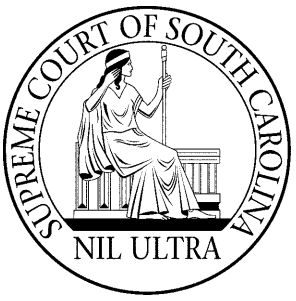

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38
September 28, 2016
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 Charles Lee Anderson, Respondent.

Appellate Case No. 2016-001473

Opinion No. 27668
Submitted September 13, 2016 – Filed September 28, 2016

DEFINITE SUSPENSION

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

Charles Lee Anderson, of Anderson, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules. In the Agreement, respondent admits misconduct and consents to a definite suspension, not to exceed three years, or disbarment. Respondent requests the sanction be made retroactive to the date of interim suspension,[1] but understands that if the Court declines to apply the sanction retroactively, the validity or enforceability of the Agreement is not affected. ODC does not oppose the request. As a condition of discipline, respondent agrees to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School prior to reinstatement. We accept the Agreement and suspend respondent from the

[1] Respondent was placed on interim suspension by order dated January 14, 2014. *In re Anderson*, 406 S.C. 641, 753 S.E.2d 532 (2014).

practice of law in this state for two years, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

In January 2014, respondent pled guilty to making false statements in a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. § 1001. Respondent made one or more false, fictitious and fraudulent statements and representations in an ongoing investigation by agents of the Drug Enforcement Agency and Homeland Security of a large-scale cocaine conspiracy that led to federal charges against multiple individuals, including a client of respondent. On June 23, 2014, respondent was sentenced to five months' imprisonment, and upon release, will be on supervised release for three years, be placed on a location monitoring program with radio frequency electronic monitoring for five months, and be required to perform 100 hours of community service or complete a week long community service project.

Respondent admits his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(d)(a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent); Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c)(it is professional misconduct for a lawyer to commit a criminal act involving moral turpitude); Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e)(it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Matter B

Respondent represented a client (Client A) in a personal injury matter. He also represented the client's mother (Client B) in her capacity as personal representative of the estate of Client A's father. Client A signed a contingency agreement, while

Client B paid a flat fee for representation. Respondent settled the liability portion of the personal injury matter for $25,000, which was the full amount of the policy involved, and the underinsured claim was settled for $8,000.

During the same time period, respondent reached an agreement with regard to the estate of Client A's father pursuant to which Client B would agree to pay $24,000 within ninety days to satisfy the claims of two illegitimate children, thereby freeing up the property of the estate for Client B. Client B was unable to obtain $24,000 within the ninety-day time period, so Client A verbally authorized respondent to use the monies held in trust from the personal injury settlement to pay Client B's debt with the estate. The understanding among the parties was that Client B would then obtain an equity line mortgage on the property and use the proceeds to repay Client A.

Respondent admits he should have obtained written consent from Client A before transferring any monies held in trust from the personal injury settlement. He also admits his conduct violates the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(a)(a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued; a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation); Rule 1.15 (requirements for safekeeping client property); and Rule 8.4(e), *supra*.

Respondent further admits the conduct constitutes grounds for discipline under Rule 7(a)(1), (4), and (5), RLDE.[2]

Conclusion

We hereby suspend respondent from the practice of law in this state for two years, retroactive to the date of his interim suspension. Respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School prior to reinstatement.

[2] These provisions state it is a ground for discipline for a lawyer to violate the Rules of Professional Conduct, be convicted of a crime or moral turpitude or a serious crime, and to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Isaac Diggs, Respondent.

Appellate Case No. 2016-001316

Opinion No. 27669
Submitted September 8, 2016 – Filed September 28, 2016

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William Isaac Diggs, of Myrtle Beach, *pro se*.

PER CURIAM: On June 9, 2016, respondent was disbarred from the North Carolina State Bar. *See* Attached Opinion. Respondent failed to inform the Office of Disciplinary Counsel (ODC) of his disbarment as required by Rule 29(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). After ODC notified the Court of respondent's disbarment, the Clerk of this Court sent a letter to ODC and respondent notifying them that, pursuant to Rule 29(b), RLDE, they had thirty (30) days in which to inform the Court of any claim as to why identical discipline should not be imposed. Respondent failed to respond. ODC filed a response stating that respondent should be disbarred and ordered to pay restitution to those clients from whom he misappropriated funds for his personal use and benefit and to the Lawyers' Fund for Client Protection (Lawyers' Fund) for claims it paid on his behalf.

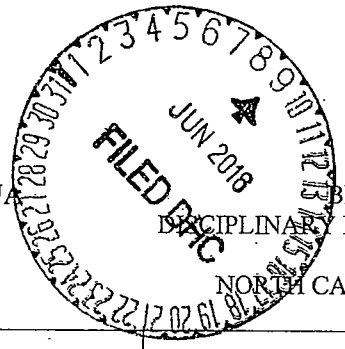
In similar cases of misconduct, this Court has imposed disbarment and ordered the payment of restitution. *In the Matter of Cutchin*, 412 S.C. 144, 771 S.E.2d 845 (2015); *In the Matter of Miller*, 406 S.C. 495, 753 S.E2d 242 (2014); *In the Matter of Lafaye*, 399 S.C. 12, 731 S.E.2d 282 (2012). Accordingly, we find respondent's misconduct warrants both his disbarment and the payment of restitution.

Within thirty (30) days of the date of this opinion, ODC and respondent shall enter into a restitution plan in which respondent shall agree to pay restitution to all clients harmed by his misconduct in this matter and to the Lawyers' Fund for claims paid on his behalf.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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



STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 16 DHC 15
THE NORTH CAROLINA STATE BAR, Plaintiff v. WILLIAM I. DIGGS, Attorney, Defendant	ORDER OF DISCIPLINE

THIS MATTER was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of the Chair, Joshua W. Willey, Jr., and members Shirley L. Fulton and Tyler B. Morris upon Plaintiff's Motion for Order of Discipline. Jennifer A. Porter represented Plaintiff, the North Carolina State Bar. Defendant William I. Diggs (hereinafter Defendant or Diggs) was not represented, did not make an appearance in this matter, and did not file any written submissions in response to Plaintiff's Motion for Order of Discipline. After review of the pleadings herein and pursuant to 27 N.C. Admin. Code § 1B.0114(f), the Hearing Panel determines it is appropriate to grant Plaintiff's Motion for Order of Discipline.

THEREFORE, based on the pleadings and the admissions established by Defendant's default pursuant to 27 N.C. Admin. Code §1B.0114(f), the Hearing Panel hereby finds by clear, cogent and convincing evidence the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar (Chapter 1 of Title 27 of the North Carolina Administrative Code).

2. Defendant, William I. Diggs (hereinafter "Diggs" or "Defendant"), was admitted to the North Carolina State Bar in 1980, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Revised Rules of Professional Conduct.

3. The Complaint in this action was filed on April 7, 2016.

4. Defendant was served with the Summons and Complaint on April 9, 2016.

5. Defendant failed to file an answer or any responsive pleading by the deadline established by 27 N.C. Admin. Code 1B § .0114(e).

6. Upon Plaintiff's motion, default was entered against Defendant by the Secretary of the State Bar on 26 May 2016.

7. Plaintiff filed a Motion for Order of Discipline on 26 May 2016 and served the motion on that date by depositing a copy of the same in the U.S. Mail in a postage prepaid envelope addressed to Defendant's address of record.

8. During all or part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of South Carolina, where he was also licensed to practice law.

9. In the course of his law practice, Defendant maintained and utilized an attorney trust account at National Bank of South Carolina (NBSC), a division of Synovus Bank, account number ending in digits 6601 ("trust account").

10. Defendant also had an operating account for his law practice at NBSC, account number ending in digits 2701 ("operating account").

11. Between July 2009 and September 2014, Defendant deposited entrusted funds for clients into his trust account, including funds for the following client matters: Sapps Estate; Tisdale minors.

12. From August 2009 through September 2014, Defendant should have maintained in his trust account entrusted funds in excess of $100,000.00 for his clients, including but not limited to funds on behalf of the Sapps Estate and the Tisdale minors.

13. Defendant failed to maintain his clients' entrusted funds in his trust account, including but not limited to funds for the Sapps Estate and the Tisdale minors, as shown by the following:

a. As of February 12, 2012, the balance of Defendant's trust account was $103.78.

b. As of June 5, 2012, the balance of Defendant's trust account was $21.09.

c. Defendant's trust account balance remained $21.09 until September 2012.

d. In September 2012, he transferred $2,500.00 from his operating account to his trust account and immediately disbursed the $2,500.00 by check on behalf of a Tisdale minor, which returned the trust account balance to $21.09.

e. Defendant's trust account balance remained at $21.09 until the end of October 2012, when a $300.00 disbursement resulted in a negative balance on October 30, 2012 of -$278.91.

f. As of October 31, 2012, the balance of Defendant's trust account was -$314.91.

g. As of March 15, 2013, the balance of Defendant's trust account was $325.94.

h. As of October 4, 2013, the balance of Defendant's trust account was $79.84.

i. As of December 20, 2013, the balance of Defendant's trust account was $64.17.

j. As of January 13, 2014, the balance of Defendant's trust account was $117.17.

k. As of March 26, 2014, the balance of Defendant's trust account was $559.17.

l. As of May 16, 2014, the balance of Defendant's trust account was $55.81.

14. In March and April 2014, Defendant made two disbursements from his trust account on behalf of Tisdale. By this time, however, Defendant did not have funds for this client in his trust account.

15. Between August 2009 and September 2014, Defendant disbursed funds from his trust account through improper means and without identification of the client whose funds were being disbursed, including as follows:

a. Electronic transfers from his trust account to his operating account;

b. Checks made payable to cash;

c. Debit counter withdrawals;

d. Checks made payable to him.

16. Through the above-described means, Defendant misappropriated entrusted funds from his attorney trust account for his personal use and benefit.

17. By letter dated September 19, 2014, Defendant reported his misappropriation of the Sapps Estate and Tisdale entrusted funds to the South Carolina Office of Disciplinary Counsel.

18. In his letter reporting his misappropriation of the Sapps Estate and Tisdale funds, Defendant admitted "I was not pushed to distribute these funds quickly and they remained in trust. Over time, I used all of these funds from both cases to cover office overhead."

19. By letter dated September 22, 2014, Dundee W. Carter, Horry County Associate Judge of Probate, notified the South Carolina Commission on Lawyer Conduct that at an in-chambers meeting held to discuss Defendant's failure to disburse the Sapps Estate funds to counsel for the conservator for the minor beneficiaries, Defendant admitted the funds had been depleted from his trust account by transfer into his operating account and the Sapps Estate funds were no longer available for disbursement.

20. Defendant did not report his misappropriation to the North Carolina State Bar.

21. By letter dated September 29, 2014, the Supreme Court of South Carolina Commission on Lawyer Conduct notified the North Carolina State Bar of its September 23, 2014 order placing Defendant on interim suspension in South Carolina.

22. On October 1, 2014 the North Carolina State Bar initiated a grievance investigation regarding Defendant's misappropriation of entrusted funds.

23. On October 9, 2014, the North Carolina State Bar served Defendant by certified mail with a letter of notice in the grievance investigation concerning his misappropriation of entrusted funds. Defendant had fifteen days from service to respond to the State Bar's inquiry in the disciplinary matter.

24. Defendant failed to respond to the inquiry of the State Bar in the disciplinary matter.

25. The above described improper transfers and disbursements of entrusted funds and admitted misappropriation occurred during times of demonstrable financial need on the part of Defendant, as shown in part by multiple negative balances in his operating account including as follows:

a. In 2009, the balance of Defendant's operating account was negative on several occasions, including on the following dates: October 15 (-

$157.34); October 26 (-$94.44); October 27 (-$722.54), November 17 (-$218.34); November 18 (-$326.34); November 19 (-$850.35); December 15 (-$545.40).

b. In 2010, the balance of Defendant's operating account was negative on several occasions, including on the following dates: February 9 (-$434.27); February 10 (-$1,003.63); February 11 (-$2,445.06); February 18 (-$561.55); April 2 (-$175.49); April 6 (-$489.04); April 7 (-$633.04); April 8 (-$729.88); May 14 (-$53.58); May 25 (-$330.29); May 26 (-$402.29); July 12 (-$1,110.32); July 13 (-$1,218.32); July 15 (-$182.51); July 19 (-$758.60); August 11 (-$794.71); August 17 (-$402.20); October 13 (-$1,529.10); October 14 (-$1,958.41).

c. In 2011, the balance of Defendant's operating account was negative on several occasions, including on the following dates: January 3 (-$647.91); January 4 (-$828.91); January 5 (-$2,237.29); January 6 (-$179.29); January 18 (-$705.77); January 19 (-$271.89); January 20 (-$90.17); January 28 (-$819.10); January 31 (-$54.89); February 2 (-$153.79); February 3 (-$319.79); February 4 (-$839.26); February 7 (-$1,185.26); February 9 (-$543.26); February 10 (-$885.04); February 15 (-$470.47); March 2 (-$969.59); March 3 (-$1,063.59); March 4 (-$495.06); March 9 (-$142.92); March 10 (-$1,273.92); March 18 (-$517.76); March 21 (-$879.98); March 23 (-$499.01); March 25 (-$94.39); April 4 (-$336.34); April 7 (-$52.06); April 8 (-$776.00); April 19 (-$1,268.13); April 25 (-$657.43); April 26 (-$983.15); May 6 (-$786.06); May 9 (-$274.91); May 10 (-$1,502.61); May 23 (-$10.52).

d. In 2012, the balance of Defendant's operating account was negative on the following dates: March 14 (-$108.15); March 15 (-$299.12); March 30 (-$1,529.82); March 31 (-$1,539.82); June 4 (-$1,737.41); June 5 (-$13.81); June 7 (-$187.06); June 12 (-$121.51); June 19 (-$122.31); June 20 (-$340.67).

26. When the above itemized negative balances occurred in this operating account, Defendant often transferred funds from his trust account to his operating account to return the balance of his operating account to a positive balance.

Based upon the pleadings, Defendant's default, and the foregoing Findings of Fact, the Hearing Panel enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel, and the Panel has jurisdiction over Defendant and the subject matter of this proceeding.

2. Defendant has failed to file any responsive pleading in this matter and a proper entry of default has been entered by the Secretary of the State Bar.

3. Section .0114(f) of the North Carolina State Bar Discipline and Disability Rules provides that, upon entry of the defendant's default by the Secretary, the allegations in the complaint will be deemed admitted. The State Bar counsel may then apply to the hearing panel for a default order imposing discipline, and "the hearing panel will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate." The hearing panel may, but is not required, to hear additional evidence before entering an order of discipline. 27 N.C. Admin. Code § 1B.0114(f).

4. The allegations of Plaintiff's complaint are deemed admitted.

5. Knowing and willful misappropriation of money by a fiduciary constitutes the crime of embezzlement under N.C. Gen. Stat. § 14-90. Embezzlement is a felony.

6. Defendant knowingly and willfully misappropriated entrusted funds on multiple occasions over several years.

7. Additional evidence is not necessary to determine the appropriate discipline in this case.

8. Defendant's conduct, as set forth in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(3) for failure to answer the formal inquiry issued by the North Carolina State Bar in a disciplinary matter, and pursuant to N.C. Gen. Stat. § 84-28(b)(2) for violation of the following Rules of Professional Conduct in effect at the time of the conduct:

(a) By disbursing to himself entrusted funds from his trust account to which he was not entitled, Defendant failed to hold and maintain separate from his property the entrusted funds of his clients in violation of Rule 1.15-2(a), used entrusted funds for his personal benefit in violation of Rule 1.15-2(j), and failed to promptly pay or deliver entrusted funds in violation of Rule 1.15-2(m);

(b) By knowingly disbursing to himself entrusted funds to which he was not entitled, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation in violation of Rule 8.4(c);

(c) By issuing checks to "cash" from his trust account, Defendant used items drawn on a trust account made payable to cash to withdraw funds from his trust account in violation of Rule 1.15-2(h);

(d) By using electronic transfers, checks made payable to himself or to cash without client attribution, and counter withdrawals to disburse funds from his trust account in a manner that failed to produce the record required under Rule 1.15-3(b)(2) identifying the client from whose funds in the trust account the disbursement was being made, Defendant failed to disburse entrusted funds in accordance with Rule 1.15 in violation of Rule 1.15-2(a), and failed to maintain requisite records for his trust account in violation of Rule 1.15-3(b)(2);

(e) By failing to report his misappropriation of entrusted funds to the North Carolina State Bar, Defendant failed to promptly inform the North Carolina State Bar of the misappropriation of entrusted funds in violation of Rule 1.15-2(o);

(f) By failing to respond to the letter of notice issued to him by the State Bar in its grievance investigation, Defendant knowingly failed, in connection with a disciplinary matter, to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b).

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Panel hereby finds by clear, cogent and convincing evidence the following additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The findings of fact in paragraphs 1 – 26 above are reincorporated as if set forth herein.

2. Defendant diverted funds that should have been available for minor beneficiaries and other clients and converted them to his own use.

3. Defendant misappropriated entrusted funds over the course of several years to satisfy personal financial needs throughout that period of time.

4. Defendant's misappropriation of the entrusted funds due to the minor beneficiaries of the Sapps Estate and concomitant failure to comply with his obligation to disburse the Sapps Estate funds to counsel for the conservator for the minor beneficiaries necessitated appearance before Judge Dundee W. Carter in Horry County, South Carolina.

5. At the meeting with the judge, Defendant had to admit he no longer had the Sapps Estate funds to disburse. Accordingly, the judge was unable to compel the disbursement of the Sapps Estate funds to counsel for the conservator that was warranted.

6. Defendant also no longer has the funds for the Tisdale minor that he should have maintained.

7. Defendant failed to participate in the profession's self-regulation, by failing to report his misappropriation to the North Carolina State Bar and failing to respond to the letter of notice concerning his misappropriation.

8. Defendant placed his own personal interests over those of his clients, including the minors for whom he should have maintained entrusted funds.

9. Defendant, by engaging in conduct involving misappropriation, misrepresentation and deceit for a substantial period of time, has shown himself to be untrustworthy.

10. The perception of the profession in the eyes of clients and the public is negatively affected by an attorney's misappropriation of entrusted funds belonging to clients and to minors.

11. Defendant has no prior record of disciplinary offenses.

12. Defendant has been licensed since 1980. With his degree of experience, Defendant should have known better than to engage in these acts that have led to the discipline imposed in this order.

13. The Hearing Panel finds by clear, cogent, and convincing evidence any additional facts that may be contained in the conclusions regarding discipline set out below.

Based on the foregoing Findings of Fact, Conclusions of Law, and Additional Findings Regarding Discipline, the Hearing Panel enters the following

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel carefully considered all of the different forms of discipline available to it.

2. The Hearing Panel considered all of the factors enumerated in 27 N.C. Admin. Code § 1B.0114(w)(1), (2) and (3) and determined that the following factors are applicable:

27 N.C. Admin. Code § 1B.0114(w)(1)

a. Factor (B), Intent of Defendant to commit acts where the harm or potential harm is foreseeable;

b. Factor (C), Circumstances reflecting Defendant's lack of honesty, trustworthiness, or integrity;

c. Factor (D), Elevation of Defendant's own interest above those of his clients;

d. Factor (E), Negative impact of Defendant's actions on client's or public's perception of the profession;

e. Factor (I), Acts of dishonesty, misrepresentation, deceit or fabrication;

27 N.C. Admin. Code § 1B.0114(w)(2)

f. Factor (A), Acts of dishonesty, misrepresentation, deceit or fabrication;

g. Factor (C), Misappropriation or conversion of assets of any kind to which Defendant or recipient was not entitled, whether from a client or any other source;

h. Factor (D), Commission of a felony;

27 N.C. Admin. Code § 1B.0114(w)(3)

i. Factor (A), No prior record of disciplinary offenses;

j. Factor (C), Dishonest or selfish motive;

k. Factor (F), A pattern of misconduct;

l. Factor (G), Multiple offenses;

m. Factor (K), Absence of full and free disclosure to the Hearing Panel;

n. Factor (R), Vulnerability of the victims; and

o. Factor (S), Substantial degree of experience in the practice of law.

3. The factors present under 27 N.C. Admin. Code § 1B.0114(w)(1) and (2) support imposition of disbarment in this case.

4. Defendant caused significant harm to his clients and to minor beneficiaries by misappropriating their entrusted funds.

5. Proper maintenance and management of entrusted funds is a cornerstone of the public's trust in the legal profession. Embezzlement is one of the most serious

offenses an attorney can commit, betraying the client's trust in the attorney and the public's trust in the legal profession. Defendant's misappropriation caused harm to the standing of the legal profession, undermining trust and confidence in lawyers and the legal system.

6. Defendant's repeated commission of criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer caused potential significant harm to the legal profession, in that criminal conduct tends to bring the legal profession into disrepute.

7. Defendant's failure to respond to the letter of notice from the State Bar and failure to participate in this disciplinary proceeding before the DHC results in potential significant harm to the profession and to the public. The legal profession is entrusted with the privilege of self-regulation. The State Bar can only regulate the profession if its members respond to inquiries of the State Bar and otherwise participate. Defendant's failure to respond to the State Bar and participate in this disciplinary proceeding before the DHC shows an unacceptable disregard for the regulatory authority of the State Bar. Defendant's failure to participate in the profession's self-regulation impedes effective self-regulation and jeopardizes the privilege of the profession to remain self-regulating.

8. The Hearing Panel has considered lesser alternatives and finds that suspension of Defendant's license or a public censure, reprimand, or admonition would not be sufficient discipline because of the gravity of the actual and potential harm to his clients, the public, the administration of justice, and the legal profession caused by Defendant's conduct, and the threat of potential significant harm Defendant poses to the public.

9. The Hearing Panel considered all lesser sanctions and finds that discipline short of disbarment would not adequately protect the public for the following reasons:

a. Defendant repeatedly engaged in criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer, and abused the trust placed in him by his clients and as a fiduciary. Misappropriation of entrusted funds is among the most serious misconduct in which an attorney can engage, and demonstrates the attorney is not trustworthy;

b. Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State; and

c. The protection of the public and the legal profession requires that Defendant not be permitted to resume the practice of law until he demonstrates the following: that he has reformed; that he understands his

obligations to his clients, the public, and the legal profession; and that permitting him to practice law will not be detrimental to the public or the integrity and standing of the legal profession or the administration of justice. Disbarred lawyers are required to make such a showing before they may resume practicing law.

Based on the foregoing Findings of Fact, Conclusions of Law, and additional Findings of Fact and Conclusions of Law Regarding Discipline, the Hearing Panel hereby enters the following

ORDER OF DISCIPLINE

1. Defendant, William I. Diggs, is hereby DISBARRED from the practice of law.

2. Defendant shall surrender his North Carolina law license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon Defendant.

3. Defendant shall pay the fees and the costs of this proceeding as assessed by the Secretary of the North Carolina State Bar. Defendant must pay the fees and costs within 30 days of service upon him of the statement of fees and costs by the Secretary.

4. Defendant shall comply with all provisions of 27 N.C. Admin. Code § 1B.0124 of the North Carolina State Bar Discipline & Disability Rules.

5. Within 15 days of the effective date of this Order Defendant shall provide the State Bar with an address and telephone number at which clients seeking return of files can communicate with Defendant and obtain such files. This address must be a physical address at which Defendant maintains a consistent presence and receives mail. Defendant must keep this information current with the State Bar, providing updated information to the State Bar within 15 days of any change.

6. Defendant shall promptly return client files in his possession, custody, or control to clients upon request, within 5 days of receipt of such request. Defendant will be deemed to have received any such request 3 days after the date such request is sent to Defendant, if the request is sent to the address Defendant provided the State Bar pursuant to the preceding paragraph or to Defendant's address of record with the State Bar if Defendant fails to provide another address pursuant to the preceding paragraph.

Signed by the Chair with the consent of the other Hearing Panel members, this the 2nd day of June, 2016.

Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel

The foregoing 12 pages are true and accurate copies of the official records of the N.C. State Bar

Secretary N.C. State Bar

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Anderson County. Effective October 18, 2016, all filings in all common pleas cases commenced or pending in Anderson County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Clarendon	Lee	Greenville
Sumter	Williamsburg	Pickens
Spartanburg	Cherokee	

Anderson—Effective October 13, 2016

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

Columbia, South Carolina
September 28, 2016

The Supreme Court of South Carolina

Amendment to Rule 31(g) and (h) of the Rules for
Lawyer Disciplinary Enforcement, Rule 413, SCACR

Appellate Case No. 2015-001286

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 31(g) and (h) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) are amended to read as follows:

> **(g) Termination of Receivership.** When the provisions of (d) above and the order of receivership have been complied with, the receiver shall apply to the Supreme Court for termination of the receivership. The application shall contain the written releases of clients to whom files and other property were returned, information regarding the efforts made to contact the lawyer's remaining clients, an inventory of the files and other property remaining in the receiver's possession, an itemized account of the expenses incurred in carrying out the order of receivership, and documentation of time spent by the receiver and the receiver's staff in carrying out the order of receivership. The Supreme Court may order the lawyer to reimburse the receiver for expenses incurred and time spent in carrying out the order of receivership. Expenses and fees for the receiver and the receiver's staff time which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts. If either no such funds exist or the remaining funds are insufficient, the Supreme Court may direct that payment be made from the Lawyers' Fund for Client Protection. If the receiver's expenses or fees are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that Fund.

(h) Appointment of Attorneys to Assist the Receiver. Upon petition of the receiver, the Supreme Court may appoint members of the South Carolina Bar as needed to assist the receiver in performing duties under this rule. With the exception of reasonable and necessary expenses, such as postage, telephone bills, copies, supplies and the cost of publishing legal notice in the newspaper, an appointed attorney shall serve without compensation as a service to the legal profession. However, the Supreme Court may order that the appointed attorney be reimbursed a reasonable amount for other expenses, such as the appointed attorney's time or the time of support staff, when it determines that extraordinary time and services were necessary for the completion of the required duties or when the appointment has worked a substantial hardship on the appointed attorney's practice. The Supreme Court shall determine the reasonableness of necessary expenses and other expenses. Expenses which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts. If either no such funds exist or the remaining funds are insufficient, the Supreme Court may direct that payment be made from the Lawyers' Fund for Client Protection. If the appointed attorney's expenses are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that Fund.

This amendment is effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
September 28, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated, Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc., a division of Trammell Crow Residential, each individually and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty, LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a/ "Halter Companies"; Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation; Budget Mechanical Plumbing, Inc.; Builders First Source-Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Association, P.A. and Gary D. Cline; Coastal Lumber & Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner

Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida; RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Of whom TAMKO Building Products, Inc., is the Appellant.

VNS Corp., individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc., Third-Party Plaintiff,

v.

Billy Grady d/b/a United Builders, LLC, Third-Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant.

Appellate Case No. 2014-002115

Appeal From Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5407
Heard May 4, 2016 – Filed June 1, 2016
Withdrawn, Substituted and Refiled September 28, 2016

REVERSED

Richard Hood Willis, Paula Miles Burlison, and Angela Gilbert Strickland, all of Bowman & Brooke, LLP, of Columbia, for Appellant.

Justin O'Toole Lucey and Dabny Lynn, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

WILLIAMS, J.: In this civil matter, Tamko Building Products, Inc. (Tamko) appeals the circuit court's denial of its motion to dismiss One Belle Hall Property Owners Association, Inc. (the Association) and Brandy Ramey's (collectively "Respondents") claims and compel them to arbitration. Tamko argues the court erred in finding the arbitration agreement located in its limited warranty was unconscionable and unenforceable. We reverse.

FACTS/PROCEDURAL HISTORY

This appeal arises from a dispute over the construction of One Belle Hall (OBH), an upscale condominium community in Mount Pleasant, South Carolina. The Association is responsible for the management and administration of the OBH community as well as the investigation, maintenance, and repair of its common elements. Headquartered in Joplin, Missouri, Tamko manufactures and sells residential and commercial roof shingles nationally and internationally.

During the construction of OBH, and prior to the transfer of ownership from its developers to the Association, a roofing subcontractor installed Tamko's "Elite Glass-Seal AR" asphalt shingles to the roofs of the condominium community's four buildings. Tamko covered the installed shingles with a twenty-five-year "repair or replace" limited warranty (Warranty) against manufacturing defects. At issue in this case is a binding arbitration provision on page five of the Warranty information that provided the following:

> **MANDATORY BINDING ARBITRATION**: EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE SHINGLES OR THIS LIMITED WARRANTY SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT www.adr.com OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED

MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

Legal Remedies: EXCEPT WHERE PROHIBITED BY LAW, THE OBLIGATION CONTAINED IN THIS LIMITED WARRANTY IS EXPRESSLY IN LIEU OF ANY OTHER OBLIGATIONS, GUARANTIES, WARRANTIES, AND CONDITIONS EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY OTHER OBLIGATIONS OR LIABILITY ON THE PART OF TAMKO BUILDING PRODUCTS, INC. IN NO EVENT SHALL TAMKO BE LIABLE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY KIND. SOME STATES DO NOT ALLOW EXCLUSION OR LIMITATION OF IMPLIED WARRANTIES OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU. NO ACTION FOR BREACH OF THIS LIMITED WARRANTY OR ANY OTHER ACTION AGAINST TAMKO RELATING TO OR ARISING OUT OF THE SHINGLES, THEIR PURCHASE OR THIS TRANSACTION SHALL BE BROUGHT LATER THAN ONE YEAR AFTER ANY CAUSE OF ACTION HAS ACCRUED. IN JURISDICTIONS WHERE STATUTORY CLAIMS OR IMPLIED WARRANTIES AND CONDITIONS CANNOT BE EXCLUDED, ALL SUCH STATUTORY CLAIMS, IMPLIED WARRANTIES AND CONDITIONS AND ALL RIGHTS TO BRING ACTIONS FOR BREACH THEREOF EXPIRE ONE YEAR (OR SUCH LONGER PERIOD OF TIME IF MANDATED BY APPLICABLE LAWS) AFTER THE

DATE OF PURCHASE. SOME STATES AND PROVINCES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY OR CONDITION LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. THIS LIMITED WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE AND PROVINCE TO PROVINCE. Invalidity or unenforceability of any provision herein shall not affect the validity or enforceability of any other provision which shall remain in full force and effect.

ANY ACTION BROUGHT BY YOU AGAINST TAMKO WILL BE ARBITRATED (OR, IF ARBITRATION OF THE ACTION IS NOT PERMITTED BY LAW, LITIGATED) INDIVIDUALLY AND YOU WILL NOT CONSOLIDATE, OR SEEK CLASS TREATMENT FOR, ANY ACTION UNLESS PREVIOUSLY AGREED TO IN WRITING BY BOTH TAMKO AND YOU.

NO REPRESENTATIVE, EMPLOYEE OR OTHER AGENT OF TAMKO, OR ANY PERSON OTHER THAN TAMKO'S PRESIDENT, HAS AUTHORITY TO ASSUME FOR TAMKO ANY ADDITIONAL LIABILITY OR RESPONSIBILITY IN CONNECTION WITH THE SHINGLES EXCEPT AS DESCRIBED ABOVE.

At some point following OBH's completion, Respondents assert the community's buildings were affected by moisture damage, water intrusion, and termite damage, all resulting from various alleged construction deficiencies. In February 2010, a developer of OBH contacted Tamko to report a warranty claim on the roof shingles, contending they were blistering and defective. As part of its standard warranty procedure, Tamko sent the developer a "warranty kit," requiring the

claimant to provide proof of purchase, samples of the allegedly defective shingles, and photographs. The developer failed to return the warranty kit within 120 days and, therefore, Tamko inactivated the warranty plan.

On November 19, 2012, Respondents filed a proposed class action lawsuit on behalf of all owners of condominium units at OBH, alleging defective construction against the community's various developers. Respondents amended their complaint on December 30, 2013, to bring, *inter alia*, causes of action for negligence, breach of warranty, and strict liability against numerous contractors and commercial entities, including Tamko for its allegedly defective roof shingles. Tamko filed a motion to dismiss and compel arbitration on February 28, 2014, arguing Respondents were bound by the arbitration clause provided in the Warranty for its roof shingles. Respondents filed a memorandum in opposition to Tamko's motion, contending neither the Association nor the property owners ever agreed to arbitrate, and the arbitration clause was unconscionable and unenforceable.

After holding a hearing on the matter, the circuit court denied Tamko's motion to compel arbitration on September 17, 2014. In its order, the court ruled that South Carolina law invalidated several of the Warranty's provisions, including the arbitration agreement. Specifically, the court noted that the sale of Tamko's shingles was based upon an adhesion contract, and Respondents lacked any meaningful choice in negotiating warranty and arbitration terms. Relying heavily upon two prior cases addressing the subject,[1] the court held the arbitration agreement was unconscionable and unenforceable due to the cumulative effect of several oppressive and one-sided terms in the Warranty. Last, the court found it could not uphold the arbitration agreement because it was not severable from the Warranty's unlawful terms. This appeal followed.

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C.

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[1] *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), *aff'd*, Op. No. 27645 (S.C. Sup. Ct. filed July 6, 2016) (Shearouse Adv. Sh. No. 27 at 12).

580, 596, 553 S.E.2d 110, 118 (2001). This court reviews an arbitrability determination de novo. *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667.

LAW/ANALYSIS

Tamko argues the circuit court erred in finding the arbitration provision located in the Warranty was unconscionable and unenforceable. We agree.

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. Unless the parties have contracted otherwise, the Federal Arbitration Act[2] (FAA) applies in federal or state court to any arbitration agreement involving interstate commerce.[3] *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The FAA provides that a written arbitration provision in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). "Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

"General contract principles of state law apply to arbitration clauses governed by the FAA." *Id.* at 539, 542 S.E.2d at 364. Thus, courts may invalidate arbitration agreements on general state law "contract defenses, such as fraud, duress, and unconscionability." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116.

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[2] 9 U.S.C. §§ 1–16 (2012).

[3] Tamko is headquartered in Joplin, Missouri, and has several manufacturing facilities across the country, none of which are located in South Carolina. Therefore, because the subject shingles were sold in interstate commerce, the circuit court properly determined the FAA applies in this matter.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. "In analyzing claims of unconscionability of arbitration agreements, the [U.S. Court of Appeals for the] Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

In *Simpson*, our supreme court held an arbitration clause in a vehicle trade-in contract between an automobile dealership and customer was unconscionable and unenforceable. 373 S.C. at 34, 644 S.E.2d at 674. In upholding the denial of the dealer's motion to compel arbitration, the court first found the customer had no meaningful choice in agreeing to arbitrate. *Id.* at 25–28, 644 S.E.2d at 699–70. The court noted the trade-in agreement was an adhesion, or "take-it-or-leave-it," contract that it viewed with "considerable skepticism" because automobiles are necessities in modern society. *Id.* at 26–27, 644 S.E.2d at 669–70. According to the court, the customer lacked business judgment to fully understand the ramifications of agreeing to arbitrate, had no attorney present to assist her, and was "hastily" presented with the contract by the dealer for her signature. *Id.* at 27, 644 S.E.2d at 670.

Further, the *Simpson* court found the arbitration clause's limitation on statutory remedies was oppressive and one-sided. *Id.* at 28–30, 644 S.E.2d at 670–71. The court pointed out that the clause prohibited an arbitrator from awarding statutorily required double and treble damages for violations of the South Carolina Unfair Trade Practices Act[4] and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act.[5] *Id.* at 28–29, 644 S.E.2d at 670–71. Specifically, the court explained the provision was unconscionable because its unconditional requirement that the customer waive statutory remedies ran contrary to the statutes' very purpose in punishing acts that adversely affect the public interest. *Id.* at 30,

[4] S.C. Code Ann. §§ 39-5-10 through -560 (1985 & Supp. 2015).

[5] S.C. Code Ann. §§ 56-15-10 through -600 (2006 & Supp. 2015).

644 S.E.2d at 671. The court also found a provision in the arbitration clause that allowed the dealer's judicial remedies to supersede the customer's arbitral remedies was unconscionable because it failed to promote a neutral and unbiased arbitral forum. *Id.* at 30–32, 644 S.E.2d at 671–72. While the provision forced the customer to submit all of her claims to arbitration, it preserved the dealer's right to bring judicial proceedings against the customer for various causes of action that would not be stayed pending the outcome of arbitration. *Id.* at 30, 644 S.E.2d at 672.

Based upon the cumulative effect of the foregoing oppressive and one-sided provisions contained within the entire clause, the *Simpson* court held the arbitration clause was unconscionable and unenforceable. *Id.* at 34, 644 S.E.2d at 674. Last, the court ruled it could not sever the offensive provisions to save the arbitration clause because only a disintegrated fragment of the agreement would remain. *Id.* at 34–35, 644 S.E.2d at 673–74. Notwithstanding its finding that the dealer's arbitration clause was unconscionable, the court stressed "the importance of a case-by-case analysis . . . to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

Following *Simpson*, this court later held an arbitration agreement embedded in a home sales contract was unconscionable and unenforceable. *D.R. Horton*, 403 S.C. at 14–15, 742 S.E.2d at 40–41. In *D.R. Horton*, the buyers purchased a house from a corporate homebuilder, which included an arbitration clause in its home purchase agreement. *Id.* at 12, 742 S.E.2d at 39. Paragraph 14 of the purchase agreement was titled "Warranties and Dispute Resolution," and it contained subparagraphs 14(a) through 14(j) addressing the obligations of the parties prior to and immediately following closing. *Id.* at 12–13, 742 S.E.2d at 39. While subparagraph 14(g) addressed arbitration between the parties, the homebuilder disclaimed various warranties in subparagraph 14(c) as well as liability for "monetary damages of any kind, including secondary, consequential, punitive, general, special[,] or indirect damages" in subparagraph 14(i). *Id.*

In upholding the circuit court's denial of the homebuilder's motion to compel arbitration, this court held the arbitration agreement was unconscionable, particularly in light of subparagraph 14(i) which exempted the homebuilder from all monetary damages. *Id.* at 15, 742 S.E.2d at 40–41. Furthermore, the court found it should not sever the arbitration provision from the unconscionable

provisions located in paragraph 14, again highlighting the homebuilder's attempt to waive its liability for the purchasers' damages. *Id.* at 16–17, 742 S.E.2d at 41.

After granting the homebuilder's petition for a writ of certiorari, our supreme court affirmed this court's decision. *Smith v. D.R. Horton, Inc.*, Op. No. 27645 (S.C. Sup. Ct. filed July 6, 2016) (Shearouse Adv. Sh. No. 27 at 19). The supreme court dismissed the homebuilder's assertion that the lower courts violated the *Prima Paint*[6] doctrine in looking beyond the express arbitration clause located in subparagraph 14(g) in their analysis of unconscionability because the various subparagraphs addressed important warranty information and contained numerous cross-references to each other. *Id.* at 16–17. In construing the entirety of paragraph 14 as the arbitration agreement, the court held the buyers lacked any meaningful choice to arbitrate and the homebuilder's attempts to disclaim implied warranties and liability for all monetary damages were oppressive. *Id.* at 17–18. Last, because the agreement did not contain a severability clause, the court found the parties did not intend for a court to sever any unconscionable terms from the arbitration agreement. *Id.* at 18 n.6.

Turning to the instant case, we first acknowledge, and Tamko concedes, the Warranty is an adhesion contract based upon the sale of mass-produced goods. Consequently, we find the circuit court properly determined Respondents lacked any meaningful choice to arbitrate. However, our supreme court has made clear that adhesion contracts are not per se unconscionable. *See Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; *see also id.* at 36, 644 S.E.2d at 674 (recognizing "the importance of a case-by-case analysis . . . to address the unique circumstances inherent in the various types of consumer transactions"). Therefore, we turn to the second prong of the unconscionability analysis to determine whether no reasonable person would make or accept any oppressive or one-sided terms within the arbitration agreement. *See Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668 (stating that an unconscionability analysis has two prongs).

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[6] In *Prima Paint*, the United States Supreme Court ruled that an arbitration agreement is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. *See* 388 U.S. at 406.

Upon our review of the arbitration agreement, we hold the circuit court erred in finding the purportedly unenforceable disclaimers and limitations within the "Legal Remedies" paragraph contributed to the unconscionability of the arbitration agreement. Specifically, we recognize that Tamko continuously used language to the effect that any attempted disclaimer or limitation did not apply to purchasers in jurisdictions that disallowed them. Moreover, unlike the arbitration agreement in *D.R. Horton*, the legal remedies paragraph contains a severability clause. Therefore, even considering the terms Respondents find objectionable, we are unable to conclude these terms are oppressive because they would not apply in the underlying dispute if the arbitrator found they violated South Carolina law.[7]

Next, we hold the circuit court erred in finding the arbitration agreement was not separable from other allegedly unconscionable provisions that precede the arbitration agreement on page five. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (providing that, under the FAA, "an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole"). On page four of the Warranty, Tamko included provisions that limited the transferability of the Warranty and excluded its liability for any damage to buildings resulting from defective shingles. In addition to being unconscionable, Respondents contend these provisions address Tamko's potential liability and must be read together with the arbitration agreement on the following page. We find, however, that such a construction of the contract violates the *Prima Paint* doctrine because these provisions are clearly outside the arbitration agreement. *See* 388 U.S. at 406 (holding that courts may only consider

[7] In any event, we believe South Carolina's Commercial Code generally permits sellers of goods to include most of the limitations and exclusions found in the Warranty. *See* S.C. Code Ann. § 36-2-316(2)–(3) (2003) (allowing a seller to exclude or modify implied warranties); S.C. Code Ann. § 36-2-719(1)(a) (2003) (permitting a seller to repair or replace nonconforming goods in lieu of statutory remedies); § 36-2-719(3) (allowing a seller to exclude consequential damages); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91–94, 749 S.E.2d 139, 151–53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA).

the threshold question of whether the *arbitration agreement* is invalid, not whether the *contract as a whole* is invalid).

Finally, we find the arbitration provision facilitates an unbiased decision by a neutral decisionmaker in the event of a dispute. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (stating courts should generally focus on whether an arbitration clause is "geared towards achieving an unbiased decision by a neutral decision-maker"). Pursuant to the arbitration agreement, the purchaser must submit "every claim, controversy, or dispute of any kind whatsoever" relating to Tamko's shingles or the Warranty to arbitration in accordance with the rules of the American Arbitration Association.[8] The arbitration agreement does not unduly limit a purchaser's right to a meaningful legal proceeding. In fact, the agreement even anticipates actions from purchasers that "sound[] in warranty, contract, statute[,] or any other legal or equitable theory."

CONCLUSION

Based on the foregoing analysis, we hold the circuit court erred in finding the cumulative effect of the Warranty's purportedly unlawful terms rendered the arbitration agreement unconscionable and unenforceable. Therefore, the circuit court's order is

REVERSED.
LOCKEMY, C.J., and HUFF, J., concur.

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[8] Although the arbitration agreement may appear one-sided because only the consumer is required to submit claims to arbitration, Tamko contends it would never be forced to initiate a cause of action—such as a collection dispute—against an end user because it receives payment for its products upon delivery to its various distributors. Therefore, we find any perceived lack of mutuality in this commercial context does not make the arbitration agreement unconscionable because Respondents are not deprived of a remedy. *See Simpson*, 373 S.C. at 31, 644 S.E.2d at 672 ("Our courts have held that lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable."); *id.* (stating that requiring one party to seek a remedy through arbitration rather than the judicial system does not deprive that party of a remedy altogether).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David A. Land, Appellant.

Appellate Case No. 2014-002423

Appeal From Lexington County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5441
Heard June 9, 2016 – Filed September 28, 2016

AFFIRMED

Clarence Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

MCDONALD, J.: A Lexington County jury convicted David A. Land of three counts of sexual exploitation of a minor, second degree. Land appeals his convictions, arguing the circuit court erred in denying his motion for a directed verdict because the State failed to provide sufficient proof from which a reasonable jury could conclude that he knowingly distributed or exchanged pictures or videos

of minors engaged in sexual acts as prohibited by section 16-15-405(A) of the South Carolina Code (2015). We affirm.

FACTS/PROCEDURAL HISTORY

South Carolina Law Enforcement Division (SLED) special investigators Britt Dove and Lucinda McKellar conduct online undercover operations targeting individuals distributing child pornography through peer-to-peer file sharing databases.[1] Using programs utilized by the Internet Crimes Against Children Task Force (the Programs),[2] Agents Dove and McKellar target individuals possessing child pornography available to be viewed on various file sharing networks, such as LimeWire, Phex, FrostWire, and others.[3] When searching for distributors of child pornography, the Programs search out specific SHA (secure hash algorithm) values—also called "hash values"—known to be associated with images of child pornography. Agent Dove described the process as follows:

> [The Programs] would search for hash values. Now, everything on the internet can be given a hash value.

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[1] All persons using such file sharing programs are considered "peers." Officer Dove described peer-to-peer file sharing as follows: "You can download free software that's out there. That software will allow me to go out over the internet, [and] connect directly with another computer or multiple computers that are on a network. . . . [O]nce I connect with them, if they make files available for sharing, . . . [y]ou can go connect with them. . . . At that time, you can use it on your computer. You can make it available on your computer to share back out to the internet to other people that are on the network."

[2] Agent Dove described using Camtasia, a program that records and documents what he is actually viewing on his computer screen as he reviews downloaded files.

[3] On redirect, Agent Dove explained how a downloaded file gets placed in LimeWire's shared folder: "[I]f you take the default settings, once you download something, it's automatically going to place it in the share folder until you either move it out of that folder or you delete it. It's going to remain in that share folder and be available for others."

> That's going to be basically a mathematical formula that's done to everything -- it gives this independent number. Almost like DNA for a person, but it's for a file. The only way that changes is if something inside that file changes. So the [Program] would go through and it would look and see for that hash value, that DNA match basically. It would go through and anything it found that it was known that it was related to child pornography or contraband, it would log that this hash value was seen at this time, in this state, and eventually return a list that I could go and look at and use GEO location stuff to find out if it was in South Carolina, and was inside my jurisdiction to begin an investigation.
>
> . . . .
>
> [The hash value] was for the individual files. It would . . . continuously and automatically go through the different softwares and look for the individual files that match that hash number.

Agent Dove further explained the process for downloading suspicious files and then viewing the files to verify whether or not they contained child pornography. In downloading these files, Dove obtains the internet protocol address (IP address), which is similar to a phone number, associated with the location of the particular file.[4] Dove testified that only one user can have one IP address assigned at a time, and the IP address provides the location of the computer being used to view or store the file. In addition to the IP address, Dove obtains the global unique identifying number (GUID) generated when the software—such as LimeWire in the instant case—is installed on the computer. The GUID identifies the software on a particular computer or device; it will not change even if the location of the computer or its IP address changes.

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[4] According to Agent Dove, when a person logs onto a computer, the internet service provider assigns an IP address. Under appropriate circumstances, agents can then request a subpoena or search warrant for the service provider and obtain the name of the person paying for the service, namely, "who the subscriber is at that time and date that [the] download occurred."

> [T]he GUID . . . is the global unique identifier. When you download a software, in this case LimeWire . . . to your system, it gives it that thirty-two character alphanumeric number that's unique to that software on that computer at that time. It doesn't change if you move the computer around to different IP addresses. It stays the same. Much like the VIN on a car . . . . You can register a car in Tennessee or South Carolina, the VIN remains the same. And that way, the system knows who has what available. It can use it for management purposes, even if the IP address changes.

On December 7, 2009, Dove conducted an online investigation and found a computer with likely child pornography available for distribution. Dove downloaded four files from the computer. The title of one of the downloaded images contained numerous words typically associated with child pornography. At this time, Dove obtained the IP address and the GUID for the computer running the LimeWire program from which he downloaded the four files. After obtaining the necessary subpoena authorization, Dove discovered that the internet service provider was Time Warner Cable in Lexington, South Carolina.

Agent McKellar conducted a separate online investigation on December 4, 2009. During her investigation, McKellar located a computer that shared known child pornography, and she was able to download several of its files. McKellar testified that the information identifying the IP address, location, and GUID were the same for each of the files. In other words, "This [document or file] would have had to come from the same person, same computer, at the same location, using the same IP address as the previous three files." The computer had an IP address in Lexington and contained images saved with terminology typically associated with child pornography.

On January 27, 2010, McKellar conducted another online investigation and located a computer housing child pornography available for peer downloading. Like the files downloaded on December 4, 2009, these new files were available from the

user to anyone using the peer network. Using a single-source download,[5] McKellar was able to determine the documents had the same GUID as the computer distributing child pornography on December 4, 2009, although the IP address had since changed.

After gathering the necessary information, Dove and McKellar realized that they had accessed computers using IP addresses not only in the same apartment complex, but that the apartments were "right above each other." When asked if she noticed any connection with the GUID in any other investigation, Agent McKellar responded, "Yes, . . . we had different IP addresses[.] [B]ut it was the exact same GUID associated with my investigation on December the 9th[,] [Agent Dove's] investigation on . . . December the 7th, and my investigation on January 27th of 2010. It was the same GUID for each address." Additionally, the investigators determined that the same GUID from the computer sharing the child pornography was previously located in Fort Campbell, Kentucky.

Dove and McKellar then went to the Lexington apartment complex and checked for wireless access points. They found five potential wireless access points, four secured and one unsecured. The unsecured access point was titled "Admin." Because the locations were sitting right on top of each other with the same GUID, Dove and McKellar were concerned that there might be an issue with a wireless access point being "basically piggybacked" (accessed or amplified by a nearby unauthorized user). At this time, the investigators decided to execute their separate search warrants simultaneously.

Agent McKellar executed her search warrant on 101 Saluda Point at the apartment of a married couple, the Does.[6] Mr. Doe explained that the couple did have wireless internet access, but their wireless access point was not password-protected. Additionally, Mr. Doe told Agent McKellar that the name of their wireless access point was "Admin." Special Agent Colin Duncan conducted an on-site forensic review of the Does' home computer to determine "what kinds of

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[5] Agent McKellar explained, "Single source means I am getting this file from one person using the software with that [GUID] from that IP address, . . . which is located in Lexington, South Carolina."

[6] As these cooperating witnesses were uninvolved in any criminal activity, they are unidentified for purposes of this opinion.

programs, if LimeWire was on this computer and also if there [were] any . . . files that depict minors engaged in sexual activity." McKellar testified, "There [were] no file sharing programs on the computer at the residence and there [were] very few images. And none of those images were children engaged in sexual activity."[7]

Agent Dove executed his search warrant on 101 Saluda Point, Apartment 1138, which was the residence of Christy Land, her daughter, and her son. Dove seized a laptop and two computer towers from the Land home. These items were submitted for forensic examination, but the examiner did not find any items related to Dove's investigation. The agents learned from Ms. Land, however, that David A. Land (Land), her older son, might be found at his grandparents' home in Greenwood.

On February 11, 2010, Agent McKellar executed a search warrant at the home of Land's grandparents. Land's grandfather called him and asked him to return to the home with his laptop. Upon Land's return, McKellar advised him of his *Miranda*[8] rights. After agreeing to speak with McKellar without an attorney present, Land admitted to being familiar with file sharing programs and discussed using LimeWire at various locations, including Fort Campbell, where he had been stationed.

According to McKellar, Land stated he would travel every couple of weeks to visit his mother in Lexington, and he used her laptop while visiting. "When [Land] would go to the VA Hospital, he would visit [his mother] and use her laptop at her residence in Lexington County." Land admitted that he would access an open wireless network called "Admin," which was not associated with his mother's residence. Land further admitted to intentionally receiving child pornography after using specific search terms. He acknowledged and admitted to downloading the three files that Agent McKellar downloaded from his computer on January 27, 2010. Finally, he admitted that after looking at the hundreds of files of child pornography he downloaded while in Lexington, he performed a system restore in an effort to delete everything from his computer.

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[7] Agent McKellar also learned that Mr. Doe had a work laptop that he brought home with him on occasion. Mr. Doe brought that laptop to McKellar's office to check for LimeWire and any files depicting minors engaged in sexual activity. Again, no such software or files were present.

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

SLED agents arrested Land at his grandparents' Greenwood home on February 11, 2010. Land was charged with three counts of second-degree sexual exploitation of a minor.

On February 10, 2014, the Lexington County Grand Jury indicted Land on all three charges pursuant to section 16-15-405(A) of the South Carolina Code (2015). Land was tried by jury on November 5–8, 2014. At the end of the State's case, Land moved for a directed verdict, which the circuit court denied. Following his conviction on all three counts, the circuit court sentenced Land to seven years in prison, suspended upon the service of thirty months and two years' probation on each count. The circuit court further required that Land register as a sex offender.

LAW/ANALYSIS

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is *any* direct evidence or *any* substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury." *State v. Brandt*, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011) (emphasis added) (quoting *Weston*, 367 S.C. at 292–93, 625 S.E.2d at 648). "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." *Id.* "The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty." *Id.* "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *Id.*

Land argues the circuit court erred in denying his motion for a directed verdict because the State failed to provide sufficient proof from which a reasonable jury could conclude that he knowingly distributed or exchanged pictures or videos of a minor engaged in a sexual act in violation of section 16-15-405(A).[9] We disagree.

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[9] In his reply brief, Land further argues, "The jury charge in this case is not an example of clarity so as to inform the jury as to what factors they are to consider or what the various terms mean." Specifically, Land asserts the circuit court "never defined soliciting and the jury was left to speculate as to the meaning of the term." Land admits that neither the defense attorney nor the State moved for clarification. Thus, we believe Land failed to preserve this issue for our review. *See Wilder*

Section 16-15-405 provides, in pertinent part:

> (A) An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:
>
> > (1) records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation; or
> >
> > (2) distributes, transports, exhibits, *receives*, sells, purchases, exchanges, ***or*** *solicits* material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.
>
> (B) In a prosecution pursuant to this section, the trier of fact may infer that a participant in sexual activity or a state of sexually explicit nudity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor.

(emphasis added).

Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 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 trial judge to be preserved for appellate review."); *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993) ("To preserve an issue for appellate review, an appellant must object at his first opportunity."); *State v. Wakefield*, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) (to be considered on appeal, all issues must be argued by the appellant in his initial brief).

Land contends that the State failed to provide sufficient proof for a reasonable jury to conclude that he *knowingly* distributed or exchanged pictures or videos of a minor engaged in a sexual act. He asserts that to prove he had the *mens rea* to violate section 16-15-405(A), the State had to prove Land knew that a person with file sharing software could access his computer and that he intended to permit such access.

In support of his argument, Land cites *Biller v. State*, 109 So.3d 1240 (Fla. Dist. Ct. App. 2013), in which a Florida District Court of Appeal considered the use of LimeWire in conjunction with allegations of possession and "transmission" of child pornography. Using LimeWire, Biller downloaded pornographic images of children to his home computer from other LimeWire subscribers who permitted access to their files. *Id.* at 1241. Biller argued that to "'send' means a purposeful act to deliver the files, rather than the mere allowance of access to the files." *Id.* Because the State conceded that Biller "did not affirmatively dispatch the images using a function on his computer," the Florida court reversed Biller's conviction for transmitting child pornography. *Id.*

Significant legal and factual differences distinguish *Biller* from the case at hand. First, the Florida court's reversal of Biller's conviction for "transmission of pornography by electronic device" focused upon the statute's definition of "transmitting" and the interpretation of the word "send." *Id.* at 1241. No such transmission requirement exists for purposes of the South Carolina statute. Section 16-15-405(A) requires only that the State prove that Land solicited or received or distributed child pornography, not that he did all three. Moreover, in addition to the evidence found on his computer, Land's own statements established that he solicited the child pornography by using such terms as "pre-teen" and "Lolita" in conjunction with LimeWire to find pornographic images and videos of minors.

Land admitted to intentionally receiving the prohibited images, including the three downloaded by Agent McKellar. McKellar testified that Land "was familiar with file sharing . . . and discussed using LimeWire as far back as his time at Fort Campbell when he was in the military." She also testified that during her investigations on December 4, 2009 and January 7, 2010, she saw the GUID in connection with Fort Campbell, meaning "the person using that program was located in Fort Campbell at some point." Further, Land admitted to McKellar that he had used LimeWire for music and to download images of child pornography. McKellar testified:

> Q: Did [Land] mention whether he would use [LimeWire] to download videos of child pornography, as well?
>
> A: Yes. At one point in time he said that he had downloaded six hundred files while at his mother's house, looked at them and then deleted those files.
>
> Q: Okay. Did you ask him about did he ever accidentally download any files?
>
> A: Yes. I asked him if he had ever gotten any files that he didn't intentionally mean to get. And he said that all the files that he got were -- that he received were intentional.
>
> Q: Okay. Did he say how often he downloaded files?
>
> A: Every couple of weeks when he would go to his mother's, he would open some of the files up, look at them and then do a mass download. . . .

McKellar was then presented with a printed copy of the titles on the browse list from her January 27, 2010 investigation, which included the three files she downloaded. She testified that she showed Land this list, as well as the three files, and that he recognized them and admitted to downloading them.

> Q: Did [Land] give any information about how he would search for those files?
>
> A: [Land] underlined a couple of words and indicated that they were search terms by writing on that word ["]search term.["]

Land identified the terms "pre-teen" and "Lolita," two terms which McKellar testified were commonly associated with child pornography.

In *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971), our supreme court examined criminal intent:

> The question of the intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. *State v. Johnson*, 84 S.C. 45, 65 S.E. 1023 [1909]. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

Thus, as the State properly argues, the issue of whether Land possessed the requisite intent at the time the crime was committed is typically a question for the jury because without an actual statement of intent by the actor, proof of intent must be determined by inferences from conduct. *See State v. Haney*, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971) (absent an admission by the defendant, proof of intent necessarily rests on inference from conduct).

Here, as noted above, Land admitted to soliciting and downloading multiple pornographic files while at Fort Campbell and at his mother's home in Lexington. The IP addresses for the computer searched by Dove and McKellar supported this confession. Additionally, Land confessed to his use of particular search terms associated with child pornography and admitted to downloading the January 27, 2010 files discovered during Agent McKellar's investigation. The circuit court explained:

> [C]onsidering the evidence as to the GUID numbers, evidence as to the IP addresses, evidence as to the use of the unsecured Admin WiFi, it appear[s] that -- and again, . . . I'm not concerned with the weight of the evidence. I'm just concerned with the *existence* of the evidence. And I believe that there is sufficient evidence to send this case to the jury.

(emphasis added).

We agree and find that the State presented ample evidence demonstrating Land's knowledge and intent to commit the offenses of sexual exploitation of a minor in

the second degree. The evidence, including Land's own admissions, established that Land knew how LimeWire worked and knew that the child pornography he downloaded would be available for others to download and view. In fact, such file sharing was the purpose of the LimeWire program. Land's knowing use of a program with the specific function of downloading and sharing stored files, in conjunction with his acknowledged use of the file-sharing program to download and view the images of child pornography, required that the circuit court deny his motion for a directed verdict.

CONCLUSION

Accordingly, we affirm Land's convictions for second-degree sexual exploitation of a minor.

AFFIRMED.

LOCKEMY, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

AFFIRMED

Philip L. Fairbanks, of Beaufort, for Appellant.

Stephen L. Brown, Russell G. Hines, and Perry M. Buckner, IV, all of Young Clement Rivers, of Charleston, for Respondent.

SHORT, J.: Otha Delaney appeals the trial court's grant of First Financial of Charleston, Inc.'s motion to dismiss his class action complaint for damages and equitable relief under the Uniform Commercial Code (UCC), alleging the court

erred in (1) dismissing the complaint as time-barred by applying the incorrect statute of limitations,[1] and (2) determining the date the statute of limitations began to run. We affirm.

On October 12, 2007, Delaney entered into a Retail Installment Contract (the Contract) to purchase a truck from Coliseum Motors. The Contract was assigned to First Financial, making it a secured party under the UCC. After Delaney failed to make payments, First Financial repossessed the vehicle. On May 2, 2008, First Financial sent Delaney a "Notice of Private Sale of Collateral" (notice of sale) advising Delaney of its intention to sell the vehicle. On December 15, 2008, First Financial sold the vehicle.

On October 4, 2011, Delaney, as a putative member of a class, filed this class action, alleging (1) the notice of sale was insufficient under the UCC, and (2) he was entitled to relief under section 36-9-625 of the South Carolina Code (2003) (providing remedies for a secured party's failure to comply with the UCC). Delaney sought recovery on behalf of the class members.

First Financial moved to dismiss, arguing Delaney's claim was barred under the one-year statute of limitations applicable for statutory penalties set forth in South Carolina Code § 15-3-570 (2005) (providing a one-year statute of limitations for actions based on a statute for a penalty). Delaney filed a response to the motion to dismiss, arguing the claim was not a statutory penalty, but it was a remedial claim for damages under section 36-9-625. Delaney argued that because the claim is remedial, the UCC's six-year statute of limitations in section 36-2-725(1) (2003) of the South Carolina Code governing breaches of contract for the sale of goods applied. In the alternative, Delaney argued if the recovery is a penalty rather than a compensable remedy, the action is governed by the three-year statute of limitations provided in South Carolina Code section 15-3-540(2) (2005) (applying to "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation").

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[1] We combine Delaney's second and third issues and address them as the first issue.

At a hearing on its motion to dismiss, First Financial argued the action was for a penalty because no contract was alleged to have been breached; there was no plea for compensatory damages; the complaint did not allege a tort; and the plea for relief consisted of the finance charge and ten percent of the principal amount under the Contract. According to First Financial, such a plea was governed by the one-year statute of limitations provided for in section 15-3-570, which would be triggered by the "commission of the offense." First Financial also argued Delaney's claim was time-barred under the three-year statute of limitations, which was triggered by the issuance of the notice of sale.

Delaney argued neither the one-year nor the three-year statute of limitations applied, and even if the three-year statute of limitations in section 15-3-540(2) applied, the time had not expired at the time of the filing because the statute would have been triggered "not when the letter [was] received[, but] . . . only when the collateral was disposed of." Delaney maintained that setting minimum statutory damages of ten percent of the contract plus finance charges ensures compliance by creditors and "that[,] in and of itself doesn't turn it into a penalty because it is clearly a substitute for actual damages."

In an order filed April 30, 2013, the trial court granted the motion to dismiss. The court found Delaney's sole cause of action was a statutory penalty because it requested the finance charge and ten percent of the principal amount of the obligation, which is the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2). Noting the Official Comment 4 to section 36-9-625(c)(2), which provides the specific relief is to be awarded "regardless of any injury that may have resulted[,]" the court found "this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for 'every noncompliance.'" The trial court noted our supreme court has interpreted the same provision as a statutory penalty in several cases, and it further noted other courts have similarly classified the statutory award based on the uniform UCC model statute, upon which South Carolina based its code.

The court next rejected Delaney's argument that section 36-2-725(1) applied, which provides a six-year limitations period for a breach of contract for the sale of goods under the UCC. The court noted Delaney did not plead breach of contract; thus, section 36-2-725(1) did not apply. The court found the case concerned the sufficiency of notice prior to the disposition of collateral; thus, the case dealt

"entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods [were] wholly irrelevant." The court also found general rules of statutory construction prevented the application of the six-year limitations period. The court found the "controlling limitations period should be either S.C. Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three years." The court noted general rules of statutory construction require a specific statute to prevail over a more general statute, and because Delaney's desired recovery was a statutory penalty, sections 15-3-570 and 15-3-540(2) spoke "more directly to the actual allegations in this lawsuit."

Finally, the court found Delaney's complaint was time-barred under either section 15-3-570 or 15-3-540(2). The court found "[w]hile either statute might be reasonably applied to this matter, the Court need not decide this inquiry as [Delaney's] cause of action accrued upon receipt of the alleged noncompliant Notice of Sale and either statute would therefore serve as a bar to . . . recovery." As to section 15-3-570,[2] the statute specifically states the commission of the offense serves as the date of accrual. The court found the statute began to run in May 2008 and expired in May 2009.

As to section 15-3-540(2),[3] the court noted the statute did not specifically delineate a date of accrual, and it found "the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations." The court continued,

> Unlike an action for actual or compensatory damages, [Delaney's] action for a penalty focuses on a specific act of non-compliance . . . that awards automatic relief. The right to bring the action and thus the proper date of

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[2] "An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005).

[3] "Within three years . . . : (2) An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." S.C. Code Ann. § 15-3-540(2).

> accrual should be determined by the date on which that alleged noncompliance occurred. However, this date of accrual would also coincide with the date on which [Delaney] either knew or should have known that a violation had occurred.
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> Furthermore, I find that the legislature intended [§§] 15-3-570 and 15-3-540 to have similar dates of accrual. Both govern actions for a statutory penalty and are nearly identical in language but for the length of the limitations period. Given that the legislature specifically enumerated the date of accrual for penalty actions under § 15-3-570 to be the date of the commission of the offense, this Court sees no logical purpose in creating an alternative date of accrual for penalty actions under § 15-3-540(2).

The court granted First Financial's motion to dismiss. After a hearing, the court denied Delaney's motion for reconsideration. This appeal followed.

ISSUES

I. Did the trial court err in applying the statute of limitations?

II. Did the trial court err in finding the action accrued at the time the notice of sale was received rather than at the time First Financial disposed of the collateral?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. *Id.* The court may sustain the dismissal when the facts alleged in the complaint do not support relief under

any theory of law. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

LAW/ANALYSIS

I. Applicable Statutes of Limitations

Delaney argues the trial court erred in finding the six-year statute of limitations in section 36-2-725 did not apply and in finding Delaney's action barred by either the limitations period provided by section 15-3-540(2) or by section 15-3-570. We disagree.

In this case, Delaney alleged he was entitled to the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2) due to First Financial's insufficient notice of sale. Section 36-9-625, found in Article 9 of the UCC, establishes remedies for a secured party's failure to comply with Article 9, providing the following:

> (a) If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.
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> * * *
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> [c](2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

S.C. Code Ann. § 36-9-625 (2003). "Article 9 of the U.C.C. does not now nor has it ever included a statute of limitations." Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks-Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus.

Rev. 1, 2 n.4 (2008). Thus, Delaney argues the statute of limitations in Article 2 of the UCC, section 36-2-725(1) applies, providing six years. We disagree.

First, Delaney did not allege a breach of contract. Rather, Delaney alleged the violation of the notice of sale requirements, and his prayer for relief requested the statutory penalty of the finance charge and ten percent of the principal amount of the obligation under section 36-9-625(c)(2). Thus, section 36-2-725(1) did not apply because it provides as follows: "An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued." S.C. Code Ann. § 36-2-725(1) (2003). Because Delaney did not allege a breach of contract, we agree section 36-2-725(1) did not apply. Instead, we look to Title 15 governing civil remedies.

Sections 15-3-540 and -570 provide statutes of limitations for actions upon statutes for a penalty. *See* S.C. Code Ann. § 15-3-540(2) (2005) (providing a three-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture"); S.C. Code Ann. § 15-3-570 (2005) (establishing a one-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense"). Like the trial court, we find the controlling limitations period is either section 15-3-570 or section 15-3-540(2), respectively one or three years, because Delaney sought a statutory penalty.

"As a general principle, the legislature has the authority to provide civil penalties to enforce observance of a legislative policy." *S.C. Dep't of Health & Envtl. Control v. Kennedy*, 289 S.C. 73, 76, 344 S.E.2d 859, 861 (Ct. App. 1986). A statutory penalty is defined as a penalty "an individual is allowed to recover against a wrongdoer as satisfaction for wrong or injury suffered, without reference to actual damage sustained." *Black's Law Dictionary* 1412 (6th ed. 1990). Although not addressing the statute of limitations issue, at least three South Carolina Supreme Court cases have identified the "damages" in section 36-9-625(c)(2) as a statutory penalty.

Citing the former version of section 36-9-625(c)(2), the supreme court in *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 51-52 (1993) (superseded by statute on other grounds), addressed whether co-obligors, who did not have title or right to possession of a mobile home, could recover under the

penalty provision of the UCC for the creditor's failure to comply with the notice requirements. The court found the Cranes were entitled to notice. *Id.* at 74, 437 S.E.2d at 53. The court continued as follows:

> If the notice provision relates to the obligation, then it would seem logical that the penalty provision for breach of the notice requirements must also be related to the obligation, and therefore, applicable to co-obligators of consumer goods security agreements. Additionally, the statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions.

Id. at 74-75, 437 S.E.2d at 53.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000), Brockbank sued Best Capital Corp. after the repossession and sale of his mobile home, alleging, among other things, a violation of Article 9's notice provision. Best Capital admitted it had not sent notice of the sale, but it argued Article 9 did not apply to the parties' agreement because there was not a security interest. *Id.* at 377, 534 S.E.2d at 691. The court found notice was required, and stated "[i]f a secured party fails to give the required notice, a debtor may seek to recover the statutory penalty under Article 9." *Id.* at 385, 534 S.E.2d at 695 (noting the former version of section 36-9-625(c)(2), section 36-9-507(1), which embodies nearly identical language as the current version); *id.* at 384, 534 S.E.2d at 694 (concluding "the outcome in this case is largely dictated by *Crane*").

More recently, in *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 373, 595 S.E.2d 461, 463 (2004), Mr. and Mrs. Singleton filed an action based in part on the UCC, claiming Stokes Motors, Inc. failed to notify them of its intent to sell the Singletons' repossessed vehicle. Citing the former version of section 36-9-625(c)(2), the court in *Singleton* referred to the statute's "penalty" provision in

finding both Singletons were entitled to recover because both were entitled to notice. *Id.* at 378, 595 S.E.2d at 466.[4]

We find no merit to Delaney's argument that our supreme court's references to the statutory penalty in these cases is the result of "loose language" and "unconsidered dictim (sic)" and the court interchangeably used the terms "compensatory damages" and "penalty" in its opinions. Based on the definition of a penalty and the cases referring to the mandatory, pre-determined amount of "damages" for failure to comply with the notice of sale requirements, we find the remedy Delaney sought in section 36-9-625(c)(2) was a penalty, and either section 15-3-570 or section 15-3-540(2) applied.

First Financial sent the notice of sale on May 2, 2008, and sold the vehicle on December 15, 2008. Delaney filed this action in October 2011. Under section 15-3-570, providing a one-year statute of limitations, Delaney's action is clearly barred. Under section 15-3-540(2), providing a three-year statute of limitations, whether the action is barred depends on when the action accrued.

II. Date of Accrual

Delaney argues the trial court erred in finding the cause of action accrued when the notice of sale was received rather than on the date of the sale of the collateral. We disagree.

Under the three-year statute of limitations, Delaney's complaint was untimely filed unless the accrual date is the date First Financial sold the vehicle rather than the date of the notice of sale. However, like the trial court, we need not decide whether section 15-3-570 or section 15-3-540(2) applied because we find the accrual date is the date the notice of sale was received, and Delaney failed to timely serve and file his complaint under either statute of limitations.

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[4] The court noted that under the revision of 2001, a secured party's liability under section 36-9-625(c)(2) is limited to one penalty "with respect to any one secured transaction." *Id.*

As to section 15-3-570, the statute specifically provides the action "must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005). The offense alleged in this case is insufficient notice of sale. As noted by the trial court, "this date . . . coincide[s] with the date on which [Delaney] either knew or should have known that a violation had occurred."

Regarding section 15-3-540(2), the statute is silent as to a date of accrual. To interpret this section for the present case, we must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812)*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Corbin v. Carlin*, 366 S.C. 187, 193, 620 S.E.2d 745, 749 (Ct. App. 2005) (quoting *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)).

Delaney's complaint alleges violations of the notice required prior to the disposition of goods in a consumer goods transaction. *See* S.C. Code Ann. § 36-9-611(b) (2003) (requiring notification prior to disposition of collateral); S.C. Code Ann. § 36-9-614 (2003) (providing specific requirements for a notification). His right to recovery for a violation of the required notice arises under section 36-9-625(c)(2). The cause of action depends on a specific act of non-compliance by the creditor. Even under the discovery rule, the date of the notice of sale would be the date of discovery of the cause of action for a failure to comply with the UCC regarding the notice. We find the legislature did not intend to impose a different date for the statute of limitation to accrue. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

The dissent maintains section 15-3-540(2)'s three-year statute of limitations did not begin to run until First Financial disposed of the collateral in December 2008 because a secured party must provide reasonable notice of sale only if it disposes

of the collateral. According to the dissent, "the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral." Further, the dissent maintains if the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b), and if a secured party sends unreasonable notice to a debtor but subsequently fails to dispose of the collateral, it has not failed to comply with section 36-9-611(b). In support of its position that a secured party must provide reasonable notice only if it disposes of the collateral, the dissent cites Official Comment eight to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." We respectfully disagree with the dissent's interpretation of section 36-9-611(b) and determination of the date the three-year statute of limitations began to run.

We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral. Initially, we note section 36-9-625 provides several remedies for noncompliance with the notice requirement. Among them, the statute provides, "[i]f it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions." §36-9-625(a). It is clear a party must be able to state a cause of action in order to request a court restrain disposition of the collateral. Therefore, if Delaney could have asked a court to restrain disposition of his collateral, his cause of action must have arisen upon his receipt of the noncompliant notice. *See Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) ("Statutes should be construed in light of their intended purposes, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Further, we believe the Official Comments to section 36-9-611 and 36-9-625(c)(2) supports our conclusions. First, Comment two to section 36-9-611 provides, "This Section requires a secured party who *wishes* to dispose of collateral under Section 9-610 to send 'a reasonable authenticated notification of disposition' to specified interested persons, subject to certain exceptions." (emphasis added). Comment two does not state that the secured party must actually dispose of the collateral to be

required to send reasonable notification; it simply requires that the secured party "wish" to dispose of the collateral. Based on our reading of Comments two and eight to section 36-9-611, we believe after the secured party gives notice, the secured party can elect not to dispose of the property; however, if the secured party initially wishes to dispose of the property, the secured party must provide appropriate notice. Therefore, we do not believe that disposition of the collateral is a prerequisite to being penalized for failing to give reasonable notice.

In addition, Official Comment four to the penalty provision, section 36-9-625(c)(2), states the penalty "is designed to ensure that every noncompliance with the requirements of Part 6 [§§ 36-9-601 to -629 (2003 & Supp. 2015)] in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, the statute of limitations can begin to run before the secured party injures the debtor by disposing of the collateral in a commercially unreasonable manner.

Accordingly, we believe section 15-3-540(2)'s three-year statute of limitations began to run in May 2008 when Respondent received the notice of sale from First Financial. *See generally Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("[W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices."); *Erdmann v. Rants*, 442 N.W.2d 441, 444 (N.D. 1989) (explaining the penalty available for failure to comply with the notice of sale requirements exists regardless of whether a commercially reasonable sale is held and regardless of whether the debtor sustained a loss).

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.[5]

LOCKEMY, C.J., concurs.

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

THOMAS, J., concurring in part, dissenting in part: I concur with the majority's conclusion that the statute of limitations found in section 36-2-725(1) of the South Carolina Code (2003) does not apply to Appellant's claims. However, I respectfully dissent and would reverse because a three-year statute of limitations applies to Appellant's claims and Appellant filed this action within three years of the date Respondent disposed of the collateral, which, I believe, is when the statute of limitations began to run.

Under section 15-3-540(2), the statute of limitations is three years for "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." By its plain language, this section's three-year statute of limitations applies to actions seeking recovery of a statutory penalty when only the aggrieved party can bring the action for the penalty.

In this case, Appellant brought his action to recover the statutory penalty found in section 36-9-625(c)(2) of the South Carolina Code (2003). This section allows only the "debtor or a secondary obligor at the time a secured party failed to comply" to recover the statutory penalty. Thus, Appellant was the only person who could have brought an action to recover the statutory penalty because he was the debtor at the time Respondent allegedly failed to provide reasonable notice of disposition of the collateral. Because Appellant, as the aggrieved party, was the only person who could have brought the action, section 15-3-540(2) provided the applicable statute of limitations. Accordingly, the statute of limitations for Appellant's action was three years.

Finding the applicable statute of limitations was three years, we must next consider when the statute began to run. I respectfully disagree with the majority's finding that the statute of limitations began to run when Respondent sent the allegedly unreasonable notice in May 2008.

Section 36-9-625(c)(2) provides "a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover" a statutory penalty for the failure to comply. The debtor can recover this penalty only if the secured party fails to comply. Under section 36-9-611(b) of the South Carolina Code (2003), "a secured party that disposes of collateral under [s]ection 36-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition." Appellant's claim is that Respondent failed to comply

with the notice requirement and, thus, Appellant is entitled to recover the statutory penalty found in section 36-9-625(c)(2) because of that failure to comply.

In my view, based on the plain language of section 36-9-611(b), the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral. Section 36-9-611(b) requires "a secured party *that disposes of collateral*" to provide reasonable notice. (emphasis added). Based on this plain language, a secured party must provide reasonable notice only if it disposes of the collateral. If the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b). Thus, if a secured party sends an unreasonable notice to a debtor but subsequently fails, for whatever reason, to dispose of the collateral, it has not failed to comply with section 36-9-611(b). And the debtor who receives an unreasonable notice cannot bring an action to recover the statutory penalty if the secured party never disposed of the collateral because the statutory penalty is authorized only if the secured party failed to comply with section 36-9-611(b). As noted above, the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

This conclusion is supported by the official comments to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." Thus, this comment contemplates that a secured party may send a revised notification in order to comply with the notice requirement in section 36-9-611(b). If a secured party sent an unreasonable notice to a debtor and subsequently, but prior to disposition, sent a reasonable second notice, the secured party would be in compliance with section 36-9-611, and the debtor would not have an action to recover the statutory penalty based on a failure to comply. Additionally, comment eight contemplates that a secured party may send a notification and later decide not to dispose of the collateral in which case the secured party would not have failed to comply with section 36-9-611(b), and the debtor could not recover the statutory penalty under section 36-9-625(c)(2).

This conclusion is further supported by examination of the purpose underlying the notice requirement, which is, in part, to allow the debtor to see that the sale is conducted in a commercially reasonable manner. *See Brockbank v. Best Capital Corp.*, 341 S.C. 372, 384, 534 S.E.2d 688, 695 (2000) ("The purpose of the notice

is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner."). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, the purpose of the notice requirement is accomplished because the debtor received a reasonable notice and can see the sale is conducted in a commercially reasonable manner. Therefore, the purpose underlying the notice requirement supports the conclusion that the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

Furthermore, this conclusion is supported by examination of the purpose underlying the statutory penalty. The penalty is necessary to motivate secured parties to comply with the code's provisions. *See id.* at 385, 534 S.E.2d at 695 ("The statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the [c]ode's provisions." (brackets removed)). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, imposing the statutory penalty based on the initial unreasonable notice would not serve the penalty's purpose because the secured party would have ultimately complied with the notice requirement.

The majority contends Appellant's cause of action "must have arisen upon his receipt" of the unreasonable notice because section 36-9-625(a) allows a party to request the circuit court to restrain disposition of the collateral, presumably through an injunction, if the "secured party is not proceeding in accordance with this chapter." Because section 36-9-625(c)(2) is a statutory penalty, it is available only in the specific circumstances prescribed by the statute. *See State ex rel. Callison v. Nat'l Linen Serv. Corp.*, 225 S.C. 232, 234, 81 S.E.2d 342, 343 (1954) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."); *King v. Atl. Coast Line R.R. Co.*, 86 S.C. 510, 513, 68 S.E. 769, 770 (1910) (noting a statutory penalty "is the creature of the statute, and comes into existence when all statutory conditions exist, and not otherwise"). As discussed above, the penalty in section 36-9-625(c)(2) is available only when a secured party fails to comply. Alternatively, the statute providing for the possibility of an injunction does not require a failure to comply; rather an injunction is available at any time a secured party is not proceeding in accordance with Article Nine. Because the legislature used different language in sections 36-

9-625(a) and 36-9-625(c)(2) to express when each remedy is available to a debtor, we must assume the legislature intended to draw a distinction between the two remedies. *See Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

Thus, the monetary penalty in section 36-9-625(c)(2) and the injunction in section 36-9-625(a) have different thresholds for applicability, and they are not necessarily available to a debtor at the same time. As a result, even if we assume, due to the possibility of an injunction, a cause of action or right arises when a secured party sends an unreasonable notice, such an assumption does not lead automatically to the conclusion, as found by the majority, that the monetary penalty is also available when a secured party sends an unreasonable notice.

Accordingly, I would find a debtor does not have a cause of action to recover the statutory penalty based on a secured party failing to provide reasonable notice as required by section 36-9-611(b) until the secured party disposes of the collateral. As a result, the statute of limitations would not begin to run until the secured party disposes of the collateral. *See Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("In analyzing a limitations defense, the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (citations and internal quotation marks omitted) (brackets removed)).

Here, Respondent could not have failed to comply with section 36-9-611(b) until it disposed of the collateral without providing reasonable notice, and Appellant could not have brought an action to recover the statutory penalty based on a failure to comply until Respondent disposed of the collateral. Thus, the statute of limitations began to run in December 2008 when Respondent disposed of the collateral. Appellant filed this action in October 2011, which was within the applicable three-year statute of limitations, and I would find the circuit court erred by dismissing Appellant's complaint.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Steven Hoss Walters, Jr., Respondent.

Appellate Case No. 2014-002770

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 5443
Heard September 8, 2016 – Filed September 28, 2016

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Kevin Scott Brackett, of York, for Appellant.

James W. Boyd, of James W. Boyd, Attorney, of Rock Hill, for Respondent.

LOCKEMY, C.J.: The State appeals the circuit court's dismissal of its case against Steven Hoss Walters, Jr. for driving under the influence (DUI), second offense. The State argues the circuit court erred in finding (1) the video recording of the incident site failed to comply with the requirements of section 56-5-2953(A) of the South Carolina Code (Supp. 2015) and (2) section 56-5-2953(B) of the South Carolina Code (Supp. 2015) was not applicable. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

On July 13, 2014, Walters was arrested for DUI in York County. On that date, Trooper Mike McAdams, the arresting officer, administered a horizontal gaze nystagmus (HGN) test. While his dashboard camera was recording, Trooper McAdams positioned Walters in front of his patrol car facing away from the camera and conducted the test. According to Trooper McAdams, Walters was turned away from the patrol car to prevent the flashing lights from causing a false positive on the HGN test.

On December 16, 2014, this case proceeded to trial in the circuit court. During a pretrial hearing, the circuit court dismissed the case, finding the video recording did not comply with section 56-5-2953(A) of the South Carolina Code (Supp. 2015) because it did not fully show the administration of the HGN test. The court found because Walters was facing away from the camera, it could not determine whether Trooper McAdams and Walters were in the proper position or whether Trooper McAdams was moving his finger at the proper pace. The circuit court further held section 56-5-2953(B) of the South Carolina Code (Supp. 2015) did not apply because the video recording was not missing or malfunctioning. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Therefore, this court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 643-44, 627 S.E.2d 726, 729 (2006).

LAW/ANALYSIS

I. Section 56-5-2953(A)

The State argues the circuit court erred in dismissing its case against Walters because the video recording did not comply with section 56-5-2953(A) of the South Carolina Code. We agree.

Pursuant to section 56-5-2953,

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> > (i) not begin later than the activation of the officer's blue lights;
> >
> > (ii) include any field sobriety tests administered; and
> >
> > (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2015).

The State asserts the video recording in this case complied with the statute because it began before Walters was stopped and continued uninterrupted during the administration of the field sobriety tests, the reading of *Miranda,*[1] and Walters' arrest. The State contends the statute does not require every aspect of the HGN test be seen in order to judge a person's performance or the officer's administration of the test. The State maintains the plain language of the statute does not require the officer's hand to be visible at all times during the administration of the HGN test, nor does it require the video to provide the viewer with the ability to assess the defendant's success or failure. The State argues as long as the recording includes "any field sobriety tests administered," it is in compliance with the plain, unambiguous language of the statute.

Walters contends he and Trooper McAdams were positioned in such a manner during the HGN test that it could not be determined whether the test was properly administered. Walters notes that prior to 2009, section 56-5-2953(A) only required the defendant's conduct be recorded at the incident site. *See* S.C. Code Ann § 56-5-2953(A) (2006). In 2009, the legislature amended the statute, expressly requiring the recording of field sobriety tests. *See* S.C. Code Ann. § 56-5-

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

2953(A)(1)(a)(ii) (Supp. 2015). Walters asserts that had the legislature intended there only be a recording of field sobriety tests, without the ability to determine the defendant's performance on the tests, there would have been no need to amend the statute.

Recently, in *State v. Gordon*, 414 S.C. 94, 777 S.E.2d 376 (2015), our supreme court addressed HGN tests and the recording requirements found in section 56-5-2953(A). The *Gordon* court affirmed this court's holding section 56-5-2953(A) requires a motorist's head be recorded during an HGN test. 414 S.C. at 96, 777 S.E.2d at 377. The supreme court held section 56-5-2953(A) is clear and unambiguous and its provision that video recordings must include any field sobriety test administered, necessarily includes the HGN test. 414 S.C. at 99, 777 S.E.2d at 378. The court noted because the HGN test focuses on eye movement, "common sense dictates that the head must be visible on the video." *Id.* Despite Gordon's assertion he was out of sight and in the dark during the HGN test, the court found the requirement the head be visible on the video was met and the statutory requirement that the administration of the HGN field sobriety test be video recorded was satisfied. *Id.* at 99-100, 777 S.E.2d at 379. The court noted the officer's administration of the HGN test was visible on the video recording; Gordon's face was depicted in the video ("it is axiomatic that the face is a part of the head"); the officer's flashlight and arm were visible during the administration of the test; and the officer's instructions were audible. *Id.*

We find the video recording at issue in the present case properly included the recording of any field sobriety tests administered as required by section 56-5-2953(A). Walters's head is visible during the entire recording of the HGN test. In addition, Trooper McAdams's arm is visible as he administers the test, and his instructions are audible. While Trooper McAdams's finger disappears at times during the test as his hand moves in front of Walters's face, the statute does not require video recordings of the HGN test include views of all angles of the test. Such a requirement would be unreasonable given the limitations of dashboard cameras. Accordingly, we reverse the circuit court's dismissal of the case.

II. Section 56-5-2953(B)

The State argues the circuit court erred in finding section 56-5-2953(B) of the South Carolina Code was not applicable. In light of our decision to reverse the circuit court as to the first issue on appeal, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d

591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

The circuit court's decision is

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rose Electric, Inc., Appellant,

v.

Cooler Erectors of Atlanta, Inc., Southern Produce, Inc., S2P, LLC, Certified Development Corporation of South Carolina, Senn Bros., Inc., Custom Concrete of Lexington, Inc., and James Dunlap d/b/a Dunlap Services, Defendants,

Of whom Southern Produce, Inc., and S2P, LLC, are the Respondents.

Appellate Case No. 2014-001633

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 5444
Heard June 16, 2016 – Filed September 28, 2016

REVERSED AND REMANDED

William E. Booth, III, of Booth Law Firm, LLC, of West Columbia, for Appellant.

Jon Robin Turner, of J. Robin Turner, P.A., of Columbia, for Respondent S2P, LLC and Kathryn M. Cook, of Myrtle Beach for Respondent Southern Produce, Inc.

LOCKEMY, C.J.: In this dispute arising out of a construction project, Rose Electric, Inc. (Rose Electric) appeals the trial court's order finding for Southern Produce, Inc. (Southern) and S2P, LLC, (S2P) (collectively Respondents) arguing the trial court erred in (1) finding an expressed contract barred its recovery under the theory of quantum meruit; (2) finding Rose Electric did not establish the elements of its quantum meruit claim; (3) and failing to award Rose Electric damages.

FACTS

Southern is in the business of processing produce for sale. In the fall of 2010, Southern leased a parcel of land from S2P in the new South Carolina Farmers Market in Lexington County. On October 27, 2010, Southern entered into a "flat fee, turnkey contract" with Cooler Erectors of Atlanta (Cooler Erectors) to construct a refrigerated processing center on the property.

During the first week of November 2010, Morris Teasley, the president of Cooler Erectors, contacted Homer Rose, the owner of Rose Electric, about subcontracting the electrical work on the Southern project. Cooler Erectors and Rose Electric worked on three other projects at the new Farmers Market prior to working on the Southern project. Rose Electric agreed to complete the work; however, Rose Electric and Cooler Erectors did not discuss a price for the Southern project.

During the project Southern asked Rose Electric to modify the plans and materials Rose Electric received from Cooler Erectors. Rose Electric agreed to make those changes.

Throughout the construction process, Southern paid Cooler Erectors $203,277.00 of the project's $213,385.00 contract price. However, Cooler Erectors did not pay Rose Electric. Eventually, Rose Electric filed a mechanics' lien on Southern's property. The statement of account attached to the mechanics lien claimed Rose Electric was owed $54,339.13 for the "Total Contract Price" and $10,755.39 for "Change Orders."

On May 20, 2011, Rose Electric filed its complaint alleging causes of action for foreclosure of its mechanics' lien, breach of contract, unjust enrichment, and quantum meruit. During opening statements, Rose Electric notified the trial court it would only be pursuing its equitable cause of action for quantum meruit.

The trial court issued its order finding for Respondents on January 30, 2014. The trial court found an expressed contract existed between Rose Electric and Southern for the change orders and between Rose Electric and Cooler Erectors for the original scope of work. The trial court recognized Rose Electric elected not to proceed on its contract claims; therefore, the trial court found for Respondents. The trial court found the existence of an expressed contract precluded Rose Electric from recovery under quantum meruit. In the alternative, the trial court found Rose Electric failed to establish the elements of quantum meruit because Southern paid all but $10,108.00 of the contract price to Cooler Erectors and offered to pay Rose Electric for the change orders and a prorated share of the retainage.

STANDARD OF REVIEW

Quantum meruit is an equitable doctrine to allow recovery for unjust enrichment. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence." *Boykin Contracting, Inc. v. Kirby*, 405 S.C. 631, 637, 748 S.E.2d 795, 798 (Ct. App. 2013).

LAW/ANALYSIS

a) Existence of a Contract

Rose Electric argues the trial court erred in finding an express contract between Rose Electric and Cooler Erectors for the scope of work under the original plans and between Rose Electric and Southern for the change orders because there was no assent to the price term of either agreement. We agree.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). "If agreement is manifested by words, the contract is said to be express." *Id*; s*ee also* 13 Am. Jur. 2d *Building & Constr. Contracts* § 5 (2009) ("Where the parties to a building contract have orally agreed to the terms of performance *and the price*, there is an express contract." (emphasis added)). "If [the contract] is manifested by conduct, it is said to be implied." *Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477.

"Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty." *McPeters v. Yeargin Const. Co., Inc.*, 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986); *see also Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477 (noting price is an essential term in a construction contract). Even if the parties intend to be bound by an agreement, the absence of material terms renders the agreement unenforceable. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014).

We find the trial court erred in finding an express contract between Rose Electric and Cooler Erectors and Rose Electric and Southern. The evidence presented showed each of the three parties intended to be bound to their agreements. Rose Electric began working prior to signing an agreement and Homer Rose testified, "We had previously done work for Cooler Erectors of Atlanta. We had completed three jobs, all of which we had been paid well. We had been paid on demand." However, Rose acknowledged Rose Electric did not have a written contract with Cooler Erectors, nor had the two parties agreed to a contract price. Rather, Rose Electric sent Cooler Erectors invoices based on the time and cost of materials used. No evidence was presented to support the trial court's finding that Rose Electric and Cooler Erectors manifested an agreement on the price of the electrical work required on the Southern project, which our courts require as an essential term in construction contracts. *See Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477 (noting price is an essential term in a construction contract); *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211 ("Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty."). Therefore, the trial court erred in finding an express contract between Cooler Erectors and Rose Electric.

We also find the trial court erred in finding an express contract between Rose Electric and Southern. At several points during the construction, Dan Stocker, the general manager of Southern, requested Rose Electric modify the electrical plans to better accommodate Southern's anticipated uses. Specifically Southern requested Rose Electric include stainless steel disconnects rather than hard wiring in certain equipment, add a hand washer and water heater circuit, relocate an onion peeler station outside the building, install additional receptacles, and add additional lighting. According to Rose, Southern took responsibility for paying for these changes. However, the parties did not agree on the cost of those changes or the method by which those charges would be determined. In this case, the lack of a

price term is fatal to the existence of an express contract and the trial court erred in finding an express contract existed.

We acknowledge Rose Electric worked with Cooler Erectors on other projects at the new farmers market, and had been paid without signing a contract. Rose Electric also provided Cooler Erectors with a "proposal" after construction was complete detailing the amount of work Rose Electric completed. We also acknowledge Southern requested Rose Electric make certain changes to the electrical plans and accepted responsibility for any additional charges. This evidence supports the inference that Rose Electric, Southern, and Cooler Erectors intended to be bound by their agreements; however, the missing price term is fatal to finding an express contract where, as here, the parties are contemplating a construction project. *See Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 579, 762 S.E.2d at 701 (2014) (finding no contract existed though the parties intended to be bound by an agreement because the absence of material terms rendered the agreement unenforceable); *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211 ("Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty."); *Stanley Smith & Sons*, 283 S.C. at 434, 322 S.E.2d at 477 (noting price is an essential term in a construction contract).

b) Quantum Meruit

Rose Electric also argues the trial court erred in finding it could not recover under quantum meruit because it did not prove Southern unjustly retained a benefit without paying for its value. We agree.

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000). In order to recover under the theory of quantum meruit, a plaintiff must prove: "1) a benefit conferred by the plaintiff upon the defendant; 2) realization of that benefit by the defendant; and 3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Swanson v. Stratos*, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct. App. 2002).

"Courts addressing a claim of unjust enrichment by a subcontractor against a property owner have typically denied recovery when the owner in fact paid on its contract with the general contractor." *Williams Carpet Contractors*, 400 S.C. at

326, 734 S.E.2d at 180 (quoting *Columbia Wholesale Co.*, 312 S.C. at 262-63, 440 S.E.2d at 131)).

Southern paid $203,277.00 to Cooler Erectors pursuant to its October 22, 2010 contract. The total contract price for the building was $213,385.00.[1] Southern retained $10,103 from the contract price because "the work contained within the scope of the contract had not been completed." On December 2 the walls were not painted, the doors were not painted, automatic door closers were not installed, and there were draining issues. However, Rose Electric's work had been completed.

The trial court found Southern paid over 95% of the contract price to Cooler Erectors and "ha[d] consistently stood ready to pay the prorated shares of the retainage." We agree with the trial court that it would be unjust to require Southern pay the entire $54,339.13 owed to Rose Electric by Cooler Erectors. Southern did withhold $10,103 from the purchase price. This was a benefit that Southern retained from the work performed by Rose Electric Southern did not pay for.

We find Southern's offer to pay Rose Electric a prorated share of the retainage creates a sufficient equitable remedy. A subcontractor that is owed a debt for labor or materials furnished and used in the erection of a building has a lien upon the building and the land to secure the payment due. S.C. Code Ann. § 29-5-10 (2007). "However, in no event shall the aggregate amount of any liens on the improvement exceed the amount due by the owner." S.C. Code Ann. § 29-5-20 (2007). "In the event the amount due the contractor by the owner is insufficient to pay all the lienors acquiring liens as herein provided it is the duty of the owner to

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[1] Rose Electric challenges the trial court's finding that the total cost of the project was $213,385.00, and that the architectural plans were included in the total project price. We recognize in an action in equity, this court may find the facts based on our own view of the preponderance of the evidence. *First Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 567, 511 S.E.2d 372, 379 (Ct. App. 1998). "However, we are not required to disregard the findings of the trial [court] who saw and heard the witnesses and was in a better position to judge their credibility." *Id.* Evidence supported both Rose Electric and Southern's respective position. We find the issue of whether the architectural plans were intended to be part of the contract price was an issue of credibility. Accordingly, we adopt the trial court's finding that the total contract price of the project included the architectural plans.

prorate among all just claims the amount due the contractor." S.C. Code Ann. §29-5-60(A) (2007).

Of the $213,385.00 total price of the project, Southern paid Cooler Erectors $203,277.00. Southern retained $10,103 because "the work contained within the scope of the contract had not been completed." When Cooler Erectors abandoned the job site, two other sub-contractors filed mechanic's liens on the property to secure payment. Rose Electric's lien claimed it was owed $54,339.13 on the construction agreement, a concrete supplier claimed a lien of $14,528.20, and a plumber claimed a lien of $10,210.93. The three subcontractors' claims totaled $79,139.26.

Had Rose Electric proceeded with its mechanics' lien foreclosure action, it's recovery would have been limited to 68.74% of the retainage, totaling $6,948.24. However, Rose Electric abandoned its mechanics' lien cause of action prior to trial and proceeded only on it quantum meruit cause of action. While Rose Electric did not invoke the mechanics' lien statute as a theory for recovery, we find the statute provides a framework for determining what recovery is proper in quantum meruit cases involving construction contracts. Where, as here, a building owner has paid a general contractor a substantial amount of the contract price, we find the mechanics lien statutes, and their limitations, are a proper measure of the subcontractor's damages against the property owner in a quantum meruit action.

Furthermore, the mechanics' lien statutes do not distinguish between liens that settle prior to trial and those that continue to trial. Rather, "it is the duty of the owner to prorate among all just claims the amount due the contractor." § 29-5-60(A). Southern did that in this case. We find the trial court properly included all liens filed against Southern when considering the amount of the retainage to which Rose Electric was entitled. [2]

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[2] Rose Electric argues Southern should not be able to use their payments to Cooler Erectors as a defense to Rose Electric's quantum meruit claim because Cooler Erectors was not a licensed general contractor in South Carolina. We disagree that Cooler Erector's status as an unlicensed general contractor prohibits Southern from relying on its payments to Cooler Erectors as a defense in this case. Section 40-11-370 of the South Carolina Code (2011) prohibits unlicensed contractors, like Cooler Erectors, from attempting to enforce a contract they entered into. That statute does not prohibit individuals who contract with unlicensed general

A defendant is not relieved of its responsibility to pay for a benefit because the defendant offered to pay prior to trial. Here, Southern has retained $10,103 of the contract price, but has recognized the full benefit of Rose Electric's services. The trial court erred in finding Rose Electric could not prove Southern retained a benefit without paying for it to the extent of the retainage. Accordingly we reverse and direct the trial court to enter judgment for Rose Electric for $6,948.24–the amount of its prorated share of the retainage.

We also reverse the trial court's order denying Rose Electric recovery for the change orders. As previously noted, no express contract between Rose Electric and Southern existed in this case. The court's only discussion of the quantum meruit action based on the change orders was "Southern Produce has offered to pay Rose [Electric] $10,755.39 for the change orders per its verbal contract." Based on Southern's offer to pay for the change orders, the trial court found Rose Electric failed to prove Southern retained a benefit under conditions that make it unjust for it to retain the benefit without paying its value. As discussed previously, there is no authority to support the assertion that a defendant is relieved of its responsibility to pay for a benefit because the defendant offered to pay prior to trial. Rose Electric modified the electrical plans to better suit Southern's work process; Southern has realized the benefit of Rose Electric's services; and Southern has not paid for those services. *See Swanson*, 350 S.C. at 121, 564 S.E.2d at 119 (noting the elements of quantum meruit are: "1) a benefit conferred by the plaintiff upon the defendant; 2) realization of that benefit by the defendant; and 3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value"). We find Rose Electric is entitled to be paid the stipulated price for its work and remand to the trial court to enter judgment in the amount of $10,755.39 for those services.

We reverse and remand to the trial court to modify its judgment to include an award of damages to Rose Electric in the amount of $17,703.63 and to address Rose Electric's claim for prejudgment interest.

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contractors from alleging payment to those contractors as a defense to claims by subcontractors. We affirm the trial court's determination that Cooler Erector's status as an unlicensed general contractor is irrelevant to this case.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

REVERSED AND REMANDED.

WILLIAMS and MCDONALD, JJ., concur.