The Supreme Court of South Carolina

In the Matter of Richard C. Bell, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 16, 1974, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court, dated November 7, 2005, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

The resignation of Richard C. Bell shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

John H. Waller, Jr. not participating

Columbia, South Carolina

December 20, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48

December 19, 2005
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Eric B. Laquiere, Respondent.

Opinion No. 26081
Submitted November 8, 2005 - Filed December 19, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Eric B. Laquiere, of Charleston, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of a letter of caution, admonition, or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On May 8, 2004, respondent and his former girlfriend engaged in a verbal argument that eventually escalated into a physical altercation. Respondent represents he struck his ex-girlfriend with his hand one time, causing injuries to her face. The same day, respondent

was arrested and charged with criminal domestic violence of a high and aggravated nature. Respondent pled guilty to criminal domestic violence, first offense, and paid the fine plus costs.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for a lawyer to violated the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude).[1] Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct) and 7(a)(4) (it shall be ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

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[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sabine S. Boulware, Respondent.

Opinion No. 26082
Submitted October 25, 2005 - Filed December 19, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to imposition of an admonition, public reprimand, or definite suspension not to exceed thirty (30) days. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

In February 2002, respondent approached Amy Cook, the principal of Carolina Title Services, Inc., (CTS) in hopes of obtaining

some of its real estate business.[1] CTS was an agent for Chicago Title Insurance Company (Chicago Title) and had an ongoing business relationship with attorney William J. McMillian, III, for the closing of real estate transactions. Respondent sought to be a closing attorney for CTS, but Cook only needed a lawyer to fill in for McMillian at closings when he was unavailable. After seeking and obtaining Chicago Title's approval and speaking with McMillian by telephone, respondent agreed to the arrangement.

Respondent represents that, during her telephone conversation with McMillian, he assured her that, other than attending the actual closing, he would be supervising all aspects of the transactions.[2] Respondent never met McMillian and did not communicate with him again until after terminating her relationship with CTS.

From February through April 2002, respondent attended approximately twenty-four real estate closings. Respondent was asked only to attend the closings and be responsible for the review and execution of the closing documents. Respondent represents she was under the good faith impression that McMillan would attend to or supervise all other aspects of the real estate transactions; however, McMillian did not do so and it is now known that he took no part in these transactions.

The closings took places at CTS' offices. Respondent received all files and instructions from Cook or her employees and, after the closing, she left all closing documents and monies with Cook or her employees. Most of the closings at issue were relatively

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[1] Respondent was admitted to the Bar in November 1999. At the time she contacted Cook, respondent had recently opened her own office and was seeking to build her practice.

[2] McMillan's statements to ODC contradict respondent's representation.

uncomplicated. On the few occasions when a question or problem arose, respondent stopped the closing and Cook rescheduled it for a later date. Respondent is now advised and does not dispute that the title abstracts and closing documents were prepared by Cook and CTS employees without the supervision of any lawyer, that disbursement of funds and recordation of documents were handled by Cook and CTS employees without the supervision of any lawyer, and that McMillian's only involvement in the transactions consisted of allowing Cook unlimited and unsupervised use of his trust accounts.[3]

Respondent represents she verbally informed the parties to each closing that her role was limited to explaining and executing the documents and that CTS and its lawyer were responsible for all other aspects of the closing. However, on several occasions, respondent supervised the buyer's execution of an attorney preference form during which buyers selected respondent to represent them in all aspects of the transaction.[4] On these occasions, respondent filled in her own name as the selected attorney on the form prior to its execution by the buyer.

On thirteen occasions, the HUD-1 Settlement Statements included a $12 wire fee payable to respondent even though respondent never incurred a wire fee in any transaction with CTS. ODC is informed and believes that, in each of these closings, a wire fee was incurred by CTS or McMillian's trust account under Cook's control. Because respondent had requested Cook increase her fee, Cook offered to give respondent the $12 wire fee as a way to increase her fee without turning away clients who might object to an overt fee increase. Respondent consented to this arrangement. Respondent now recognizes that the HUD-1 statement was not completely accurate and that the arrangement resulted in respondent receiving a portion of her fee from someone other than her client.

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[3] See In the Matter of McMillian, 359 S.C. 52, 596 S.E.2d 494 (2004).

[4] See S.C. Code Ann. § 37-10-102 (2002).

On one occasion, respondent closed a transaction in which the buyers were personal friends of Cook. Cook had agreed not to charge the buyers an attorney fee and the HUD-1 Settlement Statement reflected no fee to any lawyer. However, Cook and respondent agreed that Cook would pay respondent a fee outside the closing and not disclose the fee to anyone. Respondent now recognizes that closing the transaction in this manner and accepting an undisclosed fee violated the Rules of Professional Conduct and federal law.

In most of the transactions respondent closed, respondent's name or her firm name were shown on the HUD-1 as "Settlement Agent," but respondent did not act as settlement agent as she neither held nor disbursed the closing proceeds. Due to her inexperience, respondent was not aware of all the implications made by the statements on the HUD-1 form. Respondent now recognizes that, by forwarding inaccurate HUD-1 forms to clients and other parties, she misrepresented her role to all parties relying on the HUD-1 Settlement Statements, particularly lenders who were not present at the closings. Her misrepresentation is most pronounced in those closings in which the HUD-1 Settlement Statements indicated that respondent incurred a wire fee, as the statements implied to lenders and subsequent assignees that respondent was disbursing the loan proceeds, including making payoffs of prior mortgages and liens.

On two occasions, a lender delivered closing funds to respondent's trust account rather than to McMillian's trust account for transactions in which respondent was to act as closing attorney for CTS. Respondent endorsed the first check to CTS based on information from Cook that the lender wanted Cook to disburse the money. The second check was a wire transfer into respondent's trust account which respondent initially refused to endorse to Cook but, when a CTS employee refused to give respondent a disbursement summary, respondent relented and wrote a trust account check to CTS for the funds so that the transaction could close without the borrower losing a favorable interest rate.

On one occasion, a buyer brought funds to the closing in the form of a check payable to respondent. Due to a title issue, the closing was delayed until a time when respondent would not be available. As a result, respondent endorsed the buyer's check to CTS and gave it to Cook. Respondent now recognizes she should not have given the client funds to a non-lawyer.

On two occasions, respondent signed a loan confirmation or "First Lien Letter" several days after closing. These letters advised the lender and title insurance company that the transaction was closed and completely disbursed, that all prior liens were satisfied, and that the lender's mortgage was a valid first lien on the property. Respondent represents she believed those statements were true but admits that such a belief was merely an assumption, that she had no actual knowledge of the truth or falsity of the statements, and that she did not verify the information with anyone outside of CTS before executing the letters.

It is now known that in most, if not all, of the transactions closed by respondent for CTS, Cook diverted closing proceeds from McMillian's trust accounts to her personal accounts and did not disburse money to the parties as indicated on the HUD-1 Settlement Statements. Respondent had no knowledge of this activity at the time.

Since 2002, Chicago Title and its counsel have worked to correct the title problems caused by Cook's defalcation in transactions involving respondent and other lawyers. Chicago Title has spent approximately $250,000 to resolve title issues in closings in which respondent was involved. In addition, several holders of unpaid prior mortgages compromised their debts in settling with Chicago Title and, therefore, remain financially prejudiced; Chicago Title denied coverage in several other cases, leaving the holders of those unpaid prior liens and mortgages with no recourse but foreclosure. Respondent has resolved through settlement each lawsuit in which she was a named defendant.

In addition to the transactions in which respondent served as closing attorney, on numerous occasions respondent received checks

written on McMillian's trust account and signed by Cook as payment of attorney fees for closing in which respondent had no involvement. In at least three of these transactions, Cook had used respondent's name as the settlement agent on closing documents but, as with other transactions, Cook had stolen the lender's money and did not make the disbursements as indicated in the HUD-1 Settlement Statements. Respondent had no knowledge of these transactions or of Cook's defalcations until being so advised by ODC. Nevertheless, respondent and her staff deposited these fee checks into respondent's operating account, incorrectly assuming that they related to transactions in which she had served as closing attorney. Respondent maintained no office procedure for matching incoming payments to closing work performed and, therefore, unwittingly received payments for the use of her name and law license by a non-lawyer.

On three occasions in March 2002, a lender wired closing funds totaling $197, 285.99 to respondent's trust account. Respondent closed two of those transactions, not knowing funds were wired to her account, but assuming they were wired to McMillian's account as usual. Cook closed the third transaction without respondent's knowledge. In all three of the transactions, the funds were not disbursed as indicated in the HUD-1 Settlement Statements. Respondent attempted to reconcile her trust account on a monthly basis, but her reconciliations did not alert her to the excess funds in her trust account.

Several months after respondent terminated her relationship with CTS she sought an agency relationship with Stewart Title Company pursuant to which Stewart Title conducted an audit of respondent's trust account. The audit alerted respondent to the excess funds in July 2002 and respondent immediately took steps that resulted in delivery of those funds to the appropriate parties. Until the audit, respondent had no knowledge of the three wires into her trust account. Respondent now recognizes that, in order to comply with Rule 417, SCACR, on a monthly basis she must reconcile the trust account balance according to the bank's records with the balance according to

her records of account activity and that, if she had complied with Rule 417, she would have been immediately alerted to the improper deposits.

After closing approximately two dozen transactions between February and April 2002, respondent became aware that Cook or a CTS employee had forged her name on a HUD-1 Settlement Statement and on a closing proceeds check from a lender and that checks written by CTS were being dishonored for insufficient funds. Upon learning this information, respondent severed her relationship with CTS. Respondent then sent a letter to the Commission on Lawyer Conduct (Commission) purporting to be an anonymous report of Cook's and McMillian's actions. The letter sought the advice of the Commission and offered respondent's assistance in stopping the ongoing defalcation.

In mitigation, respondent states she was under the good faith impression that McMillian was performing or supervising all aspects of the real estate transaction that required attorney participation. She further states she was unaware that Cook was engaged in the unauthorized practice of law, that she was unaware that Cook had unsupervised access to and use of McMillian's trust accounts, and that she in no way intentionally contributed to the defalcations in these transactions.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.4(b) (lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.8(f) (lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation); Rule 1.15 (lawyer shall safe keep client funds); Rule 4.1(a) (in course of representing a client, lawyer shall not make a false statement of material fact to a third person); Rule 5.5(b) (lawyer shall not assist a person in the

unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in dishonesty, fraud, deceit, or misrepresentation).[5] Respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

[5] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael V. Hart, Respondent.

Opinion No. 26083
Submitted November 8, 2005 - Filed December 19, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of a letter of caution, admonition, or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was arrested on a charge of criminal domestic violence after a physical altercation with his wife. He pled guilty to simple assault and entered Pre-Trial Intervention (PTI). Respondent

has now completed PTI. Respondent self-reported his misconduct to ODC.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for a lawyer to violated the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude).[1] Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct) and 7(a)(4) (it shall be ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

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[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ernest Smith, Jr., as personal representative of the Estate of Ernest J. Smith, Sr., Respondent,

v.

Verne E. Cutler, as Personal Representative of the Estate of Joanne Rucker Smith, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Orangeburg County
Olin D. Burgdorf, Master-in-Equity

Opinion No. 26085
Heard October 18, 2005 - Filed December 19, 2005

REVERSED

Thomas B. Bryant, III, of Bryant Fanning & Shuler, of Orangeburg, for Petitioner.

S. Jahue Moore and M. Ronald McMahan, both of Moore, Taylor & Thomas, PA, of West Columbia, for Respondent.

CHIEF JUSTICE TOAL: This is an action for partition of real property, brought on behalf of Ernest J. Smith, Sr. (Respondent) against his wife Joanne Rucker Smith (Petitioner). The court of appeals held that Petitioner and Respondent owned the property as joint tenants with a right of survivorship and that the property was subject to partition. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

On August 17, 2000, Petitioner deeded a share in a parcel of land to her husband, Respondent. The deed, executed shortly after their marriage, granted Respondent an undivided one-half interest in the property.[1] The deed granted the property to Petitioner and Respondent "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns forever in fee simple . . . ." Identical language was used in the deed's habendum clause.

Due to conflict between the families, Respondent's family instituted an action for partition. Respondent became incapacitated and Respondent's son, acting on behalf of Respondent, brought the partition action. At the time the action was instituted, Petitioner and Respondent were married and no act, such as filing for divorce, inconsistent with the intent to remain married had been taken. A successful partition action would result in a forced sale of the property which had been Petitioner's home since 1958.

The case was referred to the master-in-equity. Respondent moved for summary judgment and the motion was granted. In granting summary judgment, the master found that the deed conveyed the shared interest to the parties as joint tenants with a right of survivorship. As a result, the master

[1] Petitioner, a woman in her seventies, and Respondent, a man in his eighties, married in June 2000. The property at issue was bought by Petitioner and owned by her most of her adult life. No other person owned an interest in the property until after the marriage when Petitioner deeded a share to Respondent. According to Petitioner's testimony, she wanted to make sure that if she were to predecease Respondent that he would get the property.

relied on S.C. Code Ann. § 15-61-10 (2005) to find that the property was subject to partition.[2] The court of appeals affirmed the master's decision, holding that the deed conveyed the property to the parties as joint tenants with the right of survivorship and that the estate was subject to partition. Petitioner appealed. This Court granted certiorari to review the following issue:

> Did the deed convey the shared interest in the estate to the parties as tenants in common with a right of survivorship, which is an estate that is not subject to partition?

LAW / ANALYSIS

Petitioner argues that the deed at issue creates a tenancy in common with an indestructible right of survivorship. We agree.

Although joint tenancies were favored in early common law, they have fallen into disfavor. *See* Harold W. Jacobs, Note, *Cotenancies, Estates of in South Carolina*, 11 S.C.L.Q. 520, 521-535 (1959) (explaining the movement away from construing deeds in favor of granting joint tenancies). In South Carolina, documents conveying a shared interest in property have generally been construed in favor of tenancies in common. *Herbemont v. Thomas*, 15 Chev. Eq. 21 (S.C. 1839). Courts began favoring tenancies in common over joint tenancies because the harsh results of survivorship rights often encumbered the land and defeated the intention of the grantor. *Free v. Sandifer*, 131 S.C. 232, 236, 126 S.E. 521, 522 (1925).

However, in 1953, this Court created a shared interest in property referred to as a tenancy in common with a right of survivorship. *Davis v. Davis*, 223 S.C. 182, 191-92, 75 S.E.2d 46, 50 (1953). The Court created the estate of tenancy in common with a right of survivorship because South Carolina did not permit husband and wife to hold property as tenants by the

[2] S.C. Code Ann. § 15-61-10 states that "[a]ll joint tenants and tenants in common who hold, jointly or in common . . . . shall be compellable to make severance and partition of such lands, tenements and hereditaments."

entirety.[3] *Id*. The Court in *Davis* opined that by adding the phrase "and the survivor of them," the parties clearly indicated that upon the death of either of them the absolute estate should vest in the survivor. *Id*. at 191, 75 S.E.2d at 50. The Court stated that while a right of survivorship is not incident to a tenancy in common, the parties may create one if they so desire. *Id*. The Court explained that:

> It has been said that great care must be exercised in construing conveyances to two or more persons and to the survivor or survivors of them. If the intention was to create a tenancy in common for life, with cross remainders for life, with remainder in fee to the ultimate survivor, a joint tenancy would not accomplish the purpose because the right of survivorship may be defeated by a conveyance by any joint tenancy [sic] *but the vested cross-remainders and, in general, the contingent ultimate remainders are indestructible*. Thus, not all instruments which provide that the survivor of a group will ultimately take the fee in severalty contemplate a joint tenancy; *the intention may be to create a true future interest by way of a remainder or an executory limitation*. (citation omitted) (emphasis added).

Davis, 223 S.C. at 187, 75 S.E.2d at 48. As noted from the excerpt above, the Court held that the future interests created by a tenancy in common with a right of survivorship were indestructible – i.e. not subject to defeat by the unilateral act of one cotenant. *Id*.

In 2000, the legislature created, by statute, the estate of joint tenants with a right of survivorship. The Code directs that:

> [i]n addition to any other methods for the creation of a joint tenancy in real estate which may exist by law, whenever any deed of conveyance of real estate contains the names of the

[3] The Married Women's Property Act was construed to abolish tenancy by the entirety. *See Davis*, 223 S.C. at 189, 75 S.E.2d at 49.

> grantees followed by the words "as joint tenants with rights of survivorship, and not as tenants in common" the creation of a joint tenancy with rights of survivorship in the real estate is conclusively deemed to have been created.

S.C. Code Ann. § 27-7-40 (Supp. 2004).

This Court recognizes that the two estates at issue have many similar characteristics. However, unlike a tenancy in common with a right of survivorship, a joint tenancy with a right of survivorship is capable of being defeated by the unilateral act of one joint tenant. *See* S.C. Code Ann. § 27-7-40(a)(v), (vii), and (viii) (depicting actions that can be taken by one joint tenant to effectively sever the joint tenancy). Further, property held in joint tenancy is subject to partition. S.C. Code Ann. § 15-61-10 (2005) (stating that all joint tenants may be compelled to partition). In contrast, a tenancy in common with a right of survivorship cannot be defeated by the act of one tenant absent the agreement of the other tenant.

We note at the outset that § 27-7-40 cited above and relied on by the court of appeals, creating a joint tenancy with a right of survivorship, was not enacted until after the deed in the current case was executed. As a result, the parties to the deed could not have intended to take advantage of the statute creating the estate of joint tenancy with a right of survivorship. However, the estate of joint tenancy still existed in South Carolina, but as previously noted this Court construed documents in favor of tenancies.[4]

In the present case, the language of the deed clearly indicates that the parties intended to create a right of survivorship. However, the question

[4] Petitioner contends that joint tenancy has been abandoned in South Carolina. While courts have moved away from construing language in conveyances in favor of a joint tenancy, joint tenancy has not been entirely abolished. Joint tenancy was disfavored as a rule of construction, but has existed and continues to exist today. *See Herbemont v. Thomas*, 15 Chev. Eq. 21 (S.C. 1839); *Ball v. Deas*, 2 Strob. Eq. 24 (S.C. 1848) (finding that language in a deed created a joint tenancy between the parties to the deed).

before this Court centers on the type ownership held by both husband and wife and whether the property is subject to partition.

We hold that the use of the phrase "for and during their joint lives and upon the death of either of them, them to the survivor of them" indicates an intention of the parties to share a tenancy in common for life, with cross remainders for life, with remainder in fee to the ultimate survivor. The deed here conveyed a true future interest in the property to the survivor of the two. This is distinct from a joint tenancy, where the full estate is vested immediately and one of the parties could end the joint tenancy. However, with a tenancy in common with a right of survivorship the property will go only to the survivor of the parties and the future interest does not vest until the death of one of the co-owners. We further hold that this conveyance does not unreasonably prevent the alienation of the property because the restriction exists only until the first tenant in common dies.

As a result, the court of appeals erred in holding that the property was subject to partition.

CONCLUSION

Based on the above reasoning, we reverse the court of appeals. The deed in the present case created a tenancy in common with a right of survivorship. Under *Davis*, the survivorship rights between tenants in common create true future interests in the entire estate that cannot be destroyed by the unilateral act of one tenant through an act such as partition.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

An L. Grosshuesch, Guardian and Conservator of Eleanor A. Breedlove, and An L. Grosshuesch, Guardian and Conservator of Bernard H. Breedlove, Appellants,

v.

Lisa Cramer; Nathan Cramer; Lawrence H. Gray, Jr.; Duane Marie Gray; and Sweetgrass Land Company, L.L.C., Respondents.

Appeal from Beaufort County
Curtis L. Coltrane, Circuit Court Judge

Opinion No. 26086
Heard November 29, 2005 - Filed December 15, 2005

REVERSED AND REMANDED

Richard S. Rosen, of Rosen Rosen & Hagood, of Charleston, for Appellants.

Charles B. Macloskie, of Macloskie Law Firm, of Beaufort; Lionel S. Lofton and V. Lynn Lofton, both of Lofton &

Lofton, of Charleston; G. Wells Dickson, Jr., of Charleston; and M. Duane Shuler, of Kingstree, for Respondents.

CHIEF JUSTICE TOAL: Bernard and Eleanor Breedlove (the Breedloves) appeal the trial court's decision denying their request for a preliminary injunction. This case was certified from the court of appeals pursuant to Rule 204(b), SCACR. We reverse.

FACTUAL /PROCEDURAL BACKGROUND

The Breedloves are elderly individuals with substantial assets. In the mid to late 1990's, the Breedloves became acquainted with Lisa Cramer, an employee in the Personal Trust division of one of the Breedloves' banking institutions. Over time, Lisa Cramer became an individual in whom Eleanor Breedlove placed a considerable amount of trust and confidence. Specifically, Lisa Cramer left the bank and became the Breedloves' primary caregiver; providing housekeeping services and assisting the Breedloves in handling much of their day to day affairs. Additionally, Lisa Cramer became a trustee assisting in the management of different trusts in which the Breedloves had considerable assets.

Beginning as early as 2001, the Breedloves began to transfer substantial assets to Lisa and her husband, Nathan Cramer (the Cramers). As of June of 2004, the Breedloves had transferred various tracts of real estate worth over $2.1 million and liquid assets worth over $3.5 million. These transfers were effectuated by checks made payable to "Cash" drawn on the Breedloves' account, payments directly to Lisa Cramer, or checks written by the Breedloves to pay the Cramers' credit card bills or other expenses.

During the time of these transfers, the Breedloves were both suffering from some degree of dementia related to their advanced age.[1] Gradually, several people with whom the Breedloves dealt became suspicious that Lisa

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[1] The Beaufort County Probate Court appointed An L. Grosshuesch as guardian and conservator for the Breedloves after the Breedloves commenced this lawsuit.

Cramer was taking advantage of the Breedloves' trust and confidence. After being alerted to an ongoing elder abuse and exploitation investigation conducted by one of the Breedloves' banking institutions, the Beaufort County Sheriff's Office arrested the Cramers. Lisa Cramer is currently under indictment in Beaufort County for violation of S.C. Code Ann. § 43-35-10(3)(b) (Supp. 2004) ("Financial Exploitation of a Vulnerable Adult") and § 16-17-410 ("Conspiracy"). Nathan Cramer is under indictment for violation of § 16-17-410 ("Conspiracy").

The Breedloves instituted a civil action seeking to set aside these transfers on the grounds of fraud and undue influence. At the outset of the case, the Breedloves sought to prevent the respondents from transferring or otherwise disposing of the assets at issue.[2] To achieve this result, the Breedloves filed lis pendens against the subject real estate, and sought a preliminary injunction preventing the respondents from exercising control over any of the subject assets and ordering an accounting for all funds transferred to the Cramers from the Breedloves.[3] Throughout this litigation, the Cramers have maintained that these transfers were gifts from the Breedloves.

The trial court denied the Breedloves' request for an injunction. The court found that although the Breedloves had shown irreparable harm and a likelihood of success on the merits, the Breedloves failed to show the absence of an adequate remedy at law. The trial court read this Court's decision in *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., et al.*, to require the Breedloves to seek relief through the statutory remedy of

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[2] The respondents Lawrence H. Gray, Duane Marie Gray, and Sweetgrass Land Company, L.L.C., are alleged to be in possession of assets wrongfully taken by the Cramers, or are alleged to have wrongfully utilized the Breedloves' assets for their own benefit.

[3] The Breedloves are specifically concerned about a Merrill Lynch account which initially contained $2 million. Since the time of the Cramers' arrest, approximately $1.4 million has been removed and transferred to an unknown location.

attachment. 361 S.C. 117, 603 S.E.2d 905 (2004). The Breedloves now raise the following issue for review:

> Did the trial court err in denying the Breedlove's request for a preliminary injunction because attachment was an adequate remedy at law?

LAW/ANALYSIS

Actions for injunctive relief are equitable in nature. *Wiedemann v. Town of Hilton Head*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence. *Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).

I. Adequate Remedy at Law

Because the trial court based its refusal to issue an injunction on the existence of an adequate remedy at law, we will address this issue first. The trial court found this court's *Scratch Golf* decision to require the Breedloves to use attachment to preserve the disputed assets until the disposition of the case. We disagree.

In *Scratch Golf*, a golf course sued a developer alleging breach of contract and negligence in designing the golf course's irrigation system. 361 S.C. at 120, 603 S.E.2d at 907. The golf course moved for a preliminary injunction freezing the developer's assets so there would be a pool of assets out of which any judgment for the golf course could be satisfied. *Id.* The trial court granted the golf course's request and ordered a large amount of money put in escrow. *Id*.

This Court reversed, finding that the golf course's arguments in favor of an injunction were really justifications for the statutory remedy of attachment. *Id*. at 122, 603 S.E.2d at 908. The golf course argued for an injunction on the grounds that the golf course would suffer irreparable harm having no adequate legal remedy to recover the potential judgment against the developer because the developer would move its assets elsewhere. *Id*. The Court drew guidance from the attachment statute, S.C. Code Ann. § 15-19-10 (2003), and case law, and concluded that attachment was the proper remedy when seeking to freeze another's assets for the purpose of satisfying a potential judgment. *Scratch Golf*, 361 S.C. at 122-23, 603 S.E.2d at 908.

The trial court incorrectly applied *Scratch Golf* to the instant case. *Scratch Golf* was an action at law, and the attachment issue dealt only with preserving another's assets for satisfaction of a potential judgment. This case is an equitable action in which the assets sought to be preserved, specifically $2 million worth of accounts, monies, and personal property, are the subject of the instant dispute. As distinguished from attachment, by which the court takes jurisdiction over the defendant's property "as a security for such judgment as a plaintiff may recover," § 15-19-10, this case involves the quintessential hallmark of an injunction: preservation of the property at issue until the matter has been adjudicated.

At least two significant obstacles would exist if the Breedloves pursued attachment in an effort to freeze the disputed assets. First, the record reveals that approximately $1.4 million has been removed from the Cramers' Merrill Lynch account since their arrest and transferred to an unknown location. Because attachment is effectuated by taking control of the defendant's property, and the location of the disputed property is not known, there is no way that any cash removed from the account or any personal property purchased with the money could be attached.[4]

[4] The Cramers have continually refused to reveal the location of any of the disputed assets. At the hearing on the preliminary injunction, Lisa Cramer's attorney stipulated that if Lisa were called to the stand, she would assert her rights under the Fifth Amendment as to the location of any of these assets. Since possession of the assets is not at issue in either of the Cramer's pending

More significantly, attachment would be inappropriate in this case because ownership of the property has not been established. Section 15-19-10 provides that attachment is a process by which the property of the defendant is brought under the court's jurisdiction. Because this lawsuit's central issue is ownership of the disputed property, attachment would be entirely inappropriate in these circumstances.

For the foregoing reasons, we hold that the trial court erred in applying the reasoning of *Scratch Golf* to this case, and we find that the Breedloves lack an adequate remedy at law to preserve the $2 million and any assets purchased therewith until this lawsuit has been resolved.

II. Likelihood of Success on the Merits & Irreparable Harm

The trial court found that the Breedloves had shown a likelihood of success on the merits and that they would suffer irreparable harm if a preliminary injunction was not issued. We agree and adopt the reasoning set forth in the trial court's order as to these issues.

CONCLUSION

For the foregoing reasons, we reverse the trial court and issue a preliminary injunction freezing the Cramers' Merrill Lynch account and any other accounts, assets, and personal property purchased or acquired with the $2 million obtained from the Breedloves. This matter is remanded to the trial court with instructions to proceed consistent with this opinion.

REVERSED AND REMANDED.

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice William P. Keesley, concur.

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legal matters, we do not view the Fifth Amendment as an impediment to the issuance of a preliminary injunction.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Brad Keith Sigmon, Appellant.

Appeal From Greenville County
Joseph J. Watson, Circuit Court Judge

Opinion No. 26087
Heard November 1, 2005 - Filed December 19, 2005

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody J. Brown, all of Columbia, and Robert M. Ariail, of Greenville, for Respondent.

JUSTICE PLEICONES: This is a death-penalty case. Appellant Brad Keith Sigmon (Sigmon) was convicted of two counts of murder and one count of first-degree burglary. He was sentenced to thirty years imprisonment for burglary and to death for murder. Before recommending

the death penalty, the jury found the following aggravating circumstances: Sigmon murdered two persons by one act or pursuant to one scheme or course of conduct; Sigmon committed the murder while committing burglary; and Sigmon committed the murder while committing physical torture.[1] The jury found no mitigating circumstances. Sigmon appeals from the murder convictions only. This opinion consolidates the appeal and mandatory sentence review. We affirm.

FACTS

The material facts are undisputed. Sigmon entered the dwelling of the two victims without consent and with intent to commit a crime. While in the dwelling, Sigmon unlawfully killed the victims with malice aforethought by repeatedly striking them in their heads with a baseball bat.

Sigmon was indicted for two counts of murder and one count of first-degree burglary. Neither murder indictment included an allegation of aggravating circumstances.

Almost one year prior to trial, the state gave Sigmon written notice of its intention to seek the death penalty.[2] Four weeks prior to trial, the state gave Sigmon written notice that it intended to introduce evidence that Sigmon committed the murders while committing burglary; that he murdered two or more persons by one act or pursuant to one scheme or course of conduct; and that he committed the murders while committing physical torture.[3]

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[1] See S.C. Code Ann. § 16-3-20(C)(a)(1)(b), (h) and (9) (2003).

[2] This notice must be given at least thirty days prior to trial. S.C. Code Ann. § 16-3-26(A) (2003).

[3] Notice of evidence of aggravation must be given, in writing, prior to trial. S.C. Code Ann. § 16-3-20(B) (2003). As discussed below, Sigmon does not argue that his due-process rights were violated because the state's notice was untimely.

At his arraignment, Sigmon stated his intention to admit at trial that he was guilty of the charged offenses. He pleaded not guilty, however, because he wanted a jury to determine his punishment.[4]

The jury found Sigmon guilty on all counts. At the subsequent penalty phase of the trial, the jury found all three aggravating circumstances mentioned above and recommended that Sigmon be sentenced to death. The circuit court sentenced Sigmon to thirty years imprisonment for first-degree burglary and to death for murder.

ISSUE

Whether the murder convictions must be reversed because the murder indictments included no allegations of aggravation.

ANALYSIS

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusations." U.S. Const. amend. VI. Because that provision is incorporated by the Due Process Clause of the Fourteenth Amendment,[5] an accused enjoys the same right in a state prosecution.[6] Faretta v. California, 422 U.S. 806, 818, 95 S. Ct. 2525, 2533-34, 45 L. Ed. 2d 562, 572 (1975). This right is satisfied if the notice is

[4] A jury trial on punishment is unavailable to a defendant who pleads guilty to murder. See § 16-3-20(B).

[5] U.S. Const. amend. XIV, § 1.

[6] The South Carolina Constitution similarly provides that "[a]ny person charged with an offense shall enjoy the right ... to be fully informed of the nature and cause of the accusation." S.C. Const. Art. I, § 14. Sigmon relies only on his right under the United States Constitution.

reasonable. In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682, 694 (1948).

We agree with Sigmon that his right to reasonable notice of the charges against him encompassed the right to notice of any aggravating circumstances to be alleged at trial. Contrary to Sigmon's assertion, however, neither Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), nor Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), mandates that such notice be given through the indictment. In fact, the United States Supreme Court "expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments. ... More important, the Fourteenth Amendment has not been construed to incorporate the Fifth Amendment's Presentment or Indictment Clause. ... State law governs indictments for state-law crimes. ... Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder." State v. Downs, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004) (citations omitted) (followed in State v. Crisp, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005), and State v. Wood, 362 S.C. 135, 144, 607 S.E.2d 57, 61 (2004)). Compliance with Code sections 16-3-20(B) and 16-3-26(A) is sufficient to put an accused on reasonable notice that aggravating circumstances are alleged and that the death penalty is sought. Sigmon does not assert that the state's notice of evidence of aggravation did not comport with statutory requirements, or that he was denied due process because the notice was not given in sufficient advance of trial.

SENTENCE REVIEW

We must review Sigmon's death sentence, based on the record, to determine whether the sentence is disproportionate to the crime committed. S.C. Code Ann. § 16-3-25(A) (2003). In conducting the review, we consider similar cases in which the death penalty has been upheld. See S.C. Code Ann. § 16-3-25(E) (2003).

We conclude that Sigmon's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and that the evidence supports the jury's findings of aggravation. See S.C. Code Ann. § 16-3-

25(C) (2003). Further, in comparison with similar cases, Sigmon's sentence was neither excessive nor disproportionate to his crime. See State v. Vazsquez, 364 S.C. 293, 613 S.E.2d 359 (2005) (involving a double murder committed in the course of robbery); State v. Hill, 361 S.C. 297, 604 S.E.2d 696 (2004) (involving a triple murder); State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004) (involving a quadruple murder committed in the course of burglary); State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (involving a murder committed in the course of physical torture); State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003) (involving a triple murder committed in the course of burglary); State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003) (involving a murder committed in the course of burglary and physical torture); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (involving a double murder committed in the course of burglary).

CONCLUSION

Sigmon's constitutional right to notice of the charges against him was not violated. Further, his death sentence was proportionate to his crime. His murder convictions and death sentence are therefore

AFFIRMED.

TOAL, C.J., WALLER and BURNETT, JJ. Acting Justice Diane S. Goodstein, concur.

The Supreme Court of South Carolina

In re: Amendment to Rule 608(d)(1)(E), SCACR.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 608(d)(1)(E), SCACR, by changing "South Carolina Administrative Law Division" to "South Carolina Administrative Law Court." This amendment shall become effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Waller, J., not participating

Columbia, South Carolina

December 14, 2005

The South Carolina Court of Appeals

RE: Expediting Appeals from Termination of Parental Rights Proceedings, Adoption Proceedings, and/or DSS Actions Involving Custody of a Minor Child

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ORDER

In recognition of the need for stability in children's lives, the South Carolina Court of Appeals will expedite all appeals from termination of parental rights proceedings, adoption proceedings, and/or DSS actions involving the custody of a minor child. To facilitate expediency, there will be a presumption against granting motions for extensions of time in these appeals, and such motions will be granted only in the most extraordinary of circumstances and for the most compelling reasons in the interest of justice. Once the final briefs and record are filed, oral arguments will be held, if at all, within thirty days. Notice of oral argument will be sent at least fifteen days prior to the scheduled argument. A written opinion from the court shall be entered within thirty days of filing the briefs or hearing oral arguments, whichever is later.

IT IS SO ORDERED.

Chief Judge Kaye G. Hearn, C.J.

Columbia, South Carolina
December 14, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Otis James Compton, Appellant.

Appeal From Abbeville County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 4060
Heard November 11, 2005 – Filed December 19, 2005

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia and Ernest Charles Grose, Jr., of Greenwood, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

STILWELL, J.: Otis James Compton appeals his convictions for murder, burglary in the first degree, armed robbery, possession of a firearm or knife during the commission of a violent crime, and malicious injury to real property. He contends an agreement granted him immunity from prosecution on the charges in exchange for his cooperation with a police investigation. Additionally, he raises several evidentiary and constitutional issues. We affirm.

FACTS

In August 1999, Johnny Hanna was murdered in his home during an apparent burglary. Compton was originally questioned about the crime that same month. In November 1999, Compton pled guilty to several unrelated counts of burglary and was sentenced to a total of fifteen years imprisonment. Compton remained a person of interest in the Hanna murder.

In January 2000, Compton was placed in a holding cell along with Tracey Black after they each had pled guilty to charges unrelated to the Hanna murder. According to Black, Compton initiated a discussion regarding the Hanna murder and told Black, "he had done what he had to do." Black informed investigators of this conversation. In March 2000, Black was transferred to the same prison where Compton was housed. He was told by investigators to "listen to Mr. Compton and see if he would talk about the case any more or what he had done or any involvement in it. They told me that I could not question the guy or pursue nothing toward him, just listen." Black was eventually placed in a cell with Compton and relayed to police several conversations in which Compton admitted taking part in the burglary and murder of Hanna.

In July 2000, Compton was in the Abbeville County Courthouse for the trial of his wife on unrelated charges. While there, he sought out Sheriff Goodwin regarding the Hanna investigation. Subsequently, Sheriff Goodwin, Lieutenant Templeton, Solicitor Townes Jones, and Compton's attorney, Joe Smithdeal, met at Smithdeal's office to talk about an agreement. The agreement at issue was labeled "Plea Agreement" and required Compton to "fully and truthfully cooperate . . . in their investigation of the events

involving the death of Johnny Hanna." In exchange, the State agreed "to reduce the sentences by all reasonable means on [the unrelated burglary charges] to Burglary Second Degree, Non-Violent, for Seven and One-half (7-1/2) years, to run concurrent with each other and concurrent with all other sentences now serving, within 18 months of arrest or within 2 years from the date of this agreement."

Compton subsequently admitted he was present at the time of the murder of Hanna. He told investigators that two other men took part in the crime and that he drove the getaway vehicle. Compton was indicted for the murder of Hanna, as well as other related charges. Before trial, Compton moved to quash the indictment or suppress his statements to police on the grounds that the information was provided subject to an immunity agreement between Compton and the solicitor. The motion also alleged the evidence should be suppressed because it violated Rule 410, SCRE,[1] and the investigators violated his Fifth and Sixth Amendment rights. The trial court denied the motion, finding there was no reasonable expectation of immunity, the agreement was not entered into pursuant to plea negotiations, and Compton breached the agreement by failing to pass the polygraph test.

Compton was tried for and convicted of Hanna's murder and all other related offenses. He appeals all convictions.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). We are bound by the trial court's factual findings unless they are clearly erroneous. See State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). "On review, we are limited to determining whether the trial judge abused his discretion. This Court does not re-evaluate the facts based on its own view of the

[1] Rule 410 generally discusses the inadmissibility of withdrawn pleas and statements made during plea negotiations.

preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (internal citations omitted). The admission or exclusion of evidence is left to the sound discretion of the trial court. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)).

LAW/ANALYSIS

I. Immunity

Compton contends his agreement to cooperate in the investigation of the murder of Hanna granted him immunity from prosecution on any related charges. We disagree.

Looking at the agreement, there is nothing to evidence an understanding between the parties that Compton could not be prosecuted for the Hanna murder. It is generally recognized that immunity agreements and plea agreements are to be construed in accordance with general contract principles. See U.S. v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) ("In the process of determining whether disputed plea agreements have been formed or performed, courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts."). Accordingly, this court should not read terms or conditions into the contract that the parties did not intend. See Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). The 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. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). In Harvey, the court discussed the interpretation of immunity and plea agreements:

> Private law interpretive principles may be wholly dispositive in an appropriate case. For example, whether a written agreement is ambiguous or unambiguous on its face should ordinarily be decided by the courts as a matter of law. If it is unambiguous as a matter of law, and there is no suggestion of government overreaching of any kind, the agreement should be interpreted and enforced accordingly. Neither side should be able, any more than would be private contracting parties, unilaterally to renege or seek modification simply because of uninduced mistake or change of mind.

Harvey, at 300.

In the instant case, the agreement makes no mention of immunity from prosecution for any crime. In fact the word immunity, or any variation thereof, is nowhere to be found in the four corners of the document. "Prosecution" is mentioned only once in relation to the State's "prosecution" of Compton for perjury if he lied to investigators. The agreement is unambiguous. It clearly indicates the State's intention—to get reliable information that could assist in solving the murder case. Compton's intention is equally clear—to get a reduction in the sentences for his burglary convictions. The burglary convictions are specifically referenced by indictment numbers, and the reduction sought is set forth in specific terms. The agreement is simply a contract of cooperation between the parties. To characterize the agreement as something more would be to read into it terms that simply are not there.

Furthermore, there is no argument by Compton that the investigators overreached or coerced him into making the agreement. It was entered into after Compton initiated contact with Sheriff Goodwin in the hopes of procuring a reduction on his already imposed burglary sentence. There is no indication the agreement contemplated the granting of immunity from prosecution on charges relating to the Hanna murder in exchange for

Compton's testimony. Accordingly, the trial court did not err in refusing to quash the indictments brought against Compton based upon this agreement.[2]

II. Rule 410, SCRE.

Compton contends the trial court erred in refusing to exclude his statements under Rule 410, SCRE, as the statements were made in the course of plea negotiations. We disagree.

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.

The unequivocal language of Rule 410 precludes its application in the instant case. The discussions between Compton, the solicitor, and investigators were not in furtherance of Compton making a plea on any charges. The discussions came after he already pled guilty to burglary charges and before any charges were brought related to the Hanna murder. Nothing in the record indicates Compton ever offered to plead guilty or planned to plead guilty to the Hanna murder in exchange for anything from the State. The only negotiations were related to the reduction in the sentence for the burglary charges. Accordingly, the trial court did not err in refusing to exclude the statements under Rule 410, SCRE.

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[2] Both parties also discuss in their briefs whether the agreement was breached and whether the State was required to honor the agreement. The issue before this court is whether the agreement granted Compton immunity from prosecution based upon his cooperation and whether the trial court erred in refusing to quash the indictments. We are therefore precluded from addressing any contention related to an alleged breach of the agreement.

III. Promise of Leniency

Compton contends the trial court erred in failing to exclude his confessions on the grounds that they were made after a promise of leniency and were, therefore, not voluntary. We disagree.

"The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances. A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." State v. Owens, 346 S.C. 637, 660, 552 S.E.2d 745, 757 (2001) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)) (internal citations omitted).

In this case, the record indicates Compton was never told his statements would not be used against him. Nothing brought out in the Jackson v. Denno[3] hearing or in the arguments to quash the indictments indicated Compton made the statements involuntarily and based upon a promise of leniency. Additionally, he sought out the sheriff in order to make a deal to reduce his burglary sentence in exchange for information about a separate matter. Accordingly, we find the trial court properly concluded the statements were given knowingly and voluntarily by Compton and were properly presented to the jury for consideration.

IV. Right to Counsel

Compton contends the court erred in failing to suppress his statements because the State violated his Sixth Amendment right to counsel by having Tracey Black initiate contact as a government informant. We disagree.

"The Sixth Amendment right [to counsel] attaches only 'post-indictment,' at least in the questioning/statement setting." State v. Council, 335 S.C. 1, 15, 515 S.E.2d, 508, 515 (1999) (citing Michigan v. Harvey, 494 U.S. 344 (1990)). "The Sixth Amendment right does not attach simply

[3] 378 U.S. 368 (1964).

because the defendant has been arrested or because the investigation has focused on him." State v. Register, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996) (citing Hoffa v. United States, 385 U.S. 293 (1966)). Furthermore, South Carolina follows the federal constitutional rule that the Sixth Amendment right to counsel is offense-specific; the mere fact counsel is appointed in one matter does not invoke the right to counsel in another, unrelated matter. State v. Owens, 346 S.C. 637, 661, 552 S.E.2d 745, 758 (2001) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)).

In the instant case, Compton was not indicted for the charges related to the Hanna murder until after he provided information to Black. While he was represented on the unrelated burglary charges and at the making of the agreement, that fact does not give rise to a Sixth Amendment violation regarding information gathered about the Hanna murder. Accordingly, the trial court properly admitted evidence of Compton's statements at trial.

V. Examination of Witness

Compton contends the trial court erred in limiting his ability to examine Solicitor Jones. We disagree.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). "This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." State v. Aleksey, 343 S.C. 20, 33-34, 538 S.E.2d 248, 255 (2000).

Compton's counsel sought to elicit testimony from Solicitor Jones to support the theory that the agreement called for Compton to be immune from prosecution in the Hanna murder. Counsel also sought testimony about Jones' belief that Compton's attorney would continue to be involved in the case. Such testimony was not relevant to the issue of Compton's guilt or

innocence. The jury was not entitled to determine whether the agreement provided transactional immunity, as that was a question of contract interpretation before the court. Additionally, the statement sought to be admitted to impeach the solicitor, while not relevant, was also based upon pure speculation that counsel would continue in his involvement. As such, we find no error on the part of the trial court in limiting the examination of Solicitor Jones or in refusing to allow Compton to impeach Jones using a prior statement that was purely speculative.

CONCLUSION

We find the agreement is unambiguous and does not intend to grant immunity to Compton from prosecution on charges related to the Hanna murder. Additionally, we find the statements given by Compton were properly admitted by the trial court. We conclude there was no violation of Compton's Sixth Amendment right to counsel by placing Black in the same prison cell to act as a conduit of information. Finally, we find the limitation of Compton's examination of Solicitor Jones was proper. Accordingly, Compton's convictions and sentences are

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, Appellant,

v.

Gedney M. Howe, III, and
Gedney M. Howe, III, P.A., Respondents.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 4061
Heard November 7, 2005 – Filed December 19, 2005

AFFIRMED IN PART, VACATED AND REMANDED IN PART

Desa A. Ballard, of West Columbia, for Appellant.

A. Camden Lewis, of Columbia, M. Dawes Cooke Jr. and James H. Elliott Jr., both of Charleston; for Respondents.

GOOLSBY, J.: This appeal involves claims by the appellant John Doe against the respondents Gedney M. Howe, III, and Gedney M. Howe, III, P.A., for legal malpractice and breach of fiduciary duty. The trial court granted summary judgment to Howe and his law firm. Doe appeals. We affirm the grant of summary judgment on Doe's action for legal malpractice, vacate the dismissal of Doe's action for breach of fiduciary duty, and remand

the breach of fiduciary duty claim for a written order pursuant to our opinion in Bowen v. Lee Process Systems Co.[1]

FACTS

We set forth the facts below, as we must, viewed in the light most favorable to Doe, the party against whom the trial judge granted summary judgment. We glean these facts from three sources: the allegations of the pleadings, the testimony given in depositions, and the statements of fact given in affidavits. We assume these facts are true only for the purpose of the summary judgment motion and determine merely whether they, when properly viewed, present triable issues.[2]

Doe, who was born September 2, 1962, is Howe's former client. From 1968 to 1980, Doe attended Porter-Gaud, a private school in Charleston. In 1977, Edward Fischer, a teacher at Porter-Gaud, began sexually molesting Doe. At the time, Doe was fourteen years old and in the ninth grade. Doe and Fischer continued to have sexual contact until 1982, two years after Doe became an adult and no longer attended Porter-Gaud.

Seventeen years later, in June 1999, Doe retained Howe and Howe's brother, Donald Howe, to represent him in an action against Porter-Gaud arising from the abuse Doe said Fischer inflicted upon him. Howe expressed concern to Doe early on that the statute of limitations presented a problem and could prevent Doe from recovering on any claim against Porter-Gaud.

Notwithstanding the statute of limitations, Porter-Gaud offered to settle Doe's claim. Based upon Howe's advice and without filing suit, Doe settled

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[1] Bowen v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000).

[2] See id. at 238, 536 S.E.2d at 89 (footnotes omitted) (stating that findings of fact for the purpose of summary judgment "are not factual findings in the ordinary sense as contemplated in our rules of procedure" but "are statements made by the court as it views the evidence and its inferences in the light most favorable to the nonmoving party").

with Porter-Gaud for $88,000 in May 2000. A few months later, in October 2000, a parent of another of Fischer's victims received jury verdicts against Porter-Gaud and the estates of two former officials of the school totaling $105 million dollars. The attorneys who obtained these verdicts had also succeeded in defeating summary judgment on at least four occasions.

After learning of the verdicts, Doe contacted Donald Howe the following month to inquire about the possibility of rescinding his settlement with Porter-Gaud. According to Doe, Donald Howe knew of no way to set aside the settlement, but nevertheless agreed to talk with his brother about the matter. Doe stated he never received an answer to his inquiry from either Donald Howe or Gedney Howe.

The attorneys who obtained the multi-million dollar verdict later settled all the sexual abuse cases brought against the Porter-Gaud defendants, with each student claimant receiving an average of $2 million dollars each.

After Doe settled with Porter-Gaud, he discovered Howe had enrolled his son in Porter-Gaud during the time Howe had represented Doe. Doe also learned Howe had made significant financial contributions to Porter-Gaud since 1996. Howe never divulged to Doe these personal relationships with Porter-Gaud. In addition, Doe learned in 2001 that Howe represented Porter-Gaud in a bad-faith action against its insurer regarding payment of claims made by Fischer's victims and their parents.

Doe then brought the present action. The trial judge subsequently granted Howe's motion for summary judgment, holding that, because Doe's action against Porter-Gaud would have been untimely, Doe could not provide evidence that he "'most probably' would have received a larger settlement than he did" or that "he 'most probably' would have prevailed on the underlying claim at trial."

In the same order, the trial judge denied a motion by Doe to recuse himself based on disclosures that (1) the judge had contacted Howe on an unrelated matter and (2) the judge's law clerk had applied for a position with the law firm of one of Howe's attorneys.

Doe filed this appeal after the trial judge denied his motion for reconsideration.

DISCUSSION

1. Doe contends the trial judge abused his discretion in failing to disqualify himself.

At the conclusion of the summary judgment hearing, the trial judge invited counsel for both parties to his chambers to disclose that he had previously contacted Howe to inquire whom his wife should contact to apply for a position at the new Charleston School of Law. He did not, however, ask Howe to otherwise assist his wife in securing employment with the school and he did not know of anything that indicated Howe did in fact exercise any influence on her behalf.

Two days after the hearing, the judge also disclosed to attorneys for the parties that his law clerk had an employment application pending with the law firm representing Howe. He assured counsel he would not allow the law clerk to have any further involvement with the case for that reason.

In support of his claim of judicial prejudice in this case, Doe argues (1) he was highly suspicious and mistrustful of people and the legal system because of his victimization by Fischer, Porter-Gaud, and Howe; (2) the trial judge "gratuitously" included the issue of damages in his ruling; (3) Howe had already made an unsuccessful motion before another judge in this case for summary judgment on the ground of the running of the statute of limitations; and (4) the trial judge's, to quote Doe's brief, "abhorrence" of deciding a matter involving an attorney influenced the judge's decision in this case.

As to the first contention, we are not aware of any decision recognizing the emotional fragility of a litigant as a ground for mandatory disqualification of a trial judge. Further, Doe cites no authority for this proposition in his brief. In any case, we hold the emotional fragility of a litigant, without more, provides no basis for disqualification of a judge.

As to the second contention, the mere fact that a judge includes an issue not raised by the parties does not indicate bias or prejudice. It is not at all unusual for a judge to include in an order an issue not raised by a party.[3] Besides, there are rules by which a party can challenge an order that includes matters not properly before the court.[4] The record does not suggest that Doe attempted to avail himself of these procedures.

As to the third contention, the fact that a judge would reach an outcome different from that reached by another judge does not give rise to an inference of prejudice. Judges differ all the time in their approach to the law. One need only look at the number of dissenting and concurring opinions that sometimes accompany appellate court decisions or at the number of times an appellate court reverses the decisions of other tribunals.[5]

And as to the fourth contention, although the trial judge expressed a dislike of having to sit in judgment of lawyers, he also said "it is what judges must do." Judging others is not an easy task. Just because a judge may dislike having to make a decision in a particular kind of case does not translate into his or her being unable to make an impartial and well-reasoned decision. What every litigant has a right to expect from a judge is that he or she be fair[6] and, to paraphrase the inscription that appears on the seal of this

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[3] See, e.g., Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) ("Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court.").

[4] See Rule 52(b), SCRCP (regarding motions to amend findings by the trial court) and id. Rule 59(e) (regarding motions to alter or amend judgments).

[5] See Reading v. Ball, 291 S.C. 492, 495, 354 S.E.2d 397, 399 (Ct. App. 1987) ("The fact a judge rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his ruling.").

[6] See Mallett v. Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) ("It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution.").

court, he or she give the litigant his or her due, no more and no less. This we are satisfied the trial judge endeavored to do in this instance. His acknowledgment of the grave responsibility that judges have in deciding cases tells us as much.

"Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal."[7] "It is not enough for a party to allege bias; a party seeking disqualification of a judge must show some evidence of bias or prejudice."[8]

Because Doe made no showing here of actual prejudice, we find no abuse of discretion in the trial judge's refusal to disqualify himself. If anything, the trial judge demonstrated sensitivity toward any concerns Doe might have had regarding his impartiality by voluntarily making full disclosure of his and his law clerk's contacts with Howe and Howe's counsel.

2. Doe contends the trial judge improperly granted summary judgment on the basis that his underlying cause of action was barred by the statute of limitations.

As we understand from his brief, Doe contends that, under Rule 56 of the South Carolina Rules of Civil Procedure and Black v. Lexington School District No. 2,[9] the question of whether the statute of limitations barred his underlying action was a matter for jury determination. He further contends evidence that "competent attorneys did, in fact, defeat summary judgment on the statute of limitations in cases exactly like [his case]" was sufficient to create a genuine issue of material fact as to whether the statute of limitations was an insurmountable bar to his claim against Porter-Gaud. He makes no contention that a triable issue of fact exists regarding whether the statute of

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[7] Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004).

[8] Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996).

[9] 327 S.C. 55, 488 S.E.2d 327 (1997).

limitations would have been raised as an affirmative defense in the underlying action.[10]

We recognize, as Doe argues, the supreme court in Black stated "the issue of whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact";[11] however, in the very same sentence in the opinion the court also noted that, nevertheless, "summary judgment is appropriate where there is no evidence of conduct on the defendant's part warranting estoppel."[12] We, too, hold that, although genuine issues of material fact regarding the applicability of the statute of limitations on an underlying case may prevent summary judgment on a legal malpractice action arising from that case, no such issues are present in this case.

To recover for legal malpractice, a plaintiff must prove the following: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate cause of the client's damages by the breach.[13] As to damages, the plaintiff must show he or she "most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice."[14] The question of the success of the underlying claim, if suit had been brought, is a question of law.[15]

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[10] See Rule 8(c), SCRCP (listing the statute of limitations among the defenses a party "shall set forth affirmatively" in a responsive pleading).

[11] Black, 327 S.C. at 61, 488 S.E.2d at 330.

[12] Id.

[13] Brown v. Theos, 345 S.C. 626, 629, 550 S.E.2d 304, 306 (2001); Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002).

[14] Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

[15] See Manning v. Quinn, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988) (holding in a legal malpractice case that the likelihood of success of action that the plaintiff alleged the defendant should have taken was a question of

Doe testified Fischer molested him from 1977 until 1982. Doe acknowledged he knew Fischer's actions were wrong when they occurred and said he had thought about what Fischer did to him at least once a day ever since the acts took place. Even assuming each act of molestation gave rise to a distinct cause of action, the statute of limitations would have expired in 1988, six years after the last act of molestation in 1982, and more than ten years before Doe even retained Howe, which occurred in 1999.

Because nothing in the record suggests that a dispute exists regarding any of the factual issues regarding the applicability of the statute of limitations in the underlying case, such as estoppel or some discrepancy as to the operative dates, we hold Doe's claim against Porter-Gaud, as a matter of law, had lapsed long before Howe undertook to represent him.[16] The trial judge, therefore, correctly concluded Doe could not, as a matter of law, prove his claim of legal malpractice against Howe because the underlying action would not have been successful in that the statute of limitations would have barred Doe from maintaining it.[17]

We further reject Doe's argument that, had he been aware of Howe's loyalties to Porter-Gaud, he would have dismissed Howe and hired another attorney who would have overcome the statute of limitations bar. This argument provides at best only a subjective assessment of the viability of Doe's underlying action against Porter-Gaud. The successful defeat of the

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law "and decision of that question on summary judgment motion is appropriate").

[16] Cf. Doe v. Crooks, 364 S.C. 349, 352, 613 S.E.2d 536, 538 (2005) (holding that, because the plaintiff's cause of action for sexual molestation had lapsed because of the expiration of the statute of limitations, it could not be "revived" by the enactment of a new statute of limitations that redefines the date at which the limitations period begins to run).

[17] See Kreutner v. David, 320 S.C. 283, 285-86, 465 S.E.2d 88, 90 (1995) ("The date on which discovery should have been made is an objective, not subjective, question.").

statute of limitations defense in another case, even one involving a plaintiff who was substantially similar to Doe, does not create an issue of fact as to whether the statute of limitations had run on Doe's action against Porter-Gaud.[18]

3. Doe further argues the trial judge erred in concluding the expert opinions he presented did not create a genuine issue of material fact precluding summary judgment.

The opinions on which Doe relied came from Gregory B. Adams, a professor at the University of South Carolina School of Law, and J. David Flowers, a Greenville attorney.

According to Adams, (1) Howe had an obligation to disclose the relationship between himself and Porter-Gaud; (2) if Howe had informed Doe of the potential conflicts of interests regarding a lawsuit against Porter-Gaud, Doe would have retained the attorneys who were representing other plaintiffs suing Porter-Gaud; and (3) consequently, Doe would have shared in the lucrative settlement and recovered much more than what he agreed to accept on Howe's advice.

Aside from whether we now need to address the question related to Adams' affidavit because of our holding that the statute of limitations barred the underlying action, the question of whether the opinions offered by Adams created an issue of material fact in this case is not properly before us. The trial judge did not address the impact of Adams' statements, and Doe did not raise this issue in his motion for reconsideration.[19]

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[18] See Wilburn Brewer, Jr., Expert Testimony in Legal Malpractice Cases, 45 S.C. L. Rev. 727, 766 (1994) ("Under the case-within-a-case concept, the test is objective. Therefore, the test is not what the outcome would have been, but rather what is should have been.").

[19] See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that, when the trial court does not explicitly rule on a question and the appellant fails to move to alter or amend the judgment on that ground, the issue is not properly before the court of appeals and should not be addressed).

Turning to the statements from Flowers, we agree with the trial judge that this expert witness did not assert anything that would create an issue of material fact warranting denial of summary judgment in this case.

According to Flowers, "Doe most probably would have defeated Porter-Gaud's defenses if his case had been filed and zealously pursued." In addition, Flowers noted that, until the present case, Porter-Gaud had been unsuccessful in obtaining dismissals of other claims arising from Fischer's misconduct. He further stated his opinion was "not 'mere speculation,'" but was "based on the record and experience of the prior litigation which lasted years, and on the defendants' apparently newfound belief in the strength of cases like Doe's."

The trial judge held Flowers' statements were insufficient to defeat Howe's summary judgment motion because Flowers never explicitly stated Doe most probably would have recovered more than the $88,000 he received in his settlement with Porter-Gaud. Doe takes issue with this holding, asserting he had to show only that he "most probably would have been successful" in the underlying action but for the alleged malpractice and therefore did not need expert testimony regarding the amount that he would have recovered. We disagree with both arguments.

Flowers based his statement that Doe most probably would have defeated Porter-Gaud's defenses on the experiences of other individuals who had asserted claims against Porter-Gaud. As we pointed out earlier, the success of other plaintiffs, even those who might be similarly situated to Doe, is not an objective criterion on which to base an assertion that, had Doe filed a lawsuit on his underlying claim against Porter-Gaud, he would have defeated the statute of limitations defense and prevailed at trial.[20]

We further agree with the trial judge's reliance on the fact that Flowers never stated "that Doe 'most probably' would have received more than the

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[20] See Brewer, supra note 18.

$88,000 he received in his settlement with Porter-Gaud." It appears to us that the trial judge, in citing this factor, was not imposing an additional requirement for Doe's prima facie case, but rather, was considering an alternative course through which Doe could avoid summary judgment.[21] As one commentator has aptly stated on this subject:

> The client's burden of establishing proximate cause in a legal malpractice action requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case. Stated otherwise, "the client need not show a perfect claim. But the client must show at least that he has lost a probability of success as a result of the attorney's negligence."[22]

Doe's counsel herself commented during oral argument to this court that numerous factors, including the statute of limitations, are considered to determine the settlement value of a claim. Notably absent from the record in this case, however, is any mention of settlement value from Flowers or any other expert that was brought to the trial judge's attention.

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[21] See Hall, 349 S.C. at 175, 561 S.E.2d at 657 (noting the plaintiff in a legal malpractice case could defeat the defendant attorney's summary judgment motion by establishing that he most probably would have received a larger settlement than what he agreed to accept while represented by the defendant or that he most probably would have prevailed on the underlying claim had there been a trial).

[22] David A. Barry, Legal Malpractice in Massachusetts: Recent Developments, 78 Mass. L. Rev. 74, 79 (1993) (footnotes omitted). The quoted language is from Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, 515 N.E.2d 891, 895 (1987).

As far as we can tell, the record contains only a "Gross Distribution" list showing that various claimants represented by other counsel each received approximately $2 million dollars following the initial verdict against the school.[23] But this list does nothing more than set forth factual information. Most certainly, the list does not constitute an opinion that Doe should have made a recovery similar to the other claimants. At best, it could serve, if at all, only as evidence that could have supported an opinion regarding the settlement value of Doe's claim.[24]

4. Finally, Doe argues his inability to maintain his cause of action for legal malpractice should not bar him from proceeding on his breach of fiduciary duty claim.

The trial judge, as we interpret his order, dismissed both the legal malpractice claim and the breach of fiduciary duty claim because he viewed the record as presenting no triable issue of fact regarding whether Doe would have recovered more by either trial or settlement than $88,000 if he had retained a different lawyer or if Howe had represented him more "zealously."

Doe followed up with a post-hearing Rule 59(e) motion in which he contended, among other things, he could pursue a cause of action for breach of fiduciary duty without establishing that he would have succeeded on the underlying claim on which the legal malpractice action was based. The trial judge denied Doe's motion in a summary order without further discussion of Doe's right to maintain an action for breach of fiduciary duty.

In Bowen v. Lee Process Systems Co., this court stated the following regarding the trial court's responsibility when issuing a summary judgment order:

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[23] The trial judge refused to consider this evidence on the grounds that it was not submitted in a timely fashion and was not in proper form.

[24] See 31A Am. Jur. 2d Expert and Opinion Evidence § 1, at 27 (2002) ("[A]n expert's purpose is to provide an opinion about a disputed issue.").

> On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order outlining its rationale, we simply cannot perform our designated function.[25]

Considering all the relevant circumstances, we do not fault the trial judge for his summary handling of Doe's post-hearing motion. We are mindful of the demands on trial judges, especially when back-to-back scheduling of nonjury matters occurs. We also recognize that, early on in the present case, the trial judge, in a conscientious effort to prevent a potential conflict of interest from tainting his decision, instructed his law clerk not to participate in the proceedings, thereby relinquishing assistance that would normally have been available to adjudicate a difficult and emotionally driven lawsuit. Moreover, in all fairness to the trial judge, we acknowledge that, after our decision in Bowen, we stated in Clark v. South Carolina Department of Public Safety that "there is no blanket requirement that the trial court set forth a separate explanation on all of its rulings on post-trial motions."[26]

The order at issue in Clark, however, had been issued pursuant to post-trial motions following a hearing on the merits. Of even greater significance is the fact that the reasoning behind the denial of the post-trial motions was discernible from the record on appeal. In contrast, we are unable to glean any "stated grounds" in this case from either the order denying reconsideration or the record on appeal as to why the trial judge rejected Doe's arguments concerning his breach of fiduciary duty claim. At this point, we can only speculate about the reason the trial judge determined Doe could not proceed on this claim. Despite a number of possible explanations[27] as to why the trial

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[25] Bowen, 342 S.C. at 235-36, 536 S.E.2d at 87-88.

[26] Clark v. South Carolina Dep't of Pub. Safety, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002), aff'd, 362 S.C. 377, 608 S.E.2d 573 (2005).

[27] Summary judgment on Doe's claim for breach of fiduciary duty claim

could conceivably have been based on the trial judge's reaffirmation of his earlier holding that Doe's failure to show he would most probably have recovered a larger settlement than he did recover but for Howe's alleged acts and omissions doomed the breach of fiduciary duty claim. Cf. General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F. Supp. 2d 951, 961-62 (E.D. Va. 2005) (holding that certain claims for breach of contract and breach of fiduciary duty were "mere disguises for the plaintiffs' legal malpractice claims" because the breach alleged in both was "the same failure to provide adequate legal services that [was] the crux of the legal malpractice claims"); Majumdar v. Lurie, 653 N.E.2d 915, 921 (Ill. Ct. App. 1995) ("[W]hen . . . the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the later should be dismissed as duplicative."). But see Mark J. Fucile, Why Conflicts Matter, 48-SEP Advocate (Idaho) 23, 23-24 (2005) (stating that, even though a lawyer can perform "flawlessly in a technical sense," if the services "result in damage to a client flowing from a conflict, the client has a remedy against the lawyer under a theory of breach of fiduciary duty").

The dismissal could also have been based on one or more other grounds, including, but not limited to the following: (1) damages from emotional distress are not recoverable under a breach of fiduciary duty claim. See Aller v. Law Office of Schriefer, No. 04CA0003 2005 WL 1773878 at *5 (Colo. Ct. App. July 28, 2005) ("[T]he purposes of limiting damages in attorney negligence cases should apply to cases involving breach of fiduciary duty. Litigation inherently causes a client to suffer emotional distress, and to allow damages for such distress would escalate the cost of practicing law."); Suppressed v. Suppressed, 565 N.E.2d 101, 106 (Ill. Ct. App. 1990) (stating that to allow an action for breach of fiduciary duty based on emotional harm alone "would be opening the door to any number of malpractice actions brought by clients who may have been less than satisfied with their legal representation but can point to no specific harm other than their own emotional distress"); (2) Doe's claim for breach of fiduciary duty was defective as a matter of law because he failed to plead the operative facts to support recovery of the particular damages he claimed to have suffered as a result of the alleged breach, namely, emotional distress, anxiety, fear, loss of

judge held as he did, we are reluctant to pass judgment on his ruling based on mere conjecture as to how he reached his decision.

We therefore vacate the dismissal of the breach of fiduciary duty cause of action and remand the matter to the trial judge for an order "identifying the facts and accompanying legal analysis on which [he] relied"[28] to enable a meaningful appellate review of this issue.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

BEATTY and SHORT, JJ., concur.

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trust, and loss of enjoyment of life; (3) the evidence in the record, viewed in the light most favorable to Doe, failed to support a finding that Howe breached a fiduciary duty to Doe; (4) Doe could not, as a matter of law, show that any alleged breach by Howe of a fiduciary duty was the proximate cause of the emotional distress he claimed to have suffered; (5) emotional injuries would not be recoverable absent evidence that Doe sustained pecuniary losses as well.

[28] Bowen, 342 S.C. at 241, 536 S.E.2d at 91.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In The Matter of Betsy M. Campbell, Robert S. Campbell, Jr.
Mary Schuyler Campbell, Respondent,

v.

Betsy M. Campbell and Robert S. Campbell, Jr., of whom Betsy M. Campbell is Appellant.

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

Opinion No. 4062
Heard November 9, 2005 – Filed December 19, 2005

AFFIRMED

James R. Thompson, of Gaffney, R. David Massey, E. Zachary Horton, all of Greenville and William E. Winter, Jr., of Gaffney, for Appellant.

Randall S. Hiller, of Greenville, for Respondent.

HEARN, C.J.: This appeal stems from a probate court action in which Mary Schuyler Campbell (Daughter) sought to have herself appointed as conservator of Betsy M. Campbell's (Mother) assets. After appointing two doctors to examine Mother's capacity to handle her own affairs, the probate

court denied Daughter's request to be appointed conservator. Daughter appealed to the circuit court, which set the order aside, finding the doctors who examined Mother were not disinterested. We affirm.

FACTS

On February 28, 2002, Daughter filed a petition seeking to be appointed conservator of Mother's assets. According to Daughter, Mother's assets exceeded sixty million dollars, and Mother needed a conservator because she "is no longer mentally capable of caring for [herself] or [her] assets due to Alzheimer disease and/or dementia and [her] assets are being given away to others who are exerting undue influence over [her]." Mother filed an answer, denying her need for a conservator and arguing that in the event she needed a conservator, William W. Brown would have priority over her daughter because he is her attorney in fact.

After filing her petition, Daughter sent a discovery request to Mother, seeking copies of all of Mother's financial transactions from 1999 to 2002, all of Mother's income tax returns from 1999 to 2002, copies of any documents evidencing the transfer of property from Mother to William W. Brown, and all documents evidencing personal property owned by Mother. In response to this request, Mother sent Daughter a copy of a deed, showing Mother had transferred a condominium to Brown for the sum of ten dollars. Other than this deed, Mother refused to comply with Daughter's discovery requests, arguing they were not only overly broad, but also irrelevant because Daughter had not made a prima facie showing of Mother's incompetence.

Because Mother had not fully complied with the discovery request, Daughter filed a motion seeking to compel production. On July 9, 2002, the probate court had a hearing on the motion. After denying Daughter's motion, the probate court directed Mother's counsel to prepare the order. Counsel complied, and the court signed the order on August 12, 2002. That same day, the probate court also executed an order appointing Dr. Preston Edwards and Dr. John Cathcart as examiners for Mother. Mother had previously designated these very doctors as her expert witnesses.

Daughter argued the doctors were appointed without her input, and she did not learn of their appointment until she received the order, which was sent to her by Mother's counsel rather than by the court. By the time Daughter received the order, arrangements had already been made with the doctors to fly them via private jet to Mother's home in Florida. Mother paid the doctors about $2,000 each for their time and also paid for the cost of their transportation. Brown accompanied the doctors during their entire trip.

Upon learning of the doctors' appointment, Daughter filed a motion to reconsider both the probate court's order denying her motion to compel discovery and its order appointing examiners. The probate court held a hearing on the motions, and at the end of the hearing, Daughter moved that the probate judge recuse himself from the case. Both the motion to reconsider and the motion to recuse were denied.

After denying Daughter's motions, the probate court proceeded to hear the matter on its merits. At the hearing, the doctors each testified that they spent an afternoon with Mother and found her to be completely competent to handle her own financial affairs. In an affidavit he submitted to the court, Dr. Cathcart admitted to being a friend of Mother's for over sixty years, attending her husband's most recent birthday party, and having supper with Mother four months prior to examining her. According to Dr. Edwards' affidavit, he had also eaten supper with Mother four months prior to examining her and before that, she had occasionally consulted him from 1950 to 1995 if she was having medical problems.

Based on the doctors' affidavits and their testimony at the hearing, the probate court found Mother to be mentally competent and therefore capable of handling her own finances. Accordingly, the probate court found there was no need to appoint a conservator for Mother's assets.

Daughter appealed to the circuit court, arguing among other things, that: (1) the order appointing examiners resulted from improper ex parte communications, (2) the probate court erred in appointing the doctors who were not disinterested parties, (3) the probate court judge erred in not recusing himself, and (4) the probate court erred in finding Mother was

mentally competent. The circuit court set aside the probate court's order, finding the probate court abused its discretion in naming Drs. Cathcart and Edwards as examiners when Mother had previously designated them as expert witnesses on her behalf. The circuit court also found the probate judge's order and the personal comments he directed at Daughter's counsel demonstrated an improper prejudice against Daughter's case, and therefore, the circuit court recused the probate judge from the case. Because the probate judge who had heard the case was the only probate judge in Cherokee County, the circuit court ordered the case be transferred to Spartanburg County Probate Court. Mother appeals.

LAW/ANALYSIS

Mother argues the circuit court erred in finding the probate court's appointment of Drs. Cathcart and Edwards was an abuse of discretion.[1] We disagree.

According to section 62-5-401 of the South Carolina Code (1987), the probate court may appoint a conservator to the estate and affairs of a person if the court determines: (1) the person is unable to manage his or her affairs due to advanced age or mental deficiency, and (2) the person has property that will be wasted unless proper management is provided. To aid the court in determining whether a person lacks the mental capacity to handle his or her own affairs, section 62-5-407(b) requires the person "be examined by one or more physicians designated by the court, preferably physicians who are not connected with any institution in which the person is a patient or is detained."

Mother argues the physicians appointed by the probate court were sufficient despite the fact she had previously designated them as her experts because the probate code does not restrict examiners to "disinterested"

[1] Mother also argues the circuit court erred in recusing the probate judge from further participation in this matter. However, Mother concedes this issue has been rendered moot because the probate judge passed away during the pendency of this appeal. Therefore, we need not address the issue.

physicians. Mother points out that the statute merely states a preference for examiners who are not connected with an institution in which the person is a patient or is detained, neither of which are present in this case as Mother is not a patient in any institution.

While the statute does not specifically address whether a physician must be "disinterested" or not, the obvious purpose of appointing examiners is to provide the probate court with a medical opinion regarding the person's mental capacity, and it is inherent that such an opinion come from a neutral physician. The statute's preference that the physician be independent from institutions in which the person is a patient evidences the Legislature's desire for neutralilty. Furthermore, in other court proceedings in which the trial court receives information from an intermediary, independence is required. See, e.g., Doe v. Ward Law Firm, 353 S.C. 509, 519, 579 S.E.2d 303, 308 (2003) (holding that it was in an adopted child's best interests to appoint an intermediary to review law firm's adoption file for information relating to child's physical and psychological problems, and requiring intermediary to be independent of any party to the suit); Wrenn v. Wrenn, 228 SC. 588, 591, 91 S.E.2d 267, 268 (1956) (modifying trial court's order dissolving partnership and remanding case for a "competent, disinterested and impartial person" to be appointed as receiver).

Here, Mother had previously designated Drs. Cathcart and Edwards as experts. Thus, it was a foregone conclusion those doctors would opine Mother was capable of handling her own financial affairs. By appointing such doctors to aid the court in determining Mother's mental capacity, the probate court merely went through the motions of following section 62-5-407. Such a charade was not what the General Assembly intended in enacting the probate code. We therefore find the probate court erred by appointing Drs. Cathcart and Edwards as examiners. Because this error impacted the probate court's subsequent order finding Mother was not in need of a conservator, the circuit court was correct to set that order aside as well. Accordingly, the order of the circuit court is

AFFIRMED.
HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

2003-CP-23-2255

Sharon Doe, as Special Conservator for her daughter, Audra Doe, Appellant,

v.

ATC, Inc., Transportation Management Services, Inc., and Multisystems, Inc., Respondents.

2003-CP-23-2256

Sharon Doe, as Special Conservator for her daughter, Audra Doe, Appellant,

v.

Calvin Murray, Respondent.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4063
Heard November 8, 2005 – Filed December 19, 2005

AFFIRMED

John Robert Peace, of Greenville, for Appellant.

Maureen Z. White, of Greenville and Michael H. Montgomery, of Columbia, for Respondents.

KITTREDGE, J.: This is an appeal from the granting of a directed verdict in a negligent retention action. The dispositive issue, as narrowly framed in the trial court, is whether a jury question existed as a result of the employer's decision not to fire an employee based on the report of a single incident of an inappropriate sexual advance toward a fellow employee. We agree with the trial court that a jury question was not created by the employer's decision to retain the employee. We affirm.

FACTS[1]

Appellant Sharon Doe[2] is the mother of Audra Doe, a disabled adult female. Audra rode a Medicaid bus to physical therapy sessions and to Greenville Memorial Hospital, where she did volunteer work. Calvin Murray, an employee of Respondents (collectively "ATC") drove the Medicaid bus on which Audra sometimes rode. While Audra was on the bus, Murray repeatedly touched her legs inappropriately, kissed her and made persistent comments to her of a sexual nature over a period of several months.

Doe filed separate lawsuits on behalf of Audra against Murray and ATC. These suits were consolidated and tried together. Doe's claim against ATC was based on a negligent retention theory.[3]

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[1] We adhere to the appropriate standard of review and thus view the facts in a light most favorable to Appellant, although the facts necessary for resolution of this appeal are largely undisputed.

[2] We have substituted the name Doe due to the nature of the allegations.

[3] The complaint alleged negligent supervision, but the case was tried as one of negligent retention.

The trial court directed a verdict in favor of ATC. The action against Murray resulted in a jury verdict of $1,000. Doe appeals only from the direction of a verdict in favor of ATC, and there is no challenge in connection with the action against Murray. Concerning the negligent retention theory of liability against ATC, Doe contended that Murray should have previously been fired due to an earlier, isolated incident involving a fellow employee, Tycie Moss.

Moss testified that several months before the incidents involving Audra, Murray made an inappropriate advance toward her. Moss's car had broken down, so Murray picked her up before her shift, around 3 or 4 o'clock in the morning. Moss got out of Murray's van and, as she was getting into her van, Murray approached her, and "then grabbed [her] arms … like he was forcing [her] to kiss him." Moss pushed him away before he could kiss her, got into her van, and left. Moss also testified that Murray made inappropriate sexual comments to her in the presence of clients on the van.

Moss reported the incident to her supervisor, Hattie Wright. Moss, however, told Wright not to write up a formal complaint against Murray because she "didn't want it to blow up." ATC had a formal complaint procedure that provided for an investigation of a complaint, but Moss refused to file a complaint. In fact, Moss did not want Wright "to do anything about [the incident]." Wright said that Moss wanted her disclosure to remain in confidence, noting that Moss did not want Wright to "say anything to anyone."

Wright ignored Moss's wishes and pursued the matter the same day, initially by speaking with Murray. Murray gave "his side" and said the incident was not as "interpreted." Without an admission from Murray and the lack of a formal complaint, Wright nevertheless issued Murray a verbal warning, instructing him to "keep [his] distance" and to "do [his] job." Also on the same day, Wright discussed the incident with her supervisor, Audlyn Williams, who was the manager in charge of the Greenville office. Williams believed that in light of Murray's otherwise laudable employment record—he "never had a [problem] before"—Wright's actions were appropriate. Wright subsequently prepared a memorandum for the file regarding the incident.

It is undisputed that ATC—prior to Doe's complaint on behalf of Audra—had no other knowledge of inappropriate conduct of any kind by Murray.

After Doe filed her complaint, Williams and Wright notified Melville Padgett, the general manager for ATC's Medicaid properties in South Carolina. Padgett testified he was satisfied with Wright's earlier actions because prior to the present action Murray had a "clean record" except for the single incident reported by Moss. Following Doe's complaint, Murray admitted making an inappropriate comment to Audra on the bus, and Padgett fired him.

The Directed Verdict Motion

ATC moved for a directed verdict, and the trial court engaged in a lengthy discussion with Doe's counsel in an effort to determine the precise allegation of negligence against ATC. Specifically, it was not clear what Doe claimed ATC should have done differently following the reported incident involving Moss. The answer eventually surfaced:

> THE COURT: So they would have to have fired him [following the report by Moss]?
> [DOE'S COUNSEL]: Yes, sir.

The trial court, as noted, directed a verdict in favor of ATC.

STANDARD OF REVIEW

In reviewing a motion for directed verdict, the appellate court applies the same standard as the circuit court. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The court must view the evidence and the inferences that can reasonably be drawn in the light most favorable to the nonmoving party. Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465

S.E.2d 84, 85 (1995); Bailey v. Segars, 346 S.C. 359, 366, 550 S.E.2d 910, 913 (Ct. App. 2001).

LAW/ANALYSIS

Doe argues that ATC negligently retained Murray by failing to fire him following the report by Moss. The issue before us, as framed in the trial court and stipulated at oral argument, is a narrow one—was a jury question presented on Doe's theory of liability that ATC was negligent in not firing Murray following the attempted kissing incident involving a fellow employee? We join the circuit court in answering the question "no."

We have canvassed the record and conclude that ATC's decision not to fire Murray following the incident with Moss was reasonable as a matter of law. Doe makes no claim that ATC's *supervision* of Murray was negligent following the incident with Moss. Cf. Degenhart v. Knights of Columbus, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992) (recognizing the tort of negligent supervision in South Carolina law); Moore by Moore v. Berkeley County School Dist., 326 S.C. 584, 590, 486 S.E.2d 9, 12-13 (Ct. App. 1997) (examining negligent supervision case law since Degenhart).[4] We can find no South Carolina case on point, and none has been cited. South Carolina, indeed, recognizes the tort of negligent retention in the context of a negligent supervision action. We have no pause in concluding our supreme court would recognize the tort of negligent retention, independent of allegations of negligent supervision. See e.g., Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993) (holding that negligent hiring and negligent retention are distinct theories of recovery separate from negligent

[4] In Appellants' Final Brief, Doe seeks to recast the case as one of negligent supervision, arguing that ATC was "on notice" about the incident with Moss and hence the need to "exercise control" over Murray. Issue preservation rules preclude us from expanding the case and issues beyond those argued in the trial court. Counsel for Doe conceded at oral argument that the case against ATC rested solely on the claim that ATC was required to fire Murray following the incident with Moss. When properly viewed, Doe has defined and equated ATC's duty to "exercise control" with a duty to fire Murray.

supervision). In addressing the law of negligent supervision, our supreme court has cited with approval the Restatement (Second) of Torts § 317 (1965). Degenhart, 309 S.C. at 116-17, 420 S.E.2d at 496. Comment c to section 317 of the Restatement (Second) of Torts deals specifically with the retention of employees, and provides, in relevant part:

> *c.* Retention in employment of servants known to misconduct themselves. There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.

Our review of negligent hiring and retention cases from other jurisdictions leads us to conclude that such cases generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties. Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982). These elements, from a factual perspective, are not necessarily mutually exclusive, as a fact bearing on one element may also impact resolution of the other element. From a practical standpoint, these elements are analyzed in terms of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused. Such factual considerations—especially questions related to proximate cause inherent in the concept of foreseeability—will ordinarily be determined by the factfinder, and not as a matter of law. Hoke v. May Dep't Stores Co., 891 P.2d 686, 691 (Or. Ct. App. 1995); Gaines v. Monsanto Co., 655 S.W.2d 568, 571 (Mo. Ct. App. 1983). Nevertheless, the court should dispose of the matter on a dispositive motion when no reasonable factfinder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard. Hoke, 891 P.2d at 690; Reed v. Kelly, 37 S.W.3d 274, 278 (Mo. Ct. App. 2000). We believe Doe's claim against ATC is properly resolved as a matter of law.

The standard, according to the Restatement section 317 comment c, is whether the employer knew the offending employee was "in the habit of misconducting [himself] in a manner dangerous to others." Accordingly, many courts have recognized that a plaintiff must demonstrate some propensity, proclivity, or course of conduct sufficient to put the employer on notice of the possible danger to third parties. See e.g., Frye v. Am. Painting Co., 642 N.E.2d 995, 999 (Ind. Ct. App. 1994) (holding that an employer may be held negligent if it retains an employee it knew or should have known had a propensity for dangerous behavior); Alpharetta First United Methodist Church v. Stewart, 472 S.E.2d 532, 536 (Ga. Ct. App. 1996) (holding that an employer may not be held liable for negligent hiring or retention unless the plaintiff shows the employer knew or should have known of the employee's dangerous propensities); Gomez v. City of New York, 758 N.Y.S.2d 298, 299 (N.Y. App. Div. 2003) ("[R]ecovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee.").

Based on this requirement, some courts have dismissed negligent hiring and negligent retention claims when the claim rests on a single prior incident of misconduct. For example, in Sullivan v. St. Louis Station Assocs., 770 S.W.2d 352 (Mo. Ct. App. 1989), the court held that a single prior incident was insufficient as a matter of law to establish negligent retention. The Sullivan court noted that "the plaintiff must demonstrate that the employee had dangerous proclivities . . . which denotes a course of conduct rather than a single aberration of behavior." Id. at 357. Similarly, in Moore v. Hosier, 43 F. Supp. 2d 978, 993-994 (N.D. Ind. 1998), the United States District Court for the Northern District of Indiana granted summary judgment to an employer in a negligent hiring and retention claim that was predicated on a single, prior incident. The court observed that a single incident does not equate to a habit or propensity toward misconduct. Id. at 993.

However, we do not view the "habit of misconducting" language in the Restatement as mandating multiple prior acts of misconduct for a negligent retention action to remain viable in South Carolina. We hold that a single isolated incident of prior misconduct (of which the employer knew or should have known) may support a negligent retention claim, provided the prior misconduct has a sufficient nexus to the ultimate harm. In Doe v. Greenville

Hosp. Sys., 323 S.C. 33, 40-41, 448 S.E.2d 564, 568 (Ct. App. 1994), in the context of a negligent supervision claim, this court affirmed the denial of the employer's directed verdict motion—and hence a jury question was presented—where the prior isolated incident involved the same sexual misconduct against the same victim.

Turning to the case at hand, the prior alleged misconduct by Murray against Moss, a co-employee, lacks a sufficient nexus to the sexual assault on Audra. While it is true that both incidents may generally be described as sexual in nature, the totality of the prior incident is a far cry from the reprehensible, persistent pattern of abuse against Audra. If Moss's allegation against Murray were founded,[5] then Murray's conduct involving Moss certainly deserved some form of disciplinary action. ATC could have taken any number of actions, such as transferring Murray or requiring counseling. However, none of these possibilities are in play here, because we are not confronted with any claim of negligent supervision, but only the claim that ATC should have fired Murray.

Doe's laser-beam approach—Murray had to be fired—is simply not reasonable under the facts presented, including the nature of the incident involving Moss, Moss's unwillingness to file a formal complaint, and the complete absence of evidence of other such similar conduct by Murray. Indeed, but for the allegation by Moss, Murray had a "clean" work record. Imposition of liability against an employer for negligent retention under these facts is legally untenable. This court in no manner condones Murray's purported misconduct against Moss, and we recognize that a single assault may well create a jury question as to whether an employee should be fired. But this is not such a case.

CONCLUSION

We find that the directed verdict for ATC was appropriate under the facts presented and the theory of liability advanced by Doe. A reasonable jury could not conclude, based on the incident involving Moss, that ATC

[5] We decline Doe's invitation to view Moss's allegation in hindsight through the lens of Murray's abuse of Audra.

knew or should have known that Murray was likely to commit a sexual assault sometime in the future. The decision to retain Murray following the informal report by Moss was reasonable as a matter of law. The order of the trial court is

AFFIRMED.

STILWELL and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sharon K. Peek, M.D., Respondent,

v.

Spartanburg Regional Healthcare System, Appellant.

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

AFFIRMED

Opinion No. 4064
Heard November 10, 2005 – Filed December 19, 2005

Perry D. Boulier, of Spartanburg, for Appellant.

James C. Cothran, Jr., of Spartanburg, for Respondent.

HEARN, C.J.: This is an appeal from an order of the trial court enjoining Spartanburg Regional Healthcare System (the Hospital) from terminating the staff privileges of anesthesiologist Sharon Peek until the merits of her case can be adjudicated. We affirm.

FACTS

Peek is a licensed anesthesiologist.[1] She has maintained staff privileges at the Hospital for almost fourteen years. On January 30, 2004, general counsel for the Hospital informed Peek that pursuant to a prospective agreement between the Hospital and Foothills Anesthesia Consultants, P.C. (Foothills), Peek would lose her staff privileges at the Hospital unless she was employed by Foothills. Although Peek did not wish to work at Foothills, she nevertheless sought employment there. Foothills declined to employ her.

On February 1, 2004, the Hospital entered into an "Anesthesiology Services Agreement" with Foothills (2004 Agreement), which provided that Foothills "shall be the exclusive provider of Services" at the Hospital. This meant that core anesthesia services—essentially, all anesthesia services outside of chronic pain management—could be performed only by employees of Foothills. Accordingly, under the 2004 Agreement, if Foothills did not employ Peek, she could not practice core anesthesia services at the Hospital.

On February 24, 2004, Peek was asked about her employment status with Foothills. Because Foothills did not employ Peek, the Hospital acted under the 2004 Agreement and terminated her core anesthesia privileges. On March 1, 2004, the President of the Hospital told Peek that effective March 6, 2004, she would no longer be allowed to perform any core anesthesia services at the Hospital. On March 5, 2004, a day before Peek's privileges terminated, Peek sought a temporary restraining order to prevent the Hospital from revoking her core anesthesia privileges. Peek also brought a breach of contract action against the Hospital for failing to follow its own bylaws when it terminated Peek's privileges.

The trial court granted the temporary restraining order finding Peek made a prima facie showing she was entitled to protection under the Hospital bylaws. The Hospital appeals from this temporary injunction.

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[1] Peek's competency as a physician is not, and has never been, an issue in this case.

STANDARD OF REVIEW

The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. Gilley v. Gilley, 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002).

LAW/ANALYSIS

The sole issue on appeal is whether the trial court abused its discretion in granting Peek injunctive relief until the merits of her case can be heard. We find no abuse of discretion.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). To establish a cause of action for injunction, the plaintiff must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." Scratch Golf, 361 S.C. at 121, 603 S.E.2d at 908.

A. Irreparable Harm

The Hospital argues Peek has not suffered irreparable harm entitling her to injunctive relief because the harm she alleges can be remedied by monetary damages alone. We disagree.

Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003). The only purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001); MailSource, 356 S.C. at 368, 588 S.E.2d at 638.

The trial court found that because Peek was a physician with a private practice, she would suffer irreparable harm while her case against the Hospital was litigated, and that as between Peek and the Hospital, the equities favored Peek. The record supports this conclusion. Peek has lived and practiced anesthesiology in the Spartanburg area for fourteen years. During this time Peek built a patient referral base, which fueled her professional practice. The loss of privileges at the Hospital would lead to the loss of her patient referral base, which would, in turn, lead to the loss of her professional practice. The complete loss of a professional practice can be an irreparable harm.[2] Accordingly, we find the trial court did not abuse its discretion when

[2] Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill. District of Columbia v. E. Trans-Waste of Md., Inc., 758 A.2d 1, 15 (D.C. 2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); Campbell Inns, Inc. v. Banholzer, Turnure & Co., 527 A.2d 1142, 1146 (Vt. 1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."); IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 200 (Tex. App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

it found Peek would suffer irreparable harm if the status quo was not maintained.

B. Success on the Merits

The Hospital next argues Peek cannot succeed on the merits of the underlying case because the 2004 Agreement is an enforceable exclusive contract. We disagree.

When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present "a fair question to raise as to the existence of such a right." Williams v. Jones, 92 S.C. 342, 347, 75 S.E.2d 705, 710 (1912). The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made. MailSource, 356 S.C. at 368, 588 S.E.2d at 638 (citing Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969)). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Helsel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) ("[I]t would have been improper for the hearing judge who issued the temporary injunction to make a finding upon the facts in such a manner as to affect the merits of the case.").

Once the trial court determined Peek made a prima facie showing she was entitled to protection under the Hospital bylaws, the trial court was not required to determine whether the 2004 Agreement was an enforceable exclusive contract because such a finding would affect the merits of the case. Therefore, the trial court did not abuse its discretion in deciding Peek would likely succeed on the merits.

C. Inadequate Remedy at Law

Finally, the Hospital argues Peek had an adequate remedy at law in the form of monetary damages. We disagree.

Again, the purpose of an injunction is the preservation of the status quo. MailSource, 356 S.C. at 368, 588 S.E.2d at 638. "A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation." Id. As explained above, the trial court correctly found that if Peek lost her privileges at the Hospital, her professional practice and, by extension, her career would be lost long before her claims against the Hospital were adjudicated. Furthermore, Peek, who both sides agree is a competent and capable anesthesiologist, would lose expertise if she were not otherwise allowed to exercise her privileges at the hospital while this case is pending, and therefore her future ability to practice anesthesiology would be compromised. While courts do often award monetary damages when a plaintiff can no longer work, such damages are usually the only possible remedy and serve to make the plaintiff as whole as possible under the circumstances. Here, monetary damages are not the only option, and injunctive relief is a better remedy because it would allow Peek to retain both her patient base and her expertise while also retaining her income. Therefore, we find the trial court did not abuse its discretion in finding Peek had an inadequate remedy at law.

CONCLUSION

For the forgoing reasons, the order of the trial court enjoining the Hospital from revoking Peek's privileges until the merits of her case can be heard is

AFFIRMED.

HUFF and WILLIAMS, J.J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beth Ellen Levine, M.D., Respondent,

v.

Spartanburg Regional Services District, Inc. and Foothills Anesthesia Consultants, P.C., Appellants.

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4065
Heard November 10, 2005 – Filed December 19, 2005

AFFIRMED

H. Spencer King, T. Alexander Evins and Perry Boulier, all of Spartanburg, for Appellants.

A. Camden Lewis, of Columbia and Michael Eugene Spears, of Spartanburg, for Respondent.

HEARN, C.J.: This is an appeal from an order of the trial court enjoining Spartanburg Regional Services District, Inc. (the Hospital) and

Foothills Anesthesia Consultants, P.C. (Foothills) from terminating the privileges of anesthesiologist Beth Ellen Levine until the merits of her case can be adjudicated. We affirm.

FACTS

Beth Ellen Levine is a licensed physician and board-certified anesthesiologist. Her competency as a physician is not, and has never been, an issue in this case.

On May 1, 2000, the Hospital and Foothills entered into a three-year "Anesthesiology Agreement" (2000 Agreement). Under the 2000 Agreement, Foothills agreed to provide the Hospital with anesthesia services performed by licensed and qualified anesthesiologists. Four months later, Foothills and Levine entered into a "Medical Service Agreement" (Service Agreement). Under the Service Agreement, Levine agreed to perform anesthesia services for Foothills at the Hospital. The Service Agreement included a three-year term limit as well as an automatic renewal provision.

The renewal provision stated:

> At the end of the initial term, this Agreement shall automatically renew for a period of three (3) years unless any party gives written notice to the other party at least ninety (90) days before the end of the renewal term of its intent not to renew the Agreement. [Foothills] agrees that it shall give [Levine] a notice of non-renewal only if the grounds for its decision not to renew this or subsequent Agreements would be grounds for terminating this or subsequent Agreements. If such notice of non-renewal is given and [Levine] elects to exercise the rights available under Section 7(h) of the Agreement prior to the expiration of this or subsequent agreements, the Agreement shall remain in full force and effect at least until the respective rights and

> obligations of the parties concerning the renewal of the Agreement are determined by final order of the arbitrator.

The 2000 Agreement, by its own terms, ended in May 2003, but the Hospital and Foothills extended it through June. On July 21, 2003, the President of Foothills told Levine the 2000 Agreement had expired. Despite the end of the arrangement between the Hospital and Foothills, Levine continued to perform anesthesia services at the Hospital.

On November 19, 2003, the Hospital Board of Directors (the Board) amended the bylaws to enable the Hospital to enter into an exclusive contract for core anesthesia services. The Board also amended a provision of the bylaws related to the termination of privileges at the Hospital. The amended provision of the bylaws stated:

> Where a physician previously has been granted . . . privileges in a Restricted Member Service,[1] and was not, or is no longer, a Contract Physician,[2] the President shall so notify the Board. The Board shall propose the termination of the affected physician's privileges . . . . The affected physician shall have the procedural rights set forth in the Medical Staff Bylaws related to revocation of privileges . . . but the only issues for determination in any such proceedings shall be:
>
> (1) Whether the privileges in question are, in fact, privileges reserved for Restricted Member Services; and

[1] "Restricted Member Service" includes anesthesiology.

[2] A "Contract Physician" is a "physician who is employed by a physician group who is party to an exclusive contract."

> (2) Whether the applicant presently is, in fact, a Contract Physician . . . .

(footnotes added). On January 30, 2004, the Hospital and Foothills entered into another three-year agreement (2004 Agreement).

A month later, on February 24, 2004, general counsel for the Hospital notified Levine that if Foothills did not employ her she would lose her privileges at the Hospital. On March 1, 2004, the President of the Hospital informed Levine of the Board's decision to terminate her privileges. He informed Levine that she was entitled to procedural rights under the bylaws, "but the only issues for determination in such proceedings" would be whether Levine was employed by Foothills.

On March 3, 2004, Levine filed the present action against the Hospital and Foothills for breach of contract, interference with a contractual relationship, violation of due process, and civil conspiracy. Levine also sought a temporary restraining order to prevent the Hospital from terminating her privileges. After a hearing, the trial court granted a temporary injunction against the Hospital and Foothills. Both entities appeal.

STANDARD OF REVIEW

The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. Gilley v. Gilley, 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976); County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002).

LAW/ANALYSIS

The Hospital and Foothills argue the trial court erred when it enjoined the Hospital from revoking Levine's privileges. We disagree.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation. County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). To establish a cause of action for injunction, the plaintiff must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." Scratch Golf, 361 S.C. at 121, 603 S.E.2d at 908.

A. Irreparable Harm

The Hospital and Foothills argue Levine has not suffered irreparable harm entitling her to injunctive relief because the harm she alleges can be remedied by monetary damages alone. We disagree.

The sole purpose of an injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001); MailSource, L.L.C. v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003). Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. MailSource, 356 S.C. at 368, 588 S.E.2d at 638. Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939).

The trial court found that Levine, as a physician with a private practice, would suffer irreparable harm if an injunction was not granted. The record supports this conclusion. Levine has built a patient referral base through her work at the Hospital. This referral base would erode and potentially disappear if Levine lost her privileges at the Hospital while the merits of her

underlying action against the Hospital and Foothills are adjudicated. Levine would also lose competency in anesthesiology if she were unable to ply her trade as the lawsuit progressed. Such inactivity could lead to the loss of her professional practice and career, which can be an irreparable harm.[3] Therefore, we find the trial court did not abuse its discretion in deciding Levine would suffer irreparable harm without injunctive relief.

B. Success on the Merits

The Hospital and Foothills next argue Levine cannot succeed on the merits because the 2004 Agreement is an enforceable exclusive contract and the Service Agreement ended, without renewal, when the 2000 Agreement expired. We disagree.

1. Validity of the 2004 Agreement

When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present "a fair question to raise as to the existence of such a right." Williams v. Jones, 92 S.C. 342, 347, 75 S.E.2d 705, 710 (1912). The determination of whether an injunction is granted should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made. MailSource, 356 S.C. at 368, 588 S.E.2d at 638 (citing Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167

[3] Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill. District of Columbia v. E. Trans-Waste of Md., Inc., 758 A.2d 1, 15 (D.C. 2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); Campbell Inns, Inc. v. Banholzer, Turnure & Co., 527 A.2d 1142, 1146 (Vt. 1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."); IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 200 (Tex. App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

S.E.2d 313, 315 (1969)). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Helsel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

The trial court concluded Levine made a prima facie showing she was entitled to protection under the Hospital bylaws. Once this conclusion was made, the court was not required to determine whether the 2004 Agreement was valid. Accordingly, the trial court did not abuse its discretion in deciding Levine would likely succeed on the merits of the underlying action.

2. Automatic Renewal Provision of the Service Agreement

The trial court also concluded Levine made a prima facie showing she was entitled to protection under the Service Agreement. The record supports this conclusion as well. Under the Service Agreement, Foothills was required to give Levine notice of its intent not to renew the Service Agreement ninety days before the termination of the Service Agreement. The July 21, 2003 letter from the President of Foothills to Levine does not appear to satisfy this requirement because it was sent within ninety days of the termination of the Service Agreement. Thus, the Service Agreement may have automatically renewed until September 1, 2006. Thus, we find the trial court did not abuse its discretion in determining Levine made a prima facie showing of success on the merits under the Service Agreement.

C. Inadequate Remedy at Law

Finally, the Hospital and Foothills argue Levine has an adequate remedy at law because she can recover money damages for her injuries. We disagree.

The purpose of an injunction is the preservation of the status quo. MailSource, 356 S.C. at 368, 588 S.E.2d 638. "A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate

investigation and to preserve the existing status during litigation." Id. As explained above, the trial court decided monetary damages alone would not remedy the harm Levine would sustain if her privileges at the Hospital were terminated. If Levine lost her privileges, her professional practice and, by extension, her career may very well be lost long before her claims against the Hospital and Foothills were finally adjudicated. This point is perhaps best buttressed by a provision of the 2004 Agreement between the Hospital and Foothills that states when privileges are terminated damages will "be difficult, if not impossible, to ascertain, and it is therefore agreed that [the Hospital] and Foothills shall have the right to an injunction or other equitable relief . . . ." Thus, we find the trial court did not abuse its discretion when it concluded the loss of a professional practice and a career could not be adequately remedied through money damages alone.

CONCLUSION

For the forgoing reasons, the order of the trial court is

AFFIRMED.

HUFF and WILLIAMS, J.J. concur.