will exist in the office currently held by the Honorable Peter R. Nuessle, Judge of the Family Court for the Second Judicial Circuit, Seat 1, upon his retirement on or before June 30, 2010. The successor will fill the subsequent full term that expires June 30, 2016.

The term of office currently held by the Honorable George M. McFadden, Judge of the Family Court for the Third Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Roger E. Henderson, Judge of the Family Court for the Fourth Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Dorothy Mobley Jones, Judge of the Family Court for the Fifth Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Donna S. Strom, Judge of the Family Court for the Fifth Judicial Circuit, Seat 4, will expire June 30, 2010.

A vacancy will exist in the office currently held by the Honorable Georgia V. Anderson, Judge of the Family Court for the Seventh Judicial Circuit, Seat 1, upon her retirement on or before June 30, 2010. The successor will fill the subsequent full term that will expire June 30, 2013.

A vacancy will exist in the office currently held by the Honorable Wesley L. Brown, Judge of the Family Court for the Seventh Judicial Circuit, Seat 3, upon his retirement on or before June 30, 2010. The successor will fill the subsequent full term that will expire June 30, 2016.

The term of office currently held by the Honorable John M. Rucker, Judge of the Family Court for the Eighth Judicial Circuit, Seat 2, will expire June 30, 2010.

The term of office currently held by the Honorable F. P. Seagars-Andrews, Judge of the Family Court for the Ninth Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Judy Cone McMahon, Judge of the Family Court for the Ninth Judicial Circuit, Seat 3, will expire June 30, 2010.

The term of office currently held by the Honorable Jack A. Landis, Judge of the Family Court for the Ninth Judicial Circuit, Seat 6, will expire June 30, 2010.

The term of office currently held by the Honorable Timothy M. Cain, Judge of the Family Court for the Tenth Judicial Circuit, Seat 2, will expire June 30, 2010.

The term of office currently held by the Honorable Kellum W. Allen, Judge of the Family Court for the Eleventh Judicial Circuit, Seat 1, will expire June 30, 2010.

The term of office currently held by the Honorable Jerry D. Vinson, Jr., Judge of the Family Court, for the Twelfth Judicial Circuit, Seat 3, will expire June 30, 2010.

A vacancy will exist in the office currently held by the Honorable R. Kinard Johnson, Jr., Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 2, upon his retirement on or before June 1, 2010. The successor will fill the unexpired term that will expire June 30, 2013.

The term of office currently held by the Honorable Alvin D. Johnson, Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 4, will expire June 30, 2010.

The term of office currently held by the Honorable Peter L. Fuge, Judge of the Family Court for the Fourteenth Judicial Circuit, Seat 2, will expire June 30, 2010.

The term of office currently held by the Honorable Lisa A. Kinon, Judge of the Family Court for the Fifteenth Judicial Circuit, Seat 2, will expire June 30, 2010.

The term of office currently held by the Honorable Robert E. Guess, Judge of the Family Court for the Sixteenth Judicial Circuit, Seat 1, will expire June 30, 2010.

A vacancy will exist is the office currently held by the Honorable Henry T. Woods, Judge of the Family Court for the Sixteenth Judicial Circuit, Seat 2, upon his retirement on or before March 31, 2010. The successor will fill the unexpired term that will expire June 30, 2013.

The term of office currently held by the Honorable Carolyn C. Matthews, Judge of the Administrative Law Court, Seat 3, will expire June 30, 2010.

The term of office currently held by the Honorable Walter H. Sanders, Jr., Master-in-Equity of Allendale County, will expire December 31, 2010.

The term of office currently held by the Honorable Mikell R. Scarborough, Master-in-Equity of Charleston County, will expire December 24, 2010.

The term of office held by the Honorable William C. Coffey, Master-in-Equity of Clarendon County, will expire June 30, 2010.

The term of office currently held by the Honorable Patrick R. Watts, Master-in-Equity of Dorchester County, will expire June 30, 2010.

The term of office currently held by the Honorable Richard L. Booth, Master-in-Equity of Sumter County, will expire December 31, 2010.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

Judicial Merit Selection Commission

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A M E N D E D M E D I A R E L E A S E
July 16, 2009

The Judicial Merit Selection Commission is currently accepting applications for the judicial office listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629

The Commission will not accept applications only for this seat after **Noon on Monday, August 17, 2009.**

A vacancy will exist in the office currently held by the Honorable Ralph King Anderson, III, Judge of the Administrative Law Court, Seat 6, upon his election as Chief Judge of the Administrative Law Court, Seat 1, on May 13, 2009. The successor will fill the unexpired term that expires June 30, 2011, and the subsequent full term that expires June 30, 2016.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

Judicial Merit Selection Commission

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M E D I A R E L E A S E
July 17, 2009

The Judicial Merit Selection Commission is currently accepting applications for the following judicial office.

The term of office currently held by the Honorable Ellis B. Drew, Jr., Master-in-Equity of Anderson County and Oconee County, will expire June 30, 2010.

Regarding only this seat, the Commission will not accept applications after **Noon on Monday, August 17, 2009.**

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

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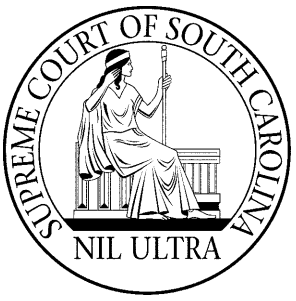
For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
July 20, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Arthur Braghirol, Respondent.

Opinion No. 26686
Heard June 10, 2009 – Filed July 13, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

David Arthur Braghirol, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) filed three separate sets of formal charges against respondent, David Arthur Braghirol. After two hearings, the Panel recommended that respondent be suspended from the practice of law for six months, with conditions, and be required to pay the costs of the proceedings. We agree a definite suspension, with conditions, is the appropriate sanction, but we impose a nine-month suspension.

PROCEDURAL BACKGROUND

The first two sets of formal charges were filed in November 2007 and February 2008; these charges represent three separate matters. Respondent failed to answer the charges, and default orders were entered. On May 29, 2008, a hearing was held before the Panel; respondent appeared and made a statement in mitigation.

Respondent was placed on interim suspension on June 24, 2008. On June 26, 2008, ODC filed the third set of charges regarding two additional matters. Respondent again failed to respond and was held in default. The Panel held a second hearing on October 28, 2008, and subsequently issued its report finding that respondent had violated various Rules of Professional Conduct. The Panel recommended that respondent be definitely suspended for six months, retroactive to his interim suspension date of June 24, 2008. Additionally, the Panel recommended that respondent:

- be ordered to pay the award from the Resolution of Fee Disputes Board;

- be required to work with a South Carolina attorney serving as respondent's mentor for 24 months;[1]

[1] The Report states that:

> The mentor's duties should include, at a minimum, regular meetings or interviews with Respondent and a monthly review of Respondent's law office practices to include Respondent's trust accounting and reconciliation practices. Respondent should be responsible for submitting quarterly reports from the mentor to the Office of Commission Counsel for the entire twenty four (24) month period.

In addition, the Panel also recommended that the mentor assist respondent in preparing a list of the cases that he is handling so that he and the mentor could go over the list on a monthly basis.

- be required to seek psychological counseling, at his own expense, for 24 months, and submit quarterly updates from the psychologist to the Office of Commission Counsel;

- make appropriate restitution to complainants; and

- be ordered to pay the costs of the disciplinary proceedings.

ODC objects to the six-month suspension and requests a definite suspension for a longer time period.[2]

FACTS

The formal charges alleged five separate matters. We also note the various mitigating and aggravating circumstances of this case, as well as respondent's prior disciplinary history.

1. Wren Matter

Respondent was appointed to represent complainant Wren in a criminal matter. He attended a preliminary hearing at which respondent told Wren he would return within a day or two to meet with him. Respondent, however, failed to meet with Wren or contact him after the preliminary hearing. Wren wrote to respondent on three separate occasions inquiring about the status of his case. Respondent failed to respond to Wren.

Respondent was notified by the Solicitor's Office that Wren's case was dismissed on August 4, 2006. Respondent failed to notify Wren about the August 2006 dismissal. There was, however, an error in Wren's discharging paperwork, and Wren remained incarcerated until April 2007, unaware that his criminal charges had been dismissed approximately eight months earlier. Respondent failed to recognize the error with the discharging paperwork or

[2] ODC does **not** object to: (1) the remaining recommendations by the Panel; and (2) any imposed sanction being applied retroactively to the date of respondent's interim suspension.

take any action to correct the error until a copy of Wren's complaint was mailed to respondent by ODC in April 2007.

Additionally, respondent failed to respond to ODC's initial inquiries about this matter, and he failed to respond to the notice of full investigation subsequently served upon him.

2. Fee Dispute Matter

The South Carolina Bar Resolution of Fee Disputes Board ("Board") ordered respondent to pay $500.00 to a former client. Respondent failed to comply with the order of the Board. As a result, the Board issued respondent a Certificate of Non-Compliance and sent a copy to ODC on August 7, 2007.

Respondent failed to respond to ODC's repeated inquiries about this matter, and he failed to respond to the notice of full investigation subsequently served upon him. As of the May 2008 hearing, respondent still had not paid the award as ordered by the Board.

3. Sheppard Matter

On September 10, 2007, respondent requested the production of a criminal trial transcript from a court reporter. On September 21, 2007, the court reporter notified respondent that the transcript was complete and mailed an invoice for $229.25. In October and November 2007, the court reporter mailed respondent overdue notices. In addition, the court reporter left telephone messages with respondent. On November 30, 2007, South Carolina Court Administration mailed respondent a letter advising respondent of his overdue court reporter invoice.

ODC served a supplemental notice of full investigation, but respondent failed to respond or otherwise communicate with ODC on this matter. Respondent finally paid the court reporter in January or February 2008.

4. Isphording Matter

Respondent was retained in 2006 to represent complainant Isphording in a domestic action. Respondent appeared at a temporary hearing in August 2007 where he was unprepared and failed to competently represent Isphording. A child support hearing was scheduled for December 5, 2007. Respondent called the Court three hours after the hearing was scheduled to begin to report that he would not be able to attend. The hearing was continued until the following week, but respondent failed to appear for the rescheduled hearing. He also failed to notify either Isphording or the court that he could not appear for the hearing. The hearing was again continued. Respondent failed to notify Isphording of the rescheduled hearing and failed to attend the hearing. He again failed to notify either Isphording or the court that he could not appear for the hearing.

Respondent received a notarized Financial Declaration from Isphording in January 2008 that he failed to submit to the court. As a result, the court issued a child support order without the benefit of reviewing Isphording's financial situation. Respondent failed to notify Isphording that the court had issued a child support order, and a Rule to Show Cause was issued against her in March 2008 for failure to pay the court-ordered support.

Respondent failed to keep Isphording reasonably informed of the status of her case and refused to return her telephone calls. She terminated respondent's services and requested that he return her complete client file, but respondent failed to do so and failed to refund her legal fees that were unearned by him.

Respondent failed to respond to ODC's supplemental notice of full investigation on this matter.

5. Glover Matter

Respondent was retained by complainant Glover in early 2004 to initiate a civil action on her behalf against Table Rock Investments, LLC.

Respondent failed to keep Glover reasonably informed regarding the status of her case and failed to return her numerous phone calls. Additionally, respondent failed to safeguard Glover's property in that he informed her that he had lost all of her original documents.

In a meeting with Glover in November 2007, respondent informed her he would be settling her case for $5,000.00. Respondent, however, has had no contact with Glover since then, has failed to settle her case, and has failed to notify her that he had not settled the case. Respondent has failed to do any meaningful work on Glover's case and has failed to expedite litigation consistent with her wishes.

Respondent failed to respond to ODC's supplemental notice of full investigation on this matter.

Mitigating Circumstances

At the May 2008 hearing, respondent testified to the Panel about his background and several extenuating circumstances that led to his misconduct. In 2005, his 79-year-old father committed suicide in front of his mother by using a .22 pistol to shoot himself in the head. Respondent's mother called him. When he arrived, his mother was refusing to let EMS take the body away from her. Respondent was the person who cleaned the blood off the walls.

Three days later, respondent and his wife found out she was pregnant. Because of a miscarriage a few months prior, they soon had an ultrasound and discovered she was pregnant with twins. Respondent described the pregnancy as "tumultuous." The twins were born in January 2006. According to respondent, his wife suffers from depression and experienced severe post-partum depression. He stated that he was trying to "juggle" his wife's depression, the care-taking of the twins, the after-effects of his father's suicide, the needs of his 11-year-old stepdaughter, and his solo practice.

Some time after he was served the formal charges, he called his mother and requested that she take care of the two-year-old twins at her home.

Additionally, after he met with disciplinary counsel for an interview, he went to a physician and found out he had type two diabetes. He was placed on medication for the diabetes, as well as anti-depressants.

Respondent also made a statement at the second hearing, which occurred in October 2008, approximately four months after he was placed on interim suspension. He told the Panel that after the first hearing, he began seeing a psychiatrist. He stated that with counseling and medication, he had "regained his strength" and he asked that he be allowed to continue to practice law.

Respondent submitted an affidavit from his treating psychiatrist, Dr. Steude. Dr. Steude began treating respondent in August 2008 and diagnosed him with Major Depressive Disorder. Dr. Steude stated that with medication and therapy, respondent's depression has gone into remission. He noted respondent has been cooperative, interactive and honest during his treatment. Dr. Steude opined that respondent's personal and marital issues, although not fully resolved, should have "minimal impact, if any, on his ability to competently practice law."

Aggravating Circumstances / Previous Disciplinary History

The Panel considered two aggravating circumstances: (1) respondent's pattern of not responding and/or cooperating with ODC regarding these five matters; and (2) his prior disciplinary history regarding a finding of minor misconduct in 2006 for failure to respond which resulted in a letter of caution.

In addition, respondent has the following additional disciplinary history. On February 3, 2004, respondent was suspended by the CLE Commission; he was reinstated on February 4, 2004. On April 2, 2008, he was again suspended by the CLE Commission; he was reinstated on April 18, 2008. He was placed on interim suspension on June 24, 2008. On April 2, 2009, he was suspended by the CLE Commission.

DISCUSSION

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. In re McFarland, 360 S.C. 101, 600 S.E.2d 537 (2004); In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). Under the Rules for Lawyer Disciplinary Enforcement (RLDE), respondent is in default, and therefore, he is deemed to have admitted all factual allegations of the formal charges. See Rule 24 RLDE, *in* Rule 413, SCACR. The charges of misconduct against respondent likewise are deemed admitted, and thus, the Court must only determine the appropriate sanction. E.g., Matter of Thornton, 327 S.C. 193, 489 S.E.2d 198 (1997).

Based on the facts of the five matters outlined above, we find respondent violated the following Rules of Professional Conduct (RPC), found in Rule 407, SCACR:

- Rule 1.1 – Competence
- Rule 1.2 – Scope of Representation
- Rule 1.3 – Diligence
- Rule 1.4 – Communication
- Rule 1.15(d) – Safekeeping of Property
- Rule 1.16(d) – Declining or Terminating Representation
- Rule 3.2 – Expediting Litigation
- Rule 8.1(b) – Bar Admissions and Disciplinary Matters
- Rule 8.4(a) & (e) – Violation of RPC and Conduct Prejudicial to the Administration of Justice

In addition, we find respondent violated Rule 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, including:

- Rule 7(a)(1) (violating a Rule of Professional Conduct)
- Rule 7(a)(3) (knowingly fail to respond to a lawful demand from a disciplinary authority)
- Rule 7(a)(5) (conduct tending to pollute the administration of justice or to bring the legal profession into disrepute)
- Rule 7(a)(6) (violating the oath of office taken to practice law in South Carolina)
- Rule 7(a)(10) (willfully failing to comply with a final decision of the Resolution of Fee Disputes Board)

ODC argues that respondent's pattern of not responding and not cooperating with ODC, combined with respondent's misconduct, warrant a definite suspension of greater than six months. We agree. See In re Sturkey, 376 S.C. 286, 657 S.E.2d 465 (2008) (where attorney failed respond to charges related to eight matters in criminal cases, the Court imposed a nine-month definite suspension, with participation in a law office management program and payment of costs); In re Conway, 374 S.C. 75, 647 S.E.2d 235 (2007) (where attorney, *inter alia*, failed to pay court reporter, failed to safeguard client files, and failed to respond to charges, this Court accepted an agreement for a definite suspension of nine months); In re Cabaniss, 369 S.C. 216, 632 S.E.2d 280 (2006) (where attorney *inter alia* neglected or performed less than competently on nine client matters, the Court accepted an agreement for a twelve-month suspension, retroactive to the date of respondent's interim suspension).

Accordingly, we impose a nine-month definite suspension as a sanction for respondent's misconduct. The definite suspension shall be retroactive to respondent's interim suspension. We further impose all the additional conditions recommended by the Panel, i.e., restitution, as well as 24 months of mentoring and counseling. We order respondent to pay the costs of these

disciplinary proceedings to the Commission on Lawyer Conduct within 30 days of the date of this opinion.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Derwin Thomas Brannon, Respondent.

Opinion No. 26687
Submitted June 12, 2009 – Filed July 13, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Hervery B.O. Young, of Clinton, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction within Rule 7(b), RLDE, Rule 413, SCACR. He requests that, if the Court imposes a suspension, the suspension be made retroactive to April 30, 2008, the date of his interim suspension. In the Matter of Brannon, 377 S.C. 474, 661 S.E.2d 98 (2008). We accept the agreement and impose a one year suspension, retroactive to the date of respondent's interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent was retained to represent Complainant A in an automobile accident case where Complainant A had previously received a settlement offer of $11,000.00 from the insurance company. Respondent failed to file suit prior to the expiration of the statute of limitations. Respondent admits he failed to adequately communicate with Complainant A regarding the case both before and after the statute of limitations expired.

By letter from ODC dated October 15, 2007, respondent was notified of the complaint in this matter. He did not file a response within fifteen (15) days, as requested; instead, he asked ODC for a fifteen (15) day extension of time in which to file a response. ODC agreed to the extension, giving respondent until November 14, 2007, to respond to the complaint. No response was received. On December 11, 2007, ODC sent respondent a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting a response. Respondent failed to respond or otherwise communicate with ODC.

On February 19, 2008, respondent was served with a Notice of Full Investigation requesting a response within thirty (30) days. Respondent did not respond within thirty (30) days. Respondent filed a response to the Notice of Full Investigation on May 16, 2008, almost two months after his response was due.

Matter II

In September 2007, Complainant B retained respondent for representation in a civil matter. Complainant B paid respondent a $5,000.00 retainer fee. Respondent admits he failed to keep Complainant B reasonably informed regarding the status of her case and failed to return or respond to her numerous telephone calls, pages, and emails.

On October 30, 2007, respondent told Complainant B that he had not done any work on her case. He promised to write a demand letter to the defendant's lawyer by the end of the week, but failed to do so.

Respondent instructed his staff to cancel his November 15, 2007, appointment with Complainant B two hours prior to the scheduled meeting. Respondent's staff promised Complainant B that respondent would telephone her later on November 15, 2007, after he spoke with defense counsel. Respondent did not contact Complainant B on November 15, 2007, as promised, and, as of December 12, 2007, he still had not made any contact with Complainant B.

On February 19, 2008, respondent was served with a Notice of Full Investigation requesting a response within thirty (30) days. Respondent failed to respond to the Notice of Full Investigation prior to the expiration of the thirty (30) day period. Respondent filed a response on May 16, 2008, almost two months after his response was due.

Matter III

On March 19, 2008, respondent was mailed a Notice to Appear before Disciplinary Counsel on April 22, 2008, at 10:00 a.m., in reference to Matter I and Matter II. He was also mailed a subpoena commanding him to bring client files in Matter I and Matter II.

Respondent failed to appear on April 22, 2008, and failed to communicate with Disciplinary Counsel regarding his scheduled appointment. Respondent also failed to produce the subpoenaed information on or before April 22, 2008, and, thereby, failed to comply with the subpoena.

Matter IV

On April 17, 2006, respondent issued a check to a client in the amount of $2,500.00 as partial reimbursement of the client's retainer fee.

The balance in respondent's trust account (Account One) per the April 30, 2006 bank statement was $31,344.00.

The following year, respondent opened a new trust account (Account Two) with a different bank. Other than allowing outstanding checks to clear Account One, respondent ceased using Account One and began using Account Two as his active trust account. The client attempted to cash the check written on Account One, but was unable to cash the check due to insufficient funds in Account One. Respondent admits he failed to maintain an accurate accounting and financial record of the funds remaining in Account One and that he failed to properly reconcile his account to insure that sufficient funds remained in Account One to satisfy all outstanding checks written on that account.

LAW

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of client); Rule 1.15 (lawyer shall safeguard client funds); Rule 8.1(b) (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). In addition, respondent admits that his actions constitute grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to willfully fail to appear personally as directed, willfully fail to comply with a subpoena issued under the RLDE, or knowingly fail to

respond to a lawful demand from a disciplinary authority to include a request for a response or appearance under Rule 19, RLDE).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for one (1) year, retroactive to the date of his interim suspension. In addition, pursuant to the agreement, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct within thirty (30) days of the date of this opinion. Within fifteen (15) days of the filing of this opinion, respondent shall file an affidavit demonstrating he has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ervin McMillian, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Richland County
James R. Barber, Post-Conviction Relief Judge

Opinion No. 26688
Submitted April 22, 2009 – Filed July 20, 2009

AFFIRMED

Appellate Defender Robert M. Pachak, of South Carolina Office of Indigent Defense, of Columbia, for Petitioner.

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

JUSTICE BEATTY: Ervin McMillian[1] filed a petition for a writ of certiorari seeking review of an order denying his application for post-conviction relief (PCR). We granted the petition to decide the following question: Was counsel ineffective for advising McMillian that the intent to commit a crime could be inferred from the act of trespassing, such that it would provide a factual basis to support a plea to first-degree burglary? We hold counsel was not ineffective and affirm.

FACTS

McMillian was charged with first-degree burglary as a result of an incident that occurred in Columbia, South Carolina on April 10, 2004. At approximately 1:00 a.m. on that date, McMillian knocked on the door of the home of Lanelle Hicks and her adult son, Mark Hicks. Lanelle Hicks looked out a window and saw McMillian, so she went to her son's room to wake him. At that point, McMillian's knocking turned into beating on the door, and then he crashed the door open, damaging the door. As soon as McMillian entered the house, however, Mark Hicks took McMillian back outside and held him there with the assistance of a neighbor until the police arrived.

McMillian subsequently pled guilty to the charge of first-degree burglary. At the plea proceeding, McMillian stated that he "had been drinking and drugging" (with crack cocaine) the night of the incident and that he thought someone was chasing him and trying to kill him. McMillian maintained he knocked on the door of the Hicks home in order to get some help, but he admitted that he pushed the door open to get inside the home. McMillian stated he believed he "was justified in asking for help," but admitted that he "know[s] that [he] did wrong."

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[1] Ervin McMillian is also referred to as "Ervin Britton" in various documents in the Appendix.

In contrast, the solicitor advised the plea judge that according to the victims they never heard McMillian ask for help and "he never asked for the police. All he did was kick their door in and rip the door jam off." Earlier in the plea proceeding, the solicitor noted that McMillian has a criminal record dating back to 1977 that includes prior convictions for, among other things, housebreaking, malicious injury to real property, second-degree burglary, and strong armed robbery.

In a separate sentencing proceeding, McMillian again admitted he "pushed the door open," but maintained he did not "go there with the intent to take anything." The plea judge sentenced McMillian to nineteen years in prison for first-degree burglary. No direct appeal was taken.

McMillian filed a PCR application. At the PCR hearing, McMillian asserted, among his claims, that his attorney did not explain to him that the State must prove not only that he had broken into the victims' home, but that he did so with the intent to commit a crime. He maintained he would have exercised his right to go to trial and would not have pled guilty if his attorney had properly advised him that there was no evidence to support an inference of his intent to commit a crime.

McMillian's counsel testified that she believed there was evidence of intent to commit a crime and that she had advised McMillian of all the elements of first-degree burglary. Counsel stated, "I explained that to Mr. McMillian, that the intent could be inferred from the trespassing because it was not his property, and he was illegally on someone else's property, and he broke the door down of -- pushed the door open. I said that it could be inferred from -- trespass could be with the intent to commit a crime. Trespass could be inferred from these actions."

Counsel stated she hired a private investigator to look into McMillian's story that he had been chased by someone and, "[a]fter a period of time . . . he [McMillian] said the person kind of existed in his head, I guess." She said a neighbor saw McMillian "looking in the windows of the home prior to him just bursting in the door." Thus, she could not substantiate McMillian's claim that he believed someone was chasing him.

McMillian's PCR attorney contended McMillian's assertion that he was high on drugs and thought he was being chased when he went to the home did not support a charge of first-degree burglary, as he had no intent to commit a crime, and plea counsel erred in advising him that intent to commit a crime could be inferred from an act of trespass.

The PCR judge denied McMillian's application and found the allegation that there was no factual basis to support a plea to first-degree burglary was without merit. The judge noted: "Counsel testified that had she gone to trial, intent to commit a crime could be inferred from the act of trespassing. Applicant testified that he did not own the house and did not have permission to enter the house. Further, the evidence suggested that he physically broke the door open to enter. Accordingly, this allegation is denied and dismissed."

McMillian's attorney submitted a Johnson[2] petition for a writ of certiorari to review the PCR order. This Court directed the parties to brief the following issue: Was counsel ineffective in advising McMillian that the intent to commit a crime could be inferred from the act of trespassing, such that it would provide a factual basis to support a plea to first-degree burglary?

LAW/ANALYSIS

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

The United States Supreme Court has announced a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for

[2] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). In the context of a guilty plea, the applicant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Id. at 56 (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

"In a PCR proceeding, the burden is on the applicant to prove the allegations in his application." Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008). "In resolving PCR issues relating to guilty pleas, it is proper to consider the guilty plea transcript as well as the evidence at the PCR hearing." Pelzer v. State, 381 S.C. 217, 222, 672 S.E.2d 790, 792 (Ct. App. 2009).

"This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "This Court will reverse the PCR judge's decision when it is controlled by an error of law." Id. at 558-59, 640 S.E.2d at 886.

First-degree burglary is a statutory offense in South Carolina that is defined as follows: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and" any one of several enumerated aggravating circumstances exists. S.C. Code Ann. § 16-11-311(A) (2003) (emphasis added). In this case, the aggravating circumstance is "the entering or remaining occurs in the nighttime." Id. § 16-11-311(A)(3).

On review, McMillian asserts he received ineffective assistance of counsel because "[t]here is ambiguous precedent on whether one can infer intent [to commit a crime] from trespassing."

This Court has previously held that for a charge under the old statute of housebreaking, i.e., breaking and entering into a dwelling with the intent to commit a felony or a crime of a lesser grade, found in section 1139 of the South Carolina Code of 1932, the element of intent to commit a crime of a lesser grade could be satisfied by a trespass. See State v. Christensen, 194 S.C. 131, 9 S.E.2d 555 (1940). In Christensen, "the defendant was convicted of breaking and entering with the intent to commit a misdemeanor, to wit, a trespass" after the defendant, who was an agent of the landlord, went into a tenant's dwelling with the specific intent of taking personal property to sell for overdue rent. Id. at 138, 9 S.E.2d at 558.

The Christensen Court cited a prior decision that stated the mere breaking and entering of a house is not a crime under the statute prohibiting the breaking and entering into a dwelling with the intent to commit a felony or a crime of a lesser grade,[3] but found that if Christensen were guilty of a trespass, "[i]t was for the jury to say whether such breaking and entry under

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[3] The Christensen Court cited State v. Clark, 85 S.C. 273, 67 S.E. 300 (1910), which provides in relevant part as follows:

> The first count of the indictment is laid under section 145 of the Criminal Code, which is as follows: "Every person who shall break and enter, or who shall break with intent to enter, in the day time, any dwelling house or other house, or who shall break and enter, or shall break with intent to enter, in the night time, any house, the breaking and entering of which would not constitute burglary, with intent to commit a felony or other crime of a lesser grade, shall be held guilty of a felony," etc. Under this statute, the mere *breaking* of a house is not a crime, nor is the mere *breaking and entering* of a house, or the mere *breaking with intent to enter* a house any crime. It is only when there is a breaking and entering, or a breaking with intent to enter, "*with intent to commit a felony, or other crime of a lesser grade*" that the crime denounced by the statute is complete.

Id. at 277-78, 67 S.E. at 302 (emphasis in original).

the circumstances constituted a crime under Section 1139 and the finding of the jury on this issue will not be disturbed by this Court." Id. at 137-39, 9 S.E.2d at 558-59.

McMillian argues counsel was ineffective in advising him that intent to commit a crime could be inferred from a trespass. We disagree. In its general sense, to "trespass" is "to make an unwarranted or uninvited incursion" onto the property of another. Webster's Third New International Dictionary 2439 (2002).[4]

Certainly, a jury would have been free to disbelieve McMillian's version of events and find that he had the intent to commit a crime based on his conduct at the time of this offense. In State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971), this Court observed that "proof of intent necessarily rests on inference from conduct." We noted the unexplained breaking and entry of a dwelling in the night is itself evidence of intent to commit larceny:

> When the building entered is a dwelling house, the weight of authority holds that the unexplained breaking and entry in the night is itself evidence of intent to commit larceny rather than some other crime. 'The fundamental theory, in the absence of

[4] In contrast, an unlawful trespass, or what is commonly called trespass after notice, is distinguishable and is prohibited by section 16-11-620 of the South Carolina Code, which provides as follows:

> Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

S.C. Code Ann. § 16-11-620 (2003).

> other intent or explanation for breaking and entering, is that the usual object or purpose of burglarizing a dwelling house at night is theft.' 13 Am.Jur.2d Burglary, Sec. 52 (1964).

Id. at 91-92, 184 S.E.2d at 345. A similar view was expressed by the Supreme Court of Wyoming, which stated:

> The law is well settled and widespread that where one breaks into the property of another in the nighttime, an inference may be drawn that he did so with the intent to commit larceny. A reasonable mind recognizes that people do not usually break into and enter the building of another under the shroud of darkness with innocent intent and that the most usual intent is to steal. . . . Direct evidence to prove intent is not necessary. . . . Proof of intent is not a precise process.

Mirich v. State, 593 P.2d 590, 593 (Wyo. 1979).

Moreover, even if we interpret McMillian's argument as being that counsel was ineffective because she referred to unlawful trespass and he did not meet the elements of an unlawful trespass because there was no entry after notice, we find there is no merit to this allegation. There was notice against entry in this case because, as we noted in Christensen, "the presence of closed doors and locked windows [i]s notice to the world that entry is forbidden." Christensen, 194 S.C. at 141, 9 S.E.2d at 560.

McMillian was facing a possible sentence of life in prison[5] and, based on the colloquy in the transcript, it appears he had hoped for a suspended sentence of less than fifteen years. When that did not occur, he brought this PCR action. We hold that the fact that counsel advised McMillian that a jury could disbelieve his version of events and could find that he entered the dwelling without consent and with the intent to commit a crime was not erroneous advice and counsel was not deficient in her representation.

[5] First-degree burglary is a felony punishable by life imprisonment, although the court, in its discretion, may sentence a defendant to a term of not less than fifteen years. S.C. Code Ann. § 16-11-311(B) (2003).

Accordingly, the PCR judge did not err in denying McMillian's PCR application.

CONCLUSION

Based on the foregoing, the order of the PCR judge is

AFFIRMED.

TOAL, C.J. and KITTREDGE, J., concur. PLEICONES, J., concurring in a separate opinion in which WALLER, J., concurs.

JUSTICE PLEICONES: I agree with the majority that counsel was not ineffective in advising petitioner that a jury could find the requisite intent to commit a crime for purposes of burglary from his trespass into the Hicks' home. I write separately, however, as I do not join the discussion of statutory "trespass after notice" as I believe it is not implicated by these facts. See State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923); State v. Cross, 323 S.C. 41, 448 S.E.2d 569 (Ct. App. 1994) (common law trespass discussed).

WALLER, J., concurs.

The Supreme Court of South Carolina

In the Matter of Jason Thomas Kellett, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) and (c), RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Richard S. Stewart, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Stewart shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Stewart may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to

effectuate this appointment.

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

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

Mr. Stewart's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina
July 17, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marichris, LLC,	Respondent/Appellant,
v.	
George Rodney Derrick, Bank of America, Inc.,	Defendants,
of whom George Rodney Derrick is the	Appellant/Respondent.

Appeal From Charleston County
Mikell R. Scarborough, Circuit Court Judge

Opinion No. 4586
Heard January 22, 2009 - Filed July 13, 2009

AFFIRMED IN PART; AFFIRMED AS MODIFIED IN PART; REMANDED IN PART

Sean A. O'Connor, of Charleston, for Appellant-Respondent.

K. Michael Barfield and Dawes Cooke, both of Charleston, for Respondent-Appellant.

HUFF, J.: In this cross-appeal from a partition action, both parties challenge the master-in-equity's award of attorneys' fees. In addition, George Rodney Derrick (Rod) challenges the allocation of the sales proceeds.

FACTS/PROCEDURAL HISTORY

This case is, in fact, a dispute between two brothers. The sole owner of MariChris, LLC, is Melissa Derrick, the wife of Thomas Derrick. Thomas is Rod's brother. Thomas serves as the President of MariChris and was responsible for all of MariChris's actions in this matter. In April of 2004, Thomas approached Rod about purchasing water-front property on Doar Road in Awendaw, South Carolina. On May 27, 2004, the parties entered into an agreement with Jerald S. Scheer a/k/a Gerald S. Scheer to purchase the property for $2,400,000.00. The parties initially discussed MariChris having a 37.5% interest in the property and Rod would have a 62.5% interest. Their financial contributions would be in proportion to their ownership interests with MariChris providing $900,000 obtained in a sale of property on Hall Road on Awendaw (Hall Road Property). Rod was to provide $1,500,000.00 from the sale of other properties. The parties also discussed each having a 50% interest with proportionate contributions. In addition, Thomas would be responsible for the work on the infrastructure to develop a subdivision on the Property.

Prior to closing on the Scheer contract, the parties decided to "flip" the property by selling it to Harry Wilhelm for $3,200,000.00. The parties agreed to divide the profits from the flip equally.

Thomas did not want to sell his Hall Road property if he was not going to be keeping waterfront lots on the Doar Road Property. Rod, therefore, obtained a loan from Bank of America for $1,560,000.00. Although Rod was the only party named on the note, Thomas, on behalf of MariChris, signed the mortgage on the Property that secured the note. In addition, at closing Rod

contributed $696,000.00 from the sale of another property, $116,000.00 in personal funds, and $27,000.00 in earnest money. MariChris contributed $13,000.00 in earnest money.

The Sheer closing occurred on September 14, 2004. The deed lists the purchasers as MariChris and Rod. A hand-written asterisk is by their names followed by a hand-written note "each a 50% interest."

After the parties closed on the Property, the closing with Wilhelm fell through. Over Rod's objection, Thomas moved into the house on the Property and attempted to make improvements to it as well as create a development plan. Thomas attempted to make two payments on the note, but Rod had the bank return the payments. The relationship between the parties quickly deteriorated.

MariChris brought this partition action asserting it owned a 50% interest in the Property. Rod requested the parties' interests be declared proportionate to their financial contributions with Rod therefore having a 99.5% interest. He also asserted counterclaims for bad faith, unclean hands, estoppel, constructive trust, and ouster.

The case was heard before the master-in-equity. The master held the parties' only agreement was to purchase the property for development or sale and to split the profits of any sale equally. He rejected Rod's contention that Rod should be the 99.5% owner of the Property based on the financial contributions. Instead, the master held the parties were legal and equal owners of the Property. In considering the contributions of the parties, the master held Thomas's work to improve the Property did not render the house or Property more valuable. The court held Rod was entitled to a return of his contributions in the amount of $972,543.26. This figure included a $120,000 credit for MariChris's one-half share of the interest paid on the Bank of America note. The court allowed MariChris a return of its $13,000 in earnest money. The master rejected all of Rod's equitable defenses due to Rod's own inequitable conduct. He also rejected Rod's claims for ouster and held any rent due for Thomas's use of the house on the Property was discharged by his efforts to make the house livable. The master held due to the parties'

inequitable conduct, he could not provide for a partition in kind or in an allotment of the Property. The court noted that Cypress Swamp, LLC, had made a reasonable offer to purchase the Property and therefore ordered the sale of the Property to Cyprus Swamp at a minimum price of $4,815,000.00. In the event Cypress Swamp did not close by September 30, 2006, the Property was to be sold at judicial sale. The master ordered the parties to bear the cost of the sale to Cyprus Swamp equally. The master ordered the parties to submit their attorneys' fees and costs for a later determination of whether these funds would be assessed against the Property. He subsequently denied Rod's motion to alter or amend the judgment and for a new trial.

The closing of the sale to Cyprus Swamp as provided in the master's order did not occur. Instead, on July 28, 2006, Rod submitted to the master a proposed contract to sell the Property to another buyer for $4,900,000.00 with no sales commission. No action was ever taken on this offer. The Property was sold at judicial sale to an agent for Rod for $4,000,000.00.[1] Rod filed a motion requesting the master issue an order determining the amount of the funds to be disbursed from the sale of the Property, stay the distribution of the disputed amount, and deposit the funds into the court. In its order, the master noted that the Bank of America mortgage had been satisfied. The court refused to allow Rod further credit for payments made on the Bank of America note subsequent to the trial and held Rod was solely responsible for the payment of taxes. The court found Rod should be responsible for the cost of the litigation and added to the amount of funds required for Rod to comply with his bid of $97,417.00 for Thomas's attorneys and $2050.00 for Rod's former attorney. The court did not make an allocation for the fees charged the attorney who represented Rod after the trial. Noting he was only requiring Rod to bring to court the amount to satisfy the lien on the Property, expenses incurred in bringing the property to sale, and the amount he needed to satisfy MariChris's 50% profit, the master calculated $855,738.91 as the amount Rod must pay to comply with his bid.

[1] Rod petitioned the master for an appeal bond, which the master set for $300,000.00. However, Rod allowed the Property to proceed to sale.

The master denied Rod's motions to stay the disbursement of funds and to deposit the funds with the court.

Rod filed a motion pursuant to Rule 59(e), SCRCP, as well as an appeal with this court. On Rod's motion, this court ordered the funds paid to the Clerk of Court for Charleston County and deposited into an account pursuant to Rule 67, SCRCP. This court also remanded the case for a hearing on Rod's Rule 59(e) motion.

After hearing the motion, the master ruled that while his award of attorney's fees to MariChris was warranted under South Carolina Code Section 15-16-110 (2005), the award must come from the common fund pursuant to Rule 71(d)(3), SCRCP. Furthermore, the court adopted Rod's position that if the Court made an award of attorney's fees to one party, it must award all parties' attorneys' fees to be paid from the fund. Thus, the master ordered attorneys' fees in the amount of $175,300.87 to be paid out of the common fund. He refused to modify his previous determination of the credit owed Rod for the payments made on the Bank of America note. The master noted that it was Rod's own conduct that unnecessarily tied the parties to the Property and created the need for the partition action. He found under his equitable powers, Rod should have to bear the cost of "prolonging the strife associated with the property." The master denied MariChris's request to have Rod deposit the entire $4,000,000.00 bid price with the court. This appeal followed.

STANDARD OF REVIEW

This is an action in equity. Wilson v. McGuire, 320 S.C. 137, 140, 463 S.E.2d 614, 616 (Ct. App. 1995) (a partition action is equitable). Therefore, this court may find facts in accordance with its own view of the preponderance of the evidence. Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their

credibility. Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

LAW/ANALYSIS

1. Attorneys' fees

Both parties challenge the master's award of attorneys' fees. MariChris argues the master erred in ruling that the attorneys' fees must be equally borne by all parties and awarded to counsel for all parties. It asserts Rod should be responsible for all of its fees. Rod argues that as neither party benefitted the property, neither party's attorneys' fees should come from the common fund.

The master originally ordered Rod to pay MariChris's attorneys' fees in the amount of $97,417.00 due to Rod's inequitable conduct. On Rod's motion to alter or amend, the master changed his ruling. While he noted that MariChris would be entitled to fees under South Carolina Code section 15-61-110 (2005) and that his view of the equities had not changed, he found persuasive Rod's argument that Rule 71(d)(3), SCRCP, must be reconciled with section 15-61-110 and thus attorneys' fees must be awarded out of the common fund. In addition, the master found if it made an award to one parties' attorney, it must make such an award to all attorneys. We find this ruling in error.

Section 15-61-110 of the South Carolina Code provides: "The court of common pleas may fix attorneys' fees in all partition proceedings and, as may be equitable, assess such fees against any or all of the parties in interest." Rule 71(d)(3) provides:

> Attorneys fees and costs may be awarded the attorney for any party(s) from any common fund generated by the partition to the extent that attorney's efforts benefited all parties; otherwise, his fee shall be paid by the party(s) he represents or from the party(s)

> share(s) only. The court may order the payment of costs from the proceeds of sale of the common property or may equitably assess the costs against shares of the parties.

In interpreting a statute and a rule of civil procedure we follow the cardinal rule that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute or rule. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); see Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) (stating that in interpreting the meaning of the South Carolina Rules of Civil Procedure, the court applies the same rules of construction used to interpret statutes). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

We find no conflict between the statute and rule. Both allow for the award of attorneys' fees from the common fund. In addition, section 15-61-110 clearly allows the court to equitably assess attorneys' fees against any or all of the parties in interests. A rule of civil procedure may not limit the provisions of a statute. See S.C. Const., art. V, §4 (2009) ("Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.") (emphasis added). Thus, the master erred in holding the award of fees must be paid from the common fund. In addition we find no requirement in either the rule or the statute that an award of attorneys' fees to one party mandates an award to all attorneys. Accordingly, we remand the issue of attorneys' fees to the master.

2. Ownership interest

Rod argues the master erred in holding the parties each owned a 50% interest in the Property. We disagree.

> Where two or more persons take as tenants in common under an instrument silent as to their respective shares, there is a presumption that their shares are equal. Ordinarily, this

> presumption is not conclusive but is subject to rebuttal, and has at times been rebutted by parol evidence. A party challenging the presumption that property held in joint tenancy is equally owned has the burden of proof.

20 Am. Jur.2d Cotenancy and Joint Ownership § 117 (2005). This presumption may be rebutted where there is evidence of unequal contributions to the purchase price of the property. Id.

There is no dispute that at the time of execution of the deed, the parties intended to equally own the property and share the profits. Rod acknowledges in his brief that the deed reflects both parties as equal owners of the property and concedes the deed accurately reflects the intentions of the parties at the time they purchased the property. Thomas explained that at the closing, the paralegal asked what the ownership interest would be. The notation was handwritten on the deed after Rod replied that it would be 50% each.

In an email sent to MariChris after the Wilhelm flip fell through, Rod acknowledged that they had closed on the Property as 50/50 partners. He requested MariChris deed him a 12.5% interest in the property to bring his interest up to 62.5%. Thomas testified that after the flip fell through, the parties never agreed on the ownership interests. Although there may have been continuing discussions, there was never an agreement between the parties that changed their respective ownership interests. There certainly was never an agreement that MariChris would only have a .5% interest in the property.

Furthermore, MariChris did attempt to make additional financial contributions by making the first two payments on the Bank of America loan. These payments were subsequently returned to MariChris and on Rod's orders, a bank officer informed MariChris that it was not to make further payments on the note. In addition, Thomas testified that by the time he sold the Hall Road property, the parties were already involved in litigation and he could not roll the proceeds of that sale into the Property.

Accordingly, we find the master did not err in holding the parties each owned a 50% interest in the Property.

3. Reimbursement for payments on Bank of America note.

Rod argues the master erred by not allowing proper credit to him for the interest payments he made on the Bank of America loan. We agree.

For the purposes of this argument, Rod does not contest the master's ruling that he prevented MariChris from making payments on the interest-only note. He asserts the master should have granted him credit for half of all payments made for a total of $300,000.00.

We find no error in the master's refusal to allow Rod credit for payments made after the trial. The master denied Rod credit for these payments due to his conduct. The master noted that while Rod contended the property was worth more than the court-approved contract for $4,815,000.00, the master believed this amount was greater than what a court-ordered sale would bring, and, in fact, the judicial sale price was only $4,000,000.00. The master found Rod was responsible for none of the offers to purchase the property ever being consummated. Thus, the master "determined that it [was] only appropriate that [Rod] should have to bear the cost of prolonging the strife associated with the subject property."

However, we find the master did err in his distribution calculations. In the original order, the master found Rod was entitled to a return of his contributions, including $120,000 for payments made to Bank of America on MariChris's behalf. To achieve the master's ruling that each party should be responsible for 50% of the payments, the master should have deducted $120,000 from MariChris's share of the profits or deducted the entire amount of the payments made before trial from the common fund. While we find no error in the master's refusal to allow credit for further payments made after trial, we hold the master did err in essentially making Rod responsible for 75% of the payments made before trial. Accordingly, we order $240,000 be deducted from the common fund to make MariChris responsible for 50% of the payments.

Rod also argues the master erred in respect to the sum to be credited to Rod with regard to the pay-off of the Bank of America note. The master used the figure of $1,560,000.00. Rod contends the actual pay-off was $1,570,764.90. First, we find there is no evidence of this payoff figure in the record on appeal other than a statement by Rod's attorney. See Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."). Furthermore, the amount of the note is stated in the pleadings as well as through-out the record as $1,560,000.00. As we found above, the master did not err in refusing to allow Rod credit for interest payments made after the trial. This ruling would include the payment of accrued interest in final pay-off. Accordingly, we find no error in the master's statement of the pay-off amount.

CONCLUSION

We **AFFIRM** the master's determination that the parties each owned a 50% interest in the property, **MODIFY** the judgment amount to allow for $240,000 to be deducted from the common fund for the pre-trial payments made to Bank of America, **AFFIRM** the master's ruling that Rod is not entitled to further reimbursement, **AFFIRM** the amount the master credited Rod for the final pay-off of the note and **REMAND** the issue of attorneys' fees to the master.

AFFIRMED IN PART; AFFIRMED AS MODIFIED IN PART; REMANDED IN PART.

THOMAS and LOCKEMY, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel K. Brookshire and Debi Baker Brookshire, Appellants,

v.

Toby Blackwell, Lauren Chambers Blackwell a/k/a Lauren Kristen Chambers, Child A, a minor under the age of 14 years and child B, a minor under the age of 14 years, Defendants,

Of whom

Lauren Chambers Blackwell a/k/a/ Lauren Kristen Chambers, is Respondent.

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

Opinion No. 4587
Heard June 9, 2009 – Filed July 13, 2009

AFFIRMED AS MODIFIED

Robert L. Jackson, of Columbia, for Appellants.

J. Michael Taylor, of Columbia, for Respondent.

PIEPER, J.: In this appeal from the family court, Daniel and Debi Brookshire (the Brookshires) assert the family court erred in dismissing their adoption action for lack of personal jurisdiction based upon a lack of minimum contacts. We affirm as modified.

FACTS/PROCEDURAL HISTORY

The children, presently ages five and eight, were born August 31, 2000, and September 7, 2003, in the State of Alabama to Toby Blackwell (Father) and Lauren Chambers (Mother). Following intervention by the Alabama Department of Human Resources (DHR), the minor children were placed in the custodial care of the Brookshires on December 25, 2003.[1] Subsequently on October 14, 2004, by order of the circuit court in Walker County, Alabama, the Brookshires were awarded custody of the minor children. At all times pertinent to this matter, the Brookshires were and have remained citizens and residents of the State of South Carolina while Mother and Father

[1] DHR initially became involved with the children when it was discovered that Mother's grandmother was the children's primary caregiver. Upon further investigation, DHR soon learned that Mother's youngest child was born addicted to methadone and that the children's great grandmother could no longer maintain custody or protection for the children. The Brookshires, who are the children's third cousins, subsequently informed DHR of their willingness to take custody of the children.

are and have remained citizens and residents of Alabama.[2] The children have been in the physical custody of the Brookshires since December 25, 2003.

On May 25, 2007, the Brookshires filed this action seeking to domesticate the prior Alabama custody order and to legally adopt the children. On June 27, 2007, Mother filed a motion to dismiss the action pursuant to Rules 12(b)(1)-(3), (6), and (8) of the South Carolina Rules of Civil Procedure. Specifically, Mother asserted that: (1) South Carolina does not have personal jurisdiction because Mother has insufficient contacts with this State; (2) South Carolina does not have subject matter jurisdiction because, under the federal Parental Kidnapping Prevention Act (PKPA),[3] Alabama has exclusive jurisdiction for the action; (3) the complaint fails to state a cause of action for failure to request or set forth grounds for termination of the natural parents' rights; and (4) there is another action already pending between the same parties for the same claim in Alabama.[4]

A hearing on the motion to dismiss took place on August 13, 2007. At the hearing, the Brookshires conceded the only connection Mother maintained with South Carolina was the fact that her children reside in South Carolina. Specifically, Mother's sworn affidavit states she has never: (1) lived in South Carolina; (2) owned, purchased, or inherited property in South Carolina; (3) paid taxes, voted in, filed for benefits, or made use of South Carolina state government programs; (4) registered a vehicle, obtained a driver's license, or leased a vehicle in South Carolina; (5) worked, operated a business, or earned any income in South Carolina; (6) filed any lawsuit or made any claims for relief in any South Carolina court; or (7) otherwise performed any act by which she purposefully availed herself of the privilege of conducting activities within South Carolina.

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[2] At oral argument, counsel indicated Father may have subsequently moved. The record does not demonstrate this fact, but it would not change our analysis.

[3] See 28 U.S.C. § 1738A (2000).

[4] On June 29, 2007, Mother filed a modification action in Alabama seeking to modify custody or, in the alternative, to set a reasonable visitation schedule.

By order dated August 31, 2007, the family court enrolled the Alabama custody decree[5] in South Carolina and granted the motion to dismiss on the ground it did not have in personam jurisdiction over Mother. The family court further found the Brookshires' complaint failed to state a cause of action for nonconsensual adoption for failure to request a termination of Mother's parental rights. Additionally, the order cited Alabama's retention of exclusive jurisdiction under the PKPA and the fact that a similar action was pending in Alabama as alternative grounds for dismissal.

The Brookshires timely filed a motion to alter or amend. Following argument on the motion on December 20, 2007, the family court reaffirmed its decision to dismiss the action for lack of personal jurisdiction but amended the order to hold it was not necessary to reach the alternative grounds cited in the original order based on the court's ruling on in personam jurisdiction. This appeal followed.

ISSUE

Did the family court err in dismissing the adoption action for lack of personal jurisdiction?

STANDARD OF REVIEW

In appeals from the family court, this court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992).

LAW/ANALYSIS

The Brookshires assert the family court erred in applying the minimum contacts standard and dismissing the action for lack of personal jurisdiction.

[5] The parties do not contest the enrollment of the Alabama order.

While due process ordinarily requires a defendant possess minimum contacts with the forum state,[6] we find this case more appropriately resolved as a question of interstate custody jurisdiction.[7] Accordingly, we affirm as modified the dismissal of this case by the family court pursuant to the provisions of the PKPA and the Uniform Child Custody Jurisdiction Act

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[6] The Due Process Clause of the Fourteenth Amendment permits a court to assert personal jurisdiction over a nonresident defendant where the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation omitted).

[7] Although numerous states have applied a status exception, recognized by the United States Supreme Court in Shaffer v. Heitner, 433 U.S. 186 (1977), to confer jurisdiction over a nonresident in termination of parental rights cases, the applicability of the status exception to adoption proceedings is less clear. See id. at 201 (stating cases involving the personal status of the plaintiff, such as divorce proceedings, could be adjudicated in the plaintiff's home state despite defendant's absence from the state); see also J.D. v. Tuscaloosa County Dept. of Human Resources, 923 So.2d 303, 310 (Ala. Civ. App. 2005) (holding the status exception to the requirement that the defendant have minimum contacts with the forum state applies to termination of parental rights proceedings); In re Interest of M.L.K., 768 P.2d 316, 319 (Kan. App. 1989) (holding the status exception extends to termination proceedings because the termination of parental rights is a determination of the legal status between the parent and the child); In re Adoption of Copeland, 43 S.W.3d 483, 487 (Tenn. Ct. App. 2000) (holding under UCCJA Tennessee court had jurisdiction over father to terminate parental rights despite father's lack of minimum contacts with forum because child custody proceeding was a determination of status falling within the status exception to the minimum contacts standard). Nonetheless, we view this nonconsensual adoption action before us as requiring a bifurcated proceeding since an adoption may not proceed in this case without first obtaining a termination of parental rights. Otherwise, the form of the action would prevail over the substance of the issues to be determined and potentially thwart the legislative goals behind the PKPA and the Uniform Child Custody Jurisdiction Act (UCCJA).

(UCCJA),[8] which prohibit the exercise of concurrent jurisdiction to modify a custody decree. See Upchurch v. New York Times, 314 S.C. 531, 538, 431 S.E.2d 558, 562 (1993) ("We may affirm the trial judge for any reason appearing in the record.") (citing Rule 220(c), SCACR).

As indicated, this case presents an issue involving the interpretation and application of the jurisdictional provisions of the PKPA and UCCJA in the context of an action to domesticate an out of state custody order and to obtain an adoption. The PKPA, enacted by the United States Congress in 1980, and the UCCJA, enacted by the South Carolina Legislature in 1981, govern jurisdiction in interstate child custody disputes. 28 U.S.C. § 1738A (2000); S.C. Code Ann. §§ 20-7-782 to -830 (Supp. 2006) (repealed 2007). Despite their titles, both the PKPA and UCCJA have been construed to apply to adoption actions. See Doe v. Baby Girl, 376 S.C. 267, 657 S.E.2d 455 (2008) (applying the PKPA to interstate adoption action); In re Baby Girl F., __ N.E.2d __, 2008 WL 5195638 at *7 (Ill. App. 2nd Dist. 2008) (stating the PKPA applies specifically to adoptions and citing applicable cases); Clark v. Gordon, 313 S.C. 240, 242-43, 437 S.E.2d 144, 145-46 (Ct. App. 1993) (holding that adoption proceedings, by virtue of their impact on the termination of a parent's custody rights, fall within the ambit of the UCCJA). Substantively, the acts are very similar; however, where the provisions of the PKPA and state law conflict, the PKPA controls. Schwartz v. Schwartz, 311 S.C. 303, 307-08, 428 S.E.2d 748, 750-51 (Ct. App. 1993) (holding that where the provisions of the PKPA and state law conflict, the federal act controls).

The PKPA and UCCJA provide four bases for jurisdiction: (1) home state; (2) significant connection; (3) emergency jurisdiction; and (4) default jurisdiction. 28 U.S.C. § 1738A (2000); S.C. Code Ann. § 20-7-788 (Supp. 2006) (repealed 2007). While the two acts provide parallel bases for

[8] See S.C. Code Ann. §§ 20-7-782 to -830 (Supp. 2006), repealed by 2007 S.C. Acts No. 60 (Act No. 60 repealed the UCCJA and replaced it with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)). At oral argument, Appellant's counsel asserted the applicability of the UCCJA, rather than the UCCJEA, since the action was filed prior to the enactment of the UCCJEA.

jurisdiction, the PKPA gives priority to the home state. The PKPA and UCCJA define "home state" as the state in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months.[9] 28 U.S.C. § 1738A(b)(4) (2000); S.C. Code Ann. § 20-7-786(5) (Supp. 2006) (repealed 2007). Home state jurisdiction also exists when the state had been the home state within the previous six months and the child is absent from the state because he or she has been removed or retained by a person claiming custody, or for other reasons, and a parent or person acting as a parent still lives in the state. 28 U.S.C. § 1738A(c)(2)(A) (2000); S.C. Code Ann. § 20-7-788 (Supp. 2006) (repealed 2007).

In addition to prioritizing home state jurisdiction, the PKPA mandates exclusive continuing jurisdiction in the state initially issuing the decree if that state remains the residence of the children or any contestant and provided that state has not declined to exercise jurisdiction. 28 U.S.C. § 1738A(f). The procedure for prioritizing the jurisdiction of the issuing decree state is contained in sections 1738A(d) and 1738A(f) of the Act. Specifically, these provisions limit custody jurisdiction to the first state to properly enter a custody order, as long as two sets of requirements are met. First, the Act requires that the initial determination is made in accordance with the PKPA. 28 U.S.C. § 1738A(a). To be consistent with the PKPA, the state must have jurisdiction under its own local law and meet one of the four identified bases for jurisdiction. 28 U.S.C. § 1738A(c). Second, the PKPA incorporates a state law inquiry by mandating that the first state must still have jurisdiction under its own law in order to retain exclusive responsibility for modifying its prior order. 28 U.S.C. § 1738A(d), (f). This state law inquiry necessarily results in the application of the issuing state's version of the UCCJA or its successor, the UCCJEA, promulgated in 1997.

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[9] "Person acting as a parent" is defined under the PKPA and UCCJA as a person, other than a parent, who has physical custody of a child who has either been awarded custody by a court or claims a right to custody. 28 U.S.C. § 1738A(b)(6) (2000); S.C. Code Ann. § 20-7-786(9) (Supp. 2006) (repealed 2007). Under this definition, Mr. and Mrs. Brookshire would each be considered to be a person acting as a parent since they were awarded custody of the children by the Alabama court.

Specifically, Sections 1738A(d) and 1738A(f) provide in relevant part:

> (d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1)[10] of this section continues to be met and such State remains the residence of the child or of any contestant . . .
>
> * * *
>
> (f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if - -
>
> > (1) it has jurisdiction to make such a child custody determination; and
> >
> > (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

28 U.S.C. § 1738A(d), (f). Briefly stated, under § 1738A(d) above, whether a state retains jurisdiction is a matter of state law and the residence of one contestant. Like § 1738A(f) of the PKPA, the UCCJA also forbids states from modifying sister state custody decrees unless the forum court itself has jurisdiction and the state which initially entered the custody order no longer has such jurisdiction or has declined to exercise jurisdiction to modify the decree. S.C. Code Ann. § 20-7-810 (Supp. 2006) (repealed 2007). The UCCJA, however, does not specifically recognize continuing jurisdiction

[10] Subsection (c)(1) provides: "A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if - - (1) such court has jurisdiction under the law of such State." 28 U.S.C. § 1738A(c)(1).

based on continued residence of one party. Id. Notwithstanding, we reiterate that where the PKPA and state law conflict, the PKPA controls. See Schwartz, 311 S.C. at 307-08, 428 S.E.2d at 750-51. Thus, the appropriate inquiry is whether the first court's exercise of jurisdiction was in accordance with the PKPA and whether that jurisdiction continues as a matter of state law and the residence of any contestant. Doe, 376 S.C. at 279, 657 S.E.2d at 461.

Here, Alabama issued the initial decree awarding custody of the two minor children to the Brookshires on October 14, 2004. Therefore, pursuant to the PKPA, South Carolina must give full faith and credit to the Alabama custody decree provided the Alabama decree was rendered in accordance with the PKPA. Upon review of the applicable provisions, we conclude the Alabama custody decree is consistent with the PKPA. Specifically, under § 1738A(c) of the PKPA, Alabama was the home state of the children within six months prior to the commencement of the initial custody proceeding. Likewise, the Alabama court had jurisdiction under its own law to render the initial custody decree because the children and the children's parents were residents of Alabama at the time the initial proceeding was commenced.

Having determined the initial custody order is consistent with the PKPA, we now must consider whether Alabama's jurisdiction continues and whether South Carolina has authority to modify the Alabama order. As indicated above, this inquiry requires that the issuing state maintain jurisdiction under its own state law. Alabama incorporates the UCCJEA, codified in Section 30-3B-101 et seq. of the Alabama Code (1975), as its authority in determining jurisdiction in custody matters.[11] Pursuant to Alabama's UCCJEA, Alabama maintains continuing, exclusive jurisdiction

[11] While the UCCJEA contains a provision specifically exempting the Act from applying to adoption proceedings, the Alabama Court of Appeals has held the UCCJEA applies to cases involving adoption where the natural parents' rights must be determined initially as part of the adoption proceeding. See D.B. v. M.A., 975 So.2d 927, 936-37 (Ala. Civ. App. 2006) (applying the UCCJEA to an adoption case where a custody determination regarding the father's parental rights had to be rendered before the adoption proceedings could continue).

over a custody determination stemming from an initial custody determination issued by its courts until:

> (1) A court of [Alabama] determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in [Alabama] concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of [Alabama] or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in [Alabama].

Ala. Code § 30-3B-202(a) (West 2009). Here, there is no indication in the record that Alabama has made any determination that the children, the children's parents, or the Brookshires no longer have a significant connection with Alabama; thus, the first of the above stated exceptions is inapplicable. Further, Mother is a contestant and continues to reside in Alabama. As such, we find Alabama maintains jurisdiction under its own law. Accordingly, we further conclude Alabama has met the requirements of § 1738A(d) for continuing jurisdiction since Mother continues to reside in Alabama.

Turning to our final inquiry, we must consider whether South Carolina may modify the Alabama decree as set forth under § 1738A(f) of the PKPA and former § 20-7-810 of South Carolina's UCCJA which allow for modification of the initial decree by a subsequent state only if (1) Alabama no longer has jurisdiction, or (2) it has declined to exercise jurisdiction. See 28 U.S.C. § 1738A(f); S.C. Code Ann. § 20-7-810 (Supp. 2006) (repealed 2007). As indicated, Alabama meets the requirements for continuing jurisdiction; thus, Alabama has not lost jurisdiction. Furthermore, there is no indication in the record that Alabama has declined to exercise jurisdiction. Thus, while a family court in South Carolina may have subject matter

jurisdiction to hear this case,[12] pursuant to the PKPA and UCCJA, it may not exercise concurrent jurisdiction over any proceeding affecting custody for the period of time Alabama's jurisdiction continues under its own law. See Clay v. Burkle, 369 S.C. 651, 658, 633 S.E.2d 173, 177 (Ct. App. 2006) (holding that South Carolina lacked authority to modify custody decision where the state that issued the initial custody order had continuing jurisdiction); Sinclair v. Albrecht, 287 S.C. 20, 23, 336 S.E.2d 485, 487 (Ct. App. 1985) ("Although more than one state may meet these jurisdictional requirements, once a custody decree has been entered, the continuing jurisdiction of the decree state is exclusive."); Marks v. Marks, 281 S.C. 316, 321, 315 S.E.2d 158, 161 (Ct. App. 1984) (holding state that issued initial custody decree had continuing jurisdiction and, therefore, under § 1738A(f), South Carolina was prohibited from modifying the issuing state's custody decree). This result is consistent with the PKPA and UCCJA's goal of providing a uniform standard for continuing, exclusive jurisdiction in the issuing state and discouraging the issuance of conflicting custody decrees. Accordingly, until such time as the circumstances providing Alabama with continuing jurisdiction are no longer present, South Carolina may not modify the existing Alabama custody decree.

CONCLUSION

In sum, we recognize the fundamental interests of the natural parents of the children. We also acknowledge our own state policy of carefully safeguarding the interests of the children. Because all of these interests are significant, the United States Congress chose to implement a procedure to avoid conflicts between the states which may understandably and justifiably attempt to protect the individuals within its borders. As a result of the federal

[12] The family court has jurisdiction over adoption proceedings. See S.C. Code Ann. § 63-9-40 (2008) (formerly § 20-7-1680 (Supp. 2007) (providing for jurisdiction over adoption proceedings in family courts)); S.C. Code Ann. § 20-7-828 (Supp. 2006) (repealed 2007) (providing for jurisdiction over actions under the UCCJA in family courts); see also Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (stating subject matter jurisdiction is the power of a court to hear and determine cases in the general class to which the proceedings in question belong).

legislation, we find Alabama maintains continuing jurisdiction over any custody and/or termination proceeding affecting custody in this matter. Absent consent or relinquishment, any adoption proceeding simply cannot proceed until termination of parental rights is obtained. We therefore affirm as modified the dismissal of this action, but do so without prejudice in the event the Brookshires obtain successful termination of parental rights in Alabama or, in the alternative, they obtain consent or relinquishment from the natural parents.[13]

AFFIRMED AS MODIFIED.

HUFF and GEATHERS, JJ., concur.

[13] Alternatively, we note that neither consent, relinquishment, nor termination of parental rights has been pled or requested as relief. As a result of this deficiency, we conclude the complaint failed to comply with the requirements for a petition for adoption as set forth under Section 63-9-710 of the South Carolina Code (2008) (formerly § 20-7-1730 (Supp. 2007)), namely the failure to state facts which excuse consent on the part of a parent to the adoption. Consequently, the failure to state facts which excuse consent renders the instant adoption proceeding premature and a dismissal without prejudice under Rule 12(b)(6) is appropriate.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Springs and Davenport, Inc.
d/b/a H.B. Springs, Co., Respondent,

v.

AAG, Inc. and John Mancino,
Individually Defendants,

Of whom AAG, Inc., is the Appellant.

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

Opinion No. 4588
Heard May 13, 2009 – Filed July 13, 2009

AFFIRMED

David B. Wheeler and Phyllis W. Ewing, of Charleston, for Appellant.

Robert C. Calamari and Michael Anzelmo, of Myrtle Beach, for Respondent.

SHORT, J.: AAG, Inc. (AAG) appeals from the master-in-equity's order awarding Springs & Davenport, Inc., d/b/a H.B. Springs, Co., (Springs) $75,000 in commissions for the sale of property, arguing the master erred in finding: (1) the commission agreement was not a modification of the original listing contract; (2) the commission agreement did not create a condition precedent to payment of the commission; (3) Springs's interest in the property did not terminate with the foreclosure sale; and (4) the sale of the property to Clark Homes was not the result of intervening events or any of Springs's actions. We affirm.

FACTS

AAG[1] owned property in Myrtle Beach and entered into an exclusive contract with Springs, an Horry County real estate brokerage company,[2] to sell the land for $1.2 million, or for another price only if agreed to by AAG. The contract, signed on July 23, 1999, provided Springs would receive a commission of ten percent of the gross sales price of the property. That same month, Springs found a buyer for the land, and on August 3, 1999, AAG sold the property to Bill Clark Homes (Clark) for $1.2 million. On November 16, 1999, AAG and Clark signed a contract addendum, reducing the sale price to $1.17 million. Clark financed the property, paying AAG $345,000 at closing and financing the remaining $800,000 pursuant to a promissory note.[3] The promissory note was signed on January 4, 2000, and the mortgage was recorded on January 10, 2000. In a January 6, 2000 letter from AAG to Springs, an agreement was entered into concerning how the commission was to be paid to Springs. The parties agreed that Springs would receive $37,000 in commission at closing and "[ten percent] of all principal payments made by [Clark] to [AAG]," pursuant to the purchase money mortgage promissory note; however, Springs's commission was not to exceed a total of $117,000.

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[1] John Mancino was a principal of AAG.

[2] Van Davenport was a principal of Springs.

[3] The $800,000 promissory note was secured by a purchase money mortgage to AAG and was to be paid in two installments of $400,000 each. The first installment was due on or before January 4, 2001, and the second installment was due on or before January 4, 2002.

Clark defaulted on the first $400,000 payment due under the note, and AAG foreclosed on the property. In the foreclosure action, the master's order granted AAG a judgment against Clark in the amount of $907,061.48 and ordered the property to be sold at a public auction. AAG re-purchased the property subject to the note at the foreclosure sale for $422,100 and filed a "Satisfaction of Mortgage by Foreclosure" in the Horry County R.M.C. office stating the mortgage was "released, canceled and satisfied." After the sale of the property, the judgment was considered partially satisfied with a balance of $484,961.48 plus interest still owed to AAG. To satisfy the remaining balance, AAG filed a second action against Clark[4] for land AAG sold to Clark that was not subject to the foreclosed mortgage. The parties settled the action. In exchange for $750,000, AAG executed a limited warranty deed transferring AAG's interest in all the property to Clark and released Clark from the deficiency judgment. The limited warranty deed was filed with the Horry County Clerk of Court and conveyed any interest AAG had in the property it purchased at the foreclosure sale and the property subject to the second action. AAG did not pay Springs any additional commission.

Springs filed a complaint against AAG and John Mancino, a principal of AAG, seeking the remaining commission for selling the property. The case was referred to the master by consent order. The amended complaint listed five causes of action; however, the parties agreed to waive all claims except Springs's claim for its real estate commission from AAG. All counterclaims and Mancino were dismissed by agreement. For the purposes of the action, Springs and AAG agreed to use $75,000 as the figure for the commission in dispute. The master entered judgment against AAG in the amount of $124,996, which was comprised of $75,000 in commission, $15,000 in attorneys' fees, and $34,996 in prejudgment interest.[5] This appeal followed.

[4] The action was against BHHL Builders, LLC and Bill Clark Homes because Bill Clark had deeded the land to BHHL, another company he partially owned.

[5] AAG did not appeal the award of attorneys' fees or prejudgment interest.

STANDARD OF REVIEW

"An action for a broker's commission is an action at law." Chambers v. Pingree, 351 S.C. 442, 449, 570 S.E.2d 528, 531 (Ct. App. 2002). In a law action tried before a master, this court's review is limited to correcting errors of law, and we are required to uphold the master's findings of fact unless there is no evidence to support it. Id.; Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "Where mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference." Chambers, 351 S.C. at 449, 570 S.E.2d at 531.

LAW/ANALYSIS

AAG argues the commission agreement was a modification of the original listing contract and created a condition precedent to payment of the commission.[6] We disagree.

Generally, a broker earns his commission when "he procures a purchaser who is accepted by the owner of the property and with whom the latter, uninfluenced by any representation or fraud on the part of the broker, enters into a valid and enforceable contract." Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 196, 232 S.E.2d 728, 729 (1977). Further, a broker's right to compensation "will not be defeated by the failure or refusal of the purchaser to consummate the contract." Id. However, the general rule may be modified by agreement:

> It is equally well settled that the broker and owner "may make such a contract for the broker's services as is agreeable to them, and may make the payment of the broker's commission dependent upon the full performance of the contract of purchase or sale, or postpone the payment of the commission, or make

[6] This issue addresses Appellant's first and second issue.

> the broker's right to the commission contingent upon the happening of future events."

Hamrick v. Cooper River Lumber Co., 223 S.C. 119, 124, 74 S.E.2d 575, 577 (1953) (quoting Brown Paper Mill Co., Inc. v. Irvin, 146 F.2d 232, 234 (8th Cir. 1945)). "'Where the obligation of the principal to pay commissions depends upon the performance of conditions precedent, the broker takes the risk of nonperformance on the part of the customer.'" Id. (quoting Segal Brokerage Co., Inc. v. Lloyd L. Hughes, Inc., 96 F.2d 208, 210 (9th Cir. 1938)).

A condition precedent is "any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise." Ballenger Corp. v. City of Columbia, 286 S.C. 1, 5, 331 S.E.2d 365, 368 (Ct. App. 1985). "Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional." Cobb v. Gross, 291 S.C. 550, 552, 354 S.E.2d 573, 574 (Ct. App. 1987). "Whether a stipulation in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id. If there is doubt about the construction of a writing, the doubt must be resolved against the drafter and in favor of the party to whom it was delivered. Charles v. West, 155 S.C. 488, 494, 152 S.E. 644, 646 (1930).

In this case, the exclusive right to sell contract signed between Springs and AAG in July 1999 stated Springs's commission was due upon any of the following events:

> (1) The sale of the property during the authorization period or as a result of a contract secured during the authorization period;
>
> (2) The signing by [AAG] of a valid contract to sell the property but [AAG] fails or refuses to complete the sale as agreed; or

> (3) The presentation to [AAG] of a valid and bona fide written offer to purchase the property which complies with the terms and conditions specified herein.
>
> The broker fee shall be earned, due and payable when an Agreement to purchase, option, exchange, lease or trade is signed by [AAG].

The January 6, 2000 letter, sent five months after the contract between AAG and Clark was signed, provided that Springs "shall be paid as follows: 1. $37,000.00 to be paid at closing. 2. 10% of all principal payments made by [Clark] to [AAG] under the balance purchase money promissory note."

AAG and Clark signed the contract for the sale of property on August 3, 1999; thus, according to the exclusive right to sell contract, Springs's commission was due when the contract was signed, regardless of whether Clark completed the purchase of the property. However, AAG argued the January 6, 2000 letter created a condition precedent, and Springs's commission was contingent on Clark making his payments under the promissory note. Thus, AAG argued because Clark failed to make his first payment, the funds from which the commission was to be paid did not exist, and the condition precedent had not been met. Springs argued the letter did not create a condition precedent because there was no language in the letter to evidence a meeting of the minds by the parties that Springs would not be due a commission until the payments were made under the promissory note. The letter did not specifically state Springs would not be paid until or unless Clark makes his payments under the promissory note.

We find this case is similar to Charles v. West, 155 S.C. 488, 491, 152 S.E. 644, 644 (1930). In Charles, at the closing, the seller gave the broker a "due bill" for payment at a later time instead of cash. Then, because of problems with the transaction, the seller attempted to not pay the broker pursuant to the due bill. Charles, 155 S.C. at 491, 152 S.E. at 644-45. The court found the due bill did not state clearly whether payment would not be

made unless and until the occurrence of a future event, and because the writing was drafted by the seller, any doubt of its construction must be resolved against him and in favor of the broker. Id. at 494, 152 S.E. at 646. The court also determined the broker did not sign the "due bill" and there was no evidence of any new consideration moving to either of the parties for its execution and delivery because when the bill was given to him, the broker had already completed what he had agreed to do, which was to procure a satisfactory customer. Id. Here, although Springs did sign the January 6, 2000 letter, when it did so, it had already done what the contract required it to do to receive its commission because AAG and Clark had signed a sales contract. See Thomas-McCain, 268 S.C. at 199, 232 S.E.2d at 730 (concluding that pursuant to the contract, the broker had earned the commission, payment of the commission was due even in the event of default, and there were no further obligations to be performed by the broker). If AAG had wanted to ensure it only owed Springs a commission if and when Clark made its payments, AAG could have used language stating no commission was due unless payment was made by Clark. Thus, construing the letter against the drafter, AAG, we find the letter did not create a condition precedent, but merely extended the time AAG had to pay Springs its commission.

Therefore, the master properly determined the January 6, 2000 letter did not create a condition precedent extinguishing AAG's obligation to pay Springs its commission because the letter did not specifically state Springs was not entitled to a commission if Clark failed to pay. Additionally, when the January 6, 2000 letter was signed, Springs had already performed its entire obligation under the broker agreement and was due its full commission. Because this issue is dispositive of the case, we do not reach the merits of AAG's remaining issues. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

Accordingly, the master's order is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mortgage Electronic Systems, Inc., Respondent,

v.

Daniel P. White, Amanda L. White f/k/a Amanda L. Frierson, Clarence Wheeler, The South Carolina Department of Public Safety, and Daniel R. White, Defendants,

And Daniel P. White and Amanda L. White f/k/a Amanda L. Frierson, and Daniel R. White, Third-Party Plaintiffs,

v.

Hugh M. Cooper and Kelly Springs Wise, Third-Party Defendants,

of whom Daniel P. White, Amanda L. White f/k/a Amanda L. Frierson are the Appellants.

Appeal From Clarendon County
William T. Geddings, Jr. Special Referee

Opinion No. 4589
Submitted March 1, 2009 – Filed July 13, 2009

AFFIRMED

Scott Lamar Robinson, of Manning, for Appellants.

John Judson Hearn, of Columbia, for Respondent.

HUFF, J.: Daniel P. White and Amanda L. White (collectively the Whites) appeal the special referee's judgment for Mortgage Electronic Registration Systems, Inc. (Mortgage Electronic). They argue the special referee erred in: (1) denying their motion for a jury trial, (2) failing to recuse himself from the case, and (3) awarding judgment to Mortgage Electronic despite evidence that allegedly indicated fraud during the mortgage process. We affirm. [1]

FACTUAL/PROCEDURAL BACKGROUND

On October 20, 2000, the Whites obtained a loan in the amount of $82,000 from Fleet National Bank in order to purchase a mobile home. To secure the loan, they executed a mortgage with the bank, using real property in Clarendon County. The real property was owned in fee simple by Son's father, Daniel R. White (Father), and neither Son nor Amanda held any concurrent interest in the real property at the time the mortgage was executed. Fleet National Bank later assigned the mortgage to Mortgage Electronic.

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

In May of 2002, Mortgage Electronic brought an action for foreclosure after the Whites defaulted on the mortgage. Mortgage Electronic was unable to locate the Whites to serve them with the complaint, and instead noticed the foreclosure through publication. On Mortgage Electronic's motion, the case was transferred to a special referee.

The Whites' first appearance in this action occurred almost two years after Mortgage Electronic initially filed the complaint, when they filed an answer and demanded a jury trial on April 7, 2004. On Mortgage Electronic's motion, the special referee joined Father to the action after Mortgage Electronic discovered Father owned the property involved in the mortgage foreclosure. In an order filed August 17, 2005, the special referee denied the Whites' demand for jury and added as third-party defendants the closing attorney, Hugh M. Cooper, and one of his employees.

The Whites, along with Father, renewed their demand for a jury trial in their answer to Mortgage Electronic's second amended complaint, filed on September 21, 2005. In their answer, they asserted a fraud counterclaim against Mortgage Electronic. Specifically, they maintained Cooper who worked on the mortgage paperwork forged the closing documents to reflect the name of Father rather than Son. The Whites alleged Cooper took these actions in order to facilitate the closing of the loan, as Son did not legally own the property. They also asserted counterclaims for slander of title and violation of the South Carolina Consumer Protection Code, 37-10-102, -5-108 of South Carolina Code (2002 & Supp. 2008). In addition, the Whites and Father asserted claims for slander of title and fraud against Cooper and his employee. The Whites subsequently dismissed their third-party claims against Cooper and his employee.

The special referee proceeded with a non-jury trial on June 20, 2006. Before the trial started, the Whites brought two pre-trial motions before the special referee: (1) a motion for the recusal of the special referee and (2) a motion for jury trial based on their fraud counterclaim. The special referee denied the Whites' motion for recusal. The special referee also denied the motion for jury trial based on the fraud counterclaim, stating the motion was not timely made.

After a two-day trial, the special referee declared the mortgage was void ab initio because Father, the fee simple owner of the property, was not a mortgagor or a party to the mortgage. He ordered the sale of the mobile home and calculated the judgment amount as $111,820.10. He did not address the issue of fraud. This appeal followed.

LAW/ANALYSIS

A. Jury Trial

The Whites argue the special referee erred in denying their motion for a jury trial. We disagree.

As an initial matter, we consider whether the Whites waived their right to a jury trial. Orders affecting the right to jury trial are immediately appealable and must be raised in court at the first opportunity. Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). If the order is not immediately appealed, the trial by jury issue is waived for purposes of appeal. Id.

We first consider the Whites' failure to appeal the August 2005 order. The Whites initially made a demand for a jury trial in three pleadings: their two individual answers to Mortgage Electronic's first complaint and their motion to add a third-party defendant/motion for jury trial. The special referee ruled upon these motions in its August 2005 order, denying the Whites' initial jury demands. As the Whites failed to appeal the special referee's order, they waived their right to raise any claims on these initial jury demands on appeal.

We next turn to an analysis of the Whites' final jury demand on the issue of fraud. The Whites made another jury demand in their answer to Mortgage Electronic's second amended complaint filed September 21, 2005, in which they asserted a counterclaim for fraud for the first time. Although the Whites did not appeal the referee's denial of their demand for a jury trial

prior to final judgment, we hold they did not waive their right to have appellate review of the denial.

This case is similar to Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). In Bateman, on the day a jury trial was scheduled, the trial judge sua sponte ruled that the appellant was not entitled to a jury trial and held a non-jury trial that same day after only a brief recess. Id. at 671, 596 S.E.2d at 388. The appellant requested that the case be continued to allow her to appeal, but the trial judge refused her request, declaring that a right to a jury trial was not immediately appealable. Id. at 672, 596 S.E.2d at 388. This court held:

> Because the judge also denied [the appellant's] motion to hold the case in abeyance and because the non-jury trial proceeded shortly after the judge made his erroneous finding that [the appellant] had no right to a jury trial, [the appellant] had no meaningful opportunity to immediately appeal. The judge's denial of [the appellant's] motion to hold the trial in abeyance placed counsel in an untenable position, as [the appellant's] counsel could not both proceed with the trial and immediately appeal the jury trial issue.

Id. at 675, 596 S.E.2d at 390. Accordingly, this court concluded the appellant had not waived her right to a jury trial. Id. at 676, 596 S.E.2d at 391.

Here, as in Bateman, the special referee made his ruling on the Whites' demand for a jury trial on the day of the hearing. Although the Whites requested the referee delay the hearing to allow for them to appeal the ruling, the special referee held they were not entitled to an immediate appeal and proceeded with the trial. Accordingly, we find the Whites appealed the special referee's denial of their motion for a jury trial at the first available opportunity. Thus, this court may consider the denial of their demand for a jury trial.

At the beginning of the hearing, the special referee denied the Whites' motion for a jury trial on the fraud counterclaim because he believed the demand was not timely made.

Rule 38(b), SCRCP, provides:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

The Whites demanded a jury trial in their September 21, 2005 answer to Mortgage Electronic's second amended complaint when they asserted their fraud counterclaim for the first time. We find this demand for a jury trial was timely made because it was made within ten days of the service of the last pleading. Accordingly, the trial court was in error in denying their demand for a jury trial on this basis. However, we find the Whites were not entitled to a jury trial based on their claim for fraud.[2]

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester, 327 S.C. at 267, 491 S.E.2d at 242. If the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim. C&S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). Therefore, in order to analyze the merits of the Whites' contention, we must determine if the Whites' fraud counterclaim was: (1) compulsory or permissive, and (2) legal or equitable in nature. A counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject

[2]See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (noting an appellate court can affirm for any reason appearing in the record).

matter of the opposing party's claim." Rule 13(a), SCRCP. Here, the fraud counterclaim arises out of the same mortgage transaction as Mortgage Electronic's claim. Therefore, the Whites' fraud counterclaim is compulsory.

A cause of action for fraud may be at law or in equity, depending on the remedy sought. W. Gordon McCabe & Co. v. Colleton Mercantile & Mfg. Co., 106 S.C. 25, 31, 90 S.E. 161, 163 (1916) ("[F]raud is cognizable at law as well as in equity."); Kiriakides v. Atlas Food Sys. & Serv., Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000) ("Actionable fraud is an action at law unless an equitable remedy is sought.").

In their counterclaim against Mortgage Electronic, the Whites alleged:

> 41. The Defendant Whites have been damaged as a result of the fraud on the part of Hugh M. Cooper and/or his employees as the agent for the Plaintiff in that the fraud perpetrated by Hugh M. Cooper has resulted in the filing of a foreclosure action against the [Father] who was not otherwise involved in the transaction and who never spoke with anyone involved in this transaction or signed any documents relating to this transaction. The [Father's] title is now clouded and he has had to incur attorney's fees and expenses to defend this action and clear the title to his real property.
>
> 42. The Defendants White are informed and believe that the Plaintiff, by and through its agent, Hugh M. Cooper, has acted fraudulently and any and all mortgages or other encumbrances against the real property of [Father] have been procured through fraud and are void.

The Whites and Father prayed for actual and punitive damages as well as for Mortgage Electronic to immediately satisfy the mortgage and release any liens against the property.

The primary relief sought is to have the mortgage declared void. Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed. Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004). Although the counterclaim includes a prayer for actual and punitive damages, the only actual damages alleged are those of Father in incurring attorney's fees and expenses to defend the action. The Whites failed to allege any damages they were seeking. Although Father may have been entitled to a jury trial, he failed to appeal the referee's order and he is not a party to this appeal. The Whites are the only appellants in this matter, and as they are not entitled to a jury trial because they sought only equitable relief, they are not aggrieved by the referee's denial of the demand for a jury trial. See Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998) ("A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interests of some other person."). Accordingly, the order of the referee denying the demand for a jury trial is affirmed.

B. Recusal

The Whites maintain the special referee should have recused himself based on his prior representation of Amanda's mother. We disagree.

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party." Koon v. Fares, 379 S.C. 150, 156, 666 S.E.2d 230, 234 (2008). "It is not sufficient for a party seeking disqualification to simply allege bias; rather, the party must show some evidence of bias or prejudice. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. (citations omitted). "The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." Mallett v. Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996).

In denying the motion to recuse, the referee explained:

> In this matter I was not aware – didn't put it together that Amanda L. White was the daughter of Debbie Cutter, who I previously represented . . . . I'm not aware of any bias or prejudice that I would have any negative things and at worse, the other side could see as making me more predisposed since I do know them. But in a small town, you're pretty much always going to know some of the parties.
>
> . . . And looking from the rules of when a conflict and when recusal is required, the elements that are required would seem to indicate it would have to be a direct involvement in this particular case or these particular parties, not associated family members. So I don't believe that recusal is required, and I don't believe that there's any bias or prejudice by me continuing on this one, so I'm going to have to deny that motion.

The Whites' only evidence of bias is the special referee's ruling denying their right to a jury trial and the judgment in favor of Mortgage Electronic. The fact the referee ruled against them is insufficient to show actual prejudice. Our review of the record reveals no indication of any actual bias on the part of the special referee. Accordingly, we find no error in the referee's refusal to disqualify himself.

C. Evidence of Fraud

The Whites argue the special referee erred in awarding judgment to Mortgage Electronic "in light of the fact that the note and the mortgage being foreclosed were procured by fraud." We find this issue is not preserved. "If the losing party has raised an issue in the [trial] court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." I'On, L.L.C. v. Town of Mt.

Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Although the Whites raised the issue of fraud in their answer to Mortgage Electronic's second amended complaint, the special referee did not rule on the issue in his order. As the Whites failed to file a motion to alter or amend the judgment to preserve the fraud issue, the issue is not properly before this court.

CONCLUSION

For the above stated reasons, the order of the special referee is

AFFIRMED.

WILLIAMS and KONDUROS, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Barney W. Williams, Respondent,

v.

Jurmie Eugene "Bucky" Watkins, Jr., Appellant.

Appeal From Sumter County
John M. Milling, Circuit Court Judge

Opinion No. 4590
Heard June 10, 2009 – Filed July 13, 2009

REVERSED and REMANDED

Franklin Beattie, Jr., and G. Turner Perrow, both of Georgetown, for Appellant.

David Cornwell Holler, of Sumter, for Respondent.

WILLIAMS, J.: Jurmie Eugene "Bucky" Watkins, Jr., appeals the circuit court's order affirming the Sumter County Magistrate Court's (the

magistrate court) denial of Watkins' request for relief pursuant to Rule 60(b)(1), SCRCP. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Barney Williams and Watkins entered into a verbal contract for Watkins to supply, install, refinish, and stain wood flooring for Williams' home in Sumter County. The total charge for the refinishing and staining was $7,891.25. Watkins assured Williams he would "stand by his work" and take any necessary steps to correct any problems that might occur. However, when Williams noticed the floors were bubbling, cracking, and peeling, he contacted Watkins about the problems, and Watkins told him to contact Sherwin Williams in order to get any relief.[1] Williams filed suit against Watkins in the magistrate court.

Both parties received a roster from the magistrate court stating a docket meeting would be held on August 11, 2005. The roster stated a jury for the case would be selected on October 7, 2005, and the trial would be held on October 14, 2005. The roster also stated, "All parties not represented by lawyers must appear in person. . . . Failure to appear at the docket meeting or jury selection may result in dismissal of the case. Please notify this court if you [are] unable to appear at any of the above scheduled dates."

The docket meeting was held on August 11, and Watkins, who was not represented by counsel, attended the meeting. At the docket meeting, both parties were again given notice the case was scheduled for trial on October 14, 2005, with jury selection occurring on October 7, 2005. Despite this notice, Watkins failed to appear at jury selection on October 7, but a jury was selected in his absence.

[1] Watkins purchased the finishing and staining materials from Sherwin Williams, and Williams originally named the company as a defendant. Sherwin Williams was later dismissed because of Williams' failure to serve the company.

Watkins called the magistrate court the morning of October 7, while jury selection was taking place, and left a voicemail message stating he had a conflict with the October 14 trial date because he was scheduled for a criminal trial in Georgetown County the week of October 10-15.

Watkins failed to leave a return telephone number on his message and did not receive a follow-up telephone call from the magistrate court. A few days later, however, Watkins received a new roster (the December roster) from the magistrate court dated October 4, 2005, stating his case was scheduled for the December term of court. Thus, Watkins believed his case had been continued, and he did not appear at the magistrate court on October 14.

The case was not continued, however, and the case proceeded in Watkins' absence. Upon Williams' request, Watkins' answer and request for a jury trial were struck, and a bench trial ensued. Williams prevailed, and damages in the amount of $7,500 were assessed against Watkins.

Watkins appealed the magistrate court's judgment under Rule 60(b)(1), SCRCP, to the circuit court.[2] At the hearing, Watkins brought the December roster to the circuit court's attention. Specifically, Watkins argued he was entitled to relief because he relied upon the roster he received from the magistrate court subsequent to his telephone call to the magistrate court regarding his conflict with the October 14 trial date. The circuit court sent the matter back to the magistrate court for reconsideration in light of the December roster and other additional evidence pertaining to Watkins' Georgetown criminal trial. The magistrate court considered the new evidence but affirmed the previous judgment and denied Watkins relief under Rule

[2] Although Watkins did not specifically state Rule 60(b)(1), SCRCP, as the basis of his appeal, the magistrate court found Watkins' appeal "was made in accordance with Rule 60(b)(1), SCRCP." This finding was never appealed and, thus, is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (stating an unappealed ruling is the law of the case and should not be reconsidered by the Court of Appeals).

60(b)(1), SCRCP. Watkins appealed to the circuit court, and the circuit court affirmed. This appeal followed.

STANDARD OF REVIEW

"Relief under Rule 60(b)(1), SCRCP, lies within the sound discretion of the [circuit court] and will not be reversed on appeal absent an abuse of discretion." Tobias v. Rice, 379 S.C. 357, 362-63, 665 S.E.2d 216, 219 (Ct. App. 2008). An abuse of discretion arises where the judgment is controlled by an error of law or is based on factual conclusions that are without evidentiary support. Id. at 363, 665 S.E.2d at 219.

LAW/ANALYSIS

Watkins argues the circuit court erred in failing to find the magistrate court abused its discretion by refusing to grant his request for relief from the final judgment. We agree.

Pursuant to Rule 60(b)(1), SCRCP,[3] a court may relieve a party of a final judgment for mistake, inadvertence, surprise, or excusable neglect. "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001).

When determining whether to grant relief, the factors to consider are: (1) the timing of the motion for relief, (2) whether the party requesting relief has a meritorious defense, and (3) the degree of prejudice to the opposing party if relief is granted. BB & T v. Taylor, 369 S.C. 548, 553 n.1, 633 S.E.2d 501, 503 n.1 (2006) (citations omitted); Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

In order to gain relief under Rule 60(b)(1), SCRCP, a party must first show a good faith mistake of fact has been made, and in the present case, we

[3] Rule 12(b), SCMCR, allows a magistrate court to provide relief from a final judgment under the same conditions.

find Watkins has made that showing. Watkins failed to appear on the date of trial because of his good faith reliance on the December roster sent to him by the magistrate court. When a court sends a litigant notice of his or her term of court, that litigant is bound by the notice and held accountable if he or she fails to appear. See State v. Goode, 299 S.C. 479, 482, 385 S.E.2d 844, 845-46 (1989) ("General notice given by courts of general session as to which term an individual will be tried in, is sufficient to enable that individual to effectively waive his right to be present."); Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) (finding a defendant bound by the notice of the term of court which the court provided); Tobias, 379 S.C. at 364, 665 S.E.2d at 220 (stating the party's attorney "was mailed and faxed notice of the mandatory roster meeting, thereby providing adequate notice of trial"); City of Aiken v. David Michael Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) (finding the defendant was bound by the notice of the term of court sent to him by the court). This notion, however, logically implies litigants are also entitled to rely on the notice of their term of court sent to them by the court.

We acknowledge that Watkins did not act in the most prudent or procedurally correct manner when notifying the magistrate court of his conflict and requesting a continuance. Watkins did, however, do exactly what the magistrate court's notice told him to do, i.e., "*notify* [the magistrate] court if [he was] unable to appear . . . ." (emphasis added). Further, despite Watkins' deficiencies, the magistrate court sent Watkins a roster stating his case would be heard in the December term of court. The magistrate court did not send Watkins any notice of either his request for a continuance being denied or his case being dismissed, as was the stated consequence for failing to appear at the docket meeting or jury selection. The only information Watkins received informed him his case would be heard the week of December 12-16, 2005, and this information was received after he left his voicemail message but prior to his trial date. Although it is unclear who authorized the rescheduling, the magistrate court was nonetheless directly involved in what appeared to be a granting of the continuance.

Consequently, Watkins had every reason to believe his case had been continued and that he did not need to appear in the magistrate court on

October 14. We find Watkins relied in good faith on the December roster sent to him by the magistrate court.

As to the timing of the motion for relief, a party is required to make the motion "within a reasonable time, and . . . not more than one year after the judgment . . . was entered . . . ." Rule 60(b), SCRCP. Watkins sought relief as soon as he discovered the trial had taken place in his absence and a judgment had been entered against him. The bench trial took place on October 14, 2005, and a judgment was issued on October 19, 2005. The magistrate court received Watkins' "Notice of Appeal" on November 21, 2005. Thus, Watkins made his motion within the allotted time period.

With respect to the meritorious defense factor, the record contains evidence Watkins made a prima facie showing of a meritorious defense to Williams' claims. To establish a meritorious defense, the party does not have to show he would prevail on the merits. McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 93-94 (Ct. App. 2008). Rather, a meritorious defense "need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. at 575, 671 S.E.2d at 94 (quotations and citations omitted).

Williams' initial action claimed Watkins breached the parties' contract by incorrectly applying the finishing and staining materials to the floor; breached implied warranties of the contract when installing, finishing, and staining the floors; and performed negligent and reckless work when finishing and staining the floors. Williams also claimed Sherwin Williams breached the implied warranty of merchantability by supplying Watkins with finishing and staining materials that were defective and inferior. Watkins' reply, which was struck by the magistrate court upon Watkins' failure to appear, denied all of the allegations but stated Sherwin Williams breached its implied warranty of merchantability. An issue exists as to whether Watkins' work was the cause of the problems or whether the materials Watkins was supplied with were the actual cause of the problems. Accordingly, we find this matter is worthy of a hearing, and while we do not make any judgment as

to whether Watkins will prevail on the merits, we find Watkins presented a prima facie showing of a meritorious defense.

Finally, we find the degree of prejudice Williams will suffer if relief is granted is not so high as to outweigh the other factors, and we note "the law favors the resolution of disputes based upon all parties having their day in court." Id. at 580, 671 S.E.2d at 96 (Hearn, C.J., dissenting). Williams was on notice of Watkins' denial of the allegations and was therefore on notice to gather evidence against Watkins, which he presented to the magistrate court. Williams was also on immediate notice of Watkins' appeal of the magistrate court's judgment, putting him on notice to preserve and maintain that evidence. Thus, we see little prejudice in requiring Williams to proceed with a trial on the merits.

Given Watkins' good faith reliance on the December roster, his swift action to try to remedy the situation following a trial in his absence, his showing of a meritorious defense, and the lack of prejudice to Williams, we find the magistrate court abused its discretion in denying Watkins' request for relief from the final judgment. See Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 512, 548 S.E.2d 223, 226 (Ct. App. 2001) ("Given [plaintiff's] good faith mistake, its swift action to try to remedy the situation, the existence of a meritorious defense, and the lack of prejudice to [the defendant], we find the [Administrative Law Judge] abused his discretion by refusing to reopen the case."). We, therefore, find the circuit court erred in not finding the magistrate court abused its discretion in denying Watkins' motion for relief. We reverse the circuit court's order and remand the case to the magistrate court for a new trial on the merits.

Due to our disposition of this issue, we need not address the other issues raised on appeal. See Melton v. Olenik, 379 S.C. 45, 56, 664 S.E.2d 487, 493 (Ct. App. 2008) (stating when determination of an issue is dispositive, other issues need not be addressed).

CONCLUSION

Based on the foregoing, the circuit court's order is

REVERSED and REMANDED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie G. McCrea, Employee, Respondent,

v.

City of Georgetown, Employer, and South Carolina Municipal Insurance Trust, Carrier Appellants.

Appeal From Georgetown County
Steven H. John, Circuit Court Judge

Opinion No. 4591
Heard June 10, 2009 – Filed July 13, 2009

APPEAL DISMISSED

J. Hubert Wood, III and Jason A. Williams, of Charleston, for Appellants.

Steve Wukela, Jr., of Florence, for Respondent.

WILLIAMS, J.: In this civil case, we must determine whether the trial court erred by failing to affirm the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission) and remanding the case to the Commission. We dismiss the appeal.

FACTS

Willie McCrea (Claimant) was employed as a firefighter for the City of Georgetown (Employer). In December 2003, Claimant was injured as he attempted to gain access to a house that was on fire by ramming his left hip and left leg into the door. Employer admitted Claimant sustained an injury but denied Claimant suffered any significant impairment as a result of this injury.

In September 2005, Claimant responded to an automobile accident. Claimant allegedly suffered an injury to his neck and back as a result of placing an injured individual onto a backboard and lifting this person into an ambulance. Following this incident, Employer commenced payment of temporary total disability benefits and provided for medical treatment until August 2006.

At that time, Employer filed a Form 21 seeking to stop payment of temporary disability benefits. In connection with the 2003 injury, Employer contended Claimant had reached maximum medical improvement (MMI). With respect to the 2005 injury, Employer argued Claimant had been provided adequate medical care, and Claimant had reached MMI.

Conversely, Claimant alleged he had yet to reach MMI and sought further medical treatment. Alternatively, Claimant argued if he were found to be at MMI, then he should be awarded compensation for permanent and total disability and lifetime causally related medical treatment. Additionally, Claimant claimed a causally related and compensable psychological condition as a result of either or both the 2003 and 2005 injuries. Moreover, Claimant alleged an injury to his left wrist involving carpal tunnel syndrome as a result of the 2005 accident.

The single commissioner held a hearing in October 2006, and issued an order in December 2006. In this order, the single commissioner concluded Claimant had reached MMI for both injuries, Claimant's alleged psychological condition was not related to either the 2003 or 2005 injuries, Claimant had not sustained permanent disability or loss of use to any scheduled body part, and Claimant's alleged carpal tunnel syndrome was not related to the 2005 accident. The single commissioner granted Employer's stop payment request and relieved Employer of any liability for further medical treatment. Claimant appealed this decision to the Commission, and the Commission affirmed the single commissioner's decision in full. Thereafter, Claimant appealed to the circuit court. The circuit court reversed the Commission and remanded the case so additional testimony and evidence could be entered into the record. This appeal followed.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of an administrative agency." Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). "Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). Under this standard, a reviewing court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence or is affected by an error of law. Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005).

LAW/ANALYSIS

Initially, we must determine the appealability of the circuit court's order. "[A]n order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." Foggie v. Gen. Elec. Co., 376 S.C. 384, 388-89, 656 S.E.2d 395, 397-98 (Ct. App. 2008). In some situations remand orders from the circuit court to the Commission may be immediately appealable. Id. Namely, if the circuit court's order is a "final judgment," then it is immediately appealable. Id.

"Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits." Brown v. Greenwood Mills, Inc., 366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005). "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." Id.

In the current case, the circuit court remanded the case to the Commission for additional proceedings. The circuit court based its decision on the stipulations the parties had entered into prior to the hearing before the single commissioner. These stipulations included that Employer had admitted the 2003 and 2005 accidents occurred.

Employer conceded Claimant suffered injuries to his neck and spine arising out of the 2005 accident. The circuit court found the single commissioner and the Commission disregarded the stipulations of the parties when the single commissioner concluded, after the record had closed, "I frankly question whether . . . Claimant sustained the [2005] accident at all; however[,] given the [Employer's] good faith acceptance of the claim, the order proceeds under the assumption and theory that the September 2005 accident in fact occurred." According to Claimant, had he known the single commissioner planned to proceed only under the theory rather than accepting as fact he was injured, he would have put testimony into evidence regarding the nature and severity of the injuries. The circuit court found the single commissioner and the Commission ignored the fact the parties had agreed Claimant had suffered injuries from the accidents.

A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties or their attorneys and is binding upon those who make them. State v. Pichardo, 367 S.C. 84, 94-95, 623 S.E.2d 840, 846 (Ct. App. 2005). The court must accept stipulations as binding upon the parties. Id. In the present case, the single commissioner and the Commission failed to recognize the fact that stipulations are binding on parties as well as the court. Consequently, they failed to accept as a legally binding fact Claimant suffered injuries from the 2005 accident.

The circuit court remanded the case to the Commission to allow Employer, if it deemed advisable, to withdraw its stipulations. Additionally, the circuit court remanded the case to allow Claimant to submit additional testimony as to the nature of the accidents and injuries incurred. Furthermore, the circuit court did not conclude Claimant did not have a compensable injury. Additionally, the circuit court did not rule Claimant had not reached MMI. The circuit court did not make a final determination regarding whether Claimant was totally and permanently disabled, nor did it advise the Commission that Employer was not entitled to stop payments. The circuit court did not instruct the Commission that Claimant had reached MMI or indicate to the Commission that Claimant's alleged psychological condition was not related to either the 2003 or 2005 injuries. The circuit court merely allowed the parties to submit additional testimony and evidence as they deem appropriate.

The circuit court's order was not a final judgment and did not involve the merits of the case. The circuit court remanded the case to the Commission so that additional evidence could be entered into the record without determining whether Claimant was disabled or whether Employer was entitled to stop payments. As such, this appeal is interlocutory. See Foggie, 376 S.C. at 389, 656 S.E.2d at 398 (holding an appeal was interlocutory where the circuit court did not make a final determination regarding whether or not a claimant was totally and permanently disabled and remanded the case for reconsideration by the Commission); Brown, 366 S.C. at 388, 622 S.E.2d at 551 (finding that because the circuit court's order mandated apportionment, the court left the percentage of apportionment to the Commission on remand, so the Commission would have no choice but to allocate some part of the claimant's disability to the non-compensable cause, thus the circuit court's order constituted a final decision on the issue of apportionment, making it appealable).

CONCLUSION

Accordingly, the appeal is dismissed.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Monica Weston, Appellant,

v.

Kim's Dollar Store and CIBA Vision, a division of Novartis Company, Respondents.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4592
Heard June 9, 2009 – Filed July 15, 2009

AFFIRMED

Robert L. Widener, Celeste T. Jones, A. Victor Rawl, Jr., and Andrew G. Melling, all of Columbia, for Appellant.

Curtis L. Ott and Daniel T. Sullivan, both of Columbia and Keith D. Munson and Sandi R. Wilson, both of Greenville, for Respondents.

CURETON, A.J.: Monica Weston appeals the circuit court's grant of summary judgment and dismissal of Counts II, V, and VI of her tort action against CIBA Vision (CIBA). On appeal, she argues the circuit court erred in granting summary judgment because (1) the circuit court lacked jurisdiction to determine whether the contact lenses at issue were federally regulated medical devices, (2) a genuine issue of material fact existed, and (3) there was neither a showing nor a finding that any South Carolina law conflicted with federal law. In addition, Weston argues the circuit court erred in refusing to amend or clarify certain provisions of its summary judgment order. We affirm.

FACTS

CIBA sells contact lenses under the trade name FreshLook Colors. FreshLook Colors contact lenses can be worn to change the color or appearance of the eye. These contact lenses, however, are also capable of correcting nearsightedness, farsightedness, and astigmatism. FreshLook Colors contact lenses come in a range of powers from (-)20.00 diopters to (+)20.00 diopters. At the zero-power point in the range, the lenses are "non-corrective" or "plano" lenses, but the lenses can still have medical and physiological effects.

In March 2004, Weston purchased two pairs of FreshLook Colors contact lenses at the zero-power point from Kim's Dollar Store (Kim's).[1] Along with changing the eye color, the contact lenses Weston purchased had UV protection and were marked with a "prescription only" symbol. Kim's was not authorized to sell or distribute the contact lenses and had no affiliation with CIBA. Additionally, Weston did not have a prescription for the contact lenses. Weston was given no instructions concerning the care, cleaning, or usage of the lenses with her purchase, nor was she informed of

[1] While Weston did not keep the actual pair of contacts she purchased or any of the packaging, both parties have stipulated the contacts involved were FreshLook Colors with ultraviolet (UV) protection, to be sold by prescription only, and approved for extended wear.

the necessity of a medical prescription and oversight for usage of the contact lenses.

After wearing a pair of the FreshLook Colors contact lenses, Weston developed an eye infection, which led to the temporary loss of vision in her left eye. Weston then brought this action against Kim's and CIBA alleging six causes of action: (1) negligence per se for selling misbranded contact lenses; (2) negligence in the manufacture, sale and/or distribution of contact lenses, and in failing to provide adequate warnings and instructions; (3) breach of implied warranty of merchantability and fitness because the lenses were not safely labeled; (4) strict liability for placing defectively labeled products into the stream of commerce; (5) sale of a defective product due to inadequate warnings; and (6) violation of the South Carolina Unfair Trade Practices Act by committing an unfair or deceptive act or practice, including inadequate labeling and warnings, in the conduct of trade or commerce. CIBA's answer generally denied Weston's allegations and asserted additional defenses. CIBA also made a motion for summary judgment on the basis that the majority of Weston's claims and legal theories were subject to federal preemption pursuant to the Medical Device Amendments of 1976 (MDA) to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. §§ 301-399a (West 1999 & Supp. 2008) (FDCA).

Following a hearing on the matter, the circuit court granted CIBA's motion. The circuit court found CIBA was entitled to summary judgment on the basis of federal preemption on all actions dependent on warning, labeling, design, marketing, misbranding, or other similar claims. The circuit court also stated CIBA could file additional motions to test the viability of the remaining causes of action. Finally, the circuit court restricted Weston from pursuing any additional discovery, without further court order, on the issues of warnings, labeling, packaging, use instructions, product design, marketing, or illegal sales of contact lenses. This appeal follows.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the circuit court under Rule 56(c),

SCRCP. Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). This standard requires all facts and reasonable inferences to be drawn therefrom to be viewed in the light most favorable to the appellant. Id. However, "[a]n appellate court may decide questions of law with no particular deference to the trial court." In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008).

LAW/ANALYSIS

Weston argues the circuit court erred in granting summary judgment because (1) the circuit court lacked jurisdiction to determine whether the contact lenses at issue were federally regulated medical devices, (2) a genuine issue of material fact existed, and (3) there was neither a showing nor a finding that any South Carolina law conflicted with federal law. We disagree.

I. Preemption

> The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Thus, as has been clear since the Supreme Court's decision in M'Culloch v. Maryland, 17 U.S. (4 Wheat.), 316, 4 L.Ed. 579 (1819), any state law that conflicts with federal law is "without effect." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (citing Maryland v. Louisiana, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)).
>
> In applying the Supremacy Clause, courts "start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of

> Congress." Medtronic v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Therefore, " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." Id. (citing Cipollone, 505 U.S. at 516, 112 S.Ct. 2608, 120 L.Ed.2d 407).

Jamison v. Ford Motor Co., 373 S.C. 248, 261-62, 644 S.E.2d 755, 762 (Ct. App. 2007) (quoting King v. Ford Motor Co., 209 F.3d 886, 891 (6th Cir. 2000)).

"The interpretation of a statute is a question of law for the [c]ourt." In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 910-11 (2008); accord Anderson v. Sara Lee Corp., 508 F.3d 181, 191 (4th Cir. 2007) (holding whether federal statute preempts state law is a question of law). The MDA generally preempts state law that affects medical devices covered by the MDA unless an exemption is granted:

> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement –
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C.A. § 360k(a) (West 1999). Under the FDCA, a "device" is:

> [A]n instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar

> or related article, including any component, part, or accessory, which is . . . intended for use . . . in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or . . . intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes.

21 U.S.C.A. § 321(h) (West 1999). A "cosmetic" is an article, or a component thereof, "intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance." 21 U.S.C.A. § 321(i) (West 1999). Federal law contemplates that a regulated device may simultaneously be classified as a cosmetic. 21 C.F.R. § 700.3 (1981) ("Any cosmetic product which is also a drug or device or component thereof is also subject to the requirements of Chapter V [of the FDCA].").

Weston casts her argument as an attack on jurisdiction, presumably over the subject matter of her suit. Subject matter jurisdiction is "the power of a court to hear and determine cases of the general class to which the proceedings in question belong." McCullar v. Estate of Campbell, 381 S.C. 205, 206, 672 S.E.2d 784, 784 (2009). Tort claims are within the jurisdiction of the circuit court. Id. When federal law seats exclusive jurisdiction over a particular type of claim in the federal courts, South Carolina courts must examine the federal law to determine whether it preempts state law. Griggs v. S.C. Elec. & Gas Co., 320 S.C. 127, 129, 463 S.E.2d 608, 609 (1995). Weston appears to argue the circuit court was somehow deprived of the authority to determine whether federal law preempted state law while presumably retaining the authority to award Weston damages for her loss. This argument is meritless. Interpreting federal statutes is an essential step in determining whether federal law preempts state law. The question whether CIBA's FreshLook Colors contact lenses fit the statutory definition of

medical devices, thus triggering the MDA's provision preempting state law, is properly a question of law for the circuit court. Consequently, the circuit court did not err in construing federal law to determine it preempted South Carolina law in this matter.

II. Background: Federal Regulation of Contact Lenses

For regulation purposes, the Food and Drug Administration (FDA) classifies medical devices into three categories: Class I, Class II, and Class III. 21 U.S.C.A. § 360c (West 1999). The FDA applies different levels of scrutiny and regulation to each category in order to establish the safety and effectiveness of a medical device. Id. Class III medical devices receive the highest level of scrutiny and may only be marketed pursuant to the FDA's premarket approval (PMA) process. 21 U.S.C.A. § 360e (West 1999 & Supp. 2008). The PMA process is rigorous, and it begins with the manufacturer of the medical device submitting detailed information to the FDA regarding the safety and efficacy of the device. Riegel v. Medtronic, 128 S. Ct. 999, 1004 (2008). The FDA spends an average of one thousand, two hundred hours reviewing all of the submitted information and "grants [PMA] only if it finds there is a 'reasonable assurance' of the device's 'safety and effectiveness.'" Id.

After a product receives PMA, "the MDA forbids the manufacturer to make, without FDA permission, changes in design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness." Id. at 1005. If such changes are to be made, the manufacturer may submit a supplemental PMA application to the FDA, which is evaluated in a similar fashion as the initial application. Id. This supplemental PMA process obviates the need to submit redundant information to the FDA regarding design features, manufacturing processes, or labeling that have already been approved by the FDA, because the entirety of the PMA, including all supplements, are before the FDA at the time the supplement is reviewed. 51 Fed. Reg. 26,342, 26,354 (1986). Following PMA, the FDA continues to subject the medical devices to reporting requirements. Riegel, 128 S. Ct. at 1005.

According to the affidavit of CIBA's expert witness Philip Phillips, former Deputy Director for Science and Regulatory Policy in the Office of Device Evaluation for the FDA, all soft contact lenses automatically became Class III medical devices when the MDA was implemented in 1976. In 1994, the FDA drew a distinction between daily wear and extended wear soft contact lenses. Daily wear lenses were reclassified as Class II medical devices while extended wear lenses remained Class III medical devices. These classifications applied to both plano lenses and corrective lenses.

In 2003, the FDA issued Import Alert 86-10, which allowed for the possibility of obtaining cosmetic classification, under certain circumstances, for plano contact lenses intended solely for the decorative purpose of changing the eye color. With a cosmetic classification, the lenses could be sold without having to undergo the rigorous PMA process. If contact lenses were marketed with any claims of effecting physical or physiological changes, then even plano contact lenses that change the color of the eye would continue to be regulated as medical devices by the FDA. The Import Alert provided a claim of sunscreen protection as an example of a claim that would disqualify a product as a cosmetic. In 2005, Congress eliminated the carve-out set forth in Import Alert 86-10 by making all contact lenses, even solely decorative contact lenses, subject to regulation as medical devices by the FDA. 21 U.S.C.A. § 360j(n)(1) (West Supp. 2008).

III. Summary Judgment

Rule 56(c), SCRCP, provides:

> [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A. Genuine Issue of Material Fact

"In determining whether any triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party." Donahue v. Multimedia, Inc., 362 S.C. 331, 337, 608 S.E.2d 162, 165 (Ct. App. 2005). This court, however, is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine." Englert, 315 S.C. at 302, 433 S.E.2d at 873 (quotations and citations omitted). Generally, only "a mere scintilla of evidence" is required to defeat a motion for summary judgment when the burden of proof is by a preponderance of the evidence. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, "in cases applying federal law, . . . the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Id. at 330-31, 673 S.E.2d 803.

Weston asserts a genuine issue of material fact exists as to whether FreshLook Colors contact lenses were subject to regulation by the FDA as a Class III medical device. Specifically, Weston argues while PMA exists for all FreshLook Colors contact lenses with a diopter of greater or less than zero, the FreshLook Colors PMA excluded plano lenses because they have no effect on visual acuity. In support, Weston points to language in letters from the Department of Health and Human Services (DHHS) addressing a PMA supplement stating FreshLook Colors contact lenses were "indicated for the correction of visual acuity." This indication, Weston reasons, excludes the lenses she purchased because, by definition, plano lenses do not correct vision. Furthermore, according to Weston, CIBA's marketing of the plano FreshLook Colors lenses for beautification rather than for correction of visual acuity invalidates any PMA that might have applied. We find this argument unpersuasive.

Initially, we find FreshLook Colors contact lenses fit the FDCA's definition of a device, in that each lens is an "instrument . . . or other similar or related article . . . intended for use . . . in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or . . . intended to affect the

structure or any function of the body of man . . . ." 21 U.S.C.A. § 321(h). As CIBA points out, these lenses contain UV protection for the prevention of disease, and as extended-wear lenses, they affect the structure of the eye. Furthermore, we find CIBA presented uncontradicted competent evidence in the form of affidavits, depositions, and documentation, indicating FreshLook Colors contact lenses were Class III medical devices, subject to and approved by the FDA pursuant to the PMA process.

Weston's expert witness, Dr. Suzanne Parisian, acknowledged the PMA history for FreshLook Colors contact lenses began with the original 1983 PMA. She further acknowledged through PMA Supplement 39 the FDA allowed FreshLook Colors UV to include the UV symbol on its labeling. CIBA then presented additional extensive evidence that through the supplemental PMA process the FreshLook Colors contact lenses in question received FDA approval through Supplement 39.

Two letters from the DHHS discussed Supplement 39. The first letter, dated January 25, 1996, referenced "P830037/S39 FreshLook Colors UV and FreshLook LiteTint UV." This letter read:

> The Center for Devices and Radiological Health (CDRH) of the Food and Drug Administration (FDA) has completed its evaluation of your premarket approval application (PMA) supplement, which requested approval for incorporating an ultra-violet absorber into the above referenced lenses. Based upon the information submitted, the PMA supplement is approved subject to the conditions described below and in the "Conditions of Approval" (enclosed). You may begin commercial distribution of the devices as modified by your PMA supplement upon receipt of this letter.

The second DHHS letter, dated August 22, 2003, referenced two PMA supplements, one being "P830037/S39 FreshLook Colors UV and FreshLook

LiteTint UV (phemfilcon A) UV Soft (hydrophilic) Contact Lenses."[2] This letter stated:

> The Center for Devices and Radiological Health (CDRH) of the Food and Drug Administration (FDA) completed its evaluation of your premarket approval application (PMA) supplement[] referenced above and issued [an] approval order[] on . . . January 25, 1996[,] for Supplement 39. We inadvertently made an error by not including the appropriate restricted device conditions of approval that apply to all UV absorbing contact lenses.

The letter went on to provide the restrictions and warnings that applied to the referenced contact lenses. However, despite the thoroughness with which the regulatory agencies reviewed CIBA's submissions, we find no indication in the record the DHHS or the FDA excluded any specific diopter or diopter range from the applicable PMA or its supplements. By contrast, both the regulatory agencies and CIBA treated the plano lenses no differently than their corrective counterparts. Plano lenses were included in the approved diopter range, were provided to the regulatory agencies as exemplars of the FreshLook Colors product, and were accompanied by all the same warnings, labels, and information as corrective FreshLook Colors lenses.

In addition to this documentation, CIBA presented expert witnesses who confirmed the FreshLook Colors contact lenses in question were approved and regulated by the FDA. Paul Oris, Head of Global Regulatory Affairs for CIBA, testified at his deposition that CIBA always treated FreshLook lenses as medical devices and that they were always approved through the PMA process.[3] He stated, "All [FreshLook Colors] contact

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[2] The other PMA supplement referenced was "P830037/S46 FreshLook COLORBLENDS (phemfilcon A) UV Soft Contact Lenses."

[3] In her brief, Weston argues Oris's testimony is hearsay. We find no evidence of this argument being made to the circuit court, and therefore, we decline to address it. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d

lenses, including plano, were approved by the FDA in the PMA process." Oris also explained the "Rx only" symbol on the package of the contact lenses at issue indicated the contacts were medical devices that should only be sold by prescription. Oris further stated the package insert that was meant to accompany all FreshLook Colors contact lenses was drafted by CIBA pursuant to a PMA supplement.

CIBA's expert witness Phillips confirmed in his deposition that the package insert that was to be included with all FreshLook Colors contact lenses was reviewed and approved by the FDA. Phillips stated the package insert that was submitted and approved by the FDA as part of the FDA's PMA oversight function was "probably what [the] FDA looked at closer than any other aspect of labeling." He further stated this FDA-approved insert applied to the specific contact lenses at issue.

Phillips provided further support that FreshLook Colors contact lenses were approved and regulated by the FDA and were unaffected by Import Alert 86-10 in his affidavit, which asserted:

> FreshLook Colors Lenses of the type [at issue] are Class III medical devices. This would include plano (zero power) FreshLook Colors lenses in 2004. . . . FreshLook Colors plano (zero power) contact lenses are approved in the Premarket Approval (PMA) P830037 and the relevant supplements thereto. . . .

731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."). We note CIBA's brief argues this issue was not properly preserved because it was raised to the circuit court for the first time in a Rule 59(e) motion, and hearsay objections cannot be raised for the first time on appeal. However, after reviewing the record we are unable to find the Rule 59(e) motion to which CIBA refers, so without a complete record for review, we need not reach CIBA's argument. See Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

> CIBA['s] . . . PMA approval was in accord with all applicable FDA requirements and resulted in legitimate approval of CIBA Vision FreshLook Colors contact lenses as Class III medical devices. . . . In PMA Supplement 33, [CIBA] obtained approval from the FDA to incorporate the UV absorber ingredient into FreshLook Colors lenses. As of at least July 2003, the FDA approved [CIBA] package insert for FreshLook Colors lenses included significant information about UV absorbing properties and UV protection. . . . UV protection[] would constitute a "medical use" under Import Alert 86-10 and therefore further make FreshLook Colors plano lenses ineligible for regulation as a "cosmetic." . . . [CIBA's] packaging, product information, warnings and labeling for FreshLook Colors contact lenses[] were in accordance with the FDA's PMA and PMA Supplement approvals and the agency's labeling regulation. . . . Throughout 2004, [CIBA] compliance with the Conditions of Approval, good manufacturing practices, medical device reporting requirements and other requirements reviewed by FDA were sufficient to maintain the PMA approval status for FreshLook Colors contact lenses.

Furthermore, the record contains ample discussion and evidence on the distinction between a cosmetic and a medical device. When discussing whether plano color contact lenses used to enhance the color of the eye are currently considered cosmetics, as the exception in Import Alert 86-10 had provided, Dr. Parisian explained, "Just because [the FDA] put [the lenses] under the device regulations doesn't change that [the lenses are] still a cosmetic. . . . [The lenses are] a cosmetic, but [they are] being regulated under medical device regulation." When asked whether the FDA would consider plano color contact lenses intended to enhance the color of the eye for extended wear to be medical devices, Dr. Parisian stated, "[The FDA] could, depending on the [manufacturer's] claims."

This notion of plano color contact lenses being both a cosmetic and a medical device was in complete accord with the evidence presented by CIBA and with federal law. Phillips explained in both his deposition and his affidavit that classification as a cosmetic and a medical device was not mutually exclusive. Further, CIBA presented the circuit court with a notice published in the Federal Register noting, "[The] FDA regulates as devices noncorrective tinted contact lenses that are expressly promoted only for their cosmetic effect of enhancing eye color because they have physiological effects on the eye." 60 Fed. Reg. 41,453 (1995).

Moreover, while Weston presented much discussion regarding the cosmetic purposes of FreshLook Colors contact lenses, the record was also replete with evidence of their medical, health, or therapeutic use and their physical or physiological effects, which requires the lenses to be regulated as medical devices. See 21 C.F.R. § 700.3(b) ("Any cosmetic product which is also a drug or device or component thereof is also subject to the requirements of Chapter V of the [FDCA]."). Although Kim's did not provide Weston with the package insert intended to accompany the FreshLook Colors contact lenses she purchased, the lenses did have an applicable package insert that was in accord with FDA requirements and obtained FDA approval. This insert included the following "Indications (Uses)" for the lenses: "FreshLook soft contact lenses with UV-absorbing monomer help protect against transmission of harmful UV radiation to the cornea and into the eye," and "The lenses may be prescribed for Daily Wear or Extended Wear . . . ." The insert goes on to note, "Long term exposure to UV radiation is one of the risk factors associated with cataracts. . . . UV-absorbing contact lenses help provide protection against harmful UV radiation."

This FDA approved language in the package insert clearly conveys the FreshLook Colors contact lenses in question had medical or therapeutic purposes and physiological effects on the eye, thus making the lenses medical devices. See 21 U.S.C.A. § 321(h) ("The term 'device' . . . means an instrument, apparatus, implement, . . . or other similar or related article, . . . which is . . . intended for use . . . in the cure, mitigation, treatment, or prevention of disease, . . . or intended to affect the structure or any function

of the body . . . ."). Weston's own expert witness did not contradict this conclusion. Dr. Parisian noted the UV symbol on the contact lenses' package and the PMA supplement information established the lenses in question contained a product to help block UV rays from the sun that can be harmful to the human eye. Dr. Parisian also acknowledged that when contact lenses are marketed "for extended wear, then it's a Class III [medical device]."

While these stated uses and warnings contained on both the packaging and package insert of FreshLook Colors contact lenses classify the lenses as medical devices subject to the MDA, they also indicate Import Alert 86-10's inapplicability to the contact lenses. Import Alert 86-10 stated it applied to color contact lenses "[p]rovided they are not marketed with claims that they effect physical or physiological change . . . . [Import Alert 86-10] does not cover contact lenses that are intended for . . . medical or therapeutic use and that are, therefore, properly regulated as medical devices under the [FDCA]." The evidence demonstrates the FreshLook Colors contact lenses in question effect physiological changes and have medical or therapeutic uses, resulting in no change of classification following Import Alert 86-10.

After reviewing the documents, depositions, affidavits, and all other evidence in the record, we find CIBA carried its burden of demonstrating no genuine issue of material fact existed as to whether FreshLook Colors contact lenses of all diopters underwent the rigorous PMA process and were, therefore, subject to regulation by the FDA. See Englert, 315 S.C. at 302, 433 S.E.2d at 873 (stating this court views all facts and reasonable inferences in light most favorable to appellant but is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine"); see generally Weinberger v. Bentex Pharms., Inc., 412 U.S. 645, 653 (1973) (explaining the FDA has jurisdiction to decide the status or class of a medical product).

B. Judgment as a Matter of Law

Having reached this conclusion, we must address the issue of whether Weston's claims are subject to federal preemption, thereby entitling CIBA to judgment as a matter of law. See 21 U.S.C.A. § 360k(a) (explaining the

MDA expressly preempts certain state law requirements governing medical devices); Quigley v. Rider, 357 S.C. 477, 483, 593 S.E.2d 476, 479 (Ct. App. 2003) (explaining when state law and federal law conflict, the former must give way). Whether a federal statute preempts state law is a question of law for the court to decide. See Campbell, 379 S.C. at 599, 666 S.E.2d at 910-11; accord Anderson, 508 F.3d at 191. PMA approval of a medical device by the FDA results in device-specific requirements that preempt inconsistent state requirements, including those sought to be imposed through tort liability. Riegel, 128 S. Ct. at 1007-08; Horn v. Thoratec Corp., 376 F.3d 163, 169 (3rd Cir. 2004); Martin v. Medtronic, Inc., 254 F.3d 573, 584 (5th Cir. 2001). Specifically, the MDA prohibits States from imposing on devices intended for human use "any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." 21 U.S.C.A. § 360k(a). This preemption clause has been read to extend to state tort claims. Riegel, 128 S. Ct. at 1008.

The United States Supreme Court recently held "common-law causes of action for negligence and strict liability do impose 'requirement[s]' and would be pre-empted by federal requirements specific to a medical device." Id. at 1007. The Supreme Court stated, "Absent other indication, reference to a State's 'requirements' includes its common-law duties." Id. at 1008. The Supreme Court reasoned:

> [C]ommon-law liability is "premised on the existence of a legal duty," and a tort judgment therefore establishes that the defendant has violated a state-law obligation. . . . And while the common-law remedy is limited to damages, a liability award "can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Id. (internal quotations and citations omitted). Further, the Supreme Court agreed that "it is implausible that the MDA was meant to 'grant greater power (to set state standards different from, or in addition to federal standards) to a

single state jury than to state officials acting through state administrative or legislative lawmaking processes.'"[4] Id. (internal quotations and citations omitted).

In the present case, the circuit court correctly applied the doctrine of federal preemption because a jury's acceptance of the disputed claims could result in different or additional requirements from the federal requirements. A jury could potentially find additional or different labeling is appropriate for the FreshLook Colors contact lenses, which would affect the model the FDA has already approved. This is not permissible. See id. ("State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect."). Additionally, the United States District Court for the District of South Carolina has stated that "any cause of action based on testing, labeling or marketing is preempted by the FDA standards for premarket approval." Tarallo v. Searle Pharm., Inc., 704 F. Supp. 653, 656 (D. S.C. 1988). Further, that court has found the MDA, "which expressly precludes the individual states from establishing requirements different from or in addition to those promulgated by the FDA, reveals on its face the congressional objective to prohibit, by the doctrine of express preemption, the proliferation of multiple, diverse, state by state device requirements." Stewart v. Int'l Playtex, Inc., 672 F. Supp. 907, 909 (D. S.C. 1987) (emphasis in original).

Any state requirements imposed by a jury verdict in favor of the causes of action at issue would be in addition to or in contradiction of federal requirements, and therefore, Weston's causes of action under South Carolina law are preempted and were properly dismissed by the circuit court. After carrying its burden of proving FreshLook Colors contact lenses were regulated by the FDA as Class III medical devices, CIBA then demonstrated it was entitled to judgment as a matter of law based on the doctrine of federal

[4] By contrast, in March 2009, the United States Supreme Court held federal law does not preempt state tort claims for injuries resulting from inadequate warning labels on prescription medications. Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009).

preemption. Consequently, the circuit court correctly granted summary judgment on all actions dependent on warning, labeling, design, marketing, misbranding, or other similar claims. See Donahue, 362 S.C. at 337, 608 S.E.2d at 165 ("Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

IV. Remaining Issue

Finally, Weston argues the circuit court erred in refusing to amend or clarify certain provisions of its order granting partial summary judgment. We do not reach this argument because we are unable to discern whether Weston raised to the circuit court the issues she now appeals. An appellate court's review is limited to facts appearing in the record. Rule 210(h), SCACR. Weston's February 2007 motion seeking amendment or clarification of the circuit court's order granting partial summary judgment does not appear in the record. Consequently, we are unable to review the circuit court's denial of that motion.

CONCLUSION

As to whether the circuit court erred in granting summary judgment because it lacked jurisdiction to determine whether the contact lenses at issue were federally regulated medical devices, we find the circuit court properly interpreted federal statutes to determine whether the MDA preempted South Carolina law in this matter. Accordingly, we affirm the decision of the circuit court on this issue.

Regarding whether the circuit court erred in granting summary judgment because a genuine issue of material fact existed, we find the circuit court correctly concluded no genuine issue existed as to whether CIBA's FreshLook Colors contact lenses were federally regulated as medical devices. Therefore, we affirm the decision of the circuit court on this issue.

As to whether the circuit court erred in granting summary judgment because there was neither a showing nor a finding that any South Carolina

law conflicted with federal law, we find any jury verdict imposing different requirements than the federal law would constitute an impermissible conflicting state law. Consequently, we affirm the decision of the circuit court on this issue.

We do not reach the issue of whether the circuit court erred in refusing to amend or clarify certain provisions of its summary judgment order because the motion underlying this issue does not appear in the record.

Accordingly, the order of the circuit court is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jennette Canteen, Appellant,

v.

McLeod Regional Medical Center, Employer, and PHT Services, Ltd., Insurer, Respondents.

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 4593
Heard May 13, 2009 – Filed July 15, 2009

REVERSED AND REMANDED

Edward L. Graham, of Florence, for Appellant.

Walter H. Barefoot, of Florence and R. Hawthorne Barrett, of Columbia, for Respondents.

SHORT, J.: Jennette Canteen appeals from the circuit court's order dismissing her appeal and remanding the case to the jurisdictional commissioner of the Workers' Compensation Commission, arguing the court erred by: (1) failing to find the Workers' Compensation Commission's Appellate Panel's decision and order is immediately appealable; (2) failing to find Canteen suffered from asymptomatic Chiari I Malformation prior to July 2, 2001; (3) failing to find Canteen's injury aggravated her previously asymptomatic Chiari I Malformation; (4) finding no medical doctor provided evidence Canteen suffered a physical brain injury and disregarding the medical doctors' evidence; (5) disregarding evidence of Canteen's physical brain damage from herself and three neuropsychologists; (6) finding Dr. Kenneth Kammer's testimony concerning brain damage was equivocal; (7) failing to affirm the Single Commissioner's finding that evidence proved physical brain damage was causally related to Canteen's work injury; and (8) failing to affirm the Single Commissioner's award of lifetime compensation and lifetime medical care. We reverse and remand.

FACTS

Canteen was working as a nurse at McLeod Regional Medical Center (McLeod) when she fell in the operating room on July 2, 2001. As a result of the fall, Canteen claimed she injured her right knee, right leg, cervical spine, head, brain, right arm, and right wrist. Canteen also claimed she suffered from mental injuries, psychological problems, exacerbation of Chiari I Malformation, hemiparesis following Chiari I Malformation surgery, and bladder incontinence. Although Canteen returned to work after the fall, she claimed she was unable to perform all of her duties, leading to her resignation. Sometime after the accident, she claimed she began having headaches and experienced a "clicking" sound when she moved her head. In February 2003, one of Canteen's doctors, Dr. Kenneth Kammer, diagnosed her with Chiari I Malformation, a condition where the "cerebellar tonsils protrude down through the foramen magnum into the cervical spinal canal."[1]

[1] Dr. Robert Braham stated that in his professional opinion, Canteen experienced a physical injury to her brain when she fell at work.

However, evidence was also presented by two other doctors[2] that disputed the Chiari I Malformation diagnosis. Canteen claimed she was totally and permanently disabled with physical brain damage; thus, she was entitled to lifetime compensation and medical care. McLeod admitted the injuries to Canteen's right knee and cervical spine; however, they denied Canteen had Chiari I Malformation and that the Chiari I Malformation decompression surgery was related to her work accident.

After a hearing, the Single Commissioner granted Canteen all of her requested relief and concluded Canteen suffered a brain injury during her fall. Specifically, the Single Commissioner determined Canteen's accident caused her pre-existing Chiari I Malformation to become symptomatic. McLeod appealed only the Single Commissioner's findings that Canteen suffered a brain injury and that the accident triggered her Chiari I Malformation symptoms. The Appellate Panel of the Worker's Compensation Commission reversed the Single Commissioner's findings concerning Canteen's brain injury and remanded the case to the Single Commissioner for a determination of permanency to body parts other than Canteen's brain. Canteen appealed the finding of the brain injury to the circuit court prior to the proceedings before the Single Commissioner regarding the remanded issues. McLeod filed a motion to dismiss based on lack of subject matter jurisdiction, arguing the appeal was interlocutory because the Appellate Panel had remanded the case to the Single Commissioner for further proceedings. The circuit court granted McLeod's motion to dismiss, concluding the court did not have jurisdiction, and dismissed the appeal without prejudice. This appeal followed.

LAW/ANALYSIS

Canteen argues the circuit court erred in finding the Appellate Panel's order was not immediately appealable. We agree.

[2] Dr. Samuel McCown and Dr. Byron Bailey testified they did not believe Canteen suffered from Chiari I Malformation; however, the Single Commissioner found Dr. Kammer to be more credible.

"An appeal to the circuit court will not lie from an interlocutory order of the Workers' Compensation Commission unless such order affects the merits or deprives the appellant of a substantial right." Green v. City of Columbia, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993). "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." Id.

In Green v. City of Columbia, the issue was whether the Workers' Compensation Commission's order sua sponte reversing the election of claims issue involved the merits of the case so as to be immediately appealable to the circuit court. 311 S.C. at 80, 427 S.E.2d at 687. This court found that because the Single Commissioner required the election, that ruling became the law of the case, and the City could therefore rely on the fact that it did not have to address the election issue on review by the Appellate Panel. Id. Thus, this court determined the Appellate Panel's reversal and remand had the effect of finally determining a substantial matter forming part of a defense the City had available because the election issue was the law of the case and Green could not pursue benefits under the statute. Id. Therefore, the Appellate Panel's action affected the merits and was immediately appealable, and the circuit court should have addressed the merits of the City's appeal. Id.

We also find Brown v. Greenwood Mills, Inc., 366 S.C. 379, 382, 622 S.E.2d 546, 548 (Ct. App. 2005), cert. denied, January 31, 2007, and Foggie v. General Electric, 376 S.C. 384, 388, 656 S.E.2d 395, 398 (Ct. App. 2008), to be helpful in determining when an order involves the merits, thus making an issue immediately appealable.[3]

In Brown v. Greenwood Mills, Inc., the Workers' Compensation Commission awarded benefits to Brown for an occupational lung disease.

[3] We find Brown and Foggie helpful even though we recognize that both cases involve remands from the circuit court to the Appellate Panel, unlike in this case where the remand was from the Appellate Panel to the Single Commissioner.

366 S.C. at 382, 622 S.E.2d at 548. The circuit court affirmed the Commission on compensability, but found the Commission should have allocated a portion of Brown's disease to his long history of smoking and remanded for allocation. Id. at 382-83, 622 S.E.2d at 548-49. The remand included "specific direction to make the necessary findings as to the apportionment . . . ." Id. at 386, 622 S.E.2d at 550. This court addressed the appealability of the order:

> Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits. In Owens v. Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984), one of the two cases cited by the Montjoy court, the supreme court found "[t]he order of the circuit court does not involve the merits of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality." Owens, 281 S.C. at 492, 316 S.E.2d at 385 (emphasis added) (citations omitted). Similarly, in Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983), the supreme court held that "[b]ecause the interlocutory order of the circuit court does not involve the merits of the action, it is not reviewable by this Court for lack of finality." Id. (emphasis added) (citations omitted). Accordingly, in determining whether the court's order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits.
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> "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) (citing Henderson v. Wyatt, 8 S.C. 112 (1877)). In the case sub judice, the order of the circuit court finally determined an issue on the merits – that Brown's smoking, a non-compensable cause,

> contributed to his disability. The court noted "the employer does have the burden of proving . . . the interplay of a non-compensable cause" and found "the employer clearly met that burden[.]" Consequently, the circuit court ruled that "the employer was entitled to a determination of the proportion allocable to the non-compensable cause[.]" The case was remanded, not for evaluation whether apportionment was appropriate, but "with specific direction to make the necessary findings as to the apportionment between compensable versus non-compensable causes, and a corresponding reduction in the Claimant's disability award."
>
> The court's order mandates apportionment. This ruling is a decision on the merits because it decides with finality whether Greenwood is required to reduce its compensation. . . . Although the judge left the percentage of apportionment to the commission on remand, the panel would have no choice but to allocate some part of Brown's disability to the non-compensable cause. Accordingly, the circuit court's order constitutes a final decision on the issue of apportionment and is appealable.

Id. at 387-88, 622 S.E.2d at 551 (emphasis in original).

In comparison, in Foggie v. General Electric Co., also a workers' compensation case, this court held an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable. 376 S.C. 384, 388, 656 S.E.2d 395, 398 (Ct. App. 2008). However, we found "where the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision, the order is immediately appealable." Id. at 389, 656 S.E.2d at 398.

In Foggie, the circuit court affirmed the Commission on two issues; however, the court remanded the case to the Commission to make determinations related to permanent total disability and credit for veteran's disability. Id. at 387, 656 S.E.2d at 397. This court distinguished Foggie from Brown because the order in Brown finally determined the issue on the merits – that the employee's smoking contributed to his disability – and the remand by the circuit court determined with finality whether there would be a reduction in compensation, leaving open only the determination of the percentage of apportionment for the Commission. Id. at 389, 656 S.E.2d at 398. Whereas, the order in the Foggie case was not a final decision on the merits because the circuit court did not make a final determination regarding whether or not the claimant was totally and permanently disabled and did not finally determine the employer's entitlement to the veteran's disability credit. Id. This court found that both of the remanded issues in Foggie were matters within the purview of the Commission, and because the issues had not been properly considered by the Commission, the circuit court was correct in remanding the case. Id. at 390, 656 S.E.2d at 398. Moreover, the Commission was the ultimate fact finder, and the appellate court would have violated the governing APA statues by reviewing the record and making factual findings on the remanded issues. Id. at 390, 656 S.E.2d at 398-99. Therefore, this court held the circuit court order remanding the two issues was not a final decision on the merits and, thus, was not immediately appealable. Id.

Here, the Appellate Panel reversed the Single Commissioner's specific findings concerning Canteen's brain injury and remanded the case to the Single Commissioner for a determination of permanency to body parts other than Canteen's brain. Thus, we find this case is similar to Green and Brown because the Appellate Panel finally determined the brain injury issue on the merits by denying compensation for Canteen's brain injury. Therefore, because the Appellate Panel ruled on that issue, there was a final agency decision on the merits in this case and Canteen exhausted all of her administrative remedies.[4] As a result, the Appellate Panel's order was not

[4] South Carolina Code section 1-23-380 states that "[a] party who has exhausted all administrative remedies available within the agency and who is

interlocutory as to the ruling on Canteen's brain injury. Because this issue is dispositive of the case, we do not reach the merits of Canteen's remaining issues. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

Accordingly, the circuit court's order dismissing Canteen's appeal is reversed, and the case is remanded to the circuit court for a determination on Canteen's brain injury.

REVERSED AND REMANDED.

WILLIAMS and LOCKEMY, JJ., concur.

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aggrieved by a final decision in a contested case is entitled to judicial review." S.C. Code Ann. § 1-23-380 (Supp. 2008).