The Supreme Court of South Carolina

In the Matter of William S. Duffey, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 1, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to South Carolina Bar, dated December 22, 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.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of William

S. Duffey, Jr. 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.

Justice John H. Waller, Jr., not participating

Columbia, South Carolina

February 1, 2006

The Supreme Court of South Carolina

In the Matter of Jan VanBever Wager, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 16, 1994, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Clerk of the Supreme Court of South Carolina, dated January 11, 2006, Petitioner submitted her 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 her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Jan

VanBever Wager shall be effective upon full compliance with this order. Her 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.

Justice John H. Waller, Jr., not participating

Columbia, South Carolina

February 1, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6

February 6, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Deborah W. Spence, Appellant,

v.

Deborah W. Spence and Floyd D. Spence, Jr., as the Personal Representatives of the Estate of Floyd D. Spence, Wayne K. Wilkes, Susan A. Wilkes, Donna T. Cromer, Roy Bunyan Cromer, Jr., Robert P. Wilkins, Jr., Floyd D. Spence, Jr., Zachariah W. Spence, Benjamin D. Spence and Caldwell D. Spence, Defendants,

of whom Donna T. Cromer and Roy Bunyan Cromer, Jr., are the Respondents.

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

Opinion No. 26104
Heard June 15, 2005 – Filed January 30, 2006

AFFIRMED

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

Robert L. Widener and Robert W. Dibble, Jr., both of McNair Law Firm, of Columbia, for Respondents.

JUSTICE BURNETT: This appeal raises the issue of whether the circuit court properly dismissed the plaintiff's complaint for failure to state a claim against two defendants because the defendants were innocent or bona fide purchasers for value of real property without notice of the plaintiff's adverse claim or alleged title defect. We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 1999, the late Floyd D. Spence (Owner 1) executed and delivered a deed conveying a parcel of real property located in Spence Plantation, a development at Lake Murray in Lexington County, to his wife, Deborah W. Spence (Owner 2). This 1999 deed, which was not recorded at the time, identified a 0.72-acre parcel. The parcel was a portion of some 163 acres originally owned by Owner 1, according to allegations in the complaint.

In January 2000, Owner 2 agreed to sell the lakefront lot to Wayne K. Wilkes and Susan A. Wilkes (Owner 3) for $250,000. Robert P. Wilkins, Jr. (Agent), an attorney at law and a real estate agent, acted as agent for Owner 2.[1] The lot was independently surveyed by Owner 3 after

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[1] Owner 2 in her reply brief objects to any description of Robert P. Wilkins, Jr., as her agent because Wilkins purportedly did not admit such a relationship in his answer and the circuit court's order did not make such a finding of fact. We note that Owner 2 in her complaint asserts she had an attorney-client relationship with Wilkins in the 1999 gift conveyance and in the 2000 sale. Owner 2 is bound by that factual assertion in an appeal of a

continued . . .

questioning the boundaries verbally described by Agent in an on-site inspection.

Owner 2 alleges in her complaint she signed a deed conveying 0.72 acre to Owner 3 on April 3, 2000, with the understanding Agent would hold the deed until the closing date. Owner 2 alleges she and Owner 1 denied Agent's request, made on behalf of Owner 3, to redefine the lot's boundaries so that it contained 0.82 acre – one-tenth of an acre more.

Owner 2 further alleges Agent wrongfully and without her permission or knowledge (1) modified, submitted to county planning officials for approval, and caused to be recorded on April 20, 2000, a revised plat dated February 1, 2000, which shows a 0.82-acre parcel as Lot 42; (2) substituted a new page for the first page of the 1999 deed, which Owner 1 previously had signed conveying the lot to Owner 2, to identify a 0.82-acre parcel as Lot 42; and (3) substituted a new page for the first page of the 2000 deed, which Owner 2 previously had signed conveying the lot to Owner 3, to identify a 0.82-acre parcel as Lot 42 and the revised plat showing the new lot.

The closing on the sale of the lot occurred April 20, 2000. The 1999 gift deed and the 2000 sale deed were publicly recorded with the Lexington County Register of Deeds four days later.

In 2002, Owner 3 sold the 0.82-acre lot to Donna T. Cromer and Roy Bunyan Cromer, Jr. (Owner 4), respondents, for $340,000. According to allegations in the complaint, documents pertaining to Lot 42 then on record with the register of deeds were: (1) the 1999 gift deed from Owner 1 to Owner 2 conveying Lot 42 consisting of 0.82 acre; (2) two earlier deeds described in the derivation clause of the 1999 deed, of which Lot 42 was a

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ruling made pursuant to Rule 12(b)(6), in which the facts asserted by the plaintiff in her complaint are deemed to be true. While Wilkins is deemed to be Owner 2's agent for purposes of this appeal, the parties and other litigants are not bound by this designation because it may present a factual issue in ongoing litigation of this matter.

portion; (3) the 2000 sale deed from Owner 2 to Owner 3 conveying Lot 42 consisting of 0.82 acre; (4) the Spence Plantation – Phase IV plat with a revision date of February 1, 2000, showing Lot 42 consisting of 0.82 acre; and (5) the original 1997 plat of Spence Plantation – Phase IV, which did not show Lot 42, but revealed that the area next to Lot 41 and from which Lot 42 later was later created was held by Owner 1. Furthermore, the complaint alleges the original 1999 gift deed from Owner 1 to Owner 2 conveying a 0.72-acre lot in the area of Lot 42 was never publicly recorded.

Owner 2 seeks reformation of the deeds due to mutual mistake, seeks a declaratory judgment that the lot size is 0.72 acre, and alleges Agent committed legal malpractice by negligently altering the deeds. Owner 4 moved pursuant to Rule 12(b)(6), SCRCP, to dismiss Owner 1's complaint for failure to state facts sufficient to constitute a cause of action against them.

The circuit court granted the motion and dismissed the case against Owner 4 with prejudice, ruling the "Complaint gives rise to no reasonable interpretation other than that the Cromers [Owner 4] were bona fide purchasers for value." The circuit court denied Owner 2's motion for reconsideration. This appeal follows.

ISSUE

> Did the circuit court err in dismissing with prejudice, pursuant to Rule 12(b)(6), SCRCP, Owner 2's claims against Owner 4 because Owner 4 was an innocent or bona fide purchaser for value of the lot in question without notice of an alleged title defect or adverse claim?

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most

favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. Id. Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

LAW AND ANALYSIS

Owner 2 presents four arguments alleging the circuit court erred in dismissing with prejudice her claims against Owner 4 pursuant to Rule 12(b)(6).

A. DUTY TO FURTHER EXAMINE TITLE

Owner 2 contends the circuit court erred in dismissing her complaint against Owner 4 because Owner 4 had a duty of inquiry to further examine a potential title defect or adverse claim. We disagree.

A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect. The bona fide purchaser must show all three conditions – actual payment, acquiring of legal title, and bona fide purchase – occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property. S.C. Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976); Jones v. Eichholz, 212 S.C. 411, 422, 48 S.E.2d 21,

25-26 (1948); Kirton v. Howard, 137 S.C. 11, 36, 134 S.E. 859, 868 (1926); Black v. Childs, 14 S.C. 312, 318 (1880); S.C. Code Ann. § 30-7-10 (Supp. 2004);[2] 92A C.J.S. Vendor & Purchaser § 483 (2000).

There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. Belk, 266 S.C. at 544-43, 225 S.E.2d at 179; Jones, 212 S.C. at 422, 48 S.E.2d at 25-26; Epps v. McCallum Realty Co., 139 S.C. 481, 498-99, 138 S.E. 297, 302 (1927).

1. ACTUAL NOTICE

We have explained in the context of an action brought under the South Carolina Tort Claims Act that "[a]ctual notice means all the facts are disclosed and there is nothing left to investigate. Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the

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[2] Section 30-7-10 provides, in pertinent part:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court . . . are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

means of knowing it, even though such means may not be employed by him. Generally, actual notice is synonymous with knowledge." Strother v. Lexington County Recreation Commn., 332 S.C. 54, 64 n.6., 504 S.E.2d 117, 122 n.6 (1998) (citations omitted). Moreover, "[a]ctual notice may be shown by direct evidence or inferred from factual circumstances." Id. at 65, 504 S.E.2d at 123.

Similarly, in the context of a real estate transaction, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own in a particular property when he actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him. E.g. Adams v. Willis, 225 S.C. 518, 522, 83 S.E.2d 171, 173 (1954) (purchaser with actual knowledge that property was subject to lease, as well as fact that service station existed on lot, was charged with knowledge of the lease); Walker v. Taylor, 104 S.C. 1, 15, 88 S.E. 300, 303-04 (1916) (where land buyer prior to sale had actual notice, orally and in writing, of stepdaughter's claim of one-third interest in property, buyer was not a bona fide purchaser for value without notice; the stepdaughter's claim "was of interest to him, and he is charged with all the knowledge he could have had that day for the asking. He is charged with this full and complete information in ordinary fairness as well as in law.").

The complaint in the present case does not allege any fact or theory of recovery indicating Owner 4 had actual notice of a title defect or adverse claim with regard to Lot 42.

2. CONSTRUCTIVE OR INQUIRY NOTICE

We have explained in the context of an action brought under the Tort Claims Act that "[c]onstructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts.

Therefore, this person is presumed to have actual knowledge of the undisclosed facts." Strother, 332 S.C. at 64 n.6., 504 S.E.2d at 122 n.6.

The proper execution and delivery of a deed is effective to convey real property from grantor to grantee. As between grantor and grantee, a properly drawn deed is valid and dispositive of their respective ownership and rights in the property regardless of whether the deed is publicly recorded. Epps, 139 S.C. at 497, 138 S.E. at 302; Martin v. Quattlebaum, 14 S.C.L. 205, 207 (3 McCord) (1825).

However, constructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world. The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim. Epps, 139 S.C. at 499, 138 S.E. at 303 ("recording amounts to notice, whether known or unknown, because the means of information are at hand"); Franklin Bank, N.A. v. Bowling, 74 P.3d 308, 313 (Colo. 2003) (en banc) (constructive notice in real estate transaction essentially is record notice).

Recording acts dating back to the days when South Carolina was an English colony – at least since 1698 – have provided that innocent or bona fide purchasers of real property, who pay valuable consideration, are protected from the claims of creditors or lienholders whose claims were not on record at the time of conveyance to the bona fide purchaser. Epps, 139 S.C. at 496-511, 138 S.E. at 302-07 (discussing development and importance of recording acts, and holding that mere possession of real property by person who held unrecorded contract of sale for deed did not constitute constructive notice of that claim, such that further investigation by subsequent mortgagee was required); S.C. Code Ann. § 30-7-10 (Supp. 2004); accord Belcher v. Powers, 573 S.E.2d 12, 19 (W. Va. 2002) (party is not entitled to protection as a bona fide purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests); Tauber v. Com. ex rel. Kilgore, 562 S.E.2d 118, 127 (Va. 2002) (purchaser of real property is bound by both actual and

constructive notice and has no right to shut his eyes or ears to the inlet of information, and then say he is a bona fide purchaser for value without notice).

Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed. As this Court has explained in a case involving the transfer of real property,

> If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose. There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.

Black v. Childs, 14 S.C. 312, 321-22 (1880) (buyers did not have actual or constructive/inquiry notice that master-in-equity who oversaw the property sale had illegally bought it through a friend, or notice of master's alleged interest in the property; therefore, subsequent grantee was a bona fide purchaser for value without notice and the tainted sale six years earlier would not be voided).

"This Court has been most exacting in determining what actions satisfy the requirements of inquiry notice. We have denied subsequent purchasers comfort under the umbrella of a bona fide purchaser when the exercise of prudence would have avoided the difficulty." Belk, 266 S.C. at

544, 225 S.E.2d at 179 (claim of bona fide purchaser for value will be defeated when "sufficient record notice is available to charge the purchaser with a duty to inquire which, if pursued with due diligence would have supplied him with knowledge of the rights of other parties"); accord Adams v. Willis, 225 S.C. 518, 522, 83 S.E.2d 171, 173 (1954) (purchaser had duty to make reasonable inquiry and investigation as to commencement date of lease, and he was chargeable with notice of effective date, when he had both actual and constructive notice that property was subject to lease); Cathcart v. Matthews, 115 S.C. 1, 6, 104 S.E. 180, 181 (1920) (trial court properly submitted defense of bona fide purchaser to jury where facts were in dispute about constructive or inquiry notice).

The complaint in the present case alleges facts and a theory of recovery based on constructive or inquiry notice grounded in the public record. The question in this instance is whether the deeds and plats on record at the date of the conveyance from Owner 3 to Owner 4 imposed on Owner 4 a duty to inquire further about potential title defects or adverse claims. In other words, did the public record raise a "red flag" requiring further inquiry by Owner 4?

Owner 2 points to two facts alleged in her complaint which should have alerted Owner 4 to a potential title defect or adverse claim. First, Owner 2 cites the "long delay" between the execution date of the first deed in May 1999 and the preparation in February 2000 of the revised subdivision plat, which was recorded in April 2000. Second, Owner 2 cites the fact that the original 1997 plat recorded for Spence Plantation did not include Lot 42. Owner 4 should have investigated why the revised 2000 plat referenced in the deeds was not prepared until some nine months after the deed from Owner 1 to Owner 2 was executed.

We conclude neither of these facts would prompt a reasonable purchaser to conduct further inquiry after examining this public record. The record notice to Owner 4 as of the closing date in 2002 revealed Owner 1, according to the original 1997 plat, held additional acreage from which Lot 42 was drawn. Owner 1 conveyed the 0.82-acre Lot 42 to Owner 2, his wife, by deed executed in May 1999. This recorded deed referred, in a notation

stamped in the margin, to the revised plat showing Lot 42. In February 2000, two months before Owner 2's conveyance of Lot 42 to Owner 3, the original 1997 plat was revised to show the newly created Lot 42. The 1999 gift deed conveying the 0.82-acre Lot 42 to Owner 2 and the 2000 sale deed conveying the 0.82-acre Lot 42 to Owner 3 – both of which referred to the revised 2000 plat showing the 0.82-acre Lot 42 – were duly recorded in April 2000. The public record contains no mention of a 0.72-acre Lot 42.

A buyer examining the public record would reasonably have concluded that a legitimate chain of title existed with regard to Lot 42. The 1999 deed was recorded and the 1997 plat was revised in 2000 only when Owner 3 entered the picture as an unrelated purchaser who, naturally, would want the public record to accurately set forth the existence, chain of title, and boundaries of a lot costing $250,000.

We affirm the circuit court's dismissal of Owner 2's claim against Owner 4 because the facts as alleged in the complaint raise no issue of actual or constructive/inquiry notice with regard to Owner 4's purchase of Lot 42. Owner 4, under the facts alleged, is a bona fide purchaser for value because they actually paid the purchase money in full, purchased and acquired the legal title, and purchased in good faith and with integrity of dealing without notice of a lien or defect.

B. AFFIRMATIVE DEFENSE NOT PROPERLY RAISED

Owner 4 did not file and serve an answer to Owner 2's complaint. Instead, Owner 4 filed a motion to dismiss under Rule 12(b)(6), asserting the defense of bona fide purchaser for value. The grounds for the motion were debated at a subsequent hearing. Owner 2 argues the circuit court erred in dismissing her complaint against Owner 4 because Owner 4 is prohibited from asserting the affirmative defense of bona fide purchaser for value in a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. We disagree.

Owner 2 correctly cites the principle that an affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6)

unless the allegations of the complaint demonstrate the existence of the affirmative defense. See Crocker v. Barr, 295 S.C. 195, 197, 367 S.E.2d 471, 472 (Ct. App. 1988) (stating the general principle), overruled on other grounds, 305 S.C. 406, 409 S.E.2d 368 (1991). This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial. 5 Wright and Miller, Federal Practice and Procedure Civil 3d, § 1277 (2004).

In cases decided long before the adoption of the South Carolina Rules of Civil Procedure in 1985, this Court stated that the affirmative defense of bona fide purchaser for value usually must be pled and proved. See Carr v. Mouzon, 93 S.C. 161, 167, 76 S.E. 201, 203 (1912) (plea of bona fide purchaser when relied on as defense must be pleaded); Lupo v. True, 16 S.C. 579, 586 (1882) (purchaser for valuable consideration without notice is an equitable defense and must be set out in the answer and sustained by the defendant); L.S. Tellier, Pleading Bona Fide Purchase of Real Property As Defense, 33 A.L.R.2d 1322, §§ 1(b) and 2(a) (1954) ("it is recognized that, in order to avail himself of such defense, a defendant must aver in his pleadings that he was a bona fide purchaser").

However, the general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice. Most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) "when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense. . . ." Wright and Miller, supra, § 1277. This view is in keeping with the pleading and discovery system established by the Rules of Civil Procedure, which allow a party to raise Rule 12(b) defenses in a pre-answer motion. See Rule 12(b), SCRCP and accompanying notes (allowing certain defenses to be raised by pre-answer

motion at option of pleader) and Rule 12(a), SCRCP (altering deadline for defendant's answer when defendant serves a pre-answer motion).

Owner 4 in this instance properly asserted the affirmative defense of bona fide purchaser for value in a Rule 12(b)(6) motion. The defense did not raise a disputed issue of fact and the relevant facts were completely disclosed in the complaint. Owner 2 has not shown that further facts could be developed by pretrial discovery or a trial on the defense of bona fide purchaser for value. The circuit court properly dismissed the complaint against Owner 4.

C. "NO-TITLE" ARGUMENT

Owner 2 argues the circuit court erred in dismissing her claims against Owner 4 because she never gained legal title to the disputed tenth of an acre; therefore, she could not and did not convey that tenth of an acre to Owner 3, meaning Owner 3 could not and did not convey it to Owner 4. We disagree.

Owner 2 correctly cites the principle that a grantee ordinarily may not claim bona fide purchaser status if his grantor never had title to the property in question. See Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (Ct. App. 1989) (stating the general principle); 92A C.J.S. Vendor & Purchaser § 484 (2000) (stating "doctrine of bona fide purchaser without notice generally does not apply where there is a total absence of title in the vendor, and the good faith of the purchaser cannot create a title where none exists").

This principle is inapplicable in the present case because the title conveyed to Owner 4 was apparently perfect, good at law, and made by a regular conveyance. See 92A C.J.S. Vendor & Purchaser § 484. Owner 1 conveyed legal title in the 0.82-acre Lot 42, a portion of a larger tract in which he held legal title, to Owner 2 by a deed duly executed and delivered in 1999 and recorded in 2000. Owner 2 conveyed legal title in exactly the same lot to Owner 3 by a deed duly executed, delivered, and recorded in 2000. Owner 3 conveyed legal title in exactly the same lot to Owner 4 by deed duly executed, delivered, and recorded in 2002.

The issues of whether the conveyance of 0.82-acre from Owner 1 to Owner 2, and from Owner 2 to Owner 3, was a mutual mistake or the result of alleged negligence by Agent apparently remain pending in circuit court against the remaining defendants. But the factual allegations contained in the complaint reveal Owner 1 held valid legal title to the area from which the 0.82-acre lot was created, and the lot was properly conveyed from Owner 1 to subsequent owners. The circuit court properly dismissed the complaint against Owner 4.

Chief Justice Toal, dissenting, would hold the alleged material alteration of the deed by Agent without the consent of Owner 2 prevented title in the additional tenth of an acre from passing to Owner 3 or Owner 4. We agree generally with the principle of law stated by the Chief Justice, *i.e.*, that a fraudulent deed is void *ab initio* and, because it is a nullity, it ordinarily may not convey valid title to the grantee. However, we do not find this single principle dispositive in this case. Owner 2 in her complaint does not allege Agent acted with an intent to *defraud* Owners 1 and 2 of a portion of their property by materially altering the deeds and plat. Owner 2's complaint seeks only reformation of the deeds due to a mutual mistake, seeks a declaratory judgment that the lot size is 0.72 acre, and alleges Agent committed legal malpractice by *negligently* altering the deeds and plat. Furthermore, the proposition of law stated by the Chief Justice is incomplete, standing alone, to resolve this case because Owner 4 properly has asserted the defense of bona fide purchaser for value as previously explained.

Justice Pleicones, dissenting, would find the complaint states a declaratory judgment action that title in the disputed tenth of an acre did not pass to Owner 4 because Owner 2 never acquired title to that portion. Justice Pleicones agrees with us the complaint alleges an agency relationship between Agent and Owners 1 and 2. See footnote 1. But, he reasons, Agent lacked the authority to alter the deeds and plat because the complaint alleges Owners 1 and 2 did not give Agent actual authority to alter them and it does not allege Agent had apparent authority to do so. He would find Agent's actions may not be imputed to Owners 1 or 2 due to the lack of authority,

which means Owner 2's allegation she never acquired title to the tenth of an acre is sufficient to defeat Owner 4's motion to dismiss.

The doctrine of apparent authority provides that the principal is bound by the acts of his agent when he has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982); Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 868-69 (Ct. App. 1996). A principal may be held liable to a third person in a civil lawsuit for the fraud, deceit, concealment, misrepresentation, negligence, and other omissions of duty of his agent which occur in the scope of the agent's employment, even when the principal did not authorize, participate in, or know of such misconduct or even when the principal forbade or disapproved of the act in question. West v. Service Life & Health Ins. Co., 220 S.C. 198, 66 S.E.2d 816 (1951). This rule "is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency. . . . Seeing that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger." *Id.* at 202, 66 S.E.2d at 817 (internal quotes omitted); accord Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945) (as a matter of public policy, principal who selects agent and directs manner in which agent executes his role, in justice to third person with whom agent may deal and who are not responsible either for his selection or conduct, is liable for agent's torts committed in furtherance of principal's business); Federal Land Bank of Columbia v. Ledford, 194 S.C. 347, 359, 9 S.E.2d 804, 809 (1940) (where agency is established and there is a wrong committed by agent, principal must ordinarily bear the loss whether the agency is actual or apparent; and equity intervenes under the rule where one of two innocent persons must suffer, he who brings about the loss must bear it); 3 Am.Jur.2d Agency §§ 262-270 (2002).

These agency principles are rooted in the same ground as the doctrine of bona fide purchaser for value which applies in this case. In both instances, a third party may be entitled to rely on the actions of an authorized agent or the public record of land conveyances. In our view, the only reasonable conclusion which may be drawn from the facts and allegations set forth in the complaint is that Agent had apparent authority to act on behalf of Owners 1 and 2 in the 1999 gift conveyance and the 2000 sale. The complaint does not allege otherwise and, as previously noted, Owner 2 asserts in her complaint she had an attorney-client relationship with Agent. Consequently, it is appropriate to impute Agent's allegedly negligent actions to Owner 2. To hold otherwise would allow Owner 2 to avoid the doctrine of bona fide purchaser for value and seek damages from Owner 4 simply by asserting that her admitted Agent, although he had apparent authority to act generally on her behalf in the transactions, did not have authority to perform the specific, negligent acts alleged in the complaint.[3]

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[3] We find instructive the following observation made during a discussion of how to determine which acts of an agent fall within the scope of employment:

> It is not that the master or principal authorized the negligent act which caused the damage, but that the servant or agent acted negligently in carrying out the orders or in doing the work of the master or principal.
>
> To illustrate: The master or principal is responsible for the negligent act of the servant or agent in doing the work which he is directed to perform. If the master or principal direct[s] the servant or agent to drive an automobile carefully along the crowded street, and the latter does drive along such street, but by his negligence another is injured by such driving, the master or principal cannot escape responsibility by showing that the servant neglected his orders to drive carefully. Again, if one dictates a letter to a stenographer, and, at the conclusion of the dictation, directs the stenographer to transcribe the letter, sign his

continued . . .

D. DISMISSAL WITH PREJUDICE

Owner 2 in a motion made pursuant to Rule 59(e), SCRCP, asked the circuit court to grant her at least fifteen days to file and serve an amended complaint instead of dismissing the complaint with prejudice. Owner 2 contends the circuit court erred in denying her motion to amend the complaint, *i.e.*, the court should have dismissed the complaint *without* prejudice instead of *with* prejudice. We disagree.

Dismissal of a case "without prejudice" means a plaintiff may reassert her complaint by curing defects that led to the dismissal. In contrast, dismissal of a complaint "with prejudice" is intended to bar relitigation of the same claim. Collins v. Sigmon, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989).

Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Hennegan v. Atlantic Coast Line R. Co., 211 S.C. 357, 45 S.E.2d 331 (1947). Dismissal of a case precludes relitigation only on matters actually decided in the dismissal. Sealy, 289 S.C. at 544, 347 S.E.2d at 505 (dismissal for improper joinder and lack of capacity to sue precluded only those issues).

> principal's name thereto, and forward to the correspondent, can it be doubted that the employer in such case would be responsible for any negligent error of the stenographer in so transcribing and forwarding the letter, whereby the correspondent was misled to his damage?

Eureka Cotton Mills v. Western Union Tel. Co., 88 S.C. 498, 70 S.E. 1040, 1050 (1911). Similarly, Owners 1 and 2 directed Agent to prepare documents conveying real property to another. Owner 2 may not shift the burden of a loss caused by alleged errors in those documents to Owner 4 simply by asserting her admitted agent neglected to follow her instructions.

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See Foman v. Davis, 371 U.S. 178, 182 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); Small v. Mungo, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); Dockside Assn., Inc. v. Deytens, Simmons & Carlisle, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); Davis v. Lunceford, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); accord Arkansas Dept. of Environ. Quality v. Brighton, 102 S.W.3d 458, 468 (Ark. 2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); Thacker v. Bartlett, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); Giuliani v. Chuck, 620 P.2d 733, 737 (Haw. App. 1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, South Carolina Civil Procedure 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

When a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his

complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly dismissed the complaint. Brighton, 102 S.W.3d at 468; Swink v. Ernst & Young, 908 S.W.2d 660, 663 (Ark. 1995) (when trial court dismisses complaint pursuant to Rule 12(b)(6) for failure to state facts upon which relief can be granted, dismissal is without prejudice; plaintiff then has the election to plead further or appeal).

When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted to leave to amend it); Barkley v. Good Will Home Assn., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff an opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6)); Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal).

On the other hand, when a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice. Potter, 708 A.2d at 286-87; Baker, 753 N.E.2d at 74.

Applying these principles in the present case, we conclude this case falls in the final category. Owner 2's complaint was dismissed with prejudice pursuant to Rule 12(b)(6) when ordinarily the dismissal would have been without prejudice. However, Owner 2 has failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted against Owner 4. Owner 2 in her Rule 59(e) motion and on appeal merely reiterates the same allegations originally pleaded in her complaint. Those factual allegations are insufficient to state a cause of action against Owner 4, as previously discussed. Furthermore, Owner 2 has not asserted or shown the need for additional time to discover facts pertaining to Owner 4's potential liability in this matter. Cf. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"). Accordingly, the circuit court properly dismissed the complaint with prejudice against Owner 4.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's dismissal with prejudice of Owner 2's complaint against Owner 4 pursuant to Rule 12(b)(6), SCRCP.

AFFIRMED.

MOORE AND WALLER, J.J., concur. TOAL, C.J., and PLEICONES, J., dissenting in separate opinions.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, the deed executed by Mrs. Spence (Owner) was fraudulent because the deed was materially altered prior to delivery to Buyer 3. As a result, I would reverse the ruling of the trial judge dismissing the complaint for failure to state a claim.

The majority holds that Buyer 4 was a bona fide purchaser who took title from Buyer 3 in good faith and without notice. I disagree. In my opinion, the majority fails to address the black-letter law which provides that a fraudulent deed is *void ab initio* and constitutes a nullity. 26A C.J.S. *Deeds* § 114 (2001). As a result, the deed cannot be the basis for superior title against an original grantor, even under the equitable doctrine of a bona fide purchaser. *Id*; *see also Concord Corp. v. Huff*, 355 P.2d 73, 76 (Colo. 1960) (holding that void deeds do not convey title); *Andre v. Hoffman*, 95 S.E. 84, 87 (W. Va. 1918) (holding that the grantee of a forged deed cannot acquire title under the forged instrument).

In the present case, Owner 2 executed a deed to convey 0.72 of an acre to Owner 3 in 1999. Prior to the delivery of the instrument to Owner 3, the deed was altered without the consent of Owner 2, by an Agent for Owner 3. The alteration made the instrument reflect a conveyance of 0.82 of an acre. Owner 3 then conveyed the 0.82 of an acre to Owner 4. However, Owner 2 wished to only convey 0.72 of an acre and signed an instrument that reflected such. The majority focuses on the intent of the person that made the alteration, Agent, however, this does not address the issue that instrument did not reflect the *intent* of Owner 2. As a result, the alteration of the instrument by Agent, regardless of Agent's intent, prevented title from passing.

Consequently, I would hold that the change by the agent without the consent of Owner 2 constituted a material alteration. In my opinion, this would prevent title from passing to Owner 3 or Owner 4 because the unauthorized change in acreage resulted in a fraudulent deed. Accordingly, I would reverse the trial court's decision dismissing the compliant.

JUSTICE PLEICONES: I respectfully dissent. I agree with the majority that neither Owner 3 nor Owner 4 had any notice of a defect in the chain of title. I agree with the Chief Justice, however, that it can be reasonably deduced from the face of the complaint that Owner 2 never acquired title to the tenth of an acre at issue and that Owner 4 therefore cannot be a good faith purchaser for value. Consequently, I would reverse the dismissal of the complaint for failure to state a cause of action for declaratory judgment.

"A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint." Toussaint v. Ham, 292 S.C. 415, , 416, 357 S.E.2d 8, 9 (1987). Regardless whether the court believes that the plaintiff is likely to prevail on the merits, " the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Id.

The majority is correct that the complaint alleges an agency relationship between Wilkins and Owners 1 and 2. That is not dispositive, as the complaint further alleges that neither Owner 1 nor Owner 2 invested Wilkins with actual authority to alter the deeds or the plat at issue. Furthermore, the complaint does not aver that Wilkins had apparent authority to alter the instruments, nor can such be reasonably deduced from its four corners. If Wilkins lacked actual or apparent authority to perform these acts, then his conduct cannot be imputed to Owner 1 or Owner 2. Thus, principles of agency do not facially negate the allegation that Owner 2 never acquired title to the tenth of an acre. That allegation, on its face, is thus sufficient to defeat the claim that Owner 4 is a good faith purchaser for value.

I find troubling that the complaint fails to spell out the relief sought by Owner 2. The complaint does not allege that Owner 2 would be entitled to the tenth of an acre, as devisee or heir, if the disputed acreage were returned to Owner 1's estate. Nevertheless, the complaint reasonably indicates Owner 2's desire to insulate herself from a potential breach-of-warranty action. Further factual development is necessary to determine whether her concern is legitimate. I would therefore hold that the complaint states a cause of action for declaratory judgment.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Gerald Means, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Chester County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 26105
Heard November 1, 2005 – Filed February 6, 2006

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General David A. Spencer, all of Columbia, and John R. Justice, of Chester, for Petitioner.

Acting Deputy Chief Attorney Wanda H. Carter, of the South Carolina Office of Appellate Defense, of Columbia, for Respondent.

JUSTICE BURNETT: We granted the State's petition for a writ of certiorari to review the Court of Appeals' reversal of the conviction of Gerald Means (Respondent) based on a lack of subject matter jurisdiction by the circuit court. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A county grand jury issued the following indictment against Respondent in March 2001:

> INDICTMENT FOR CRIMINAL DOMESTIC VIOLENCE – AGGRAVATED
> That Gerald Means did in Chester County on or about December 16, 2000, did [sic] commit an act of violence against one Natalie Flynn with whom he has two children.

Prior to Respondent's trial in August 2001, the solicitor moved to amend the indictment to ensure it properly alleged criminal domestic violence of a high and aggravated nature (CDVHAN) by adding, in handwriting, the following emphasized phrase:

> That Gerald Means did in Chester County on or about December 16, 2000 did [sic] commit an act of violence against one Natalie Flynn with whom he has two children, *such act of violence being of a high and aggravated nature*.

The solicitor believed the indictment was defective as originally issued and moved to amend it "prior to calling this case in order to avoid any unfair surprise to [Respondent and his counsel]." The solicitor further asserted the defect was merely a "clerical error" because the proposed amendment would not alter the nature of the offense charged.

Respondent objected to the untimely amendment of the indictment and noted the proposed change was in the charging language. Asked by the trial judge whether Respondent was prejudiced by the

amendment, counsel stated "[w]e were prepared for criminal domestic violence of a high and aggravated nature, I have to admit that."

The trial judge granted the State's motion to amend the indictment. Respondent subsequently was convicted of CDVHAN and sentenced to nine years in prison.

A divided Court of Appeals vacated the conviction, concluding the circuit court lacked subject matter jurisdiction in the case due to the improper amendment of an insufficient indictment. State v. Means, Op. No. 2003-UP-633 (S.C. Ct. App. filed October 23, 2003) (unpublished opinion). The majority reasoned the amendment changed the nature of the offense charged, transforming it from a charge of criminal domestic violence in which Respondent faced a maximum sentence of thirty days into a charge of CDVHAN in which the maximum sentence was ten years.[1] The majority

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[1] S.C. Code Ann. § 16-25-20 (2003) at the time of Respondent's trial provided:

> It is unlawful to: (1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

S.C. Code Ann. § 16-25-30 (2003) at the time of Respondent's trial provided:

> Any person who violates Section 16-25-20 is guilty of the misdemeanor of criminal domestic violence and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than thirty days.

S.C. Code Ann. § 16-25-65 (2003) at the time of Respondent's trial provided:

> (A) The elements of the common law crime of assault and battery of a high and aggravated nature are incorporated in and made a part of the

continued . . .

noted the offense of CDVHAN requires the State to prove an element not contained in a CDV charge, namely, at least one element of the common law crime of ABHAN.[2] The majority found that the term "aggravated" in the indictment caption was insufficient to uphold the validity of the amended indictment.

ISSUE

Did the Court of Appeals err in vacating Respondent's conviction on the ground that the circuit court lacked subject matter jurisdiction in light of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)?

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offense of criminal domestic violence of a high and aggravated nature when a person violates the provisions of Section 16-25-20 and the elements of assault and battery of a high and aggravated nature are present.

(B) A person who commits the crime of criminal domestic violence of a high and aggravated nature is guilty of a misdemeanor and, upon conviction, must be fined not more than three thousand dollars or imprisoned not more than ten years, or both.

(C) The provisions of this section create a statutory offense of criminal domestic violence of a high and aggravated nature and must not be construed to codify the common law crime of assault and battery of a high and aggravated nature.

Amendments of these statutes in 2003 and 2005 do not apply in Respondent's case.

[2] Circumstances of aggravation include the infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in sexes, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. *E.g.* State v. Foxworth, 269 S.C. 496, 238 S.E.2d 172 (1977).

LAW AND ANALYSIS

The State contends the Court of Appeals erred in vacating Respondent's conviction in light of Gentry, which we decided after the Court of Appeals decided the present appeal. We agree.[3]

As we recently explained,

> In Gentry, we abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid indictment by either a county or state grand jury. Under the former approach, except for certain minor offenses, the circuit court did not have subject matter jurisdiction in a criminal case unless there was an indictment which sufficiently stated an offense, the defendant had waived presentment of the indictment to the grand jury, or the charge was a lesser included offense of the crime charged in the indictment. Under that former approach, a defective or insufficient indictment could result in a lack of subject matter jurisdiction, which is a matter that may be raised at any time, including on direct appeal, in a [post-conviction relief] action, or *sua sponte* by the trial or appellate courts.
>
> In Gentry, taking our cue from the United States Supreme Court and in keeping with our view of subject matter jurisdiction in civil cases, we explained that the subject matter jurisdiction of

[3] See State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994) (new rule of criminal law should be applied retroactively to cases pending on direct review at the time the new decision is issued, unless the new rule results in a finding that the trial court acted without jurisdiction or the trial court's action is void because the defendant's conduct is not subject to criminal sanction, in which case the new rule should be fully retroactive and applied to all previous cases).

the circuit court and the sufficiency of an indictment are two distinct concepts. "[S]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Gentry, [363 S.C. at 100, 610 S.E.2d at 498]; see also Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000) (stating same principle); Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (stating same principle); S.C. Const. art. V, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.").

In Gentry, then, we returned to our earlier view that an indictment is a "notice document," albeit one required by our state constitution and statutes. See S.C. Const. art. I, § 11 and art. V, § 22 [footnote omitted]; S.C. Code Ann. § 17-19-10 (2003) ("[n]o person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury" except in specified instances). The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted. Gentry, [363 S.C. at 102-03, 610 S.E.2d at 500]; S.C. Code Ann. § 17-19-20 (2003). This required notice is a component of the due process that is accorded every criminal defendant. See U.S. Const. amend. V; S.C. Const. art. I, § 3. Given that the sufficiency of an indictment will no longer be considered an issue of subject matter jurisdiction which may be raised at any time, we applied the general rule regarding preservation of error and held that a defendant must raise an issue regarding the sufficiency of the indictment before the jury is sworn in order to preserve the error for direct appellate review. Gentry, [363 S.C. at 101, 610 S.E.2d at 499] (citing S.C. Code Ann. § 17-19-90 (2003)).

Evans v. State, 363 S.C. 495, 507-09, 611 S.E.2d 510, 516-17 (2005); see also State v. Smalls, 364 S.C. 343, 346-48, 613 S.E.2d 754, 756-57 (2005) (applying Gentry and Evans to hold that the circuit court had subject matter jurisdiction to accept a guilty plea where the defendant had not been indicted for the charge to which he pled guilty, but signed a sentencing sheet which constituted a written waiver of the right to have the charge presented to a grand jury and also signified the defendant had been notified of the charge to which he pled guilty).

We conclude, pursuant to Gentry, the Court of Appeals erred in finding the circuit court lacked subject matter jurisdiction in Respondent's case. An indictment which allegedly is improperly amended no longer raises a question of subject matter jurisdiction; it instead raises a question of whether a defendant properly received notice he would be tried for a particular crime. We take this opportunity to explain how, post-Gentry, the State's pretrial motion to amend an indictment should be analyzed. The analysis remains largely the same as it was under pre-Gentry law, although it is now driven by concepts of notice and due process.

A defendant has a constitutional and statutory right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment. "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Evans, 363 S.C. at 508-13, 611 S.E.2d at 517-19 (citing Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500, and also citing cases in which the Court has emphasized the importance of the grand jury process). Furthermore, a sufficient indictment prevents later retrials for the same offense in contravention of the constitutional prohibition against double jeopardy and prevents a prosecutor from usurping the power of the grand jury by ensuring a defendant is tried for the crime for which he was indicted. State v. Tabory, 262 S.C. 136, 139, 202 S.E.2d 852, 853 (1974); State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 312 (Ct. App. 2002), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; People v. Grega, 531 N.E.2d 279, 282 (N.Y. 1988); State v.

Lewis, 36 S.W.3d 88, 97 (Tenn. Crim. App. 2000). The sufficiency of an indictment is examined objectively, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. This principle does not mean a defendant's understanding of an indictment is irrelevant; that understanding, or lack thereof, is a factor for the court to consider in its sufficiency determination. However, a defendant's purported lack of understanding of an indictment which is sufficient, when viewed objectively, ordinarily will not serve to defeat the sufficiency of the indictment.

In South Carolina, an indictment "shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided." S.C. Code Ann. § 17-19-20 (2003). Thus, an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981); Guthrie, 352 S.C. at 107-08, 572 S.E.2d at 312.

"In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. . . . Further, whether the indictment could be more definite or certain is irrelevant." Gentry, 363 S.C. at 103, 610 S.E.2d at 500) (citations omitted). All the surrounding circumstances must be weighed to make an accurate determination of whether the defendant was prejudiced by a lack of notice and an insufficient indictment. State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993); State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950).

While the court should focus primarily on charging language in the body of the indictment, a caption or title which is consistent with the language in the body of the indictment may be considered in conjunction with the body in determining the sufficiency of the indictment as a whole.

Thompson v. State, 357 S.C. 192, 195, 593 S.E.2d 139, 140 (2004) (indictment was sufficient to charge the offense of criminal conspiracy where language in body of each indictment used verbs which implied defendant acted with another person, and title of each indictment cited the statute defining the offense), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003) (indictments stating that defendant assaulted officers while they were attempting to process him after arrest were sufficient; although body of the indictments failed to specify that officers were employees of correctional facility, language in the indictments was substantially same as language of statute defining offense charged, captions indicated victims were correctional facility employees or cited the statute defining offense, and title of charge in body of indictments stated victims were correctional facility employees), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; Tate v. State, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001) ("It is the body of the indictment rather than the caption that is important. If the body specifically states the essential elements of the crime and is otherwise free from defect, defect in the caption will not cause it to be invalid."); State v. Tabory, 262, S.C. 136, 141, 202 S.E.2d 852, 854 (1974) ("the State may not support a conviction for an offense intended to be charged by relying upon a caption to the exclusion of the language contained in the body of the indictment").

When a defendant timely objects to the sufficiency of the indictment, before the jury is sworn, a ruling that an indictment is not sufficient will result in the quashing of the indictment unless the defendant waives presentment to the grand jury and pleads guilty. The solicitor ordinarily will be free to later submit a properly drafted indictment to the grand jury for its consideration. Cutner v. State, 354 S.C. 151, 155, 580 S.E.2d 120, 122-23 (2003), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; Hopkins v. State, 317 S.C. 7, 10, 451 S.E.2d 389, 390 (1994), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; *cf.* Evans, 363 S.C. at 510-13, 611 S.E.2d at 518-19 (indictment must be quashed when defendant timely objects to indictment issued by a grand jury which is established or constituted illegally, or when defendant timely proves disqualification of individual grand juror).

A defendant may waive a potential challenge to an indictment, just as he may waive any of his constitutional rights, by failing to raise the issue or by admitting the sufficiency of a particular indictment. *Cf.* Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (defendant may waive right to assert various statutory and constitutional rights, nonjurisdictional defects, and defenses by pleading guilty); TNS Mills, Inc. v. S.C. Dept. of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) (an issue conceded in lower court may not be argued on appeal).

Amendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty. State v. Myers, 313 S.C. 391, 438 S.E.2d 236 (1993); S.C. Code Ann. § 17-19-100 (2003) (trial court "may amend the indictment . . . if such amendment does not change the nature of the offense charged").[4]

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[4] The second sentence of Section 17-19-100 states: "After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause." In a pre-Gentry case, we observed that "[t]he appropriate analysis is whether the amendment to the indictment changed the nature of the offense charged, not whether the amendment in any way surprised or prejudiced appellant." State v. Lynch, 344 S.C. 635, 641, 545 S.E.2d 511, 514 (2001), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494. The second sentence of the statute applies only to *permissible* amendments, *i.e.*, those which do not change the nature of the offense charged. *Id.* at 641 n.3, 545 S.E.2d at 514 n.3 (emphasis in original). Therefore, this continuance provision will not be applied to deprive a defendant of the right to presentment when the court determines an existing indictment fails to give the required notice to the defendant or is otherwise insufficient pursuant to Gentry.

When the State moves before trial to amend an indictment previously issued or "true-billed" by the grand jury, the court first should determine whether the existing indictment is sufficient to place the defendant on notice of a particular offense, and identify the nature of that offense. Second, the court should determine whether the amended indictment would be sufficient to place the defendant on notice of a particular offense and, if so, identify the nature of that offense.

Third, the court should determine whether the proposed amendment changes the nature of the offense set forth in the original indictment. If it does, the motion to amend must be denied unless the amended indictment states a lesser included offense of the crime charged in the original indictment or the defendant chooses to waive presentment of the amended indictment to the grand jury and plead guilty. To rule otherwise would violate the defendant's statutory and constitutional right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment. See *e.g.* Cutner, 354 S.C. 151, 580 S.E.2d 120 (reversing conviction for possession with intent to distribute marijuana within proximity of a school because substituting a school for the church named in the original indictment was not a scrivener's error, but changed the nature of the offense charged); State v. Lynch, 344 S.C. 635, 641, 545 S.E.2d 511, 514 (2001) (reversing conviction where trial court, with regard to first-degree burglary indictment, allowed aggravating circumstance to be changed from entering during the darkness to causing physical injury; amendment changed the nature of the offense charged because proof required for each aggravating circumstance was materially different), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) (granting post-conviction relief where prosecutor verbally amended indictment for second-degree burglary to state that the burglary occurred at nighttime; amendment changed the nature of the offense charged by changing the classification from nonviolent to violent), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996) (affirming grant of post-conviction relief where defendant was indicted for trafficking in cocaine weighing more than 100 grams and less than 200 grams, and defense counsel consented to an amendment of the indictment to an amount more than 200 grams, which

changed the nature of the offense charged by increasing the penalty); Hopkins v. State, 317 S.C. 7, 10, 451 S.E.2d 389 (1994) (granting post-conviction relief and new trial where original indictment for felony DUI causing great bodily injury was amended to indictment for felony DUI causing death; amendment, which increased potential penalty from ten to twenty-five years, changed the nature of the offense charged), overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494.

On the other hand, amendments usually are permitted for purposes of correcting an error of form, such as a scrivener's or clerical error. Cutner, 354 S.C. at 155, 580 S.E.2d at 122. Thus, a motion to amend an indictment should be granted when the proposed amendment does not change the nature of the offense or affect the sufficiency of the indictment. See *e.g.* State v. Batson, 261 S.C. 128, 132, 198 S.E.2d 517, 519 (1973) (upholding amendment of indictment to state name of law enforcement officer who allegedly bought illegal drugs from defendant where original indictment identified the officer only as an "undercover SLED agent"); State v. Quarles, 261 S.C. 413, 416-17, 200 S.E.2d 384, 385-86 (1973) (indictment may be amended to state the correct time or date of the alleged crime when time or date is not of the essence of the crime); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947) (amending indictment to correct the victim's name is a scrivener's error and does not change the nature or grade of the offense charged; defendant was neither misled nor prejudiced in his defense on the merits); State v. Horton, 209 S.C. 151, 39 S.E.2d 222 (1946) (upholding amendment of indictment to strike out inapplicable charge of common-law rape, where remaining language charged statutory rape of minor; amendment did not change the nature of the offense charged and defendant was not prejudiced in his defense on the merits).

In applying the above principles in this case, we conclude the body and caption of the original indictment, when examined with a practical eye in view of all the surrounding circumstances, provided adequate notice to Respondent that he faced a charge of CDVHAN. The law proscribed only two forms of criminal domestic violence – non-aggravated and CDV of a high and aggravated nature. See footnote 1. The caption of the indictment stated the offense was "aggravated," indicating CDVHAN, and this caption

was consistent with charging language in the body of the indictment. See Thompson, 357 S.C. at 195, 593 S.E.2d at 140; Wilkes, 353 S.C. at 465, 578 S.E.2d at 719. The indictment was sufficient to apprise Respondent of the elements of the offense, the circuit court knew what judgment to pronounce in the event of conviction, and Respondent was ensured the protections of double jeopardy. Accordingly, the amendment of the indictment proposed by the solicitor and approved by the judge, as well as Respondent's statement he was prepared to defend a charge of CDVHAN, were both superfluous and of no import in this case.

CONCLUSION

We reverse the decision of the Court of Appeals and affirm Respondent's conviction for CDVHAN.

REVERSED.

TOAL, C.J., WALLER, PLEICONES, J.J., and Acting Justice Diane Schafer Goodstein, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Robert Earl Miller, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Cherokee County
Gary E. Clary, Circuit Court Judge

Opinion No. 26106
Heard November 16, 2005 – Filed February 6, 2006

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Charles H. Richardson, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for petitioner.

William G. Rhoden, of Winter & Rhoden, of Gaffney, for respondent.

JUSTICE MOORE: Respondent was convicted of armed

robbery, failure to stop for a police vehicle, and unlawful possession of a pistol. He was sentenced to concurrent terms of imprisonment of twenty-four years for armed robbery, three years for failing to stop, and one year for the pistol charge. Respondent's alleged accomplice, Tavo Glenn (Glenn), was arrested at the same time as respondent and was tried and convicted prior to respondent's trial. We granted this writ of certiorari to determine whether the Court of Appeals properly reversed and remanded this case for an *in camera* hearing to determine whether the identification of respondent's alleged accomplice was so tainted as to require its suppression at respondent's trial. *See* State v. Miller, 359 S.C. 589, 598 S.E.2d 297 (Ct. App. 2004). We affirm.

ISSUE

Did the Court of Appeals err by remanding the case to the trial court?

FACTS

The following evidence was introduced at respondent's trial. About 4:00 p.m. on October 5, 2001, the Alltel Communications store on Floyd Baker Boulevard in Gaffney, South Carolina, was robbed. The perpetrator entered the store with his back to the store's two female employees. As he turned to face the employees, he pulled a black mask over his face, brandished a black handgun, and ordered the employees to fill a bag with money.

The two employees began filling the bag with money from one of the store's cash registers. Keys could not be found to the second cash register and the store safe was found to be empty. Realizing they would not be able to open the second register, the man took both employees into the back of the store and made them lie down on the floor. The employees did as instructed until they heard the front door buzzer. Assuming the robber had left the store, the employees went to the front of the store, locked the door, and called 911.

The robbery lasted approximately ten minutes and resulted in a little over four hundred dollars being stolen. When police arrived, the employees described the robber as a black male wearing a blue shirt and dark pants.

Shortly after beginning his 4:00 shift, Trooper Johnnie Godfrey was traveling on Floyd Baker Boulevard near the Alltel store when a vehicle came from his right and cut him off. Trooper Godfrey testified he turned on his blue lights and attempted to pull over the car for the purpose of issuing a warning for improper lane change and failure to yield the right-of-way. The car pulled into a parking lot, but did not stop, instead exiting on another street and heading up the interstate. A pursuit ensued involving officers from several law enforcement agencies.

The fleeing car sideswiped another car and turned off the interstate. A bystander testified she observed the chase and, as the car approached her, she saw a gun tossed from the passenger side window. An officer searched the area where the gun was allegedly thrown and retrieved a black handgun.

The chase ended after the car attempted to make a right turn and ran off the road into a field. The two occupants fled from the car. The driver of the vehicle was quickly apprehended and identified as respondent.

Respondent was placed in the back of Sergeant Mark Gooch's patrol car. Respondent remained in the car for roughly twenty minutes, while detectives and the crime scene unit responded to the scene. Sergeant Gooch testified that while en route to the detention center, respondent commented, "I heard someone say something about a robbery. I don't know anything about a robbery. I wasn't even near an Alltel store." Respondent also questioned what the crime scene officers were doing at the vehicle, and when the sergeant told him they were recovering evidence and asked respondent if he was worried about them finding his fingerprints on the gun, he stated, "my man had a gun." After hesitating, respondent then said, "if you will get a detective to talk to me, I'll tell them what they need to know." Officer Gooch stated that, while respondent was seated in the patrol car, he did not mention a robbery or any charges against him to respondent. He admitted, however,

that his police radio was on while respondent was seated in the car, and he had discussed the robbery with other officers outside of the car.

Trooper Godfrey testified he smelled an odor of alcohol on respondent and also suspected he had been using marijuana. Once respondent was transported to the local detention center, a DataMaster test was administered. Based on the DataMaster test, the trooper asked respondent to submit to a urine test and respondent refused. Trooper Godfrey charged respondent with driving under the influence and respondent subsequently pled guilty to the charge.

The passenger from the vehicle was apprehended shortly after respondent and identified as Tavo Glenn. He was wearing a blue shirt and dark pants when apprehended. Glenn had several items in his possession when he was arrested, including a little over four hundred dollars, a pair of latex gloves, and eight to ten rounds of .380 caliber pistol ammunition. A search of the automobile produced a .380 caliber silver handgun, found under the passenger seat.

Shortly after Glenn's apprehension, Officer Chris Skinner of the Gaffney Police Department arrived and instructed one of his officers to take Glenn back to the Alltel store to be identified. When Glenn arrived at the Alltel store, the officers took him out of the patrol car and placed him in front of the vehicle, twenty to twenty-five feet from the front door of the store. Glenn was handcuffed and was the only civilian in the area, standing among police officers. The two employees positively identified Glenn as the perpetrator of the robbery at that time and they reiterated that pre-trial identification at respondent's trial.[1] Thereafter, both Glenn and respondent were charged with armed robbery.

At his trial, respondent took the stand and admitted he was the driver of the vehicle and that he intentionally failed to stop when he saw the police car's blue lights. He claimed he did not see the lights while on Floyd Baker

[1]An in-court identification of Glenn was not conducted at respondent's trial.

Boulevard, but noticed them after he cut through a parking lot, and thought he was being pulled for cutting through the lot to avoid a red light. Respondent claimed he rode with Glenn to Gaffney so that Glenn could purchase some marijuana. The two were riding around smoking[2] and drinking and made some stops along the way for Glenn to sell drugs. They also stopped for respondent to go to the bathroom, at which point he took over driving since Glenn's license had been suspended. Respondent stated he failed to stop for the blue lights because he was on parole and he knew there was a gun in the car, as well as significant amounts of illegal drugs. At some point during the chase, respondent saw Glenn throw something out the window. He knew that Glenn was getting rid of the drugs, but he did not know if Glenn threw a gun out the window. Respondent denied he robbed anyone. He stated he did not know anything about the Alltel robbery until after he was placed in the police car. While sitting in the car, he was listening to the police radio, and "heard them keep bringing up something about armed robbery." He stated he must have heard them specifically mention Alltel. He also testified that he did not say, "My man had a gun," but that he said, "If my man had a gun, I don't know."

Prior to trial, defense counsel moved for a suppression hearing based on the unduly suggestive show-up identification of Glenn. Recognizing Glenn was not on trial in this case and had already been convicted in the matter, defense counsel nonetheless argued respondent was entitled to such a hearing as this was a "hand of one, hand of all case" and the identification of Glenn was a critical part of the State's case against respondent. The defense asserted the court needed to make a determination of the reliability of the evidence prior to the matter going before the jury.

The trial court pointed out that it had held such a hearing in Glenn's trial and, although it acknowledged that courts generally disfavor one-person show-ups, the court had found the necessary requirements of the law met and

[2]Respondent stated they were smoking a blunt or "boonk," which is a marijuana joint with either powder cocaine or rock cocaine added to the joint.

admitted the identification in Glenn's trial.[3] Because Glenn had already been tried and convicted, the court held that his identification was not an issue in respondent's case. Defense counsel countered that the State elected to try Glenn and respondent separately, and as a result, respondent was not present during the proceedings in Glenn's trial dealing with the identification issue. He therefore never had the opportunity to cross-examine the witnesses. Finding no case law to give guidance on the matter, the court determined respondent was not entitled to an *in camera* hearing regarding the identification of Glenn as the perpetrator. The Court of Appeals disagreed and remanded for an *in camera* hearing regarding the reliability of Glenn's identification.

DISCUSSION

The State argues the Court of Appeals erred by remanding the case for an *in camera* hearing because respondent lacks standing to challenge the reliability of Glenn's identification; and even if respondent has standing, any error in the admission of Glenn's identification was harmless in light of the overwhelming evidence against him.

Standing

Whether a defendant has standing to challenge the identification of an alleged co-participant in a crime is a novel issue in South Carolina.

The Court of Appeals concluded the trial court erred by failing to conduct a suppression hearing regarding the reliability of Glenn's show-up identification. Noting that respondent was never identified by the victims of the robbery and that the only thing linking him to the robbery of the Alltel store is the fact that he was apprehended in the company of Glenn, who in turn, was identified as the person who perpetrated the robbery, the Court of

[3]The Court of Appeals found the trial judge did not err by admitting Glenn's identification at his own trial. State v. Glenn, Op. No. 2003-UP-515 (S.C. Ct. App. filed August 27, 2003). We denied Glenn's petition for a writ of certiorari to review that decision.

Appeals found that respondent had standing to challenge Glenn's identification. The court distinguished the present case from those where defendants have unsuccessfully sought to exclude incriminating evidence obtained in violation of another's Fourth Amendment rights. *See* State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate he has a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search). Unlike Fourth Amendment cases, the court explained that the concern under the current set of facts is not whether one's personal constitutional rights were violated in obtaining the evidence, but whether the evidence obtained is unreliable.

In this case, we find respondent has a substantial personal stake in the admissibility of the identification evidence because the identification undercut his ability to present his defense that he and Tavo Glenn were with each other the entire day of the crime and that he did not know anything about the Alltel robbery. *See* State v. Clausell, 580 A.2d 221 (N.J. 1990) (because defendant had a substantial personal stake in the admissibility of the identification evidence, he had standing to challenge identifications of his co-defendant). The identification of Glenn was an essential element in proving respondent's participation in the crime. Admitting the evidence of Glenn's identification in respondent's trial effectively destroyed his defense. *See* People v. Bisogni, 483 P.2d 780 (Calif. 1971) (identification evidence based on an unfairly conducted show-up is equally unreliable when it is directed toward the identity of a co-participant in a crime as when it relates to the identity of the defendant on trial; whenever the identity of a confederate is essential to prove the defendant's participation in a crime and when such evidence effectively destroys the defense offered by the defendant, he has standing to challenge the fairness of the identification procedures of the alleged co-participant). Therefore, respondent has standing to challenge the fairness of the show-up identification of Glenn.

Harmless Error

In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict.

State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990).

Without the identification of Tavo Glenn, the case against respondent is circumstantial with no direct link between respondent and the Alltel robbery. Respondent was not identified as being part of the robbery of the Alltel store; in fact, there was only one perpetrator inside the store. There is, however, circumstantial evidence of respondent's guilt. The circumstantial evidence is as follows: (1) respondent was driving a car, with Glenn as his passenger, shortly after the robbery; (2) they were first noticed by police when respondent "cut off" an officer not far from the store; (3) respondent failed to stop for blue lights; (4) a bystander saw a gun being tossed from the passenger side window during the chase – the gun was later determined to be similar to the gun used in the crime; (5) after apprehending Glenn, police found the following items in Glenn's possession: a pair of latex gloves, .380 caliber pistol ammunition, and a little over $400, which was the amount taken from the Alltel store; and (6) after being captured, respondent made the following unsolicited comments: that he did not know anything about a robbery, that he "wasn't even near" an Alltel store, that his man had a gun, and that he would be willing to tell what he knew to a detective. The circumstantial evidence against respondent is strong.

However, respondent's defense included explanations of why he fled from police – that he was on parole and did not want to be caught with drugs and a gun in the car. He also explained his comments to police by stating he heard about the robbery from the police radio and from the officers standing outside the car. When Glenn threw the gun out of the car, respondent stated he thought Glenn was getting rid of the drugs. Respondent further testified that he and Glenn were never apart the entire day except for stopping for respondent to go to the bathroom and to switch drivers.

Therefore, the admission of the identification of Glenn at respondent's trial effectively destroyed his defense. The trial court's failure to allow respondent to challenge Glenn's show-up identification was not harmless error. If Glenn's show-up identification was in fact not proper, the admission

of that unreliable evidence could have reasonably affected the result of respondent's trial. The Court of Appeals correctly held that the interests of justice required an *in camera* hearing be conducted on the pre-trial identification of Glenn.

The Court of Appeals found that respondent was not, however, entitled to a new trial. The Court of Appeals remanded the case to the trial court for the purpose of conducting an *in camera* hearing to determine whether the identification of Glenn was so tainted as to require its suppression at trial. The court stated that should such a finding be made, respondent would then be entitled to a new trial. The Court of Appeals properly remanded for an *in camera* hearing. *See* State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992) (*per se* rule requiring court to hold *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification). We note that the fact Glenn's identification has been upheld on appeal is irrelevant to the question of whether respondent is entitled to have an *in camera* hearing to determine whether Glenn's show-up identification was properly conducted. When respondent was denied the hearing, he was denied the opportunity to participate and elicit evidence that may not have been elicited in the pre-trial hearing at Glenn's trial.

CONCLUSION

We find respondent has standing to challenge the identification of his alleged co-participant in the crime. We find the trial court's error in not holding a hearing regarding Glenn's identification was not harmless error. Therefore, the Court of Appeals' decision to remand to the trial court for the purpose of conducting an *in camera* hearing to determine whether Glenn's identification should be suppressed is
AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, J.J., and Acting Justice Paula H. Thomas, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Williamsburg Rural Water and Sewer Company, Inc., Petitioner,

v.

Williamsburg County Water and Sewer Authority, a Body Politic, County of Williamsburg, a Body Politic, and Town of Kingstree, a Body Politic, Respondents.

ON WRIT OF CERTIORARI

Appeal from Williamsburg County
John M. Milling, Circuit Court Judge

Opinion No. 26107
Heard November 16, 2005 – Filed February 6, 2006

REVERSED

Larry G. Reddeck, of Nettles, Turbeville & Reddeck, of Lake City, for Petitioner.

W. E. Jenkinson, III, and Ernest J. Jarrett, both of Jenkinson, Jarrett and Kellahan, of Kingstree, for Respondents.

JUSTICE PLEICONES: We granted certiorari to consider a Court of Appeals decision upholding the grant of summary judgment to respondents (County).[1] Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 357 S.C. 251, 593 S.E.2d 154 (Ct. App. 2003).[2] We reverse the Court of Appeals insofar as it affirmed summary judgment on Company's statutory interpretation claim.[3]

FACTS

The material facts are not in dispute, and a complete recounting may be found in the Court of Appeals' opinion. We have recited a briefer version below.

In January 1995, one of Company's organizers[4] sent a letter to County's Supervisor notifying County of Company's intent to provide water and sewer services in a portion of County's unincorporated area. In March and April 1995, the organizer appeared before County Council to reiterate Company's plan.

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[1] For purposes of this opinion we will refer to respondents collectively as 'County.'

[2] This *en banc* opinion was filed following the grant of a petition for rehearing. Chief Judge Hearn authored the majority opinion. Judge Anderson filed a separate concurrence, as did Judge Stilwell. Judge Connor joined Judge Stilwell's concurrence.

[3] We dismiss certiorari as improvidently granted on the Tort Claims Act issue.

[4] Company did not file its articles of incorporation until May 1995. The date of incorporation does not affect the analysis.

The circuit court held the January letter, as well as the March council appearance, satisfied the notice requirements of S.C. Code Ann. § 33-35-90, and that County's failure to respond within the statutory period was the equivalent of consent. Section 33-35-90, repealed in October 2000 and replaced by § 33-36-270,[5] provided in relevant part:

> [P]rior to providing any of the services authorized in this section, nonprofit corporations or groups intending to organize such corporations shall first notify the governing body, of the county or municipality in which the services are to be provided, of their intentions and the nature of such services. The governing body shall, from the date of such notification, have a period of ninety days in which to approve the request to provide such services or inform the persons requesting permission to provide such services that the governing body intends to provide for such matters as a public function of the government. Any such notification of intent by the governing body shall include a detailed description of the area to be served, the services to be provided and the time schedule under which such services will be available from the county or municipality.
>
> (Emphasis supplied).

County has not challenged the finding that it received the statutory notice on January 16, 1995, or that it was deemed to have consented to Company's proposal.

While County did not affirmatively respond to Company's notice, it took up a franchising ordinance (Franchising Ordinance) which would permit it to grant water and sewer franchises in County, including the area Company wished to service. The Franchising Ordinance received its first reading on March 6, 1995, its second in June, and its third in August, and was adopted

[5] The repeal/replacement does not affect our analysis of the nature of the rights acquired by a not-for-profit corporation pursuant to § 33-35-90.

on August 7, 1995. In October 1995, Company was notified that its application for funding from the federal government could not be processed until it received a franchise pursuant to the Franchising Ordinance. More than one year later, in November 1996, a referendum allowing County itself to provide water and sewer services in Company's area passed.

In May 1998, County and/or its Water and Sewer Authority applied for federal funding to construct its system. In November 1998, it solicited bids to construct facilities in an area within Company's area, and awarded a construction contract that month. This suit followed.

Among Company's claims was that it had acquired an exclusive right to provide water and sewer services in the area identified in its 1995 notice by operation of § 33-35-90. The circuit court granted County summary judgment on this claim, and the Court of Appeals affirmed. We reverse.

ISSUE

> Whether County was entitled to summary judgment on the statutory interpretation issue?

ANALYSIS

The Court of Appeals' majority held that summary judgment was properly granted to County because while Company acquired the right to provide service in the area specified in its January 1995 letter by virtue of § 33-35-90, nothing in that statute provided that the right was exclusive. The Court of Appeals was persuaded of this conclusion, at least in part, because Company has no existing facilities. The Court of Appeals' majority seemed to rest its decision on the fact that other providers were up and operating in the contested area:

> The difficulty of this case lies in giving effect to the rights acquired by [Company] as a result of the County's failure to comply with section 33-35-90. If this statute is to have any meaning, there must be some enforceable quality

> belonging to those rights; otherwise, a party obtaining approval under this statute receives, in effect, nothing at all. Complicating the matter is the fact that during the pendency of this appeal, the County awarded numerous franchises affecting the disputed area, and those facilities are presently under development for the benefit of the people of Williamsburg County. Thus, in this case, valid but competing interests are diametrically opposed. An unfortunate result of our ruling today is that [Company] likely possesses a right which has little commercial value in light of the County's intrusion into the designated service area. Nevertheless, in the absence of case law on point, and without specific language in section 33-35-90 compelling the grant of exclusive rights, we hold that [Company] does not possess an exclusive service right within the described service area; rather, as the circuit court found, it possesses a non-exclusive service right.
>
> Williamsburg Water, 357 S.C. at 263, 593 S.E.2d at 161.

Company complains, and we agree, that the Court of Appeals' majority improperly rested its decision in large part not on evidence in the record, but rather on the affidavit of John Whiteside, Director of the County Water & Sewer Authority, which was attached to County's petition for rehearing filed after the first Court of Appeals' decision in this case. In this affidavit, dated April 9, 2003, Mr. Whiteside described numerous projects planned and/or funded in the service area in dispute. Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record. We review the summary judgment issue using only the evidence presented to the trial court and included in the Record on Appeal. In addition, we know of no authority for the proposition that a court should construe a statute not by its terms, but rather by weighing competing interests.

The statute does not state that the right to provide water and sewer services in the area identified by the not-for-profit company is exclusive. In our view, the statute's silence is the strongest argument for interpreting § 33-

35-90 to grant a non-exclusive right. On the other hand, the statute gives the governmental body ninety days either to accept the not-for-profit's offer to provide the services, or to decide to offer comparable services itself. The purpose of the statute is to expedite the provision of these vital services to unserved areas; it encourages a not-for-profit corporation to step into a governmental void, but effectively gives the local government veto power, permitting it to trump the not-for-profit's offer by making its own proposal within a short time period.

We hold that once the local government fails to respond within the time period provided for by the statute, the not-for-profit's right to operate in the specified area is exclusive. As the record in this case so amply demonstrates, anything less than an exclusive right to operate in the area will cause federal funding programs to deny assistance to the not-for-profit corporation. The purpose of the statute, to expedite the provision of water and sewer services to unserved areas, is frustrated by anything less than an exclusive right. Cf. Johnston v. S.C. Dep't of Labor, Licensing and Reg., 365 S.C. 293, 617 S.E. 2d 363 (2005) (statutes should be interpreted to further, not frustrate, legislature's intention).

Where the governmental agency consents[6] to the not-for-profit corporation's notice pursuant to S.C. Code Ann. §33-35-90 or § 33-36-270, that corporation acquires the exclusive right to operate water and sewer systems in the designated areas. Such an operation is in the nature of a quasi-public utility, as evidenced by the unique condemnation provisions applicable only to these type corporations. S.C. Code Ann. § 4-9-30(4) (Supp. 2004). We therefore reverse the Court of Appeals' decision which affirmed the circuit court order granting County summary judgment on Company's statutory interpretation claim, and remand the case for further proceedings.

CONCLUSION

[6] This consent provision satisfies the requirement of S.C. Const. art. VIII, § 15 (1976).

The decision of the Court of Appeals affirming summary judgment on the statutory interpretation claim is

REVERSED.

MOORE, BURNETT, J.J. and Acting Justice Paula H. Thomas, concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion.

CHIEF JUSTICE TOAL: I concur in part and respectfully dissent in part. Although I agree with the majority's reversal of the statutory interpretation issue, I would not dismiss certiorari as improvidently granted on the Torts Claim Act (TCA) issue. In my view, there exists a material issue of fact regarding the possible gross negligence on the part of the County and the application of the TCA. Further, the result articulated by the majority effectively forecloses Company from pursuing any remedy for the violation of the exclusive right to which the majority finds Company is entitled. Therefore, I would reverse the circuit court's order in its entirety and remand for further proceedings.

The TCA provides that the State, its agencies, political subdivisions, and other governmental entities are immune from tort liability for specific losses including those resulting from:

> licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority *except when the power or function is exercised in a grossly negligent manner*.

S.C. Code Ann. § 15-78-60(a)(12)(2005) (emphasis added). Although the gross negligence standard contained in this exception is not expressly contained in the other exceptions upon which the County relies,[7] we read the gross negligence standard into all of the relevant TCA exceptions. *Staubes v. City of Folly Beach*, 339 S.C. 406, 417 529 S.E.2d 543, 548 (2000) (quoting *Steinke v. SC Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999)). Therefore, the dispositive issue is whether the evidence presents an issue of material fact regarding gross negligence.

"Gross negligence is the intentional, conscious failure to do something which one ought to do." *Staubes v. City of Folly Beach*, 331 S.C. 192, 204,

[7] County also relies on the exceptions found in §§ 15-78-60 (a)(1), (2), (3), and (4) as grounds for immunity to company's tort action.

500 S.E.2d 160, 167 (Ct. App. 1999), *aff'd*, 339 S.C. 406, 529 S.E.2d 543 (2000). Additionally, under § 15-78-60(a)(12), gross negligence is a mixed question of law and fact which must be determined by a jury. *Id*. at 205, 500 S.E.2d at 168. Unless there is only one reasonable inference to be drawn from the evidence, summary judgment is inappropriate. *Id.*

In the instant case, County was provided with notice of Company's intention to provide service to certain rural areas of the county in accordance with § 33-35-90. This section also provides that County was to respond to Company within ninety days indicating whether County intended to provide the services as a public function, including "a detailed description of the area to be served, the services to be provided, and the time schedule under which such services will be available from the county. . . ." *Id*.

County contends that its initial reading of a franchise ordinance within the ninety day period combined with the fact that the second reading was postponed to consult with legal counsel shows that County did not act with gross negligence. In opposition, Company points to several acts by County to show that County intentionally frustrated Company's efforts to provide service to the area including the denial of Company's application for a franchise ordinance. In my view, deciding between these competing factual scenarios is the hallmark of the function of a jury, and it should be the jury's job to determine whether County's actions rise to the level of gross negligence.

Therefore, in my view, the TCA issue should be submitted to a jury for a determination of whether the County acted with gross negligence. The evidence in this case does not lead to only one reasonable inference, especially when all ambiguities, conclusions, and inferences arising from the evidence are construed in favor of the nonmoving party. Furthermore, I find it perplexingly odd that, on one hand, the majority finds that Company's rights have been violated by County, and on the other hand, the majority deprives Company of any possibility of relief. If Company is unable to proceed in its tort action, there is no other remedy for the violation of its rights.

Accordingly, for the foregoing reasons outlined above, I would reverse the grant of summary judgment and remand the case for trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clearwater Trust and Russell B. Lentz Trust, Appellants,

v.

Boyd G. Bunting and Media General Communications, Inc., Respondents.

Appeal from Spartanburg County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26108
Reheard November 30, 2005 – Filed February 6, 2006

AFFIRMED

Marshall Winn, Wallace K. Lightsey, and Troy A. Tessier, all of Wyche, Burgess, Freeman & Parham, of Greenville, for Appellants.

Brent O. Clinkscale and Heather Ruth, both of Womble, Carlyle, Sandridge & Rice, of Greenville, F. Dean Rainey, of Greenville, and Leslie H. Weisenfelder, of Dow, Lohnes & Albertson, of Washington, D.C. for Respondents.

JUSTICE PLEICONES: This is an appeal from a circuit court order dismissing appellants' amended complaint alleging breach of fiduciary duty and securities fraud pursuant to Rule 12(b)(6), SCRCP. We affirm.

STANDARD OF REVIEW

The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004). The question is whether, viewing the allegations in the light most favorable to the plaintiff, the complaint states any valid claim for relief, even if the court doubts that the plaintiff will prevail. Id.

FACTS

The amended complaint alleges that the appellants are trusts which owned stock in a closely held corporation known as Spartan Communications, Inc. (Spartan). Respondent Bunting was an officer of Spartan, and is alleged to have been a shareholder in the corporation and an "insider." Appellants' representatives consulted Bunting when deciding whether to sell some of their Spartan stock, and he reassured them that "there was no contemplation, consideration, discussion or activity within Spartan relating to a possible merger, sale, or other transaction concerning Spartan or its stock up to that point." Prior to these conversations, Bunting had told the beneficiaries of the trusts that Spartan would prefer them to sell any Spartan stock to the corporation rather than "outsiders" in order to keep it within the close corporation's "family." In addition to alleging that Bunting was an officer, shareholder, and insider of Spartan, the complaint alleges that Bunting attended shareholder meetings and occasionally drove a beneficiary of one of the trusts to these meetings.

The complaint alleges that Bunting knowingly made false and misleading affirmative representations that no changes were contemplated at Spartan, and that in reliance on his representations the appellants sold some of their shares (2,300) back to Spartan at $200/share.

Approximately six months later, in December 1999, Spartan announced its merger into respondent Media General. When the merger was consummated in March 2000, all Spartan shareholders received approximately $800/share. Had the appellants retained the 2,300 shares sold

back to Spartan in May and June 1999, appellant Clearwater Trust would have received an additional $660,000 (approximately) and appellant Lenz Trust would have received $720,000 (approximately) more.

The complaint alleged four causes of action. Three were directed to both Spartan and Bunting: breach of fiduciary duty, breach of fiduciary duty-unjust enrichment, and negligent misrepresentation. One was directed to Spartan alone, and alleged a violation of the South Carolina Securities Act, specifically S.C. Code Ann. § 35-1-1210(2) (Supp. 2004). The circuit court held that § 35-1-1210 does not create a private cause of action, and concluded that appellants' three other claims alleged a single wrong, and that this claim arose under S.C. Code Ann. § 33-8-420 (1990). The circuit court held this claim was precluded by the two-year statute of limitation found in § 33-8-420(e), and granted respondents' motion to dismiss.

ISSUES

On appeal, appellants raise the following issues:

(1) Whether there is a private cause of action pursuant to § 35-1-1210?

(2) Whether § 33-8-420 codifies common law causes of action against a corporate officer who owes a fiduciary duty to a party separate and apart from his status as an officer?

(3) If § 33-8-420(e) applies, what is the statute of limitations where the officer is alleged to have fraudulently concealed his breach of fiduciary duty?

ANALYSIS

I. Private Cause of Action

Appellants' third cause of action alleged Spartan committed fraud and deceit in purchasing appellants' stock, thereby rendering it liable under the

Securities Act, § 35-1-1210(2). Appellants argue the circuit court erred in dismissing this claim. We hold the claim was properly dismissed.

Section 35-1-1210(2) makes it unlawful for any person:

> in connection with the offer, sale, or purchase of any security, directly or indirectly, to:
> …
> (2) make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or
> ….

Appellants acknowledge that this Court has held that there is no implied private cause of action for aiding and abetting fraud under § 35-1-1210, but argue that decision does not answer the question whether there can be a direct private action under the statute. See Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc., 320 S.C. 113, 463 S.E.2d 600 (1995). They also concede that the Court of Appeals has stated in dicta that there is no such private right, see Garrett v. Snidegar, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), and acknowledge that in another appeal decided by this Court, the appellant conceded the issue. Carver v. Blanford, 288 S.C. 309, 342 S.E.2d 406 (1986). Appellants point out that these cases were all decided prior to 1997, when S.C. Code Ann. § 35-1-510 (Supp. 2004) was amended, and argue this amendment evidences the General Assembly's intent to create a private cause of action under § 35-1-1210.

In Atlanta Skin, the Court stated that the primary statute creating a private cause of action under the Securities Act is § 35-1-1490, which imposes liability on sellers of securities. The Court held that while § 35-1-1210 makes "fraud or deceit in [securities] offers, sales, or purchases "unlawful," [it does] not, by itself, create a private cause of action." Id. at 119, 463 S.E.2d at 603. Contrary to appellants' contention that Atlanta Skin only decided the aiding and abetting question, it held there was no private action under § 35-1-1210.

Appellants rely on a post-Atlanta Skin amendment to § 35-1-510. This section authorizes the securities commissioner to "require registered broker-dealers, agents, and investment advisors[1] who have custody of or discretionary authority over client funds or securities, to post surety bonds…Every bond shall provide for suit thereon by any person who has a cause of action under Section 35-1-1210…." While this statutory amendment may be read to give rise to a private cause of action under § 35-1-1210, such a private action exists merely to the extent the alleged violator has posted a surety bond under § 35-1-510. Here, there is no allegation that a "510 bond" has been required or posted, and thus § 35-1-510 does not support a finding that these appellants have a private cause of action under § 35-1-1210. This cause of action was properly dismissed pursuant to Rule 12(b)(6). Carolina Care Plan, *supra*.

II. Applicability of § 33-8-420

Appellants contend that they pled that Bunting owed them a fiduciary duty separate and apart from that owed as an officer of Spartan, based upon an alleged special relationship. Thus, the first question we address is whether they have pled facts sufficient to give rise to a separate duty. See, e.g. Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275 (2003) (existence of duty is question of law for the court). We find no such duty was pled.

A. Basis of Duty

Appellants concede that their special relationship was predicated in part on Bunting's status as an officer, but allege that other facts gave rise to a special relationship and consequent duty. First, they alleged that Bunting was a fellow shareholder and therefore owed them a fiduciary duty by virtue of that relationship. Our decisions imposing a fiduciary duty on fellow shareholders are limited to situations that involve oppression of a minority shareholder by a controlling shareholder. See e.g., Lesesne v. Lesesne, 307

[1] We need not decide whether Bunting is a registered broker-dealer, agent, or investment advisor within the meaning of this statute. See S.C. Code Ann. § 35-1-20 (Supp. 2004) (definitions under Uniform Securities Act).

S.C. 67, 413 S.E.2d 847 (Ct. App. 1992). There is no contention that Bunting was a controlling shareholder, or that he used fraud or oppression to procure the appellants' shares for himself. There is no breach of shareholder fiduciary duty alleged here.

Second, appellants would impose a special relationship and a fiduciary duty upon Bunting as a result of their decision to repose trust in him, and on their repeated questioning of him. We decline to impose a fiduciary duty as a consequence of such unilateral actions. Compare Jacobsen v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967) (officer owes fiduciary duty of full disclosure when purchasing shares from shareholders); Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1975) (same).

There are no allegations that Bunting undertook to advise the appellants. Instead, appellants sought information from Bunting, based on their belief that he had special knowledge, in order to make their own informed financial decisions. If Bunting had misrepresented the facts to any shareholder who had inquired, then he would have breached the identical fiduciary duty to that individual that appellants contend was owed specially to them. The only breach of fiduciary duty pled here was that owed by Bunting as a corporate officer.

Finally, while appellants repeatedly argue they are not basing the claim that Bunting owed them a duty solely on the basis of his status as an officer of Spartan, this contention is belied by their pleadings.

In the first cause of action for Breach of Fiduciary Duty, the appellants allege:

> 39. Spartan and Mr. Bunting were fiduciaries with regard to the shareholders of Spartan, [appellants] placed special trust and confidence in Spartan and Mr. Bunting; and Spartan and Mr. Bunting owed [appellants] a fiduciary duty.
> …

> 43. In addition to its direct liability to [appellants] Spartan is vicariously liable for the conduct of Mr. Bunting….
>
> 44. Mr. Bunting and [Spartan's successor] are liable to [appellants]….

The second cause of action, titled Negligent Misrepresentation, alleges the following:

> 46. Spartan and Mr. Bunting owed [appellants] a duty of due care…
>
> 47. Spartan and Mr. Bunting were negligent, grossly negligent, reckless, willful, and wanton in their communications…
>
> 48. In addition to its direct liability to [appellants], Spartan is vicariously liable for the conduct of Mr. Bunting.

The fourth cause of action, entitled Breach of Fiduciary Duty-Unjust Enrichment alleges:

> 56. Spartan and Mr. Bunting were fiduciaries with regard to the shareholders of Spartan; [appellants] placed a special confidence in Spartan and Mr. Bunting; and Spartan and Mr. Bunting owed [appellants] a fiduciary duty;
> …
> 59. Spartan and Mr. Bunting breached their fiduciary duty to all Spartan shareholders when they approved these windfall [stock] options, which caused additional damages to the [appellants] in that the issue of these options diluted the total consideration from the sale of Spartan that should have been divided *pro rata* among all of the shareholders.
> …
> 61. [Spartan's successor] is liable to the [appellants] for the *pro rata* share they would have received based on the

> fair market value of Spartan's stock before the windfall options diluted the company's value.

The pleadings conclusively demonstrate that appellants pled a breach of the fiduciary duty owed by Bunting as a corporate officer. The next question of law we address is whether an action for breach of that duty must be brought pursuant to the statute, or whether a common law duty continues to exist.

B. Source of Duty

That the General Assembly intended the South Carolina Business Corporation Act (Act) to codify[2] the common law duties owed to shareholders by officers and directors is made clear by the South Carolina Reporters' Comments (Reporters' Comments). Section 33-8-420, at issue here, sets forth the standards for corporate officers, while S.C. Code Ann. § 33-8-300 (1990) covers the standards for corporate directors. The Reporters' Comments to the officers' statute state, "This section basically applies the standards of Section 33-8-300 to officers. The [Reporters' Comments] to Section 33-8-300 apply." We therefore look to those directors' comments in aid of determining the legislature's intent with regard to fiduciary duties.

The Reporters' Comments to § 33-8-300 contain the following:

> As the foregoing authorities suggest, the underlying principle of shareholders being express beneficiaries of fiduciary duties predates the technical amendment made in 1963. South Carolina case law since Black v. Simpson, 94

[2] The dissent would find that the Act does not abrogate the common law duties. We agree that those duties have not been abrogated, that is, "annulled, cancelled, repealed or destroyed" as that term is defined in Black's Law Dictionary, but rather hold that the duties have been codified, as is the Legislature's prerogative. See, e.g. Wooten v. Wooten, 364 S.C. 562, 615 S.E.2d 98 (2005) (statute codifies common law rule that alimony terminates at death).

S.C. 312, 77 S.E. 1023 (1913), has firmly embraced the notion that officers and directors owe duties to shareholders as well as the entity. The principle has been applied in insider trading cases (see Jacobson v. Yaschik, 249 S.C. 577, 584, 155 S.E.2d 601, 605 (1967)) and squeeze-out cases (see Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 322 S.E.2d 674 (1984)).

In 1981, the Model Act's articulation of duties owed was adopted verbatim with the exception that the established principle that shareholders of South Carolina corporations are express statutory beneficiaries of duties owed was retained.

….

Basically, the drafters of the current [1988] revision faced three alternatives: follow the [1984] Model Act entirely; continue the pattern of following the Model Act but with added express recognition of the legal principle that duties run to shareholders; or opt for a very pro-insider statute along the lines recently adopted by Delaware.

….

The decision of whether to adhere strictly to the Model Act, to maintain the status quo in this State, or to opt for the Delaware approach (or one even more liberal) raised philosophical points…. One concern of proponents of the status quo is that dropping from the statute a duty that previously existed can hardly be taken as anything different than a repudiation of prior law.

….

After detailed discussion and analysis, the decision was made to retain mention in this provision of a direct duty owed to shareholders.

….

The common law fiduciary duty, first recognized in 1913, owed to shareholders by corporate officers and directors has been codified by §§ 33-8-300 and -420. The trial court correctly held that appellants' breach of fiduciary duty claims against Bunting must be brought within the statute's terms.

III. Statute of Limitations

We have determined that appellants' claims predicated on a breach of fiduciary duty must be brought pursuant to the statute. Appellants alleged three theories: Breach of Fiduciary Duty, Negligent Misrepresentation, and Breach of Fiduciary Duty-Unjust Enrichment. The trial court held that since there was only one wrong alleged, that is, Bunting's misrepresentation that no merger was planned, all three theories should be treated as a single breach of fiduciary duty claim. As we read the complaint, however, appellants alleged two separate wrongs: the Breach of Fiduciary Duty and Negligent Misrepresentation claims involve Bunting's responses to appellants' inquiries, while the Breach of Fiduciary Duty-Unjust Enrichment claim alleged Spartan and Bunting breached a fiduciary duty owed to all stockholders when "they"[3] approved windfall stock options prior to the sale to Media General, thereby diluting the sale proceeds that should have been divided *pro rata* among all shareholders. We will discuss this Unjust Enrichment wrong first.

A. Unjust Enrichment

Appellants allege corporate malfeasance that resulted in identical harm to all shareholders: such a breach of fiduciary duty gives rise to a classic shareholders' derivative suit. See Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001) (diminution in value of stock suffered by all

[3] We strongly suspect that the board of directors, rather than an officer and the corporate entity, committed the alleged misdeed. Since we are reviewing the grant of a Rule 12 (b) (6) motion to dismiss, we must accept the complaint's allegations as true.

shareholders must be brought as a derivative action); 12B Fletcher Cyclopedia Corporations § 5909 (2000). A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCP, is properly dismissed pursuant to Rule 12(b)(6). Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000).

We affirm the circuit court's dismissal of the Unjust Enrichment cause of action under Rule 12(b)(6). Brown v. Stewart; Carolina First; Rule 220(c), SCACR (court may affirm for any reason appearing in the record).

B. Breach of Fiduciary Duty/Negligent Misrepresentation

The remaining two causes of action allege a breach of fiduciary duty.[4] The trial court held these claims were barred by the statute of limitations in § 33-8-420(e), as they were admittedly brought more than two years after appellants discovered the alleged breach. Appellants contend the circuit court misconstrued the statute. We affirm.

Section 33-8-420(e) provides:

> An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

The circuit court held the last sentence of this section should be read to apply only to that part of the statute placing a three year accrual limit on an action. In other words, a plaintiff must bring an action within two years of discovery

[4] As we recently clarified, a breach of fiduciary duty is an action at law. See Jordan v. Holt, ___ S.C. ___, 608 S.E.2d 129 (2005).

or within three years of the accrual, except that when the breach has been fraudulently concealed, the three year outer limit does not apply, and the two-year discovery rule governs. This reading is supported by the Reporters' Comments to § 33-8-300(e), the statute of limitations for directors' suits that contains identical language.

The Reporters' Comments state:

> The third difference between prior law and the Model Act section is that the South Carolina statute, since the enactment of the 1981 South Carolina Business Corporation Act, has had a special statute of limitations found in Section 33-13-150(d). As enacted it cut off suits based on violations of the statute unless brought:
>
> "within three (3) years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs."
>
> Note that under the statute, the plaintiff's right to bring a cause of action which had been concealed, and could never have been reasonably discovered, lapsed after three years. There was no provision for tolling based on fraudulent concealment. Arguably, the statute would reward fraudulent concealment of a wrong. The statute was flawed. If the statute rewarded fraudulent concealment by corporate fiduciaries, it was bad policy; if it was intended not to apply in cases of fraudulent concealment, it was poorly drafted.
>
> The leading proponents of adding the statute of limitations to the Model Act section were also the leading proponents for elimination of the duty to shareholders on the theory that it was better to have the Model Act unsullied by local law.

> There was a general willingness to import a specific limitations period into the statute defining duties owed. This was accomplished by adding to the Model Act provision a new subsection (e) which reads the same as Section 33-13-150(d) of prior law, but with this limitation added at the end: "This limitations period does not apply to breaches of duty which have been concealed fraudulently." The advantage to the short limitations period set forth in subsection (e) is not available to fiduciaries who fraudulently conceal their wrongdoing.

A breach of fiduciary duty suit against a corporate officer or director, even where that breach has been concealed, must be brought no later than two years after discovery of that breach. Here, the suit was admittedly commenced more than two years after discovery. The circuit court properly dismissed the Breach of Fiduciary Duty and Negligent Misrepresentation claims under Rule 12(b)(6) as they were brought after the expiration of the statute of limitations. [5] Carolina Care Plan, Inc., *supra*.

CONCLUSION

The circuit court order dismissing the appellants' complaint pursuant to Rule 12(b)(6), SCRCP, is

AFFIRMED.

BURNETT, J., and Acting Justice J. Ernest Kinard, Jr., concur. MOORE, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

[5] The dissent begins its analysis of the statute of limitations issue by assuming that § 33-8-420 applies, but concludes by holding that this section is "inapplicable" and that the appellants had three years to bring their claim pursuant to the general statute, § 15-3-530. We adhere to our analysis of § 33-8-420, which is borne out by the Reporters' Comments.

JUSTICE MOORE: I respectfully dissent. Unlike the majority, I would hold the amendment to S.C. Code Ann. **§** 35-1-510 (Supp. 2004) gives rise to a private cause of action under S.C. Code Ann. **§** 35-1-1210 (Supp. 2004) and does not limit private causes of action to instances where a surety bond has been posted.

Additionally, I would find that the common law causes of action alleged were not abrogated by S.C. Code Ann. § 33-8-420 (1990). Simply because the General Assembly enacted a statute addressing the fiduciary duty owed to shareholders by corporate officers or directors does not mean that it intended to abrogate all common law causes of action involving corporate officers or directors and shareholders. *See* State v. Prince, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993) ("Common law offenses are not abrogated simply because there is a statutory offense proscribing similar conduct. Rather, it is presumed that no change in common law is intended unless the Legislature explicitly indicates such an intention by language in the statute.") (citations omitted). *See also* Nuckolls v. Great Atlantic & Pacific Tea Co., 192 S.C. 156, 161, 5 S.E.2d 862, 864 (1939) ("[I]t is not presumed that the Legislature intended to abrogate or modify a rule of the common-law by the enactment of a statute upon the same subject; that it is rather to be presumed that no change in the common-law was intended unless the language employed clearly indicates such an intention . . . ."). There is nothing in the Reporter's Comments cited by the majority or the statute itself that indicates the General Assembly intended to abrogate all common law causes of action involving corporate directors and officers and shareholders.

Furthermore, even if § 33-8-420 applies, I would find the statute of limitations period set forth in subsection (e) does not bar appellants' claims. Section 33-80-420(e) provides:

> An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations

> period does not apply to breaches of duty which have been concealed fraudulently.

(Emphasis added). The majority states that the Reporter's Comments to S.C. Code Ann. § 33-8-300 (1990) support its conclusion that the last sentence in § 33-8-420(e) applies only to the three-year statute of limitations period. I disagree. This subsection sets forth only one period, whichever occurs sooner of three years from the actual accrual or two years from discovery, and "this limitations period" does not apply when fraudulent concealment is alleged. The Reporter's Comments specifically state: "The advantage of the short limitations period set forth in subsection (e) is not available to fiduciaries who fraudulently conceal their wrongdoing." (Emphasis added). In my opinion, the last sentence in this subsection does not apply only to the three-year period and I would find this entire subsection inapplicable. I would hold that appellants had three years from discovery, pursuant to the general statute of limitations set forth in S.C. Code Ann. § 15-3-530 (2005), in which to bring their claims.

Accordingly, I would reverse the order dismissing appellants' complaint.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richland County
Magistrate Golie S. Augustus, Respondent.

Opinion No. 26109
Submitted January 4, 2006 - Filed February 6, 2006

SUSPENDED

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

I.S. Leevy Johnson, of Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a one year suspension. The facts as set forth in the agreement are as follows.

FACTS

The South Carolina Summary Court Judges' Association sponsored a seminar for all South Carolina summary court judges from Thursday, March 3, 2005, through Saturday, March 5, 2005, in Myrtle Beach. Respondent needed the continuing legal education (CLE) hours afforded by attendance at the seminar in order to meet his mandatory CLE requirements for the reporting period of July 1, 2004 to June 30, 2005.

As instructed by respondent, an employee of respondent enrolled respondent in the seminar and picked up respondent's enrollment package at the seminar on Thursday, March 3rd. Based on his enrollment in his seminar, the South Carolina Supreme Court Commission on CLE & Specialization (the CLE Commission) sent respondent a Form K/Report (Compliance Report) which included twelve hours of CLE credit for attendance at all three days of the seminar.

Respondent signed the Compliance Report under oath before a notary public and then submitted the signed and notarized report to the CLE Commission. In actuality, respondent did not attend the first two days of the seminar and only attended the seminar on the third day (which was scheduled from 10:30 a.m. to 3:00 p.m., including a 1½ hour non-credit adjournment for lunch).

On or about October 26, 2005, Disciplinary Counsel filed a complaint with the Commission alleging respondent did not attend the seminar on Thursday, March 3rd or Friday, March 4th. Respondent was required to file a written response to the complaint. In his October 27, 2005 written response, respondent asserted he attended the seminar on Friday, March 4th from 9:00 a.m. through 5:00 p.m., as well as Saturday, March 5th from 10:30 a.m. through 3:00 p.m.

Disciplinary Counsel initiated an investigation and requested Special Investigator James L. Evans, Jr., of the Attorney

General's Office interview respondent. Investigator Evans interviewed respondent over the telephone on October 31 and November 1, 2005. In both interviews, respondent admitted he did not attend the seminar on Thursday, March 3rd, and asserted he had attended the seminar on Friday, March 4th, and Saturday, March 5th.

When respondent signed the initial Compliance Report, made his initial written response to Disciplinary Counsel, and gave oral statements to Investigator Evans, respondent knew or should have known he had not attended the seminar on Friday, March 4th, and knew or should have known that his representations to the contrary were false. Also, when respondent filed the initial Compliance Report, he knew or should have known that he had not attended the seminar on Thursday, March 3rd, contrary to the information he certified in the report.

On November 3, 2005, respondent sent correspondence to Disciplinary Counsel in which he acknowledged he only attended the Saturday, March 5th portion of the seminar. Subsequently, respondent amended the Compliance Report, changing his CLE hours earned for the seminar from twelve hours to four hours, thereby claiming CLE credit for only Saturday, March 5th. Respondent filed the amended Compliance Report with the CLE Commission. Respondent amended the Compliance Report by making a pen and ink change to the CLE hours and without having the amended Compliance Report re-notarized or the change initialed by the notary. On November 29, 2005, respondent filed an amended response with Disciplinary Counsel.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); and Canon 2A (judge shall respect and comply with the law

and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). Respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for discipline for judge to violate Judge's Oath of Office) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent for one (1) year.

SUSPENDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Marlene T. Sipes, Respondent.

Opinion No. 26110
Submitted December 28, 2005 – Filed February 6, 2006

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel, and Charles N. Pearman, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Marlene T. Sipes, pro se, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction pursuant to Rule 7(b), RLDE, Rule 413, SCACR. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent represented Complainant A's ex-wife in divorce proceedings between Complainant A and his ex-wife. As part

of the divorce settlement between Complainant A and his ex-wife, Complainant A agreed to pay $22,000 to his ex-wife to extinguish a portion of the parties' $40,000 marital debt with the understanding that his ex-wife would pay off the entire marital debt using Complainant A's $22,000 and her own funds for the balance.

In December 2003, respondent received the $22,000 from Complainant A and placed those funds in her trust account. The balance in the trust account prior to the deposit of the $22,000 was $0. Respondent then transferred $2,200 from her trust account to her personal account which, according to notations on respondent's bank statement, represented a "10% debt settlement fee." Neither Complainant A nor his ex-wife agreed to, were advised about, or were even aware of the "10% debt settlement fee."

From December 2003 through April 2004, respondent transferred client funds totaling $14,600 from her trust account to her personal account. The $14,600 was not used to pay the marital debts of Complainant A and his ex-wife or for any other benefit to Complainant A and his ex-wife. The funds were used for respondent's own personal benefit.[1] Respondent diverted a total of $19,311.67 in funds belonging to Complainant A and his ex-wife from her trust account to her own personal use without knowledge or acquiescence of Complainant A and his ex-wife.

From January 2004 through April 2004, respondent made two deposits of personal funds totaling $7,900 into her trust account. From December 2003 through April 2004, respondent made payments to Complainant A and his ex-wife's creditors totaling $8,475.26 using funds paid into the trust account by respondent.

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[1] In March 2004, respondent paid off her Lowe's credit card balance of $1,897.52 with client funds using a check drawn on her trust account. In April 2004, respondent paid $600 in filing fees for other clients out of her trust account; there are no corresponding deposits to the trust account for these amounts.

Impermissible interest earned on the trust account funds was credited to respondent by the bank on a monthly basis. The interest was retained by respondent and not remitted to the South Carolina Bar in accordance with Rule 412, SCACR.

At the end of April 2004, the balance in respondent's trust account was $17.59 when the amount of client funds belonging to Complainant A and his ex-wife should have been $13,524.75. Respondent acknowledges she did not have this amount in cash or on deposit in any bank account at the end of April 2004.

From May 2004 through the present, respondent has made additional payments of $5,096.32 to Complainant A and his ex-wife's creditors. The total amount paid by respondent to date on behalf of Complainant A and his ex-wife is $13,571.58. Respondent does not have the balance of Complainant A and his ex-wife's funds of $8,428.42 in her trust account or elsewhere and, in fact, her trust account has reached a $0 balance and has been closed by the bank. As a result of respondent's actions and inactions, Complainant A and his ex-wife's credit ratings have been severely impaired and the majority of their $40,000 marital debt remains outstanding.

In May 2005, ODC issued a subpoena to respondent requiring the production of certain bank records including reconciliations, check stubs, deposit slips, and trust account ledgers. Respondent produced some of the requested information but could not locate, and therefore, could not provide, much of the information, notwithstanding the maintenance of documentation required by Rule 417, SCACR. Respondent has completely failed to reconcile her trust account has failed to comply with other requirements of Rule 417, SCACR.

Matter II

Respondent represented Complainant B in a divorce action. Over the course of the representation, Complainant B repeatedly attempted to contact respondent via telephone, e-mail, and through

third parties. Respondent frequently failed to respond to Complainant B's communications, thereby failing to properly and reasonably communicate with Complainant B regarding the status of her case.

In 1989, respondent was suspended form the practice of law for one year. In the Matter of Sipes, 297 S.C. 531, 377 S.E.2d 574 (1989). In 2003, respondent received a letter of caution with a finding of minor misconduct citing Rule 1.16 of Rule 407, SCACR.

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 to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.5 (lawyer's fee shall be reasonable); Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(c) (it is professional misconduct for lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent further admits her misconduct violated Rule 417, SCACR. She agrees her misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that

she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

In addition, within thirty (30) days of the date of this order, ODC and respondent shall file a restitution plan with the Court. In the plan, respondent shall agree to pay restitution to all presently known and/or subsequently identified clients, banks, and other persons and entities who have incurred losses as a result of her misconduct in connection with this matter. Moreover, in the restitution plan, respondent shall agree to reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of her misconduct in connection with this matter.

DISBARRED.

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

The Supreme Court of South Carolina

In the Matter of Marlene T. Sipes, Respondent.

ORDER

By opinion dated February 6, 2006, respondent was disbarred from the practice of law. See In the Matter of Sipes, Op. No. 26110 (S.C. Sup. Ct. filed February 6, 2006) (Shearouse Adv. Sh. No. 6 at 92). The Court hereby appoints an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

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

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

s/James E. Moore_____J.
FOR THE COURT

Columbia, South Carolina

February 6, 2006

The Supreme Court of South Carolina

In the Matter of H. Dewain Herring, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

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

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

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

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

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

Columbia, South Carolina
January 31, 2006