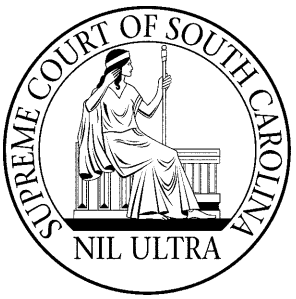

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
October 29, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Antonio D. Bordeaux, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-212349

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27457
Heard September 23, 2014 – Filed October 29, 2014

AFFIRMED IN PART, REVERSED IN PART

Assistant Attorney General James Rutledge Johnson, of Columbia, for Petitioner.

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari in this post-conviction relief (PCR) action to review the Court of Appeals' decision, which remanded for a determination of the lawfulness of Antonio Bordeaux's sentence. *Bordeaux v.*

State, Op. No. 2012-UP-284 (S.C. Ct. App. filed May 9, 2012). The State argues the Court of Appeals erred because the unambiguous plea colloquy and imposition of sentence control over the ambiguous written sentence. We agree. It is clear Bordeaux pleaded guilty to *first* degree burglary, was sentenced within the legal limits for that crime, and in consonance with his negotiated plea agreement. We therefore affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Bordeaux's plea agreement was capped at a sentence of twenty-five years. He pled guilty to two counts of armed robbery and two counts of burglary. He was sentenced to twenty-four years' imprisonment on the armed robbery charges, and to twenty-five years' imprisonment, suspended upon the service of twenty years with three years' probation on the burglary counts.

Bordeaux's plea proceeding was conducted simultaneously with that of his co-defendant, Wesley Washington. Like Bordeaux, Washington had been indicted on two counts of first degree burglary, but pleaded guilty to two counts of second degree burglary. The transcript demonstrates that the plea colloquy with the trial judge alternated between Bordeaux and Washington. During Bordeaux's plea colloquy, he acknowledged on at least *seven* occasions that he was pleading guilty to two counts of *first* degree burglary. At sentencing, Bordeaux was again reminded, and acknowledged, that he was being sentenced pursuant to his plea negotiations for two counts of first degree burglary, each of which carried a minimum fifteen-year sentence, and a maximum of life imprisonment. The trial judge announced Bordeaux's sentence for first degree burglary as:

> "a term of *twenty-five years*, provided that upon the service of twenty years the balance is suspended and you be placed on probation for a period of three years." (Emphasis added).

The sentencing sheets, however, indicated Bordeaux pleaded guilty to "Burglary 2nd Degree," included the CDR Code for second degree burglary, and referenced S.C. Code Ann. § 16-11-312 (2014), the second degree burglary statute. Despite these references, the sentencing sheets also indicated Bordeaux pleaded guilty "as indicted," and that his sentence was in accord with the plea colloquy.

At the PCR hearing, Bordeaux claimed his twenty-five year sentence was illegal because the sentencing sheets clearly indicated that he pleaded guilty to second

degree burglary, and because his twenty-five year sentence exceeded the maximum for second degree burglary. *See* § 16-11-312(C)(2) (setting a fifteen-year maximum term of imprisonment for defendants convicted of second degree burglary pursuant to § 16-11-312(B)). In support of his contention, Bordeaux offered into evidence the two sentencing sheets. Bordeaux further testified that after the sentencing sheets were signed, someone scratched out "15" years, and replaced it with "25" years.

The PCR judge granted Bordeaux a new trial as to the burglary charges because he found Bordeaux was serving an illegal sentence for second degree burglary given his sentence of twenty-five years. The PCR judge based his finding on his conclusion that Bordeaux's sentencing sheets amounted to a "contract" between Bordeaux and the State, and trumped the unequivocal plea transcript.

The State appealed. The Court of Appeals reversed and remanded for a determination of the lawfulness of Bordeaux's sentence given the conflict between his plea colloquy and the sentencing sheets. *Bordeaux*, Op. No. 2012-UP-284. The court found the PCR judge committed an error of law in ruling the sentencing sheets definitively took precedence over the unambiguous plea transcript and directed the PCR judge, on remand, to give "appropriate weight to the plea transcript." *Id.* The State sought certiorari on the remand issue. We granted the petition.

ISSUE

Did the Court of Appeals err in remanding for reconsideration of the legality of Bordeaux's convictions and sentences for first degree burglary?

LAW/APPLICATION

Whether a sentencing transcript or sentencing sheet is ambiguous is a question of law. *See Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 346, 759 S.E.2d 398, 404 (2014). Likewise, whether a PCR applicant is serving an illegal sentence is a question of law. *See Talley v. State*, 371 S.C. 535, 545, 640 S.E.2d 878, 883 (2007); *see also United States v. Johnson*, No. 13-3649, 2014 WL 4211065, at *7 (7th Cir. Aug. 27, 2014) (comparing the sentencing transcript with the written judgment to determine whether an error occurred as a matter of law). We therefore review de novo the lawfulness of a sentence. *See Tant*, 408 S.C. at 346, 759 at 404; *Talley*, 371 S.C. at 545, 640 S.E.2d at 883.

A sentence is ambiguous if its pronouncement is susceptible of differing interpretations based on the totality of the circumstances. *See United States v. Stallone*, 399 F.2d 415, 422–27 (2d Cir. 2005) (viewing the totality of the circumstances to determine whether a sentencing pronouncement was ambiguous); *Tant*, 408 S.C. at 344–45, 759 S.E.2d at 403–04 (finding both the oral and written sentencing pronouncements were ambiguous because it was not clear from either whether Tant's sentences were to run concurrently or consecutively). An unambiguous sentencing pronouncement will control over an ambiguous sentence, whether oral or written, so long as giving effect to that pronouncement does not result in an illegal sentence or a deprivation of a defendant's constitutional rights. *See, e.g.*, *Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) (declining to give effect to an unambiguous sentencing sheet over an unambiguous plea colloquy because to do so would result in a deprivation of the defendant's right to due process).

Here, Bordeaux's oral sentencing pronouncement was subject to only one interpretation as it is clear Bordeaux pled guilty to two counts of *first* degree burglary, and he was sentenced in consonance with his negotiated plea agreement. As stated, Bordeaux acknowledged on seven occasions that he was pleading guilty to two counts of *first* degree burglary. Further, Bordeaux twice acknowledged that he was being sentenced pursuant to a negotiated agreement, which included pleading guilty to two counts of *first* degree burglary. Moreover, the trial judge reminded Bordeaux that he was being sentenced for pleading guilty to two counts of *first* degree burglary. Thus, we find the oral sentencing pronouncement unambiguous as it is susceptible of only one interpretation. *Cf. Tant*, 408 S.C. at 344–45, 759 S.E.2d at 403–04.

On the other hand, the written sentences were subject to multiple interpretations as it is not clear whether Bordeaux pleaded guilty to first or second degree burglary. For example, the sentencing sheets indicated Bordeaux was being sentenced for "Burglary 2nd degree," included the attendant CDR Code for that crime, and referenced the *second* degree burglary statute. Yet, the sentencing sheets also indicated that he was being sentenced "as indicted," and Bordeaux's indictments referenced only *first* degree burglary. Moreover, one sentencing sheet had a sentence of fifteen years crossed out and replaced with the twenty-five year sentence. If Bordeaux had in fact pleaded guilty to second degree burglary as the sentencing sheets suggested, his sentence of twenty-five years would have exceeded the fifteen year maximum for that crime. *See* § 16-11-312(C)(2).

Therefore, we find the written sentencing pronouncements are ambiguous as they are susceptible of differing interpretations.[1] *See Tant*, 408 S.C. at 344–45, 759 S.E.2d at 403–04.

Therefore, we affirm in part the Court of Appeals' decision as we agree the PCR judge committed an error of law in ruling the ambiguous sentencing sheets took precedence over the unambiguous plea transcript. However, we reverse the Court of Appeals' decision to remand because we find as a matter of law that Bordeaux pleaded guilty to two counts of first degree burglary and was properly sentenced to twenty-five years' imprisonment pursuant to his negotiated plea agreement. *See Talley*, 371 S.C. at 545, 640 S.E.2d at 883.

AFFIRMED IN PART, REVERSED IN PART.

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

[1] It appears the ambiguity may have arisen from the confusion attendant upon the plea proceeding being conducted simultaneously with Washington's who was "pleading down" to burglary second.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Property and Casualty Insurance Guaranty Association, Appellant/Respondent,

v.

Roger Brock, Ryan Stevens, Malachi Sanders and Health Advantage/BCBS of Arkansas, Defendants,

Of whom Roger Brock is the Respondent/Appellant.

Appellate Case No. 2013-000402

Appeal from Charleston County,
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27458
Heard April 2, 2014 – Filed October 29, 2014

AFFIRMED IN PART, REVERSED IN PART

Howard A. VanDine, III, A. Mattison Bogan, Erik T. Norton and Tara C. Sullivan, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant/ Respondent.

Andrew D. Gowdown and Timothy J.W. Muller, of Rosen, Rosen & Hagood, LLC, of Charleston, for Respondent/Appellant.

JUSTICE PLEICONES: This appeal concerns the construction and application of the South Carolina Property and Casualty Insurance Guaranty Association Act (the Act), S.C. Code Ann. §§ 38-31-10 to -170 (2002 and Supp. 2013), and specifically the exhaustion/non-duplication provision in section 38-31-100(1). Roger Brock (Brock) was a passenger in a car involved in a wreck and sustained severe injuries. Brock settled his claim, but before payment was made, the insurance carrier responsible for the claim was declared insolvent and the claim was assumed by the South Carolina Property and Casualty Insurance Guaranty Association (Guaranty). Guaranty and Brock moved for summary judgment on the issue whether Guaranty may offset payments from solvent insurance carriers against Brock's settlement under section 38-31-100. The circuit court found section 38-31-100 was ambiguous and granted partial summary judgment to both parties, holding that Guaranty may offset some but not all of the benefits received by Brock from solvent insurance carriers. We disagree that section 38-31-100 is ambiguous and hold that the unambiguous language of section 38-31-100 provides that Guaranty may offset all payments from all solvent insurers made to Brock as a result of this wreck.

FACTS

Brock was passenger in a vehicle driven by Brian Mason (Mason), which was involved in an accident with a logging truck, driven by Ryan Stevens (Stevens). [1] At the time of the accident, Stevens was insured through the owner of the logging truck, Malachi Sanders's (Sanders), policy issued by Aequicap Insurance Company (Aequicap).

Brock sustained severe injuries as a result of the wreck and filed suit. Soon after the litigation began, Brock settled his claim against Stevens and Sanders with Aequicap for $185,000 for the release of all claims.

Shortly after the settlement was reached but before Brock received any payment, Aequicap was declared insolvent. Because Aequicap was an insurer licensed to do business in the State of South Carolina and the insured was a resident of South Carolina, the claim was referred to Guaranty. As a result, Brock made demand on Guaranty for payment of the full settlement amount of $185,000.[2]

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[1] Mason and Stevens were found to be jointly responsible for the wreck.

[2] *See* §§ 38-31-10 to 38-31-60.

As a result of the wreck, Brock received the following amounts directly from or paid on his behalf by solvent insurers:

a. Liability Coverage from Nationwide Ins. Co.
(Mason's Policy) $22,500.00

b. Payments for the provision of medical care by Health Advantage/BCBS of Arkansas
(Brock's private pay medical insurance carrier) $40,590.45

c. Uninsured Motorist coverage from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) $25,000.00[3]

d. Personal Injury Protection from Progressive Ins. Co.
(resident relative coverage through Brock's parents' carrier) $5,000.00

Total: $93,090.45

In the trial court, Guaranty asserted entitlement to offset all payments from the solvent insurers pursuant to section 38-31-100(1). As a result, Guaranty paid Brock $91,909.55, the difference between the settlement amount ($185,000) and the offset amount ($93,090.45). Brock alleged that he was entitled to the remaining $93,090.45, arguing that this would not lead to duplicative recovery. The circuit court found that section 38-31-100(1) was ambiguous, and held that Guaranty could not offset the benefits received under Mason's policy or the amount paid by Brock's medical insurance. The court did allow offset of the uninsured motorist (UM), and personal injury protection (PIP) benefits. As a result, the court ordered Guaranty to pay Brock an additional $63,090.45.

STANDARD OF REVIEW

The parties agree that the issue is solely one of statutory interpretation. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

[3] This uninsured motorist coverage was triggered by Aequicap's insolvency which rendered Stevens an uninsured motorist.

DISCUSSION

This case is one of first impression and concerns the construction and application of the Act's exhaustion provision, section 38-31-100(1).

Guaranty is an unincorporated, non-profit legal entity. Because Guaranty is a creature of statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act. § 38-31-60. Pursuant to the Act, Guaranty must pay certain "covered claims," as the term is defined in section 38-31-20(8).[4] As a condition precedent to recovery from Guaranty, a claimant is required to first exhaust all available coverage from solvent insurers, and Guaranty is allowed to offset the full limits of such other coverage against its obligations under the Act. § 38-31-100.

Both parties agree that the $185,000 settlement entered into by Aequicap qualifies as a "covered claim" for which Guaranty is responsible under section 38-31-20(8). The parties disagree on what types of insurance coverage Guaranty may offset against its obligation to pay the $185,000. The exhaustion provision provides in relevant part:

> A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy *arises from the same facts, injury, or loss that gave rise to the covered claim against the association*, is required to first exhaust all coverage and limits provided by any such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery. Notwithstanding the foregoing, no person may be required to exhaust all coverage and limits under the policy of an insolvent insurer.

§ 38-31-100(1) (emphasis supplied).

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[4] A "covered claim" is "an unpaid claim . . . which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies. . . ." § 38-31-20(8).

Brock contends the circuit court erred in permitting Guaranty to offset any of the insurance benefits. Conversely, Guaranty contends the circuit court erred by holding that Guaranty was not able to offset the proceeds of Mason's policy and the amount of medical insurance benefits provided to Brock. We agree with Guaranty that the Act unambiguously provides that Guaranty may offset all the proceeds received by Brock in this case.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *McClanahan v. Richland Cnty. Council,* 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id*. Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.*

Applying section 38-31-100(1), Brock received payments under the medical, UM, and PIP insurance coverages, as well as from Mason's policy. These claims were paid "under an insurance policy," and the claims arise from "the same facts, injury or loss" that gave rise to the $185,000 settlement. Thus, this $185,000 covered claim should, under § 38-31-100(1), be offset by the full limits of these policies.

As we find section 38-31-100(1) unambiguous, the trial court erred in turning to other jurisdictions' applications of their own provisions.[5] We also disagree with Brock and the ruling below that allowing set-off in this case offends the "collateral source rule."

The trial court and Brock misconstrue the applicability of the collateral source rule. The collateral source rule provides that a tortfeasor has no right to any mitigation of damages because of payment or compensation received by the injured person from a source wholly independent of the wrongdoer. *Johnston v. Aiken Auto Parts,* 311 S.C. 285, 428 S.E.2d 737 (Ct. App. 1993). This scenario is not comparable to the traditional application of the collateral source rule, since Guaranty is neither the

[5]Moreover, the jurisdictions which have found their statutes to be ambiguous have statutes that contain different language than section 38-31-100(1). *Compare* Utah Code § 31A-28-213 (Supp. 2008) and 8 V.S.A § 3619(a) (2013) *with* § 38-31-100(1).

wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies. *See S.C. Prop & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund*, 303 S.C. 368, 369, 401 S.E.2d 144, 145 (1991) ("The Guaranty Association's function is to provide protection for insureds in the event their insurance carriers become insolvent."). Therefore, we do not agree with the circuit court or Brock that allowing Guaranty to offset the payments from solvent insurers in this case would effectively permit a tortfeasor to benefit from the victim's decision to carry insurance and violate the collateral source rule. [6]

Finally, we note that on appeal, Guaranty argues it should be entitled to an offset of the policy limit of $25,000 from Mason's liability insurance policy rather than the $22,500 that Brock accepted. [7] This offset would be permitted under our reading of section 38-31-100(1), since it provides that "the covered claim under this chapter must be reduced by the full limits of such other coverage . . . and [Guaranty] will receive full credit for such limits." However, in the circuit court, Guaranty asserted it was seeking to offset only $22,500 in liability coverage and not the full policy limits.[8] Thus, the argument that Guaranty may offset the full $25,000 is not preserved since it was not raised below. *Nationwide Mut. Ins. Co. v. Hunt*, 327 S.C. 89, 488 S.E.2d 339 (1997). Therefore, Guaranty is entitled to set-off only $22,500 in liability coverage. Accordingly, we reverse the circuit court and hold that Guaranty is entitled to offset the full $93,090.45 paid by solvent insurers.

AFFIRMED IN PART, REVERSED IN PART.

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

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[6] The circuit court held that allowing set-off of the medical insurance benefits would effectively penalize Brock for carrying medical insurance. To the contrary, Brock was not prohibited from using the cost of medical care he received as a component of his damages in arriving at the negotiated settlement. Thus, in establishing his damages, Brock was not penalized by his procurement of medical insurance, the danger sought to be guarded against by the collateral source rule.

[7] This is the only coverage for which Guaranty argues it is entitled to offset more than Brock actually received.

[8] If Guaranty were seeking offset of the full $25,000 limit of the policy below, it would have only paid Brock $89,409.45, which would have reflected the $25,000 offset plus the other benefits received under the medical, PIP, and UM coverage.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Nathan N. Jardine, Respondent.

Appellate Case No. 2014-001621

Opinion No. 27459
Submitted October 14, 2014 – Filed October 29, 2014

DISCIPLINE IMPOSED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Nathan N. Jardine, of Farmington, Utah, pro se.

PER CURIAM: Respondent is licensed to practice law in Utah and California;[1] he is not licensed to practice law in South Carolina. On November 1, 2013, the Office of Disciplinary Counsel (ODC) filed Formal Charges against respondent alleging he offered to provide legal services in South Carolina and directly solicited a resident of this state in violation of Rule 7, Rules of Professional

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[1] At the time the Formal Charges were filed, the Supreme Court of Utah had suspended respondent from the practice for eighteen (18) months. Utah State Bar v. Jardine, 289 P.3d 516 (2012). According to the Utah State Bar's website, respondent remains suspended from the practice of law in Utah.

On May 23, 2014, the Supreme Court of California accepted the California State Bar's recommendation to impose reciprocal discipline. Respondent is not eligible to practice law in California.

Conduct, Rule 407, SCACR, and Rule 418, SCACR. Respondent did not answer the Formal Charges, was found to be in default, and was therefore deemed to have admitted the factual allegations made in this charges.[2] See Rule 24(a), RLDE, Rule 413, SCACR. Following an evidentiary hearing in which respondent did not appear, the Hearing Panel issued a Panel Report recommending the Court bar respondent from seeking any form of admission in South Carolina for five (5) years, along with other sanctions. Neither ODC nor respondent filed exceptions to the Panel Report. The matter is now before the Court for consideration.

FACTS

Matter I

In January 2013, respondent associated with Fulcrum 360, a loan modification company, for the purpose of soliciting clients in loan modification cases under the name J Nolan Legal.[3] Fulcrum 360 was owned and operated by non-lawyers. Fulcrum 360 prepared and distributed marketing materials for J Nolan Legal on behalf of respondent. The materials included a direct mail solicitation and a website. Fulcrum 360 represented to respondent that an attorney had reviewed the marketing materials for ethical compliance and that it had developed a referral network consisting of attorneys in each state to refer clients for foreclosure representation if necessary. In fact, neither respondent nor Fulcrum 360 had a referral relationship or association with an attorney licensed to practice law in South Carolina.

In or around February 2013, a South Carolina resident received a direct mail solicitation from respondent addressed to her at her home in Eastover, South Carolina. The solicitation stated it was issued after the prospective client made known to respondent a desire not to be solicited by virtue of her failure to respond to prior attempts to contact her. The direct mail solicitation contained material

[2] When respondent failed to file an answer to the Formal Charges, ODC filed a Motion for Default. Respondent filed a return to the motion. By order dated March 7, 2014, the Hearing Panel denied the Motion for Default and directed respondent to file an answer to the Formal Charges no later than April 10, 2014. Respondent did not file an answer and, subsequently, by order dated May 2, 2014, the Hearing Panel held respondent in default.

[3] Nolan is respondent's middle name.

misrepresentations and omissions of facts necessary to make certain statements considered as a whole not materially misleading. Specifically, the solicitation did not disclose the name under which respondent was licensed to practice law, contained the trade name J Nolan Legal which made it difficult for the prospective client to identify respondent, and did not specify that respondent is not licensed to practice law in South Carolina or otherwise indicate the jurisdictional limitations on his ability to practice law in this state. The direct mail solicitation: 1) listed a "virtual office" in California which respondent only used for the purpose of receiving mail while he actually worked from an office in Utah and 2) failed to include the various disclaimers required by Rule 7.3(d)(1), (2) and (3), Rule 407, SCACR. Further, respondent sent the solicitation in the form of a folded postcard that revealed the nature of the prospective client's legal problem on the outside and he failed to maintain a record of dissemination of his solicitations to South Carolina residents.

Matter II

Although respondent filed an initial response to the notice of investigation issued by ODC, the response failed to address the allegations with specificity and was not verified as required by Rule 19(b) RLDE. ODC sent a second request for specific responses to the allegations and verification. In response, respondent submitted a response which, again, did not specifically address the allegations or contain his verification. As a result, ODC issued a notice to appear and subpoena pursuant to Rules 15(b)(1) and 19(c)(3), RLDE. Respondent appeared and answered questions under oath. At the conclusion of the interview, respondent was instructed to provide certain documents in support of his testimony. Subsequent to the interview, respondent failed to communicate with ODC regarding the disciplinary investigation.

Respondent made false statements during the disciplinary investigation. In particular, respondent stated in his response to the initial notice of investigation, "I have a lawyer licensed to practice law in South Carolina as part of my network. This lawyer was responsible for all legal work for South Carolina residents and lives in South Carolina." At the interview, respondent admitted he did not have an attorney licensed or living in South Carolina in his network and that a representative of Fulcrum 360 prepared his response and he signed it.

In addition, respondent stated in his response to the initial notice of investigation that he had three residents of South Carolina enrolled in his loan modification

program and that he intended to inform them that he was withdrawing from working with South Carolina residents. At the interview, respondent stated he was mistaken and did not represent any South Carolina residents.

The Hearing Panel found respondent's conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 7.1(a) (lawyer shall not make false, misleading, or deceptive communications about lawyer or lawyer's services; communication violates this rule if it contains material misrepresentation of fact or law, or omits fact necessary to make statement considered as a whole not materially misleading); Rule 7.2(b) (lawyer is responsible for content of any advertisement or solicitation placed or disseminated by lawyer and has duty to review advertisement or solicitation prior to dissemination to reasonably ensure compliance with the Rules of Professional Conduct; lawyer shall keep copy of every advertisement or communication for two (2) years after its last dissemination along with record of when and where it was disseminated); Rule 7.2(d) (any communication made pursuant to this rule shall include name and office address of at least one lawyer responsible for content); Rule 7.2(h) (all advertisements shall disclose the geographic location, by city or town, of office in which lawyer or lawyers who will actually perform services advertised principally practice law); Rule 7.3(b)(1) (lawyer shall not solicit professional employment from prospective client by direct written communication if prospective client has made known to lawyer desire not to be solicited by lawyer); Rule 7.3(c) (lawyer who uses written solicitation shall maintain file for two years showing basis by which lawyer knows person solicited needs legal services and factual basis for any statements made in written communication); Rule 7.3(d)(1) (every written communication from lawyer soliciting professional employment from prospective client known to be in need of legal services in particular matter must contain words "ADVERTISING MATERIAL" printed in capital letters and in prominent type on front of outside envelope and on front of each page of material); Rule 7.3(d) (2) (every written communication from lawyer soliciting professional employment from prospective client known to be in need of legal services in particular matter must contain following statements: "You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting directories, seeking the advice of others, or calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer" and "The exact nature of your legal situation will depend on many facts not known to

me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary;" when solicitation is written, statements must be in type no smaller than that used in body of the communication); Rule 7.3(d)(3) (every written communication from lawyer soliciting professional employment from prospective client known to be in need of legal services in particular matter must contain following statement: "ANY COMPLAINTS ABOUT THIS COMMUNICATION OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, 1015 SUMTER STREET, SUITE 305, COLUMBIA, SOUTH CAROLINA 29201 – TELEPHONE NUMBER 803-734-2037;" where solicitation is written, statement must be printed in capital letters and in size no smaller than that used in body of communication); Rule 7.3(h) (written communication seeking employment by specific prospective client in specific matter shall not reveal on envelope, or on outside of a self mailing brochure or pamphlet, nature of the client's legal problem); and Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not fail to disclose fact necessary to correct misapprehension known by person to have arisen in matter, or knowingly fail to respond to a lawful demand for information from disciplinary authority).[4]

The Hearing Panel further found respondent is subject to discipline pursuant to the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully violate valid order of Commission or hearing panel, willfully fail to appear personally as directed, or knowingly fail to respond to lawful demand from disciplinary authority to include request for response or appearance); and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or to bring courts or the legal profession into disrepute).

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[4] The Rules of Professional Conduct, Rule 407, SCACR, are applicable as respondent's solicitation specifically targeted a prospective client in South Carolina. See Rule 418(b), SCACR (any solicitation by unlicensed lawyer shall comply with Rule 7.1 through 7.5 of RPC when solicitation is targeted to potential client in this state).

The Commission and this Court have jurisdiction over all allegations that a lawyer has committed misconduct. The term "lawyer" includes "a lawyer not admitted in this jurisdiction if the lawyer …offers to provide any legal services in this jurisdiction [and] anyone whose advertisement or solicitations are subject to Rule 418, SCACR." Rule 2(q), RLDE. Further, Rule 418, SCACR, titled "Advertising and Solicitation by Unlicensed Lawyers," defines "unlicensed lawyer" as an individual "admitted to practice law in another jurisdiction but…not…in South Carolina." Rule 418(a). The rule also provides for jurisdiction over allegations of misconduct by unlicensed lawyers, procedures for determining charges of misconduct, and for sanctions. Rule 418(c) and (d). Accordingly, even though he is not admitted to practice law in South Carolina, respondent is subject to discipline in this state.

As noted above, since respondent failed to answer the Formal Charges, he is deemed to have admitted the allegations in the charges. See Rule 24(a), RLDE. Further, since he failed to appear for the Panel Hearing, respondent is deemed to have admitted the factual allegations and to have conceded the merits of any recommendations considered at the Panel Hearing. See Rule 24(b), RLDE. Finally, since respondent did not file a brief taking exception to the Hearing Panel's report, he has accepted the findings of fact, conclusions of law, and the Hearing Panel's recommendations. See Rule 27(a), RLDE.

The authority to discipline lawyers and the manner in which the discipline is imposed is a matter within the Court's discretion. In the Matter of Berger, 408 S.C. 313, 759 S.E.2d 716 (2014); In the Matter of Van Son, 403 S.C. 170, 742 S.E.2d 660 (2013). When the lawyer is in default, the sole question before the Court is the determination of the appropriate sanction. Id.

We find debarment with other sanctions appropriate. The misconduct in this matter is similar to that in In the Matter of Van Son, id., where a lawyer who was not admitted in this state sent solicitation letters to South Carolina residents and, thereafter, failed to cooperate with ODC's investigation. In addition to other sanctions, the Court barred the lawyer from admission in this state and from advertising or soliciting clients in South Carolina for a period of five years.

In determining the appropriate sanction, the Court has not only considered respondent's written communication directly soliciting a resident of South Carolina in violation of the requirements of Rule 7, RPC, but also his false statements of

material fact to ODC, his failure to participate in the disciplinary investigation after his interview, and his failure to appear for the hearing. In the Matter of Hall, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998) ("An attorney's failure to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law. Such an attorney is likely to face the most severe sanctions because a central purpose of the disciplinary process is to protect the public from unscrupulous or indifferent lawyers."). Finally, the Court has considered respondent's disciplinary history in imposing debarment and other sanctions.[5] In the Matter of Jacobsen, 386 S.C. 598, 690 S.E.2d 560 (2010) (recognizing disciplinary history is appropriate consideration in imposing sanction).

We find it appropriate to permanently debar respondent from seeking any form of admission to practice law in this state (including pro hac vice admission) without first obtaining an order from this Court allowing him to seek admission. Further, we prohibit respondent from advertising or soliciting business in South Carolina without first obtaining an order from this Court allowing him to advertise or solicit business in this state. Before seeking an order from this Court to either allow him to seek admission or to advertise or solicit, respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School, Law Office Management School, and Advertising School. Respondent shall pay the costs of the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order.

DEBARRED.

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

[5] See Footnote 1.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Erika Fabian, Appellant,

v.

Ross M. Lindsay, III and Lindsay and Lindsay, LLC, Respondents.

Appellate Case No. 2012-213726

Appeal from Georgetown County
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27460
Heard April 2, 2014 – Filed October 29, 2014

REVERSED AND REMANDED

James Matthew Dillon, of Mt. Pleasant; and Thomas A. Pendarvis and Catherine Brown Kerney, both of Pendarvis Law Offices, of Beaufort, for Appellant.

Curtis W. Dowling and Matthew Gregory Gerrald, both of Barnes Alford Stork & Johnson, of Columbia, for Respondents.

David A. Merline, Jr., of Merline & Meacham, PA, of Greenville, for Amicus Curiae, The Greenville Estate Planning Study Group.

JUSTICE BEATTY: Erika Fabian (Appellant) brought this action for legal malpractice and breach of contract by a third-party beneficiary, alleging attorney Ross M. Lindsay, III and his law firm Lindsay & Lindsay (collectively, Respondents) made a drafting error in preparing a trust instrument for her late uncle and, as a result, she was effectively disinherited. Appellant appeals from a circuit court order dismissing her action under Rule 12(b)(6), SCRCP for failure to state a claim and contends South Carolina should recognize a cause of action, in tort and in contract, by a third-party beneficiary of a will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. We agree, and we reverse and remand for further proceedings.

I. FACTS

A. The Trust Agreement

The facts, in the light most favorable to Appellant, are as follows. On May 25, 1990, Appellant's uncle, Dr. Denis Fabian, executed a trust agreement that was drafted by Respondents. Dr. Fabian was then around 80 years old and his wife, Marilyn Fabian, whom he had married in 1973, was about twenty years younger. Dr. Fabian made his wife the life beneficiary of the trust.

Mrs. Fabian had two adult daughters from a prior marriage. Dr. Fabian then had one living brother, Eli Fabian, who was in his 70s and not in good health. Dr. Fabian also had two nieces, Miriam Fabian, who was Eli's daughter, and Appellant, who was the daughter of Dr. Fabian's predeceased brother, Zoltan Fabian. Dr. Fabian was aware of Appellant's loss of both her father and her mother at an early age.

Dr. Fabian died on February 5, 2000, and his brother Eli died a few weeks later. Thus, Eli survived Dr. Fabian, but not Mrs. Fabian, who held the life interest in the trust. At Dr. Fabian's death, the trust was valued at approximately $13 million.

Appellant had been told by Dr. Fabian and his wife that she was being provided for in Dr. Fabian's estate plan. She alleges that at the time of Dr. Fabian's death, everyone involved in the matter was under the impression that, when Mrs. Fabian passed, one-half of Dr. Fabian's estate was going to Appellant and Miriam, with the other half to be distributed to Mrs. Fabian's two children.

After Dr. Fabian's death, however, Respondents mailed a letter and two pages from the trust agreement to Appellant and informed her that she would not be receiving anything from Dr. Fabian's trust upon Mrs. Fabian's future death because the share that would have been distributed to her would, instead, be distributed to Eli's estate. Since Appellant's cousin Miriam was Eli's only heir, Miriam would now stand to be the beneficiary of both her share and Appellant's share. The distribution provision at issue in the trust agreement drafted by Respondents reads as follows:

> *Upon or after the death of the survivor of my said spouse and me*, my Trustee shall divide this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of Marilyn K. Fabian and One (1) share for my brother, Eli Fabian. If either of my wife's children predceases (sic) her, the predeceased child's share shall be distributed to his or her issue per stirpes. *If my said brother, Eli Fabian, predeceases me*, then one half of *his share* shall be distributed to his daughter, Miriam Fabian, or her issue per stirpes, and the other half of *his share* shall be distributed to my niece, Erica (sic) Fabian [Appellant], or her issue per stirpes.

(Emphasis added.) Appellant maintains the first sentence makes it abundantly clear that the division and distribution of the trust corpus is to occur only *after* the death of *both* Dr. Fabian and his wife. In addition, Respondents knew that Dr. Fabian wanted Eli's share of the trust to pass to the two named nieces if Eli was not alive at the time of distribution to receive his share. However, the use of the word "me" in the last sentence has effectively defeated her uncle's intentions by inadvertently disinheriting her. She contends this drafting error has resulted in an "unexpected windfall" to one cousin (Miriam), who has now received an unintended double share, and the "devastating" disinheritance of the other cousin (Appellant).

B. Reformation Action

In response to this situation, Appellant filed an action for reformation of the trust agreement. Two of the three trustees, Mrs. Fabian, who held the life interest, and Walter Pikul, Dr. Fabian's long-time business advisor, agreed with Appellant that the trust document contained a drafting error that thwarted Dr. Fabian's intent, and they concurred in Appellant's request for reformation on the basis the error made the trust ambiguous. In contrast, Appellant's cousin Miriam, who stood to

reap the windfall of receiving a double share, strenuously opposed reformation, as did the drafting attorney, respondent Ross M. Lindsay, III, who maintained the trust document was unambiguous and did not need correction.

After years of escalating litigation expenses, Appellant accepted a settlement paid for by the trust. The trust was not reformed, but the parties stipulated that Appellant was not releasing any claim she had against Respondents in their capacity as Dr. Fabian's estate planning attorneys who had drafted the instrument and counseled Dr. Fabian on the creation of the trust.

C. Action for Professional Negligence & Breach of Contract

Appellant filed the current action against Respondents as the drafters of the trust agreement in which she claims to hold an intended beneficial interest. She asserted a tort claim for professional negligence (attorney malpractice) and a claim for breach of contract on behalf of a third-party beneficiary. Respondents promptly moved to dismiss Appellant's claims under Rule 12(b)(6), SCRCP for failure to state a cause of action.

The circuit court granted the motion to dismiss, finding Appellant could not assert a claim for legal malpractice because South Carolina law recognizes no duty in the absence of an attorney-client relationship. In addition, the court stated no South Carolina court had ever recognized a breach of contract action by an intended beneficiary of estate planning documents, stating: "To the contrary, the Supreme Court has characterized such a cause of action as merely one of a variety of theories which fall under the umbrella of 'legal malpractice,' which requires privity."[1] The court concluded Respondents were "immune from liability" to Appellant under any theory for their alleged error in drafting the trust document. Appellant appealed, and this Court certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR. We thereafter granted a motion by the

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[1] The circuit court relied upon *Rydde v. Morris*, 381 S.C. 643, 645, 675 S.E.2d 431, 432 (2009), in which this Court held "an attorney owes no duty to a prospective beneficiary of a *nonexistent* will." (Emphasis added.) We noted some jurisdictions had relaxed privity requirements to allow a cause of action where an attorney failed to draft a will in conformity with the testator's wishes, but not for cases involving a nonexistent document. *Id.* at 647-48, 675 S.E.2d at 433-34. *Rydde* is not controlling as it involves a distinguishable issue that implicates different legal and policy considerations, as suggested in *Rydde* itself.

Greenville Estate Planning Study Group to file an amicus curiae brief in support of Respondents.

II. STANDARD OF REVIEW

A defendant may move to dismiss the plaintiff's complaint for "failure to state facts sufficient to constitute a cause of action" pursuant to Rule 12(b)(6), SCRCP. "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013); *see also Turner v. Daniels*, 404 S.C. 430, 431 n.1, 746 S.E.2d 40, 41 n.1 (2013) (noting under the standard of review applicable to Rule 12(b)(6) motions, we construe all of the facts in the appellant's well-pled complaint in the light most favorable to the appellant and presume those facts to be true). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014).

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard applied by the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). This Court is free to decide questions of law, such as whether South Carolina recognizes a certain cause of action, with no particular deference to the trial court. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

III. LAW/ANALYSIS

A. Privity Under Existing Law

In dismissing Appellant's claims, the circuit court essentially found Appellant was not in privity with Respondents and therefore failed to establish a viable cause of action. "'Privity' denotes [a] mutual or successive relationship to the same rights of property." *Thompson v. Hudgens*, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931) (citation omitted); *see also Black's Law Dictionary* 1394 (10th ed. 2014) (defining "privity" as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interests"). South

Carolina courts have equated privity with standing. *See Maners v. Lexington Cnty. Sav. & Loan Ass'n*, 275 S.C. 31, 33-34, 267 S.E.2d 422, 423 (1980) (affirming the trial judge's determination that "appellant had no standing to allege [her claim] because she was not in privity with respondent").

An early case by the United States Supreme Court adopted the concept of privity from an English decision, *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Exch.) (1842), and applied it to hold an attorney was not liable to a bank that relied on his erroneous certification that his client had good title to land. *See Nat'l Sav. Bank v. Ward*, 100 U.S. 195, 205-07 (1879) (discussing *Winterbottom*'s limitation of recovery in another context to those having privity of contract). The Supreme Court noted there were exceptions, however, for instances of fraud, collusion, and like circumstances. *Id.* at 205-06.

Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship. *See generally Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009) (stating "existing law [] imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina"). "A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012).

Appellant contends the current appeal presents an opportunity not available in prior cases for South Carolina to join the vast majority of states allowing intended third-party beneficiaries to bring claims against the lawyer who prepared the defective will or estate planning document. *See Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009) (stating whether a duty exists in regard to an alleged wrong is a question of law for the court). Appellant argues a lawyer's negligence in preparing an estate or testamentary document impacts three potential classes of plaintiffs: (1) the client, (2) the decedent's estate, and (3) the intended beneficiaries. As she aptly states:

> [O]f the three possible plaintiffs, only the beneficiaries have the motivation and sufficient damages to bring a malpractice claim. The client is deceased and the estate lacks a cause of action or damages or both. Indeed, because the beneficiaries were supposed to be the beneficial owners of estate assets, only the beneficiaries suffer directly

due to the lawyer's negligence. If no cause of action is available to the beneficiaries, the negligent drafting lawyer is effectively immune from liability. Therefore, only the beneficiaries suffer the loss caused by the lawyer's negligence.

In the 1950s, after observing the problems created by the traditional privity requirement, jurisdictions in the United States began abandoning strict privity as an absolute bar to claims for legal malpractice. A majority of jurisdictions now recognize a cause of action by a third-party beneficiary of a will or estate planning document against the lawyer whose drafting error defeats or diminishes the client's intent, although they have done so using a variety of tests and formulations, whether in tort, contract, or both. Max N. Pickelsimer, Comment, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, 58 S.C. L. Rev. 581, 581-86 (2007) (discussing the origin and evolution of privity in the United States); *see also* Joan Teshima, Annotation, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4th 615 (1988 & Supp. 2014) (collecting cases considering the legal theories for imposing civil liability upon an attorney for damages to a nonclient directly caused by the attorney's professional negligence).

"The jurisdictions that have eased the strict privity requirement typically use one of the following three approaches to determine whether the intended beneficiary of a will has standing to bring an action for legal malpractice: (1) the balancing of factors test, which originated in California; (2) 'the Florida-Iowa rule['']; and (3) breach of contract based on a third-party beneficiary contract theory." Pickelsimer, *supra*, at 586 (footnotes omitted).

B. Theories for Imposing Liability in Tort or Contract

(1) Balancing of Factors Test

In an influential decision emanating from California in 1958, the rule on privity in legal malpractice actions began to evolve throughout the United States. In *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958), the court held that where the defendant negligently prepared an invalid will, the beneficiary could recover for her loss in tort even though she was not in privity with the defendant. Although the defendant in that case was a notary public and not an attorney, the court also overruled prior cases involving attorneys.

The holding in *Biakanja* was formally extended to attorneys a few years later in *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961). In *Lucas*, the court allowed recovery both in tort and as a third-party beneficiary to a contract. In discussing whether to impose tort liability, the *Lucas* court reiterated all but one of the factors it originally delineated in *Biakanja* and stated, "[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm." *Id.* at 687 (citing *Biakanja*, 320 P.2d at 19).

Applying these factors, the court reasoned that "one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of prevent[ing] future harm would be impaired." *Id.* at 688.

The court then noted since the defendant in this case was an attorney, it "must consider an additional factor not present in *Biakanja*, namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." *Id.* The court found although in some situations liability could be large and unpredictable, this was also true for any attorney's liability to his client, and the extension of liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when taking into consideration that the opposite conclusion would cause the innocent beneficiary to bear the entire loss of the attorney's professional negligence. *Id.*

Other jurisdictions have engaged in a similar or modified "balancing of factors" analysis to generally determine whether an attorney should be liable to a third party in the absence of strict privity. *See e.g., Fickett v. Super. Ct.*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) (citing *Biakanja* and *Lucas* and stating "[w]e are of the opinion that the better view is that the determination of whether, in a specific

case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors . . . ."); *Pizel v. Zuspann*, 795 P.2d 42, 51 (Kan. 1990) ("We find the California cases persuasive. We conclude that an attorney may be liable to parties not in privity based upon the balancing test developed by the California courts."); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995) (en banc) ("[T]he question of legal duty of attorneys to non-clients will be determined by weighing the factors in the modified balancing test.").

(2) The Florida-Iowa Rule

In the event this Court joins the majority of jurisdictions allowing a third party beneficiary to seek recovery for the improper drafting of a will or estate planning document, Respondents and the amicus urge this Court to adopt an alternative theory of recovery known as the "Florida-Iowa Rule." It provides:

> An attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (third-party beneficiaries). However, liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence.

DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983) (citations omitted); *see also Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987) ("[W]e hold a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."). A few other jurisdictions have also adopted this theory. *See, e.g., Mieras v. DeBona*, 550 N.W.2d 202 (Mich. 1996) (stating the beneficiary named in a will may bring a tort-based action for negligence in drafting the will, but the court will not look to extrinsic evidence).

Respondents' desire, in the absence of this Court's retention of strict privity, is to promote the Florida-Iowa Rule because its essential feature, the imposition of a ban on all extrinsic evidence, obviously makes it more difficult for a plaintiff to

establish a claim. *See* Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client*, 61 A.L.R.4th 464, 480 (1988) ("Some courts have ruled in this situation that evidence extrinsic to the will cannot be admitted to prove the testator's intent, thus making it impossible, or virtually so, for a thwarted beneficiary to prove his case against an attorney.").

Appellant understandably opposes this theory. As she correctly asserts: "The fundamental flaw in the Florida-Iowa [R]ule is that it focuses on the testamentary documents prepared by the lawyer rather than the source of the beneficiary's claim, which is not the allegedly defective will or trust document, but instead is the client-lawyer agreement that was intended to satisfy the client's testamentary intent. The proper approach in cases like this one where latent ambiguities exist in the will, trust agreement, or estate plan would be to allow the admission of extrinsic evidence to establish the client's intent as is generally allowed in a typical will contest."

The Florida-Iowa Rule is actually based on a California case, *Ventura County Humane Society v. Holloway*, 115 Cal. Rptr. 464, 468 (Ct. App. 1974), which held the plaintiff had standing under the balancing of factors test articulated in *Biakanja* and *Lucas*, but in doing so, the court stated "[a]n attorney may be held liable to the testamentary beneficiaries only . . . [i]f due to the attorney's professional negligence the testamentary intent expressed in the will is frustrated and the beneficiaries clearly designated by the testator lose their legacy as a direct result of such negligence." *See* Pickelsimer, *supra*, at 589 (discussing the genesis of the Florida-Iowa Rule).

Appellant's argument for rejecting the Florida-Iowa Rule and its prohibition on extrinsic evidence finds support from the fact that a California district court has specifically observed that other courts applying the Rule have "read *Ventura* too broadly" because extrinsic evidence "was not at issue in *Ventura*," and the case does not stand for the proposition that inquiries should be limited to the testamentary document to the exclusion of all other evidence. *Creighton Univ. v. Kleinfeld*, 919 F. Supp. 1421, 1425 n.5 (E.D. Cal. 1995). To the contrary, extrinsic evidence is often "vital" to proving an attorney's drafting error. *Id.*

For these reasons, we reject the Florida-Iowa Rule and hold extrinsic evidence is not barred, as it is often essential to the pursuit of a claim. *See Jewish Hosp. of St. Louis, Mo. v. Boatmen's Nat'l Bank of Belleville*, 633 N.E.2d 1267,

1273-76 (Ill. App. Ct. 1994) (holding an attorney who drafted a will owed a duty in contract or tort to the remainder beneficiaries of a testamentary trust; under either theory, the non-client beneficiary must demonstrate that they are in the nature of a third-party intended beneficiary of the relationship between the attorney and the client, and evidence of intention is derived from a consideration of all of the circumstances surrounding the parties at the time of the execution of the will).

(3) Third-Party Beneficiary of Contract Theory

Another theory recognized for recovery is based on a third-party beneficiary approach. South Carolina law already generally recognizes a breach of contract claim for a third-party beneficiary of a contract and we find this principle is appropriate here.

"Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff." *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (citation omitted). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Id.* (citation omitted).

Courts in other jurisdictions have expressly extended this principle to frustrated third-party beneficiaries of estate instruments, although some have done so as a breach of contract action while others have used the "third-party beneficiary" principle as a basis to allow recovery in negligence. Some jurisdictions have recognized that a plaintiff may choose to proceed in contract, tort, or both. *See, e.g., Lucas*, 364 P.2d at 689 & n.2; *Stowe v. Smith*, 441 A.2d 81, 84 (Conn. 1981); *Blair v. Ing*, 21 P.3d 452, 464 (Haw. 2001).

In *Lucas*, in addition to allowing tort recovery, the California court found "that intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries." 364 P.2d at 689. The court stated, "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will, and therefore it seems improper to hold . . . that the testator intended only 'remotely' to benefit those persons." *Id.* at 688. The court

found this main purpose and "intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, [so] we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries." *Id.* at 689. Moreover, the court noted the general rule is "where a case sounds in both tort and contract, the plaintiff will ordinarily have freedom of election between the two actions." *Id.* at 689 n.2.

We find this reasoning sound and adopt it here. We also find persuasive *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983) to the extent that the Pennsylvania court stated it would allow recovery as to *named* beneficiaries:

> [W]hile important policies require privity (an attorney-client or analogous professional relationship, or a specific undertaking) to maintain an action in negligence for professional malpractice, a named legatee of a will may bring suit as an intended third party beneficiary of the contract between the attorney and the testator for the drafting of a will which specifically names the legatee as a recipient of all or part of the estate.

The court found the grant of standing to a narrow class of third-party beneficiaries was appropriate based on the Restatement (Second) of Contracts § 302 (1979), "where the intent to benefit the plaintiff is clear and the promisee (testator) is unable to enforce the contract," as named legatees would otherwise have no recourse for failed legacies that resulted from attorney malpractice. *Id.* at 747.

Recognizing a cause of action is not a radical departure from the existing law of legal malpractice that requires a lawyer-client relationship, which is equated with privity and standing. Where a client hires an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there *is* an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent. This intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries. Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the *client's intent*, and the third party is in privity with the attorney. It is the breach of the attorney's duty to the client that is the actionable conduct in these cases. *See* Dennis J. Horan & George W. Spellmire, Jr., *Attorney Malpractice: Prevention and Defense* 2-1 to 2-5 (1989) (discussing directly intended beneficiaries of the attorney-client relationship); *see also Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986) ("In his professional capacity the attorney is not

liable, except to his client *and those in privity with his client*, for injury allegedly arising out of the performance of his professional activities." (emphasis added)); *Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931) ("Generally speaking, the heir is in privity with his ancestor . . . .").

In these circumstances, retaining strict privity in a legal malpractice action for negligence committed in preparing will or estate documents would serve to improperly immunize this particular subset of attorneys from liability for their professional negligence. Joining the majority of states that have recognized causes of action is the just result. This does not impose an undue burden on estate planning attorneys as it merely puts them in the same position as most other legal professionals by making them responsible for their professional negligence to the same extent as attorneys practicing in other areas.

In sum, today we affirmatively recognize causes of action both in tort and in contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. The focus of a will or estate document is, inherently, on third-party beneficiaries. That being the case, the action typically does not arise until the client is deceased. *See Stowe*, 441 A.2d at 83 (stating "merely drafting and executing a will creates no vested right in the legatee until the death of the testatrix"); Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 36:12, at 1288 (2014) ("Since litigation concerning errors in the preparation of a will necessarily arrives after the client's death, the plaintiff usually is an allegedly injured or omitted beneficiary . . . .").

Specifically as to tort actions, the balancing test propounded by the California courts provides a valuable framework in evaluating the considerations that support adoption of a cause of action. *See Donahue*, 900 S.W.2d at 627 ("That balancing test has been cited with approval by most jurisdictions which have considered the issue." (citing Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 7.11, at 383 (3d ed. 1983)). As discussed previously, we reject the Florida-Iowa Rule for its narrow application and ban on extrinsic evidence. As to contract actions for third-party beneficiaries, we find the reasoning in *Lucas* and *Guy* particularly persuasive, and we adopt *Guy*'s limitation on recovery to persons who are named in the estate planning document or otherwise identified in the instrument by their status (e.g., my children and grandchildren, my wife's children).

One court that still retains strict privity, but struggled greatly in doing so, is particularly notable for a vigorous joint dissent in which the justices pointedly remarked:

> With an obscure reference to "the greater good," [] the Court unjustifiably insulates an entire class of negligent lawyers from the consequences of their wrongdoing, and unjustly denies legal recourse to the grandchildren for whose benefit Ms. Barcelo hired a lawyer in the first place. . . .
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> . . . .
>
> . . . [T]he Court's decision means that, as a practical matter, no one has the right to sue for the lawyer's negligent frustration of the testator's intent. A flaw in a will or other testamentary document is not likely to be discovered until the client's death. And, generally, the estate suffers no harm from a negligently drafted testamentary document.

Barcelo v. Elliott, 923 S.W.2d 575, 579-80 (Tex. 1996) (Cornyn & Abbott, JJ., dissenting) (citations and footnotes omitted). The justices asserted the majority "gives no consideration to the fair adjustment of the loss between the parties, one of the traditional objectives of tort law," and "[t]hese grounds for the imposition of a legal duty in tort law generally, which apply to lawyers in every other context, are no less important in estate planning." *Id.* at 580. We agree with these observations and find there are compelling policy reasons supporting recognition of these claims.

IV. CONCLUSION

We recognize a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. Recovery under either cause of action is limited to persons who are named in the estate planning document or otherwise identified in the instrument by their status. Where the claim sounds in both tort and contract, the plaintiff may elect a recovery. We apply this holding in the instant appeal and to cases pending on appeal as of the date of this opinion. As a result, we reverse the order dismissing Appellant's complaint and remand the matter to the circuit court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HEARN, J., concurs. KITTREDGE, J., concurring in a separate opinion. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which TOAL, C.J., concurs.

JUSTICE KITTREDGE: I concur in the majority opinion except as may concern the applicable burden of proof, which is not addressed in the majority opinion. I agree with Justice Pleicones that the burden of proof should be the clear and convincing standard.

JUSTICE PLEICONES: I agree with the majority that we should recognize a cause of action for legal malpractice brought on behalf of a person in Appellant's position. As I believe this cause of action should properly sound only in tort, I write separately. Further, I would hold that a decision should only apply prospectively, but that Appellant may pursue her claim to finality under the guidelines announced today.

I agree that public policy considerations dictate a relaxation of the strict privity requirement for purposes of asserting a legal malpractice claim against an attorney who drafts an estate planning document. *See Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) ("We have not hesitated to act in the past when it has become apparent that the public policy of the State is offended by outdated rules of law."); *see also Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983) (relaxing the requirement of strict privity in the context of a legal malpractice action based on public policy considerations because the possibility of liability for negligent drafting of an estate planning instrument is one way to make an attorney accountable for his negligence). Likewise, I agree that an attorney owes a duty only to a beneficiary named in an estate planning instrument or identified as such by status in the instrument. *See Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961) (stating the policy reasons, such as the foreseeability of harm to the named-beneficiary, that support the imposition of a duty); s*ee also* Restatement (Third) of the Law Governing Lawyers § 51(3)(a) (2000) (stating a lawyer owes a duty to a non-client when "the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client"). Thus, I agree that Appellant may assert a legal malpractice claim against Respondent based on Respondent's status as a named beneficiary in the trust instrument.

I also write separately as I would require a beneficiary asserting such a legal malpractice claim to prove by clear and convincing evidence that the attorney breached the duty owed to the beneficiary, and the beneficiary suffered damages which were proximately caused by the attorney's breach. *See* S.C. Code Ann. § 62-2-601(B) (Supp. 2013) (noting the burden of proof is clear and convincing evidence in a will reformation action); *see, e.g.*, *Pivnick v. Beck*, 762 A.2d 653, 654 (N.J. 2000) (adopting the clear and convincing burden of proof when a non-client brings a legal malpractice claim on the basis that a lawyer was negligent in drafting an estate planning document).

I respectfully differ from the majority's recognition of a breach of contract action based on a beneficiary's supposed status as a third-party beneficiary. While I acknowledge, as the majority sets forth in great detail, that many jurisdictions recognize a breach of contract action on this basis,[2] I would rely on precedent from this Court and find that a legal malpractice action, which is a form of professional negligence brought by a third-party who lacks privity, sounds only in tort. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54–55, 463 S.E.2d 85, 88 (1995) (finding a professional negligence action sounds in tort). Moreover, while I agree with the majority that evidence extrinsic to the four corners of the estate planning instrument is admissible to prove whether a lawyer breached his duty in drafting the instrument, I believe characterizing such evidence as "extrinsic" in a legal malpractice context is a misnomer because the evidence sought to be admitted does not "relate to a contract."[3]

Finally, I disagree with allowing "cases pending on appeal as of the date of the opinion" the opportunity to pursue a legal malpractice action in this context. Instead, I would hold that while Appellant may pursue her claim to finality, our decision should only apply prospectively. *See Toth v. Square D Co.*, 298 S.C. 6, 8–10 377 S.E.2d 584, 586–87 (1989) ("Prospective application is required when liability is created where formerly none existed."). I would allow Appellant the benefit of pursuing her claim because our decision today recognizes a duty that has been foreshadowed by this Court. *See Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009) (noting, albeit in dicta, that generally an attorney owes a duty to a non-client intended beneficiary of an executed will where it is shown that the testator's intent has been defeated or diminished by negligence on the part of the attorney, resulting in loss to the beneficiary); *see also* Joan Teshima, Annotation, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4th 615 (1988 & Supp. 2014) (compiling cases from a majority of jurisdictions recognizing that an estate planning attorney *may* be liable to a beneficiary named or one identified as such by her status in an estate planning instrument).

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[2] s*ee, e.g.*, *Lucas*, 364 P.2d at 689.

[3] *See* Black's Law Dictionary 637 (9th ed. 2009) (defining extrinsic evidence as evidence "relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement").

Whether Appellant can prevail on her legal malpractice claim is a question for the fact finder and is one in which we do not answer today. Therefore, I concur with the majority's reversal of the circuit court's Rule 12(b)(6) dismissal because Appellant has stated a viable cause of action in tort based on Respondent's purportedly negligent drafting of the trust instrument.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Christopher Heller, Petitioner.

Appellate Case No. 2012-212983

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27461
Heard October 7, 2014 – Filed October 29, 2014

DISMISSED AS IMPROVIDENTLY GRANTED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

PER CURIAM: We granted Christopher Heller's petition for a writ of certiorari to review the decision of the Court of Appeals in *State v. Heller*, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dwayne Eddie Starks, Appellant.

Appellate Case No. 2013-000869

Appeal From Abbeville County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5276
Heard October 8, 2014 – Filed October 29, 2014

AFFIRMED

John Edward Robinson, of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Christina Catoe Bigelow, both of Columbia, for Respondent.

FEW, C.J.: Dwayne Starks appeals his conviction for armed robbery and possession of a deadly weapon during the commission of a violent crime. Starks argues the trial court erred in refusing to suppress evidence of an out-of-court identification of Starks by the sole eyewitness, Nakelia Williams. Starks contends the evidence should have been suppressed because the one-man show-up identification procedure used by police was unnecessarily suggestive and created a

substantial likelihood of misidentification under *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). We affirm.

On the night of February 27, 2012, Starks robbed a convenience store where Williams worked as a clerk. Because Starks wore a ski mask during the robbery, Williams did not see his face, but Williams testified she recognized his voice and body build based on her prior knowledge of Starks as a regular customer of the store. Immediately after the robbery, Williams called the police and told the dispatcher she had been robbed and Starks was the person who did it. Shortly thereafter—before the show-up—she told an investigating officer she was "robbed by Dwayne Starks." One hour after the robbery, police brought Starks to the store in the back seat of a patrol car, and Williams identified Starks after viewing his face.

As to Starks' argument the trial court erred in finding the identification procedure was not unnecessarily suggestive, we agree and find the trial court's ruling was clearly erroneous. *See State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) (stating "[s]ingle person show-ups are particularly disfavored in the law," and holding that "it is patent the show-up procedure used was . . . suggestive").

However, we question whether *Biggers* applies to the facts of this case. Williams used one criterion—Starks' face—to identify Starks during the identification procedure but used other criteria—Starks' voice and body build—to identify Starks during the commission of the crime. Therefore, the reliability of Williams' testimony that Starks committed the crime depended only upon the accuracy of her recognition of Starks' voice and body build during the crime sequence, and did not depend upon any likelihood of misidentification the police created when she viewed Starks' face during the show-up procedure. *See Biggers*, 409 U.S. at 198, 93 S. Ct. at 381-82, 34 L. Ed. 2d at 410 ("It is the likelihood of misidentification which violates a defendant's right to due process . . . ."). The show-up served the primary purpose of identifying Starks as the person Williams knew before the crime, and she identified him as the person who committed the crime based on her prior knowledge of him—not as a result of suggestive police procedures. *See State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("Due process requires courts to assess . . . whether the identification *resulted from* unnecessary and unduly suggestive *police procedures* . . . ." (emphasis added)). *Compare Liverman*, 398 S.C. at 134-35, 140-41, 727 S.E.2d at 424, 427 (finding *Biggers* applies where the witness saw the suspect's face during the crime and identified the

suspect upon viewing his face in a show-up) *with State v. McGee*, 408 S.C. 278, 286-87, 758 S.E.2d 730, 734-35 (Ct. App. 2014) (holding *Biggers* did not apply to an identification because the "testimony related to seeing [the defendant] a year before the [crime] and was for the purpose of showing that [the defendant] knew [the victim]").

In any event, we find the trial court acted within its discretion in applying the *Biggers* reliability factors and in determining the identification procedure "was nevertheless so reliable that no substantial likelihood of misidentification existed." *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." 398 S.C. at 137-38, 727 S.E.2d at 425. "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion." 398 S.C. at 138, 727 S.E.2d at 425. "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Biggers*, 409 U.S. at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411; *see also Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (listing factors).

In this case, the trial court considered all the *Biggers* factors and discussed its findings as to those factors on the record. The trial court placed particular emphasis on the fact that Williams knew Starks before the crime. *See Liverman*, 398 S.C. at 141, 727 S.E.2d at 427 ("[T]he fact that an identification witness knows the accused remains a significant factor in determining reliability."). The trial court's finding that the identification was sufficiently reliable is supported by the evidence, and thus was not an abuse of discretion.

AFFIRMED.

LOCKEMY, J., concurs.

THOMAS, J., concurs in result only.