The Supreme Court of South Carolina

In the Matter of William Ashley Boyd, Respondent.

ORDER

On August 9, 2010, the Court definitely suspended respondent from the practice of law for six (6) months. In the Matter of Boyd, Op. No. 26847 (S.C. Sup. Ct. filed August 9, 2010) (Shearouse Adv. Sh. No. 31 at 16). The Office of Disciplinary Counsel (ODC) now petitions the Court for appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413. We grant the petition.

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

escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

September 20, 2010

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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N O T I C E

IN THE MATTER OF DERWIN T. BRANNON, PETITIONER

Derwin T. Brannon, who was definitely suspended from the practice of law for a period of one (1) year, retroactive to April 30, 2008, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Tuesday, October 26, 2010, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

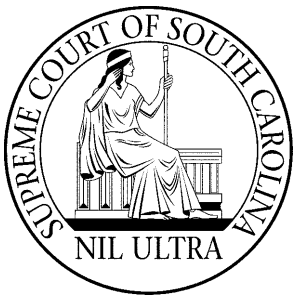
Any individual may appear before the Committee in support of, or in opposition to, the petition.

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

Columbia, South Carolina

September 21, 2010

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
September 27, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Christopher Blakeslee Roberts, Respondent.

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition is granted.

Pursuant to Rule 17(b), RLDE, respondent's license to practice law in this state is hereby suspended until further order of the Court.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT
Pleicones, J., not participating

Columbia, South Carolina

September 24, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donald M. Prince, Appellant,

v.

Liberty Life Insurance Company, Respondent.

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

Opinion No. 4741
Heard March 2, 2010 – Filed September 22, 2010

AFFIRMED

John Eagle Miles, of Sumter and John S. Nichols, of Columbia, for Appellant.

Kevin Kendrick Bell, of Columbia, for Respondent.

KONDUROS, J.: In this dispute over the termination of a life insurance policy, Donald M. Prince, the beneficiary and owner of the policy, appeals the trial court's grant of summary judgment to Liberty Life Insurance Company, finding the statute of limitations barred the action. Prince argues his cause of action as beneficiary could not have accrued until the insured died and the fact that he is also the owner of the policy does not change that. We affirm.

FACTS

In 1986, Prince obtained an insurance policy in the amount of $100,000 on the life of his brother from Argus Life Insurance Company. The following year, Prince took out a second policy in the amount of $800,000 on the life of his brother from Argus. Prince was the owner and beneficiary under both policies. Liberty subsequently assumed the billing, collection, and claims payment responsibilities for both policies.

In June 1997, Prince mailed Liberty checks to pay the premiums for each policy.[1] On July 1, 1997, Liberty sent Prince a letter returning both checks and stating both policies lapsed in 1996; the $100,000 policy had lapsed because it lost all value once it was overloaned, and the $800,000 policy lapsed for nonpayment of premiums. After a series of correspondence between Liberty and Prince, Liberty brought a declaratory judgment action in 1999 against Prince and a creditor/assignee of the $800,000 policy pertaining only to that policy. Prince counterclaimed for reinstatement of the policy, asserting Liberty had failed to properly notify him the policy was about to lapse. Prince ultimately prevailed, and Liberty reinstated his policy after he paid the back premiums.

On February 3, 2003, Prince requested Liberty reinstate the $100,000 policy as well. Liberty refused to reinstate the policy, informing Prince the statute of limitations had expired on any claim regarding the policy. On August 6, 2003, Prince's brother died. On December 7, 2005, Prince brought

[1] Because Prince was in prison, his sister obtained his power of attorney and sent the payments on his behalf.

a cause of action against Liberty contending it wrongfully terminated the $100,000 policy and seeking reinstatement of the policy upon payment of back premiums. Liberty answered contending the statute of limitations had run, barring the claim.

On February 21, 2009, Liberty moved for summary judgment asserting the statute of limitations barred the action. Liberty also maintained the claim was a compulsory counterclaim in the action regarding the $800,000 policy and Prince's failure to raise the claim during that cause of action waived the claim. Prince opposed summary judgment arguing his cause of action as beneficiary did not exist until his brother died in 2003, and thus, the statute of limitations did not bar his cause of action filed in 2005.

Following a hearing on the motion, the trial court granted Liberty summary judgment solely on the ground the statute of limitations had lapsed. The court found Prince's cause of action accrued no later than July 1997. The trial court found because Prince's claim as owner of the policy was barred once the statute of limitations expired in 2000, when the insured died in 2003, Prince had no benefits to convey to himself as beneficiary. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

Prince contends the trial court erred finding the action was barred by the statute of limitations and his right as beneficiary to challenge the cancellation of the policy was no better than the right he had as owner to challenge the cancellation. He maintains this was error because his claim as beneficiary did not accrue until his brother's death and he brought this claim within three years of that. We disagree.

An action for breach of contract must be commenced within three years. S.C. Code Ann. § 15-3-530(1) (2005). Under "the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). The discovery rule applies to breach of contract actions. Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 273, 384 S.E.2d 693, 695 (1989), overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995).

When an insured reserves the right in his policy to change the beneficiary, the named beneficiary does not have a vested right during the insured's lifetime. Horne v. Gulf Life Ins. Co., 277 S.C. 336, 338, 287 S.E.2d 144, 146 (1982). "Instead, the named beneficiary has a mere expectancy; the complete control of the policy remains in the insured." Id. In Shuler v. Equitable Life Assurance Society of the United States, 184 S.C. 485, 491, 193 S.E. 46, 48 (1937), the supreme court found the beneficiary's bringing of an action while the insured was still alive was premature because the beneficiary could still be changed.

However, "[w]hen an insurance policy does not reserve to the insured the right to change the beneficiary, 'the beneficiary, upon the issuance of the policy, acquires a vested interest in the proceeds of the insurance when available according to the terms of the policy, which cannot be divested by any act of the insured.'" Waters v. S. Farm Bureau Life Ins. Co., 365 S.C. 519, 523, 617 S.E.2d 385, 387 (Ct. App. 2005) (quoting Antley v. N.Y. Life

Ins. Co., 139 S.C. 23, 27, 137 S.E. 199, 200 (1927)). South Carolina case law allows "an action for wrongful cancellation to be brought during the lifetime of the insured by either the insured or beneficiary if the beneficiary's interest is an absolute and indefeasible vested interest." McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 382, 597 S.E.2d 181, 186 (Ct. App. 2004).

In Babb v. Paul Revere Life Insurance Co., 224 S.C. 1, 8, 77 S.E.2d 267, 270 (1953), the South Carolina Supreme Court found a beneficiary's interest was contingent during the insured's life because the insured had the right under the policy to change the beneficiary, even though the option was not exercised. However, the supreme court further found that did not prevent the beneficiary from maintaining an action that resulted from the alleged wrongful cancellation of the policy after the insured had died. Id. The Babb court noted:

> An action for damages for wrongful cancellation or repudiation of an insurance policy may be maintained by either insured or the beneficiary during the lifetime of insured, but the beneficiary cannot maintain the action during insured's lifetime if he does not have a vested interest in the policy, or if his interest is in the nature of a mere expectancy and does not become absolute and indefeasible until the death of insured. . . . After the death of insured, the action may be maintained by the beneficiary.

Id. at 9, 77 S.E.2d at 271(quoting 45 C.J.S. Insurance § 465(b)).

In Rice v. Palmetto State Life Insurance Co., 196 S.C. 410, 412, 13 S.E.2d 493, 494, (1941), a mother obtained a policy on the life of her daughter, named herself the beneficiary, and paid all the premiums. The supreme court stated had the insured "undertaken to change the beneficiary, the court would be bound by [its previous holdings that the beneficiary has no vested right when the insured has reserved the right to change beneficiaries]

if any complaint were made by the mother." Id. at 421, 13 S.E.2d at 498. The court determined:

> [T]he rights of the existing beneficiary are inchoate and may be nullified by action on the part of the insured in strict accordance with the terms of the policy. But so long as there is no change of beneficiary, the rights of the beneficiary are tangible and are protected by the law.

Id. at 422, 13 S.E.2d at 498. In Horne, the supreme court found even though a beneficiary paid most of the premiums, the court was bound by previous rulings that stated that the beneficiary has no vested right when the insured has reserved the right to change beneficiaries. 277 S.C. at 339, 287 S.E.2d at 146.

Prince relies on Babb, which found a beneficiary's interest vests once an insured dies, and the beneficiary can then pursue action, even if the policy is no longer in existence. However, in that case only the insured had the right to change the beneficiary. Here, because only Prince had the right to change the beneficiary, he had a vested interest in the insurance policy as a beneficiary while his brother was still alive. The statute of limitations applies to beneficiaries and begins to run once both the cause of action accrues and the interest is vested. Therefore, when Prince filed the action in 2005, the statute of limitations barred the claim. Accordingly, the trial court's order granting Liberty Life summary judgment is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Theodore David Wills, Jr., Appellant.

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

Opinion No. 4742
Submitted September 1, 2010 – Filed September 22, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

PER CURIAM: Theodore David Wills, Jr. appeals his murder conviction and forty-year sentence, arguing the trial court erred in admitting his statement in violation of Rule 410, SCRE. We affirm. [1]

FACTS

Wills was charged with murdering Julian Lee. Prior to his trial, Wills entered into a proffer agreement with the State, reviewed and signed by his attorney, whereby he agreed to truthfully divulge the events and circumstances surrounding Lee's death in exchange for the State's consideration and a recommended sentence. The agreement contained several conditions, including Wills's submission to a polygraph examination to test the veracity of his statement. Additionally, the agreement provided:

> [U]pon examination(s) by polygraph, if the responses given by Theodore David Wills Jr. show deception, are inconsistent with information previously provided or indicates he is the person or one of the persons that shot the victim, the terms of this proffer are null and void and any statements made by Theodore David Wills Jr. may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial of Theodore David Wills Jr. and impeachment.

After Wills gave a video-taped proffer statement, the polygraph was administered and the State determined Wills was untruthful.

At trial, Wills opposed the statement's introduction, and after a Jackson v. Denno, 378 U.S. 368 (1964), hearing, the trial court found the statement was voluntary and admissible on the conditions both parties would refrain from mentioning the polygraph, and the videotape would be redacted where Wills referenced his previous incarceration and the polygraph. Wills was

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

convicted as charged and sentenced to forty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. Id.

LAW/ANALYSIS

"Rule 410[, SCRE,] provides . . . a statement made during plea negotiations with a prosecuting authority, even if a guilty plea is not entered or is later withdrawn, is not admissible." State v. Compton, 366 S.C. 671, 679, 623 S.E.2d 661, 665 (Ct. App. 2005).

In Compton, this court addressed the admissibility of a defendant's statements procured pursuant to an agreement with the State. Id. Otis James Compton was questioned about an unsolved murder prior to pleading guilty to unrelated counts of burglary. Id. at 675, 623 S.E.2d at 663. At all times, Compton remained a person of interest in the murder investigation. Id. While incarcerated, Compton pled to additional charges unrelated to the murder and was placed in a holding cell. Id. Compton initiated a conversation with his holding cellmate regarding the unsolved murder, admitting his involvement. Id. Approximately two months later, the cellmate was transferred to Compton's prison and asked by investigators to listen to Compton about the unsolved murder. Id. at 675-76, 623 S.E.2d at 663. The cellmate acquiesced and reported several conversations to investigators. Id. at 676, 623 S.E.2d at 663.

Eight months after his initial plea, Compton contacted investigators regarding the unsolved murder and entered into a written agreement labeled "Plea Agreement" whereby Compton agreed to fully and truthfully cooperate

in the murder investigation. Id. at 676, 623 S.E.2d at 663-64. In exchange for his cooperation, the State agreed to reduce all sentences Compton was serving for the unrelated burglary charges. Id. at 676, 623 S.E.2d at 664. As a result of his cooperation during the investigation, Compton was indicted for murder. Id. Pretrial, Compton moved to suppress his statements, arguing they were subject to an immunity agreement and precluded by Rule 410, SCRE. Id. The trial court admitted the statements after finding no reasonable expectation of immunity existed and the statements were not procured during plea negotiations. Id.

On appeal, this court examined the "Plea Agreement," and determined the agreement did not contain an immunity clause. Id. at 676-78, 623 S.E.2d 664-65. In construing the agreement, our court stated "immunity agreements and plea agreements are to be construed in accordance with general contract principles." Id. at 677, 623 S.E.2d at 664. Thus, "[t]he court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Id. at 678, 623 S.E.2d at 665. Likewise, this court determined the admission of Compton's statements did not offend Rule 410, SCRE. Id. at 679, 623 S.E.2d at 665. This court held Rule 410, SCRE, did not preclude the admission because the statements were not procured in the course of plea negotiations when the negotiation "related to the reduction in sentence for the burglary" convictions. Id. Specifically, our court stated the discussions "were not in furtherance of Compton making a plea on any charges." Id.

Applying the principles of Compton to the instant facts, an ambiguity in South Carolina law seems to emerge. Our case law unequivocally establishes agreements between defendants and the State should be interpreted "in accordance with general contract principles." Id. at 677, 623 S.E.2d at 664. However, by examining the admissibility of Compton's statements[2] under Rule 410, SCRE, our court has left the precise question of

[2] Compton was also subjected to a polygraph, and the State determined he was deceitful. Compton, 336 S.C. at 676, 623 S.E.2d at 664. However, in his appeal, we declined to address whether Compton's breach of the

whether an agreement can waive the application of the Rules of Evidence unanswered.

While no South Carolina case law specifically discusses whether a defendant can waive the exclusionary provisions of Rule 410, SCRE, the United States Supreme Court addressed waiver of the exclusionary provisions of Rule 410, FRE, in United States v. Mezzanatto, 513 U.S. 196, 200 (1995).[3] Gary Mezzanatto was arrested and charged with possession with intent to distribute methamphetamine after attempting to sell an undercover officer drugs. Id. at 198. The controlled buy was arranged by an informant who was arrested a few hours before Mezzanatto for operating a methamphetamine laboratory in his residence. Id. at 197-98. Pretrial, Mezzanatto and his attorney contacted the prosecutor to discuss the possibility of cooperating with the government. Id. at 198. The prosecutor informed Mezzanatto he was under no obligation to talk; however, the prosecutor stated Mezzanatto would have to be completely truthful if he wanted to cooperate with the government. Id. Additionally, Mezzantto orally agreed, with advice of his counsel, "that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far." Id.

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agreement contributed to his statements' admissibility because the issue was not properly before this court. Id. at 679 n.2, 623 S.E.2d at 665 n.2.

[3] Rule 410, SCRE, is substantially similar to Rule 410, FRE. Compare Rule 410, FRE, and Mezzanatto, 513 U.S. at 197 ("Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) provide that statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant."), with Rule 410, SCRE, and Compton, 366 S.C. at 679, 623 S.E.2d at 665 ("Rule 410 provides that evidence of a guilty plea that is later withdrawn or evidence of a plea of nolo contendere is inadmissible against a defendant. Furthermore, statements made in the course of court proceedings related to such pleas are not admissible. Likewise, a statement made during plea negotiations with a prosecuting authority, even if a guilty plea is not entered or is later withdrawn, is not admissible.").

During the meeting, Mezzanatto attempted to minimize his involvement in distributing methamphetamine and claimed he had not visited the methamphetamine laboratory at the informant's residence for at least a week before his arrest. Id. at 199. After showing Mezzanatto video surveillance of his vehicle at the methamphetamine laboratory the day before his arrest, the government terminated the meeting due to Mezzanatto's deceit. Id.

Accordingly, Mezzanatto was tried, and during his cross-examination, the prosecutor impeached him using the statements procured during the cooperation meeting. Id. Mezzanatto was ultimately convicted. Id. On appeal to the Ninth Circuit Court of Appeals, Mezzanatto's conviction was reversed. Id. The Ninth Circuit "held [Mezzanatto's] agreement to allow admission of his plea statements for purposes of impeachment was unenforceable." Id. The United States Supreme Court granted certiorari and reversed the Ninth Circuit, stating: "The presumption of waivability has found specific application in the context of evidentiary rules. Absent some 'overriding procedural consideration that prevents enforcement of the contract,' courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objections." Id. at 202 (citation omitted). Furthermore, the Court held "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable." Id. at 210.

Here, the principles of Mezzanatto are instructive in determining whether Wills's statements were properly admitted. First, we note the proffer agreement between Wills and the State constituted a plea negotiation and triggered the exclusionary provisions of Rule 410, SCRE. Likewise, any statements procured in execution of the agreement were unequivocally in furtherance of Wills entering a plea on his pending charges. Second, construing the proffer agreement in accordance with general contract principles, regardless of the agreement's wisdom or lack thereof, the agreement unambiguously provides Wills's statement can be used against him by the State for any legal purpose if the State determines Wills was deceitful.

Thus, we hold the proffer agreement waived the protections of Rule 410, SCRE. Next, we must determine whether an affirmative indication that Wills entered the agreement unknowingly or involuntarily exists. Because Wills entered the proffer agreement with advice of counsel, evidenced by counsel's co-signature, and the record lacks support for a finding to the contrary, we find the agreement was knowingly and voluntarily entered. Therefore, the trial court properly admitted Wills's statements as evidence against him at trial.

Accordingly, Wills's conviction is

AFFIRMED.

WILLIAMS, PIEPER, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Ronald Garrard, Respondent.

Appeal From Richland County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4743
Submitted May 3, 2010 – Filed September 22, 2010

AFFIRMED

John Benjamin Aplin, of Columbia, for Appellant.

Eleanor Duffy Cleary, of Columbia, for Respondent.

FEW, C.J.: Ronald Garrard served a six-year prison sentence for criminal sexual conduct with a minor in the first degree. He was released from prison on March 1, 2006, and entered the community supervision program as required by section 24-21-560(A) of the South Carolina Code (2007). He committed no violations of the program's terms during 2006 and 2007. On December 31, 2007, he helped his brother move a washer and dryer for their mother. In the course of doing this, Garrard briefly stopped at his brother's workplace, approximately 750 feet from Lexington High School. The State[1] charged him with violating number five of the sex offender conditions for community supervision which states: "I will not enter into, loiter or work within one thousand . . . feet of any area or event frequented by people under the age of 18 including but not limited to: schools . . . ." Garrard conceded he entered within one thousand feet of the school, and thus that he violated the terms of condition five. He denied the violation was willful. The trial judge initially ruled Garrard had committed a willful violation. After a motion to reconsider, however, she reversed her decision and ruled that the violation was not willful.

The State contends the trial judge abused her discretion in finding that Garrard did not commit a willful violation. The State also contends the court violated the Victim's Rights Act by not holding a hearing on Garrard's motion to reconsider. We affirm.

I. Community Supervision Program

A. Definition of "Willfully"

The community supervision program is operated by the South Carolina Department of Probation, Parole and Pardon Services. S.C. Code Ann. § 24-21-560(A) & (B) (2007). When the department determines that a participant has committed a violation warranting revocation, "a probation agent must

[1] The State is represented by the South Carolina Department of Probation, Parole and Pardon Services at hearings on alleged violations of community supervision. See S.C. Code Ann. § 24-21-560(A) & (C) (2007).

initiate a proceeding in General Sessions Court." Id. § 560(C). A circuit judge then "shall determine whether . . . the prisoner has willfully violated a term of the community supervision program." Id. § 560(C)(5). In this appeal, we must determine what the Legislature meant in using the term "willfully." The State contends that simply because Garrard was physically located less than one thousand feet from the school, he committed a willful violation. We disagree.

Our appellate courts have defined "willful" in a variety of contexts. In each instance, the court has required a showing of a consciousness of wrongdoing in order to prove willfulness. See, e.g., S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992) (In the context of termination of parental rights, "[c]onduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child."); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000) (In the context of punitive damages, "[w]illfulness has been defined as a conscious failure to exercise due care."). In the context of contempt, our supreme court defined a willful act "as one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done . . . .'" State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (quoting Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)). In both Sowell and Padgett, the supreme court quoted Black's Law Dictionary in defining "willful." See id. Black's Law Dictionary defines "willful" as "[p]roceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary." Black's Law Dictionary 1434 (5th ed. 1979).[2]

[2] Sowell and Padgett quote the fifth edition. The definition of "willful" in the current edition is shorter, but essentially the same: "[v]oluntary and intentional, but not necessarily malicious." Black's Law Dictionary 1737 (9th ed. 2009). "Willfulness" is defined in the ninth edition as "[t]he voluntary, intentional violation or disregard of a known legal duty." Id.

These general definitions are appropriate to use in construing the term "willfully" in section 24-21-560(C)(5). We find support for this conclusion in this court's opinion in State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007). In the closely related context of an alleged violation of probation, the Spare court explained the requirements for proving "willfulness" to establish a violation for failure to pay money.[3] 374 S.C. at 269-70, 647 S.E.2d at 708-09. The court began by stating: "'Willful failure to pay means a voluntary, conscious and intentional failure.'" 374 S.C. at 269, 647 S.E.2d at 708 (quoting People v. Davis, 576 N.E.2d 510, 513 (Ill. App. Ct. 1991)). The court then referenced Sowell, and quoted the passage from Sowell cited earlier in this opinion. 374 S.C. at 269, 647 S.E.2d at 708. Following these general definitions, we construe the term "willfully" as used in this section to require that the State prove either: (1) a voluntary and intentional act done with consciousness that the act is a violation of a term of the community supervision program, or (2) the voluntary and intentional failure to do something known to be required by a term of community supervision.

In his motion to reconsider, Garrard cited Spare in arguing that the judge had applied the incorrect definition for "willful." The trial judge relied on Spare in changing her ruling to conclude that the State had failed to prove a willful violation. We hold the trial judge used the correct definition of "willfully" after reconsideration. Depending on the facts of a particular case and the nature of an alleged violation, the specific facts the State must prove may vary. In order to prove a willful violation in this case, the State was required to prove that Garrard voluntarily and intentionally went within one

[3] Willfulness is not normally required in order to prove a violation of probation. For alleged violations based solely on a failure to pay money, however, as was the case in Spare, the State must prove willfulness before a circuit judge may revoke probation. See State v. Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999).

thousand feet of a school, and that he knew doing so was a violation of a term of the community supervision program.[4]

B. Trial Judge's Discretion

Both the decision of whether an alleged violation was willful and the decision of whether to revoke community supervision are discretionary. The trial court will not be reversed unless the appellant has shown an abuse of that discretion. See State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (applying an abuse of discretion standard of review to the related context of an appeal from an order revoking probation). Where there is any evidence to support the court's factual findings, there is no abuse of discretion. Id. We find evidence to support the trial court's factual determination that the violation was not willful. First, Garrard described the incident as follows: "I pulled into this business and got out of my truck and got in his truck and I drove and got a washer and dryer and came back to his business and got in my truck and drove off. . . . I was not there a total of four minutes there and back." Second, in response to the judge's questions, Garrard testified that his violation was not willful. He also testified he did not know that working at his brother's workplace was impermissible. This testimony was supported by Garrard's treating therapist for the previous two years, Dr. Lazarus, who suggested that Garrard had worked hard to remain in compliance with the terms of community supervision. Dr. Lazarus testified that Garrard had "been exemplary in following exactly my directions, my

[4] In its brief, the State argues the trial judge "confuses the intent behind the actual violation charged (to knowingly enter an area within one thousand feet of a school) with the intent to commit a bad act once he entered the area." We do not believe the trial judge was confused at all. Rather, she used the correct definition of willfully in finding "[t]he evidence presented demonstrated a lack of willfulness to violate the terms of his supervision." In the context of the violation of community supervision alleged in this case, the definition of willfulness does not require that the State prove Garrard intended to disobey or disregard the law while within one thousand feet of the school. Rather, proof that he intended to go to the location, and that he knew doing so was a violation, would have been sufficient to prove willfulness.

recommendations," and that Garrard "is at the lowest level that is possible for reoffending."

Finally, the trial judge repeatedly asked the probation officer representing the State at the hearing to address whether the violation was willful. The officer never gave a direct answer, stating at one point "we are going to leave that to the judge's discretion." The trial judge finally asked "you are telling me you don't feel it was willful? . . . I need you to be honest with me." The officer replied merely that she felt a verbal reprimand was sufficient to address Garrard's violation. The trial judge's finding that the State had not proven a willful violation was within her discretion.

II. Victim's Rights Act

In its return to Garrard's motion to reconsider, the State requested that the trial judge hold a hearing. The State now contends the decision not to conduct a hearing violated the Victim's Rights Act. We disagree. The Act requires the State to "attempt to notify each victim, who has indicated a desire to be notified, of post-conviction proceedings affecting the . . . release of the offender, . . . and of the victim's right to attend and comment at these proceedings." S.C. Code Ann. § 16-3-1560(A) (2003). When an offender files a motion to reconsider a decision to revoke community supervision, the section requires the State to notify the victim that the motion has been filed. See id. If the trial judge chooses to hold a hearing on the motion, then the section requires the State to notify the victim of her right to "attend and comment." See id. The section says nothing, however, about whether the judge must choose to hold a hearing. In fact, while the judge should give a reasonable opportunity to allow the State to comply with section 16-3-1560(A),[5] the section imposes no requirement whatsoever on the judge.

[5] No section of the Act specifically addresses a circuit judge's responsibilities regarding a motion or proceeding after conviction. However, two sections address a circuit judge's responsibilities in hearings and proceedings conducted before conviction. See S.C. Code §§ 16-3-1525 & 1550 (2003). In both of those sections, the circuit judge is generally required to verify the

We hold the decision of whether to conduct a hearing on a motion to reconsider the revocation of community supervision is within the discretion of the trial court. See Rule 29, SCRCrimP (A post-trial "motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument."). If there is any reasonable basis for the decision not to hold a hearing, the decision will be affirmed on appeal. In this case, no additional evidence was offered in the motion to reconsider or in the State's return. Rather, the motion focused on the proper definition of "willfulness," and whether the evidence already offered was sufficient for the State to meet its burden to prove the violation was willful. Under these circumstances, the trial judge's decision not to hold a hearing was within her discretion.

AFFIRMED.

PIEPER, J., and CURETON, A.J., concur.

State's compliance with the Act, and to allow reasonable time for the State to comply if it has previously failed to do so.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

M. R. C. L., R. L., and G. L., Defendants,

Of whom M. R. C. L. is Appellant,

In the Interest of One Minor Child.

Appeal From Berkeley County
W. Thomas Sprott, Family Court Judge

Opinion No. 4744
Submitted September 1, 2010 – Filed September 22, 2010

REVERSED AND REMANDED

Phillip S. Ferderigos and Jeremy E. Bowers, both of Charleston, for Appellant.

Paul C. White, of Moncks Corner, for Respondent.

Tammie Lynn Hoffman, of North Charleston, for Guardian ad Litem.

KONDUROS, J.: M. R. C. L. (Mother) appeals the termination of her parental rights to her minor child (Child) pursuant to sections 20-7-1572 (3) and (4) of the South Carolina Code (2007) (current version at 63-7-2570(3) & (4) (2010)) (willful failure to visit and willful failure to support, respectively). We reverse and remand to the family court for a permanency planning hearing.[1]

FACTS

On May 25, 2007, after Mother and R. L. (Father) tested positive for cocaine, Child was removed from their home.[2] Child was one year old at the time of removal. Child was placed in a pre-adoptive foster home with two of her sisters.

Following a merits hearing on October 22, 2007, the family court ordered Mother and Father to complete a treatment plan including mental health assessments, parent evaluations, alcohol and drug assessments, and other recommendations. In addition, the family court ordered them to provide Child with safe and appropriate housing,[3] report their legal income,

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

[2] The South Carolina Department of Social Services (DSS) first became involved with Mother and Father in 1991. Mother and Father had seven children. In April 2004, before Child's birth, DSS removed the other children from Mother and Father's home. Mother's and Father's parental rights to the other six children were terminated October 7, 2008, in a separate action.

[3] The record does not make clear what improvements to the home the family court ordered or why. One month before Child's removal, the home was inspected and found to be safe. The sole reason for Child's removal was her parents' positive cocaine tests, which occurred on May 16, 2007. However,

pay child support, and complete "an extensive parenting course." Mother and Father failed to complete the alcohol and drug assessments, parenting classes, and home safety improvements necessary for DSS to return Child to them.[4] Although Father paid some child support from his Social Security disability benefits, Mother, a homemaker, paid nothing.

In April 2008, DSS initiated termination of parental rights (TPR) proceedings. The complaint for TPR alleged as statutory grounds meriting TPR (1) willful failure to visit, (2) willful failure to support, (3) failure to remedy the condition leading to removal, (4) a diagnosable condition that was unlikely to change and that prevented Mother from providing Child with "minimally acceptable care," and (5) harm or neglect of Child from which the home cannot likely be made safe within twelve months. Moreover, the complaint indicated Child had remained in foster care continuously since her removal from Mother. Both parents testified at the November 3, 2008 TPR hearing. Mother stated they lived in a two-bedroom trailer home. According to Father, their income consisted of his Social Security disability benefits of approximately $689 per month and occasional income he earned by doing odd jobs and lawn care. In addition to everyday expenses, Father had recently purchased new cell phones for himself and Mother at a cost of $100 each. Their monthly expenses included approximately $50 per month for food and healthcare for their ten dogs and $30 per month for cellular telephone service.[5] An unspecified amount of Father's Social Security disability benefits went to support Child.

When Mother last worked in April 2004, she held three jobs. Mother suffered from diabetes during her pregnancy with Child. A degenerative disk disease prevented her from doing jobs that included lifting heavy objects. At

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Mother tested negative for drugs on May 3, 2007; May 29, 2007; November 1, 2007; April 21, 2008; and September 27, 2008.

[4] However, Dr. Lois Masouris testified she provided Mother and Father with three sessions of "Triple P" parenting training but could not complete the course without Child's attendance. Dr. Masouris wrote to DSS requesting Child's attendance at ten future sessions, but DSS never responded.

[5] Mother and Father do not have a landline telephone.

the time of the TPR hearing, Mother had applied unsuccessfully for approximately thirty jobs. She was on probation for assault on a child, and she admitted driving while her driver's license was suspended. However, Mother denied doing drugs, including smoking crack cocaine.

Mother testified she visited Child in foster care fourteen times. However, a court order prevented her from visiting Child for two or three months during the seventeen months between Child's removal and the TPR hearing. According to Kathleen Spell, the DSS case manager, Mother and Father took snacks, drinks, toys, lotion for Child's skin issue, and antibiotics to Child. Mother also testified they provided toys, food, clothes, diapers, wipes, medication, and lotion. In anticipation of Child returning home, Mother redecorated the smaller bedroom for Child by painting, installing curtains and carpet, and rearranging furniture.

Spell testified she attempted to evaluate improvements to the home on several occasions, but Mother and Father prevented her from entering. The last time she visited, they permitted her to enter the house, but she left before completing her evaluation because Father cursed at her, yelled, and slammed doors.

Wendy May of South Carolina Vocational Rehabilitation (SCVR) testified she saw Mother on June 12, 2007. May offered Mother guidance counseling, GED preparation classes, and job readiness training. SCVR offered Mother van transportation to its GED classes and job readiness training sessions, but she declined. Mother attended a few classes but did not complete any of the programs within the first year. On the date of the TPR hearing, Mother had been re-enrolled for approximately one month.

Maria Royle, Child's guardian ad litem (GAL), testified Child appeared reluctant to spend time with Mother and Father, and they had to "bribe" her with treats. According to Royle, Child bonded with her foster family and called her foster mother "Mommy." Royle believed it was in Child's best interest to terminate Mother's and Father's parental rights so Child and her siblings could be adopted by their foster family. She expressed concern that

despite being "in the system" since 1991, Mother and Father had failed to rehabilitate themselves from their history of drug use and arrests.

The family court terminated Mother's and Father's parental rights pursuant to sections 20-7-1572 (3) and (4) of the South Carolina Code (2007) (willful failure to visit and willful failure to support, respectively). The family court also found TPR was in Child's best interests. Mother now appeals.

STANDARD OF REVIEW

"A ground for [TPR] must be proved by clear and convincing evidence." Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 32, 496 S.E.2d 864, 868 (1998). "In reviewing a termination of parental rights, the appellate court has the authority to review the record and make its own findings of whether clear and convincing evidence supports the termination." Id.

LAW/ANALYSIS

I. Willful Failure to Visit

Mother argues the family court erred in finding DSS proved by clear and convincing evidence she willfully failed to visit Child. We agree.

One ground for TPR is proven when:

> The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's

> placement from the parent's home must be taken into consideration when determining the ability to visit.

S.C. Code Ann. § 63-7-2570(3) (2010). "Willful conduct is conduct that evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." Charleston County Dep't of Soc. Servs. v. Jackson, 368 S.C. 87, 97, 627 S.E.2d 765, 771 (Ct. App. 2006) (internal quotation marks omitted). Whether the failure to visit is willful "is a question of intent to be determined from the facts and circumstances of each individual case." S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. 602, 610, 582 S.E.2d 419, 423 (2003).

South Carolina courts have not quantified how many visits a parent may make while legally failing to visit. Rather, the family court and this court are required to examine "the facts and circumstances" of this particular case to determine whether Mother's failure was willful. See id. In the instant case, the record is more deficient than informative. It reflects that, during the approximately fifteen months Mother was permitted to visit Child, she made fourteen visits. The visits were described as "sporadic," and the GAL testified three of them occurred during the month preceding the TPR hearing. However, no evidence indicated how many visits were scheduled, how many scheduled visits Mother missed, or how much time elapsed between visits. According to the GAL, during the last month, Mother's visitation required the GAL to be present, but the record contained no evidence as to whether additional limitations or requirements applied to her other visits. The GAL testified she had observed only Mother's last three visits with Child. Although the GAL believed Mother and Child did not bond, no evidence indicated how long the visits lasted or what activities, if any, took place besides the presentation of toys and snacks. The GAL testified that she personally visited Child approximately two times per month, but no evidence indicated whether Mother was invited to these visits. Furthermore, the record contained no evidence of the distance between Mother's home and either the foster home or the visitation location. Because Mother visited Child nearly once per month on average, and because the record fails to provide details of

the purported failure to visit or clear indications of willfulness, the family court erred in finding DSS proved by clear and convincing evidence Mother willfully failed to visit Child.

II. Willful Failure to Support

Mother asserts the family court erred in finding she willfully failed to support Child. We agree.

Another ground for TPR is met when:

> The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

S.C. Code Ann. § 63-7-2570(4) (2010). "Willful conduct is conduct that evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." Jackson, 368 S.C. at 97, 627 S.E.2d at 771. Whether the failure to support is willful "is a question of intent to be determined in each case from all the facts and circumstances." S.C. Dep't of Soc. Servs. v. Seegars, 367 S.C. 623, 630, 627 S.E.2d 718, 721 (2006).

The record clearly reflects that Mother had no income of her own. The statute requires a "material contribution" of either money or necessities "according to the parent's means." § 63-7-2570(4). The evidence adduced at the TPR hearing indicates Mother's means were extremely limited but she provided some necessities during her visits with Child. Because of her inability to find employment, Mother either had no means whatsoever or was entirely dependent upon Father for means to support Child. The family's only regular income came from Father's Social Security disability benefits. Although Child received some amount of money from that source, the record does not indicate how much money Child received or when she began receiving it. The payments appear to have started at the urging of the GAL, but aside from the entry of an order of support against Mother, no evidence indicates the GAL made additional requests for money from Mother. More importantly, the record contains no evidence the family court examined the relevant circumstances to determine what would have constituted a material contribution according to Mother's means.

We find unpersuasive Mother's argument that she was a housewife by choice. Mother applied to dozens of jobs and diligently followed up on her applications until she received responses. The record reflects she sought but failed to take full advantage of vocational rehabilitation services from SCVR, but the SCVR representative testified that SCVR was not a job placement agency. Although SCVR offered services to assist individuals in becoming more marketable, it did not provide employment. Consequently, even Mother's full, successful completion of SCVR's programs would not have guaranteed her income.

Mother contends that, lack of income notwithstanding, she made material contributions to Child. Child's DSS case manager testified Mother and Father provided child with snacks, drinks, toys, lotion for Child's skin issue, and antibiotics. Mother testified they provided toys, food, clothes, diapers, wipes, medication, and lotion. Lastly, Mother testified that she had prepared the smaller bedroom in their home for Child by painting, installing curtains and carpet, and rearranging furniture. Considering her extremely limited means, Mother's efforts do not appear to "evince[] a settled purpose to

forego parental duties." See Jackson, 368 S.C. at 97, 627 S.E.2d at 771. Therefore, the family court erred in finding DSS proved by clear and convincing evidence that Mother willfully failed to support Child.

III. Best Interests

Finally, Mother asserts the family court erred in conducting a best-interests analysis despite DSS's failure to prove any statutory ground by clear and convincing evidence. Because we reverse the family court's grant of TPR on the statutory grounds, we do not reach this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

In accordance with the foregoing, we reverse the family court's termination of Mother's parental rights and remand for a permanency planning hearing. See S.C. Code Ann. § 63-7-2580(B) (2010) ("If the court finds that no ground for termination exists and the child is in the custody of [DSS], the order denying termination must specify a new permanent plan for the child or order a hearing on a new permanent plan.").

REVERSED AND REMANDED.

CURETON, A.J., concurs.

WILLIAMS, J., dissenting: I respectfully dissent and would affirm the grant of TPR in this case, finding the family court correctly found clear and convincing evidence that Mother willfully failed to support Child. See S.C. Code Ann. § 63-7-2570(4) (2010) (stating a ground for TPR exists when "[t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child" either financially or through material contributions to the child's care); see also Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 32, 496

S.E.2d 864, 868 (1998) ("A ground for [TPR] must be proved by clear and convincing evidence."). Our courts have held that "[c]onduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999).

I would find there is sufficient evidence in this record to support the finding that Mother's failure to support Child was willful. Mother admits that she paid no child support, despite her proven ability to earn an income based on her testimony that prior to April 2004 she held three jobs simultaneously. In her brief, Mother argues she intentionally remained at home by agreement with her husband, choosing to remain dependent upon Father's Social Security disability income for all her needs rather than returning to work to help support this child or any of her other six children. Her position is that is it is unfair to consider that she prefers to remain in the home as a housewife instead of working to support Child. No evidence indicates Mother's presence was required at home to care for Father. In fact, Father testified that despite his disability, he performed lawn care and odd jobs for additional money. With all seven children removed from the home, Mother was free to seek gainful employment. However, evidence that she pursued employment is scant and contradictory. She testified that she submitted thirty job applications, but on cross-examination she admitted this was different than the testimony given one month earlier in another TPR action involving one of her other children. Mother does not argue on appeal that she is disabled and unable to work. In fact, Mother testified that during the month prior to the merits hearing, she redecorated Child's room by repainting, installing carpet, and moving furniture. She testified she did take a day off from redecorating because her back hurt. However, she indicated she was still able to use that time to grocery shop and to submit job applications.

Evidence is plentiful that she eschewed not only employment but also any professional assistance that would have improved her ability to find work. Although Mother initially sought assistance from SCVR, she failed for over fifteen months to take advantage of any of the several programs they

offered that could have improved her workplace skills and her employability. Not surprisingly, she even refused offers of transportation to get her to these classes. She attended so infrequently that she was dropped from their rolls. Accordingly, it is clear the inability of Mother to find employment was because Mother had neither the desire nor the intention to provide financial support for Child. Most importantly, Mother testified that she and Father agreed she would not work outside the home even though she had a responsibility to support Child.

Finally, I believe any contributions Mother made to Child's welfare were not material. Testimony indicated Mother provided a few items for Child during her initial visits. The GAL testified that Mother provided nothing during her last three visits, which occurred during the month immediately preceding the TPR hearing. Consequently, Mother's efforts to provide for Child were negligible.

Moreover, the record demonstrates the best interest of Child would be served by granting TPR.

Accordingly, I would find there is clear and convincing evidence of her failure to support Child. Mother's choices indicate a clear and settled purpose to forego her parental responsibilities to support Child. Therefore, I would affirm the family court's decision to terminate Mother's parental rights.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Moore, Respondent,

v.

Jeannette M. Benson and
Thomas Lee Benson, Jr., Appellants.

Appeal From Spartanburg County
Gordon G. Cooper, Master-in-Equity

Opinion No. 4745
Submitted May 3, 2010 – Filed September 22, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jessica Ann Salvini, of Greenville, for Appellants.

Edwin C. Haskell, III, and Chadwick Dean Pye, both of Spartanburg, for Respondent.

PER CURIAM: James Moore filed this action against Jeannette M. Benson and Thomas Lee Benson seeking damages and equitable relief based on allegations of inter alia, fraud, conversion, and breach of fiduciary duty arising from the sale of real property from Moore to the Bensons. The master ordered the Bensons to reconvey the property to Moore, and awarded Moore actual and punitive damages. This appeal followed. We affirm in part, reverse in part, and remand.[1]

FACTS

Moore was eighty-eight years old at the time of the trial in 2008. Moore and Allean Moore were married in 1949. Throughout the marriage, Allean handled the bills and personal business. Moore and Allean lived on seventeen acres in Lyman, South Carolina, in the marital home.

Moore's daughter, Jeannette, testified she began the caretaking of her father as early as 1989. According to Jeannette, BB&T sent Moore a letter, dated January 14, 1999, stating that because Moore was to turn eighty, his retirement account needed to be closed and the money transferred to another account. The funds, $29,433.46, were transferred into account #471, Jeannette's account. Jeannette testified Moore stated: "Jeannette, you have been taking care [of] me all of these years . . . . I am giving you all of this money." According to her, she was to continue to take care of Moore and pay his bills. On February 16, 1999, Moore signed a durable power of attorney, appointing Jeannette as his attorney-in-fact.

Moore and Allean were divorced by family court orders filed on November 3, 2000, and January 8, 2001. The divorce decree awarded Moore the marital home, valued by the family court at $154,000, and further provided:

> 9. Husband is to inform wife, within forty-five (45) days of the date of this Order, relative to his election

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

> to buy her out; if he is able, or elects to do so, this is to be done within ninety (90) days of the date of this Order.
>
> 10. If husband is unable or unwilling to buy out wife's interest, then within forty-five (45) days of the date of this Order, the home is to be placed on the market for sale, under the control of the husband; upon the sale of the home, wife's interest in the marital estate is to be paid forthwith; if the home is not under contract for sale within six (6) months of being placed on the market, wife has the election to petition the Court for a judicial sale.

In the order addressing Allean's motion to reconsider, the family court ordered Moore to pay $52,851 to Allean to effectuate the order relative to equitable distribution.

On March 8, 2001, account #471, with a balance of $30,338.35 was closed, withdrawing $30,215.82 and incurring a $122.53 early withdrawal penalty. The withdrawal check was made payable to Jeannette. On March 9, 2001, Moore signed a purchase contract and HUD settlement statement, selling the marital home to the Bensons.[2] The price paid for the property, $56,294.41, was the amount necessary to pay costs, a small mortgage remaining on the property, and the equitable distribution amount due to Allean.

John H. Heckman, III, a real estate attorney, testified he knew many of the Moore family members, including Moore, from a previous family land dispute. Heckman testified Jeannette and her husband Thomas were purchasing Moore's house to enable Moore to pay Allean her equitable distribution award. Heckman stated he met with Jeannette and Moore in his conference room and explained each document to Moore. Moore appeared to

[2] The Purchase Contract is dated March 1, 2001. The HUD Settlement Statement and the Title to Real Estate are dated March 9, 2001.

understand he was selling his property. The proceeds check from the sale was made payable to Allean's attorney.

Moore testified he has a fifth-grade education and cannot read. He also testified Jeannette took over paying his bills after his divorce. He stated Jeannette would have him sign papers from time to time, but she did not explain to him what he was signing. He denied gifting the funds from his retirement account to Jeannette. He claimed he did not know he had signed a power of attorney or closing documents to sell his property. Moore testified he did not intend to sell the property to the Bensons, and he did not talk to Heckman at the closing. He testified he was in the hall at Heckman's office and Jeannette brought papers out for him to sign.

Jeannette testified Moore could read, stating he read the newspaper, his driver's manual, and readings in church. She testified she used the money withdrawn from Moore's retirement account to pay his expenses, such as his divorce attorney's fees of approximately $15,000, and medical bills. She testified Moore asked her to obtain money to pay the equitable distribution award from her siblings. She testified she could not get any of them to provide financial help.

Jeannette took Moore to Heckman's office. According to her, Heckman explained "everything" to Moore and he understood. She agreed to pay all of the taxes and insurance on the house, and Moore could live there for the remainder of his life.

Thomas, Jeannette's husband, testified he cashed in a $20,000 certificate of deposit, a savings bond worth more than $5,000, and borrowed $20,000 to contribute to the purchase of the house. He stated Moore contributed the remaining $10,000 from the funds transferred to Jeannette's name. Thomas also testified he was at the closing, and Moore was present and "fine."

The master found Jeannette breached her fiduciary duty to Moore and converted Moore's retirement account. He further found the Bensons paid for

the property partially with funds belonging to Moore. He also found the Bensons intentionally concealed the truth from Moore and "were not only dishonest but in light of the facts of this case outrageous . . . ." The master ordered the Bensons to reconvey the property to Moore, pay actual damages of $3,770.26, and pay punitive damages of $25,000. This appeal followed.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Corley v. Ott, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997). The reviewing court should "view the actions separately for the purpose of determining the appropriate standard of review." Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). In an action in equity, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). On the other hand, when reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to the correction of errors at law, and the appellate court will not disturb the judge's findings of fact as long as they are reasonably supported by the evidence. Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005).

LAW/ANALYSIS

I. Statute of Limitations

The Bensons argue the master erred in denying their motion to dismiss based on the statute of limitations. We disagree.

This action is governed by a three-year statute of limitations period. S.C. Code Ann. § 15-3-530 (2005); see Mazloom v. Mazloom, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009) (citing three-year statute of limitations in breach of fiduciary duty action); Turner v. Milliman, 381 S.C.

101, 109-10, 671 S.E.2d 636, 640 (Ct. App. 2009) (applying three-year statute of limitations in fraud action).

The discovery rule applies to this action. See S.C. Code Ann. § 15-3-535 (2005) (applying the discovery rule to causes of action arising under section 15-3-530(5)); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004) (stating "[i]n determining when a cause of action arose under section 15-3-530, we apply the 'discovery rule'"). According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence that a cause of action might exist. Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999). The date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, this court stated:

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

The property transfer in this case was made on March 9, 2001. The action was not filed until October 2006. Moore testified he first became aware that something was amiss on December 25, 2005. When he was riding with the Bensons to Christmas dinner at his son Robert's house, Thomas asked who had permitted someone to park a truck on the subject property. Moore testified he had concern about why Thomas was asking about his property.

Moore's son, James Luther Moore, Jr., testified Moore rode home with him from the Christmas dinner and Moore stated he heard Jeannette tell Thomas to "be quiet" when Thomas asked about the vehicle parked on the property. Moore allegedly explained to James that Thomas and Jeannette acted like the property belonged to them. According to James, Moore was also concerned that Thomas was picking up bottles and cans on the property and Moore wanted James's son, Marcus, to check on it.

Marcus testified Moore and his father asked him to look into Moore's affairs a week or so after Christmas 2005. He found the property was titled to the Bensons. He later took Moore to the bank and received the bank records from 2000 to at least 2005. He explained the withdrawal of retirement funds to Moore, who denied withdrawing any money. Marcus also took Moore to Heckman's office to get copies of the closing documents on the property.

In this case, we look to when a person of common knowledge and experience under the circumstances of the case would have known that he sold his property to the Bensons. In light of the evidence that Jeannette handled Moore's personal affairs, we affirm the master's finding that the statute of limitations did not begin to run until Moore first had suspicions that something was amiss in December 2005.

II. Conversion

The Bensons argue the master erred in finding Jeannette converted Moore's retirement funds. We disagree.

"'Conversion' is defined as the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." Mullis v. Trident Emergency Physicians, 351 S.C. 503, 506-07, 570 S.E.2d 549, 550-51 (Ct. App. 2002). An action for conversion is an action at law. Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986). Therefore, we review the record to determine if any evidence

supports the master's finding. See id. (finding in an action for conversion where the appeal is based on alleged errors of fact, this court must affirm if there is any evidence reasonably supporting the findings of the trial court).

Moore presented evidence his retirement account was closed in January 1999, and the retirement funds were deposited into Jeannette's account. Moore testified he did not give the retirement funds to Jeannette. During direct examination, Moore was asked: "Did you give that money to anybody? Did you make a gift of that retirement money to anybody?" Moore responded: "No." We find evidence to support the master's finding of conversion.

III. Breach of Fiduciary Duty

The Bensons next argue the master erred in finding Jeannette breached her fiduciary duty to Moore. We disagree.

Our supreme court recently held that an action alleging a breach of fiduciary duty is an action at law but "may sound in equity if the relief sought is equitable." Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010). The "[c]haracterization of an action as equitable or legal depends on the appellant's 'main purpose' in bringing the action.'" Id. at 16, 690 S.E.2d at 773 (quoting Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978)). We find the main purpose of the breach of fiduciary duty action in this case was for the equitable remedy to rescind the contract and reconvey the property to Moore. See Dixon v. Dixon, 362 S.C. 388, 395, 608 S.E.2d 849, 852 (2005) (finding action to rescind contract and set aside deed is in equity). Thus, we may find facts in accordance with our own view of the preponderance of the evidence. See Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) (stating appellate court may find facts in accordance with its own view of the preponderance of the evidence in equitable actions).

"A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in

good faith and with due regard to the interests of the one reposing confidence." O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Moore v. Moore, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004); see In re Estate of Cumbee, 333 S.C. 664, 672, 511 S.E.2d 390, 394 (Ct. App. 1999) (finding fiduciary relationship existed where a son had his mother's power of attorney and managed her finances).

Like the master, we find the timing of the withdrawal to Jeannette on March 8, 2001, of all funds in account #471, indicated the funds originally belonging to Moore were used by the Bensons as part of the purchase price of the property. The master further found Jeannette:

> concocted a scheme whereby the [Bensons] could purchase property of James Moore for $56,294.41, which is approximately 37% of the value of the subject property . . . . In addition, the purchase price paid was funded partially from the funds that belonged to [Moore]. The [Bensons] through their intentional actions and representations made to [Moore] concealed the truth of the transaction from [Moore].

The master found Jeannette breached her fiduciary duty to Moore. After our own review of the record, we likewise find Jeannette breached her fiduciary duty owed to Moore and affirm the master's order directing the Bensons to reconvey the property to Moore.

IV. Property Taxes and Insurance

The Bensons argue the master erred in awarding damages by failing to credit them for property taxes and insurance payments they allegedly made. We find no error.

Although Moore did not dispute the allegations and testimony that the Bensons paid these items, the Bensons provided no documentary evidence in support of their claims. The master, as the fact finder, was free to accept or reject the testimony. See S.C. Dep't of Transp. v. M&T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 668 n.12, 667 S.E.2d 7, 20 n.12 (Ct. App. 2008) (finding the master in equity, as the trier of fact, is free to accept or reject all of a witness's testimony). We find no error by the master.

V. Award of Damages to Moore

The Bensons argue the master erred in finding Moore was entitled to damages because the master failed to consider the equitable distribution award and the outstanding mortgage on the property, paid on Moore's behalf from the proceeds of the sale. We agree.

The Settlement Statement showed that from the proceeds of the sale of the property, Allean Moore was paid $52,851 and a mortgage on the property of $3,024.36 was paid in full, totaling $55,875.36. The master found Moore was entitled to damages of $3,770.26 by subtracting the Bensons' contribution to the sales proceeds, $26,568.09, from the amount in account #471 at the time of the closing, $30,338.35. However, this fails to take into account Moore's debts of $55,875.36, which were paid off at the closing. From this, we find Moore is entitled to a credit for his retirement funds of $30,338.35, but must repay the Bensons for their contribution to the payment of his debts of $25,537.01.[3]

[3] Moore argues this issue is not preserved for appellate review. The HUD-1 Settlement Statement, which included information regarding the equitable distribution award and outstanding mortgage, was introduced into evidence and considered by the master. The master also ordered a credit against Moore's award. We find this issue was before the court and preserved for our review. See Spence v. Wingate, 381 S.C. 487, 489-90, 674 S.E.2d 169, 169 (2009) (finding an issue preserved despite the failure to file a Rule 59(e), SCRCP, motion where the issue was raised to and ruled upon by the trial court).

VI. Punitive Damages

The Bensons argue the master erred in awarding punitive damages because there were no actual damages. We agree.

Punitive damages may only be awarded upon an underlying finding of actual damages. Keane v. Lowcounty Pediatrics, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007). In Keane, this court reversed the actual damages award, on which an award of punitive damages was based. Id. at 149, 641 S.E.2d at 60. Thus, this court likewise reversed the punitive damages stating "without a finding of actual damages . . . the award of punitive damages is reversed." Id.

In this case, the master's award of actual damages failed to take into account debts paid on Moore's behalf. As the final calculation of damages requires Moore to reimburse the Bensons in the amount of $25,537.01, we find no actual damages due to Moore, and reverse the award of punitive damages pursuant to Keane.

CONCLUSION

For the foregoing reasons, we affirm in part, reverse in part, and remand for entry of judgment in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT, HUFF, and WILLIAMS, JJ., concur.