The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
E-MAIL: dshearouse@scjd.state.sc.us

N O T I C E

IN THE MATTER OF WARREN STEPHEN CURTIS, PETITIONER

On July 14, 2003, Petitioner was suspended from the practice of law for a period of two years, retroactive to June 17, 2002. In the Matter of Curtis, 355 S.C. 45, 583 S.E.2d 755 (2003). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than April 12, 2004.

Columbia, South Carolina

February 11, 2004

The Supreme Court of South Carolina

In the Matter of Stephen B. Grubb, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 1, 1974, Stephen Bunyan Grubb was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, received January 14, 2004, Mr. Grubb submitted his resignation from the South Carolina Bar. We accept Mr. Grubb's resignation.

Mr. Grubb 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, he 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.

Mr. Grubb 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 Stephen B. Grubb 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/John H. Waller, Jr. J.

s/Costa M. Pleicones J.

Justice E. C. Burnett, III, not participating

Columbia, South Carolina

February 20, 2004

The Supreme Court of South Carolina

In the Matter of Robert W. Garrett, Jr., Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 11, 1975, Robert Willoughby Garrett, Jr. was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court dated January 11, 2004, Robert W. Garrett, Jr. submitted his resignation from the South Carolina Bar. We accept Mr. Garrett's resignation.

Mr. Garrett 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, he 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.

Mr. Garrett 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 Robert W. Garrett, 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.

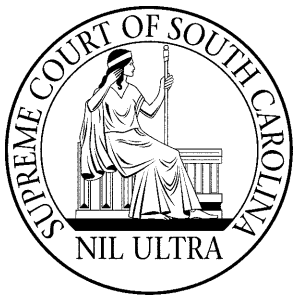
s/John H. Waller, Jr. J.

s/Costa M. Pleicones J.

Justice E. C. Burnett, III, not participating

Columbia, South Carolina

February 20, 2004



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

February 23, 2004

ADVANCE SHEET NO. 7

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

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3701-Sherman v. W & B Enterprises, Inc.	Denied 2/20/04
3703-Sims v. Hall	Denied 2/19/04
3707-Williamsburg Rural v. Williamsburg County	Pending
3709-Kirkman v. First Union	Denied 2/20/04

3710-Barnes v. Cohen Dry Wall	Denied 2/20/04
3712-United Service Auto Assn. v. Litchfield	Denied 2/19/04
3716-Smith v. Doe	Denied 2/02/04
3717-Palmetto Homes v. Bradley	Denied 2/19/04
3719-Schmidt v. Courtney	Denied 2/20/04
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3721-State v. Abdullah	Denied 2/20/04
3722-Hinton v. SCDPPPS	Denied 2/20/04
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2003-UP-688-Johnston v. SCDLLR	Denied 2/20/04
2003-UP-715-Antia-Obong v. Tivener	Denied 2/20/04
2003-UP-751-Samuel v. Brown	Denied 2/19/04
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Denied 2/20/04
2003-UP-757-State v. Johnson	Denied 2/20/04
2003-UP-758-Ward v. Ward	Denied 2/19/04
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Denied 2/20/04
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Denied 2/19/04
2004-UP-006-Hunt v. Warder et al.	Denied 2/20/04
2004-UP-008-Hall v. Bell	Denied 2/20/04
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2004-UP-010-Munnerlyn et al. v. Moody	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Denied 2/20/04
2004-UP-019-Real Estate Unlimited v. Rainbow Living Trust	Denied 2/19/04
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2004-UP-030-Meehan v. Meehan	Denied 2/20/04
2004-UP-038-State v. Toney	Denied 2/19/04
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2004-UP-047-Matrix Capital v. Brooks	Pending	
2004-UP-050-Lindsey v. Spartan Roofing	Pending	
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending	
2004-UP-056-Greene v. Griffith	Pending	
2004-UP-059-Burdette v. Turner	Pending	
2004-UP-061-SCDHEC v. Paris Mtn (Hiller)	Pending	
2004-UP-062-Blake v. Logan	Pending	

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3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart Stores	Pending
3646-O'Neal v. Intermedical Hospital	Pending
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3679-The Vestry v. Orkin Exterminating	Pending
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2003-UP-009-Belcher v. Davis	Pending
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2003-UP-144-State v. Morris	Pending
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2003-UP-205-State v. Bohannan	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-270-Guess v. Benedict College	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Panther v. Catto Enterprises	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-376-Heavener v. Walker	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
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2003-UP-468-Jones v. Providence Hospital	Pending
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2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-508-State v. Portwood	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending

2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth B. Massey, Respondent.

Opinion No. 25784
Submitted January 27, 2004 - Filed February 23, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel 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 the imposition of any sanction set forth in Rule 7(b), RLDE. We accept the agreement and find a two year suspension from the practice of law is the appropriate sanction. The facts, as set forth in the agreement, are as follows.

Facts

I. Domestic Relations Matter

Respondent was retained to represent a client in a domestic relations matter. During his representation of the client, respondent's wife filed for divorce in North Carolina on several grounds, including adultery. During his representation of the client, and while his own divorce action was pending, respondent was observed leaving the client's residence at 3:00 a.m. on a night that the client had custody of her minor child.

In addition, concurrent with his representation of the client, respondent employed the client as a contract employee of his law firm. Respondent maintains he had an agreement with the client that she could work off her attorney's fee debt by performing certain work related to respondent's law firm. However, respondent admits that the financial declaration he filed on the client's behalf in her domestic action did not reflect that the client derived any income as a result of working at respondent's office.

In response to inquiries by the Office of Disciplinary Counsel, respondent denied having an extra-marital affair with the client and, instead, affirmatively asserted the client was working on certain projects for him, including acting as a process server, and he was at the client's home several times at night. Respondent maintains that while his conduct created an appearance of impropriety, he did not engage in a sexual relationship with the client.

Respondent provided Disciplinary Counsel with affidavits from both the client and the client's mother indicating the client's mother was present at all times that he and the client were together and that no illicit relationship took place during the visits. However, respondent concedes that the private investigator's report indicated that the private investigator made multiple visits to the client's home and did not see anyone else in the home on those occasions, nor did he see any additional vehicles. Respondent provided

the same affidavits of his client and the client's mother to the court handling his own divorce action. He denies the affidavits were false.

II. Fee Agreement Matter

Respondent was retained, for a fee of $5,000, to represent another client in a domestic matter. The client also retained respondent to represent him on a traffic violation and in a criminal domestic violence (CDV) matter in which the client was the purported victim. Respondent entered into separate fee agreements with the client for representation in the traffic violation matter and the CDV matter, both of which set forth an hourly rate of $150.

Respondent provided the client with a billing statement wherein respondent billed the client for 52 telephone calls, 3 after-hours telephone calls, 6.5 hours of court and drive time, 10.25 hours for review, dictation and appointment time, and 6 hours for review of client correspondence, at the agreed upon rate of $150 per hour. Thereafter, respondent provided the client with another billing statement in which he billed the client for 7.25 hours of professional services at the rate of $150 per hour. Respondent filed an affidavit, executed under oath and before a notary public, in family court in an effort to recover attorney's fees for his representation of the client in the domestic matter. The affidavit stated respondent's billing rate was $175 per hour. Respondent maintains the hourly rate set forth in the affidavit was an error and that he was unaware of the error at the time he executed and filed the affidavit. However, respondent admits that it is his obligation to submit accurate affidavits to the court concerning his billing rate and that his submission of the affidavit at issue violated the Rules of Professional Conduct.

III. Divorce Matter

During the pendency of his divorce action, respondent made multiple complaints to the North Carolina Department of Social Services against both his former spouse and her parents. He also sent, or caused to be sent, certain facsimile transmissions to his former spouse's workplace.

Respondent admits that he utilized his law firm's facsimile equipment and letterhead to transmit various allegations concerning his former spouse's character to her employer.

The court handling the divorce action issued an order stating that "[t]hroughout the course of the marriage [respondent was] verbally abusive to [his former spouse] to the extent that the verbal abuse was overheard by neighbors and seen by close friends of the parties." The order also states that respondent testified at the hearing "that [he] had only been at [an alleged paramour's] residence on other occasions to drop off and pick up files." The order then provides that "[respondent] had approved an Affidavit signed by [the alleged paramour] stating this fact. . . .", and that he submitted the affidavit to the court. Finally, the order finds that [respondent] engaged in illicit sexual behavior with [the alleged paramour] after the separation of the parties and that this relationship [was] shown by a preponderance of the evidence."

Respondent admits that in his response to Disciplinary Counsel's inquiries, he maintained the North Carolina court found there to be neither evidence of marital misconduct nor physical abuse on his part. Respondent maintains that at the time he made his initial response to Disciplinary Counsel, he had not been served with an executed copy of the order in the divorce action. Respondent contends he was responding to the initial inquiry based on his memory and his understanding of the court's ruling. He also contends that he was responding to the original allegations filed by his former spouse with the Office of Disciplinary Counsel and that his understanding was that the complaint concerned evidence of marital misconduct prior to the date of the parties' separation.

IV. Client File Matter

Respondent was retained to represent a client in a matter concerning a Social Security disability claim. Respondent entered into a fee agreement with the client. The fee agreement stated the client would be billed $150 per hour for respondent's services, $50 per hour for paralegal services, plus all costs, whether the case was settled or went to trial.

Approximately eleven months later, the client terminated respondent as legal counsel and requested a copy of her file. Respondent charged the client $.33 per page to copy the file and, after receipt of payment, returned the file to the client.

In his response to Disciplinary Counsel's inquiries, respondent maintained that he was required by law to retain a copy of the client's file, so a copy of the file was made and the client was billed at the rate of $.33 per page. Thereafter, respondent was asked to provide a copy of the fee agreement he had entered into with the client and to explain his "legal" argument or justification for charging a client for the copying of the client's file. Respondent failed to timely respond to the second request for information. In the untimely response he eventually filed, respondent failed to provide a complete explanation as originally requested. Instead, respondent provided a copy of the fee agreement, which respondent now admits was an insufficient legal basis for charging the client $.33 per page for the copying and return of the client's file.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.3(a)(4) (a lawyer shall not knowingly offer evidence that the lawyer knows to be false); Rule 8.1(a) (a lawyer in connection with a disciplinary matter, shall not knowingly make a false statement of material fact); Rule 8.1(b) (a lawyer in connection with a disciplinary matter shall not fail to disclose a fact necessary to correct a misapprehension known by the lawyer to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); 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 also admits that his misconduct constitutes grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violation of the

Rules of Professional Conduct); Rule 7(a)(3) (knowing failure to respond to a demand or inquiry from a disciplinary authority); and Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We hereby accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for two years. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jeffrey A. Keenan, Respondent.

Opinion No. 25785
Submitted January 27, 2004 - Filed February 23, 2004

PUBLIC REPRIMAND

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

Jeffrey A. Keenan, of Myrtle Beach, pro se.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

Facts

Respondent was appointed to represent a client in a criminal matter. Respondent requested, and a date was set for, a bond reduction hearing. However, prior to the hearing, respondent resigned from his law firm and did not resume the practice of law. Respondent failed to notify his

clients of the fact that he was no longer practicing law, failed to take steps to protect the interests of his clients, did not seek permission from the courts to withdraw as counsel for his clients who had cases pending in court, nor did he seek to substitute counsel, and failed to notify opposing counsel in his pending cases. In the case of his criminal client, respondent failed to appear at the bond reduction hearing.

Respondent maintained his own trust account at the firm where he was employed. Upon his resignation from the firm, respondent failed to reconcile the trust account and failed to provide his employer with records pertaining to the account. Respondent failed to maintain adequate financial records and failed to conduct monthly reconciliations of the trust account, resulting in an overdraft in the amount of $81.50 upon his resignation. Respondent has since replaced the funds.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter); Rule 1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, and allowing time for employment of other counsel); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

Respondent also admits that by violating the Rules of Professional Conduct, he is subject to discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR.

Finally, respondent has violated Rule 417, SCACR, which sets forth the requirements for financial recordkeeping.

Conclusion

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Homes, Inc., Appellant,

v.

Philip Bradley, Chad Summerall, B&S masonry, Inc., Bradley and Summerall Masonry, Inc., Respondents.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3717
Submitted September 8, 2003 – Filed December 23, 2003
Withdrawn, Substituted and Re-Filed February 19, 2004

AFFIRMED AS MODIFIED

H. W. Pat Paschal, Jr., of Greenville, for Appellant.

John R. Devlin, Jr., Christopher R. Antley, both of Greenville, for Respondents.

HOWARD, J.: Palmetto Homes, Inc. ("Contractor") sued Philip Bradley, Chad Summerall, B&S Masonry, Inc., Bradley and

Summerall Masonry, Inc. (collectively "Subcontractor"), asserting causes of action for breach of contract, breach of contract accompanied by a fraudulent act, breach of warranty, and negligence. In response, Subcontractor pled a previously obtained arbitration award as a bar to Contractor's causes of action, simultaneously moving to confirm the arbitration award. The circuit court confirmed the arbitration award and entered judgment in favor of Subcontractor. Contractor moved to vacate the award and compel another arbitration, arguing it had not been provided notice of the arbitration proceeding and thus had not appeared to defend it. The circuit court denied the motion to vacate the arbitration award, ruling Contractor had been provided notice. Additionally, the court granted Subcontractor's motion to dismiss Contractor's claims, ruling they were barred by res judicata. Contractor appeals. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

Contractor is a residential homebuilder. Contractor entered into a contract with Subcontractor, whereby Subcontractor agreed to provide the masonry work on a residential homebuilding project. The contract between the parties provided for the arbitration of disputes with the American Arbitration Association ("AAA"). Specifically it read:

> ARBITRATION: SHOULD A DISPUTE ARISE BETWEEN THE CONTRACTOR AND SUB-CONTRACTOR AS TO ANY MATTER CONCERNING THE WITHIN SUB-CONTRACTOR AGREEMENT AND OR ANY WORK PERFORMED, MATERIALS FURNISHED ON PAYMENT MADE OR REQUESTED FOR SAME, SAID DISPUTE SHALL BE RESOLVED IN ACCORDANCE WITH THE RULES AND REGULATIONS OF THE AMERICAN ARBITRATION ASSOCIATION.

(emphasis as in original).

Following Subcontractor's completion of the masonry work, Contractor asserted there were defects in the masonry work and refused to pay Subcontractor. Subcontractor then filed a demand for arbitration with the AAA, asserting a claim for a mechanic's lien. Contractor never responded to the demand for arbitration.

After numerous notices were mailed and faxed to Contractor by the AAA, the arbitration took place without the participation of Contractor, and the arbitrator issued an award in favor of Subcontactor.

Following the arbitration award, Contractor brought this action asserting causes of action for breach of contract, breach of contract accompanied by a fraudulent act, breach of warranty, and negligence.

Subcontractor filed a Petition to Confirm Arbitration Award, and the circuit court issued an order confirming the arbitration award and entering judgment. Contractor then filed and served a motion to vacate the arbitration award and compel another arbitration of the dispute, arguing Rule 4, South Carolina Rules of Civil Procedure, applied, and Contractor never received proper notice of the arbitration proceedings. Subcontractor then filed and served its motion to dismiss Contractor's action on the grounds that res judicata barred the suit.

The circuit court denied Contractor's motion to vacate, ruling numerous attempts were made to serve and provide notice of the arbitration proceedings, but Contractor intentionally avoided service. Additionally, the circuit court granted Subcontractor's motion to dismiss Contractor's causes of action on the grounds of res judicata.

LAW/ANALYSIS

I. Contractor's Motion to Vacate the Arbitration Award

Contractor argues the circuit court erred by finding Contractor received service of process because the service did not comply with

Rule 4, South Carolina Rules of Civil Procedure.[1] We hold Palmetto received sufficient service of process and affirm as modified.

An appellate court may affirm the circuit court's ruling using any sustaining grounds that are both raised by the respondent's brief and found within the record. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

In the present case, the contract signed by the parties specifically stated the rules and regulations of the AAA apply to the arbitration. Thus, we analyze whether service of process was effected pursuant to the AAA rules. See Dowling v. Home Buyers Warranty Corp. II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993) (holding an agreement to arbitrate is a contract, and the parties are free to determine its terms); see also Simmons v. Lucas & Stubbs Assocs., Ltd., 283 S.C. 326, 332-33, 322 S.E.2d 467, 470 (Ct. App. 1984) (holding arbitration is a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement); Marolf Const. Inc. v. Allen's Paving Co., 572 S.E.2d 861, 863 (N.C. Ct. App. 2002) (holding parties may alter statutory service of process rules through valid arbitration agreements).

The AAA publication of the Construction Industry Dispute Resolution Procedures (1999) contains Rule R-40, which states:

> Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service.

[1] Rule 4 requires service of process on a corporation by personal service or by "registered or certified mail, return receipt requested and delivery restricted to the addressee."

Additionally, the rule provides for the following methods of service: "The AAA, the parties, and the arbitrator may also use overnight delivery, electronic facsimile (fax), telex, and telegram." Rule R-40.

The record indicates Subcontractor utilized regular mail as provided by the AAA rules for the service of the demand for arbitration. Subsequent notices sent by the AAA were sent by certified mail, regular mail, and facsimile. Sometimes the same notice was sent by more than one method.

The record also indicates the facsimiles were transmitted properly. Additionally, there is no evidence the regular mail was returned as undeliverable or for any other reason. The certified mail was returned. However, it was returned because its acceptance was refused or it went unclaimed. [2]

Given the facts of this case, we hold service of process was effected pursuant to the AAA rules.[3] Thus, Contractor received proper service of process.[4]

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[2] As an ancillary argument, Contractor contends the circuit court erred by ruling Contractor received service of process pursuant to Patel v. Southern Broker's Ltd., 277 S.C. 490, 493-95, 289 S.E.2d 642, 644-45 (1982) (holding a defendant cannot avoid process of the court by intentionally avoiding service). However, having ruled service of process was sufficient pursuant to the AAA rules, we need not address this issue.

[3]On petition for rehearing, Contractor argues this Court erred by considering the AAA rules because the rules were not within the record on appeal. Although the rules are not within our record on appeal, we take judicial notice of them. See Hetrick v. Friedman, 602 N.W.2d 603, 606 (Mich. Ct. App. 1999) (holding an appellate court may take judicial notice of the AAA medical malpractice rules, where the arbitration agreement stated it would be governed by them); see also Jones v. Anderson Cotton Mills, 205 S.C. 247, 254, 31 S.E.2d 447, 449 (1944) (holding the supreme court will take judicial notice of the

II. Subcontractor's Motion to Dismiss

Contractor argues the circuit court erred by granting Subcontractor's motion to dismiss, ruling Contractor's causes of action for breach of contract accompanied by a fraudulent act and negligence were barred by principles of res judicata. We disagree.

A. Scope of the Arbitration Agreement

As a threshold matter, Contractor contends its causes of action for breach of contract accompanied by a fraudulent act and negligence are not within the scope of the arbitration agreement, and thus, the arbitration award cannot bar the claims.[5]

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existence and content of a rule adopted by the Industrial Commission); Porter v. South Carolina Pub. Serv. Comm'n, 327 S.C. 220, 223, 489 S.E.2d 467, 469 (1997) (holding the supreme court will take judicial notice of South Carolina statutes).

[4] Contractor also argues the circuit court erred by denying Contractor's motion to vacate the arbitration award because: 1) Subcontractor was required to file a motion to compel arbitration prior to proceeding with the arbitration in its absence; 2) the arbitration award was obtained through undue means; 3) the arbitration award was rendered by a partial arbitrator; and 4) the arbitrator refused to postpone the proceedings for good cause resulting in prejudice to Contractor. However, these issues were not ruled on by the circuit court. Furthermore, Contractor did not raise these issues in a post-trial motion. Therefore, these issues are not preserved for appellate review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")

[5] Contractor's Summons and Complaint stated causes of action for breach of contract, breach of contract accompanied by a fraudulent act, breach of warranty, and negligence. The circuit court dismissed all of Contractor's claims, ruling the causes of action were barred by res

South Carolina law favors arbitration of disputes. Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000). Arbitration is a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement. Simmons, 283 S.C. at 332-33, 322 S.E.2d at 470.

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause . . . . [U]nless the court can say with positive assurance the arbitration clause . . . [does] not cover[] the dispute, arbitration should be ordered." South Carolina Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993).

The arbitration agreement states, "ANY MATTER CONCERNING THE WITHIN SUB-CONTRACTOR AGREEMENT AND OR ANY WORK PERFORMED" will be subject to arbitration. (emphasis as in original).

The parties' agreement provided Subcontractor would perform masonry work for Contractor's homebuilding project. Contractor's causes of action for breach of contract accompanied by a fraudulent act and negligence essentially allege Subcontractor defectively installed the masonry work on a residential homebuilding project.[6] These claims

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judicata. Contractor has only appealed the dismissal of its causes of action for breach of contract accompanied by a fraudulent act and negligence. Therefore, the dismissal of Contractor's other causes of action are not before us on appeal.

[6] Contractor's cause of action for breach of contract accompanied by a fraudulent act alleges:

> [Subcontractor] did commit an act of fraud by installing the brick veneer and other brick masonry products on a dwelling without adequate code required wall ties, by using and

are matters concerning the agreement or the work performed. Therefore, the claims are within the scope of the arbitration agreement. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597-98, 553 S.E.2d 110, 119 (2001) (holding where the partnership agreement provided all claims arising from the partnership agreement were to be arbitrated, any torts related to the partnership agreement were also matters for arbitration); Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001) (holding claims are within the scope of the arbitration clause if a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained).

B. The Doctrine of Res Judiciata

Contractor next argues the circuit court erred by ruling res judicata bars his claims for breach of contract accompanied by a fraudulent act and negligence. We disagree.

"Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any

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> installing mortar mix which was mixed incorrectly, with the wrong material ratios, this creating a defective, substandard, non-structural 'soft mortar,' not suitable for the veneer application, and not in accordance with standards of the industry or structurally safe and per manufacturer's recommendations, by omitting the 'air space' between house wall and brick veneer, by omitting flashing above doors/windows as well as intentional defective sub-standard brick veneer construction and installation process while concealing the same from the Plaintiff.

Contractors' cause of action for negligence alleges "[Subcontractor] . . . w[as] negligent and reckless in the construction of the masonry product and the use of defective masonry process."

issues which might have been raised in the former suit.'" Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "The doctrine requires three essential elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) the second action must involve matter properly included in the first action." Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995).

Intially, we note, an arbitration award is a final, binding award on the merits. See Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award."); Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 111, 333 S.E.2d 781, 788-89 (1985) (holding an arbitration award is meant to signify the end, not the commencement, of litigation; thus, arbitration awards are presumptively correct). Furthermore, it is uncontested the parties in the first arbitration proceeding are the same parties in this litigation. Thus, we need only determine if the causes of action for breach of contract accompanied by a fraudulent act and negligence involved matter properly included in the first action.

Contractor, by its own admission, began discovering defects in the brick work in the fall of 2000. It was subsequently served process of the arbitration proceedings over the course of several months beginning in December of 2000, and the arbitration award was granted in April 2001. Contractor did not participate in the proceedings, and thus, it did not present any of its claims to the arbitrators.

Contractor's failure to participate in the proceedings did not preclude its claims from being submitted to the arbitration proceeding. Rather, pursuant to the contract, all claims arising from the agreement were to be submitted to arbitration. see District of Columbia v. Bailey, 171 U.S. 161, 171 (1898) (holding a submission is an agreement between two or more parties to refer a dispute to a third party and be

bound by the third parties' decision); H.S. Cramer & Co. v. Washburnwilson Seed Co., 195 P.2d 346, 349 (Idaho 1948); 4 Am. Jur. 2d Alternative Dispute Resolution § 85 (1995) (stating a matter is submitted to arbitration when "two or more parties agree to settle their respective legal rights and duties by referring the disputed matters to a third party . . ."); Id. § 88 (holding an agreement to arbitrate all issues arising from a contract submits all issues within the scope of the contract to the arbitrators).

As previously noted, Contractor's claims arose from the Subcontractor agreement, and thus, its claims were within the scope of arbitration. Therefore, when the arbitration proceedings began, all claims arising from the contract were submitted to the arbitration proceeding, and, as with civil litigation, Contractor was procedurally required to arbitrate all claims arising therefrom or be barred by res judicata. See 4 Am. Jur. 2d Alternative Dispute Resolution § 214 (1995) ("The award of the arbitrators acting within the scope of their authority determines the rights of the parties as effectually as a judgment secured by regular legal procedure . . . . [Thus,] [i]f otherwise sufficient, an arbitration award is conclusive and binding . . . as to all matters submitted to the arbitrators, even though one of the parties neglects to present portions of his claim.") (emphasis added); see Rodgers Builders, Inc. v. McQueen, 331 S.E.2d 726, 730 (N.C. Ct. App. 1985) (holding res judicata applies to bar arbitration of claims actually arbitrated, as well as claims that could have been arbitrated in the prior proceeding); Lee L. Saad Construc. Co. v. DPF Architects, P.C., 851 So.2d 507, 517-18 (Ala. 2002) (holding an arbitrator's award is res judicata as to a subsequent claim if the original claim was within the scope of the arbitration agreement and all of the other elements of res judicata are met); Springs Cotton Mills v. Buster Boy Suit Co., 275 A.D. 196, 199-200 (N.Y. App. Div. 1949) (holding an arbitrator's award is res judicata as to all matters reasonably submitted, and thus, where one party does not participate in the arbitration proceedings, its claims, if they otherwise meet the elements of res judicata, will be barred); Hurley v. Fox, 587 So.2d 1 (La. Ct. App. 1991).

Notwithstanding the traditional res judicata analysis, Contractor argues, in an arbitration setting, res judicata only bars claims that were actually arbitrated, not claims that merely could have been arbitrated. In that regard, Contractor predicates its contention on Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 330 S.C. 13, 496 S.E.2d 858 (1998).

In Renaissance, our Supreme Court stated in a footnote:

> Res judicata can only apply to those matters included within the submission agreement. 4 Am. Jur. 2d Alternative Dispute Resolution § 214 (1995) (arbitrator is limited to decide only those issues submitted by the parties and res judicata may bar only issues submitted). The issue of . . . [plaintiff's] right to future fees was not submitted for arbitration in the prior proceeding. Therefore, . . . [plaintiff] is not precluded from raising this issue once it becomes entitled to the fees . . . .

Id. at 17, 496 S.E.2d at 860. Contractor contends this passage establishes that res judicata only applies to issues actually litigated in an arbitration proceeding and not to issues that could have been litigated. We do not read Renaissance so broadly.

In Renaissance, the plaintiff arbitrated its disputes against the defendant for breaches of the contract that occurred prior to the arbitration. The arbitrator then issued an award encompassing the breaches occurring prior to the arbitration but did not rule the contract was rescinded. Subsequently, the plaintiff brought another action against Defendant to recover damages for the breaches of contract occurring after the original arbitration award. In response, the Defendant moved for summary judgment, claiming res judicata barred the action because the prior arbitration award terminated the contract. The circuit court dismissed the action, ruling the arbitration award terminated the contract.

On appeal, this Court reversed and remanded, ruling further inquiry into the facts and circumstances surrounding the arbitration award was necessary to clarify the application of the law, and thus, summary judgment was inappropriate. On writ of certiorari, our supreme court vacated this Court, ruling the issue was not properly preserved at the trial level.

Reading Renaissance as a whole, we believe the supreme court's footnote merely reflected that the plaintiff could not have been required to submit issues, or arbitrate breaches of contract, that had not yet occurred. In the present case, Contractor's claims existed at the time of the original arbitration and thus could have been arbitrated in the original proceeding. Consequently, Renaissance is inapposite.

CONCLUSION

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

AFFIRMED AS MODIFIED.

STILWELL and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

The Late Terry Henson, by Harriet Hunt, his Aunt and Appointed Guardian ad Litem and Personal Representative, Appellant,

v.

International Paper Company, Georgetown Steel Corporation, The City of Georgetown and Georgetown County, Defendants, Of Whom International Paper Company is, Respondent.

Appeal From Georgetown County
Paula H. Thomas, Circuit Court Judge

Opinion No.3745
Heard December 11, 2003 – Filed February 17, 2004

AFFIRMED

Gregg E. Meyers, of Charleston and J. David Flowers, of Greenville, for Appellant.

Sean K. Trundy, of Charleston, for Respondent.

GOOLSBY, J.: This is a wrongful death action brought by Harriet Hunt against the respondent International Paper Company ("IPC") and others.[1] The issues on appeal relate to the verdict, which Hunt challenges as inconsistent, and to the trial judge's failure to instruct the jury regarding the doctrine of attractive nuisance. We affirm.

FACTS

Hunt commenced this action against IPC for the wrongful death of Terry Henson ("Terry"). Hunt's complaint alleged negligence, attractive nuisance, and unguarded dangerous condition. IPC answered, pleading affirmative defenses of comparative negligence and sole negligence of others.

IPC owns and operates a canal that runs twenty-seven miles through Georgetown County. The canal eventually terminates in the City of Georgetown. Several pumping stations aid the flow of the water through the canal. When water reaches the Church Street pumping station, it rushes through an underground, forty-two-inch pipe at 19,000 gallons per minute.

Access roads that IPC uses for maintenance run alongside the entire length of the canal. IPC employees travel these roads Monday through Friday, inspecting the canal. With the exception of some small areas near two schools, the canal is not fenced. "NO TRESPASSING" signs, which IPC erected when it constructed the canal, have disappeared. On Saturday, April 25, 1998, there were no signs warning trespassers of the hazard created by the swift, flowing water.

On that day, ten-year-old Terry and his older brother went to the home of Donnie Lippert, a friend. Another friend, Dustin, had been riding his go-cart near the canal and wanted to show the boys something the record describes as "a

[1] The complaint originally included Georgetown Steel Corporation, the City of Georgetown, and Georgetown County as defendants.

dirt jumping hill." The boys walked to the canal and entered the canal property, using a dirt path by a fence that protected the Church Street pumping station.

The boys eventually walked over to a pipe that spans the canal. Metal bracing, which serves as support for the pipe, gives it the appearance of a bridge.

The boys used the pipe to cross over to the other side of the canal, where they found a cast net. Terry decided to enter the water, holding on to the cast net while his friends held the other end. After being in the water for a short period, Terry attempted to grab the metal supports to lift himself out of the water. In the process, he slipped and fell back into the water. With his friends unable to hold on to the cast net, the swift current swept Terry away and he drowned.

IPC knew of at least three other people who had drowned in the canal, two of whom were reportedly good swimmers.

The trial judge directed a verdict in favor of IPC as to attractive nuisance and submitted the case to the jury, using a verdict form to which no one objected.

The form consisted of four questions. The first asked whether IPC was negligent and whether its negligence proximately caused Terry's death. The jury answered "yes." The second question asked whether Terry was negligent and whether his negligence proximately caused his death. Again, the jury answered "yes." Question three instructed the jury to allocate the percentage of negligence attributable to each party. The jury attributed 75 per cent to Terry and 25 per cent to IPC. Question four asked for the total amount of damages sustained by the plaintiff. The jury found $400,000. The question, however, instructed the jury not to reduce the amount of damages by the negligence attributed to Terry. It did not do so.

When the jury reached its verdict, the trial judge instructed the clerk to publish the answers to the verdict form. The clerk read the answers to questions one through three. Once the clerk stated the jury had allocated 75 per cent of the negligence to Terry and 25 per cent to IPC, the trial judge instructed the clerk

not to read any further; consequently, the clerk did not publish the jury's answer to the fourth question in the jury's presence.

After affirming the verdict, the judge asked the parties if there was anything else they wanted from the jury. Receiving negative responses from both parties, she dismissed the jurors.

Afterward, the judge published the answer to the fourth question. She explained she did not publish the answer earlier because of the percentage of negligence attributed to the child would not have entitled Hunt to a judgment against IPC.

LAW/ANALYSIS

I.

Hunt argues the jury's verdict is inconsistent and also contends the trial judge erred by discharging the jury before publishing the jury's answer to the fourth question.

A.

Hunt maintains the verdict was inconsistent because the jury, which experienced confusion concerning certain issues it was to decide, found Terry 75 per cent at fault, damages notwithstanding.

While it is true the record reflects the jury raised several questions with the trial judge during its deliberations and twice returned to the courtroom for further instructions, the trial judge responded to each question without objection from Hunt. In particular, Hunt did not object to the judge's additional instructions on comparative negligence.[2]

[2] See Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 119, 512 S.E.2d 510, 522 (Ct. App. 1998) (stating because no objection was raised concerning the trial judge's jury instruction in regard to contributory negligence, the issue was not preserved for appeal).

Regarding the verdict form, the trial judge explained to the jury how it was to complete it. She told the jury:

> Now, if you answered number three [which instructed the jury to apportion fault if it found the negligence of both parties proximately caused Terry's death] and you put a percentage, and this is again for instructions only, if this should happen, you put a percentage of negligence on the part of the deceased, Terry Henson, you do not lower the amount of damages by that percentage. Do not do it. In other words, even if you found negligence on the part [sic] for this question I want to see the total amount of damages. Do you understand what I'm saying? Do not reduce it by any amount of negligence you might apply.

Hunt did not object to these instructions and, as indicated above, did not object to the verdict form.[3]

Hunt, however, cites cases concerning inconsistent verdicts or the failure of a jury to follow instructions.[4] These cases have no application here. In this instance, the jury rendered a verdict that was consistent on its face with the structure of the form submitted to it and the jury completed the verdict form in accordance with the trial judge's instructions.

B.

Hunt also argues the trial judge erred in discharging the jury before publishing the verdict form to counsel in its entirety. We disagree.

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[3] See Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after a liability verdict had been reached, party failed to preserve any issue relating to the verdict form).

[4] See Johnson, 317 S.C. 415, 453 S.E.2d 908; Southeastern Mobile Homes, Inc., v. Walicki, 282 S.C. 298, 317 S.E.2d 773 (Ct. App. 1984).

The trial judge properly determined the jury returned a defense verdict based on the law of comparative negligence and in accordance with her instructions; thus, there was no need to publish the entire verdict form in the jury's presence.[5]

II.

A.

Tragic as this case is, the trial judge committed no error in directing a verdict in favor of IPC on the issue of attractive nuisance. Settled law supports what the trial judge did.[6] When viewed in the light most favorable to Hunt,[7] the evidence shows Terry was not attracted to the premises by reason of the canal. He went there for another purpose entirely, i.e., to see "a dirt jumping hill." The attractive nuisance doctrine "is not applicable where the injured child went to the dangerous situation for some other reason."[8]

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[5] See Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) (adopting the doctrine of comparative negligence and holding plaintiff can recover in South Carolina when his or her negligence is not greater than the defendant's negligence).

[6] See Kirven v. Askins, 253 S.C. 110, 117, 169 S.E.2d 139, 142 (1969) ("It follows that the doctrine is not applicable where the injured child went into the dangerous situation for some other reason. In Hancock v. Aiken Mills, Inc., 180 S.C. 93, 185 S.E. 188 [(1936)], we held that unless the child goes on the property by reason of the temptation of the very instrumentality, which is held to be the attractive nuisance, he cannot recover. Here, the appellant was not attracted to the premises of the respondent by reason of the presence thereon of either the pile of dirt or clods of clay.").

[7] See Adams v. Creel, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (stating that on an appeal from an order granting a directed verdict, the appellate court views the evidence and all reasonable inferences that can be drawn from the evidence in the light most favorable to the party against whom the verdict was directed).

[8] Kirven, 253 S.C. at 117, 169 S.E.2d at 142.

B.

Even if the trial judge erred in directing a verdict as to attractive nuisance, the error is harmless. The questions of whether IPC was negligent and whether IPC maintained an "unguarded condition"[9] remained for the jury's consideration.

Regarding the question of "unguarded condition," where, as here, the element of attractiveness is missing and the child does not enjoy the status of an invitee or business visitor, a child who sustains injury by reason of a dangerous condition of the premises may still have a right of recovery for his or her injuries under appropriate circumstances.[10] Our supreme court has recognized that this right runs "[p]arallel with the attractive nuisance doctrine."[11] We therefore fail to see how the trial judge's directing a verdict on the question of attractive nuisance prejudiced Hunt, being that the trial judge did not direct a verdict on the question of unguarded condition.[12] Then too, the negligence cause of action subsumed both unguarded condition and attractive nuisance.[13]

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[9] On the issue of "unguarded condition," the trial judge stated, "[I]n looking at the evidence in the light most favorable to the non-moving party, it is a jury issue for their determination and I'm speaking clearly [sic] on the unguarded condition issue."

[10] Everett v. White, 245 S.C. 331, 335, 140 S.E.2d 582, 584 (1965).

[11] Id. at 335, 140 S.E.2d at 584.

[12] See 65A C.J.S. Negligence § 507, at 240 (2000) ("Also, even though a thing or a condition may be both attractive and dangerous to children, the attractive nuisance doctrine cannot apply to it unless it is maintained or left in an unprotected or unguarded condition.").

We recognize the verdict form did not ask the jury to determine the unguarded condition claim separately from the negligence claim; however and as noted above, counsel for both parties examined the form after the trial judge submitted it to the jury and neither side voiced any objection to the form.[14]

C.

We also have serious reservations regarding whether this court can consider the issue regarding attractive nuisance.[15]

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[13] See, e.g., Daniels v. Timmons, 216 S.C. 539, 550-51, 59 S.E.2d 149, 155 (1950) ("All of the so-called attractive nuisance cases spring from negligence of the defendant in regard to his or her own property which is subject to being entered upon by a child who may be attracted onto the premises."); 65A C.J.S. Negligence § 494, at 220 (2000) ("The attractive nuisance doctrine is merely a detailed articulation of ordinary negligence, and under that doctrine, a trespassing child is afforded the protection of ordinary negligence doctrine . . . .").

[14] In fact, counsel for Hunt agreed that principles of negligence applied. In discussing IPC's motion for a directed verdict, he agreed it was "for the jury to say under the circumstances was it reasonable what [IPC] did and how they set it up and was the kid himself liable for it."

[15] See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal.") (citing Rule 208(b)(1)(B), SCACR); Barnes v. Cohen Dry Wall, Inc., Op. No. 3710 (S.C. Ct. App. filed December 8, 2003) (Shearouse Adv. Sh. No. 44 at 84-85) (declining to address an argument not set forth in the statement of issues on appeal). We are aware of the supreme court's holding in Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995), wherein the supreme court held this court should not have addressed an issue not preserved for review. The difference between Hendrix and this case is that here the question of whether the directed verdict issue is procedurally barred from appellate review is not, like the one in Hendrix, a settled one. Moreover, in this case, the dissent addresses the merits of the issue of attractive nuisance;

Rule 208(b)(1)(B), SCACR requires an appellant's initial brief to contain "[a] statement of each of the issues presented for review." The rule further states that, "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Chief Justice Toal and her co-authors write in their work Appellate Practice in South Carolina that "where an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments."[16]

For the latter proposition, the authors cite Southern Welding Works, Inc. v. K & S Construction Co.,[17] a case decided under the prior Rules of the Supreme Court in which Rule 4, Section 6, required an appellant to include exceptions, among other things, in a transcript of record. Each exception had to contain a concise statement of one proposition of law or fact that the appellant asked the supreme court to review.

Judge Bell, writing for the court of appeals in that case, noted the appellant's exceptions violated Rule 4, Section 6, because they failed to contain a complete assignment of error. Nevertheless, the court elected to consider those issues "which [were] reasonably clear from [appellant's] argument and which were ruled on by the trial court."

What we gleaned from Judge Bell's opinion is that the exceptions, questions, and issues presented for appellate review in that case, namely, whether the appellant had been denied its statutory right to four peremptory challenges and whether the trial court properly refused to allow the appellant to recall a witness, were preserved for appellate review notwithstanding the exceptions did not contain a "because" clause. In other words, although the

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therefore, under the circumstances and in the interest of judicial economy, we think we should likewise do so.

[16] Toal, Vafai, and Muckenfuss, Appellate Practice In South Carolina 75 (2d ed. 2002).

[17] 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985).

appellant challenged two particular, identifiable rulings made by the trial court, but failed to detail its reasons for each challenge, the failures were not fatal to its appeal because the court could discover the assignments of error directed to each of the two rulings from the arguments set out in the appellant's brief.

That is a far cry from what Hunt did in this case. Here, Hunt set forth in her initial brief the following issue:

> The trial court erred in failing to charge attractive nuisance where a ten year old was attracted to the canal in which he drowned but entered the property for a purpose unrelated to water.

(Emphasis added.)

The reason the trial judge did not charge the law regarding attractive nuisance was because that theory of recovery was no longer an issue in the case.[18] The trial judge had earlier directed a verdict on that issue in IPC's favor pursuant to its motion.

Nowhere in the issues on appeal does Hunt ask this court to review the granting by the trial judge of IPC's motion for a directed verdict. Rather, Hunt, under an issue relating to jury instructions, bootstraps an attack on the trial judge's action in directing a verdict by arguing the trial judge erred in refusing to charge attractive nuisance as a basis for recovery.

An issue directed at a trial court's denial of a request to charge does not reasonably and fairly embrace a trial court's granting of a directed verdict.[19] If a

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[18] A trial court should confine its instructions to the issues made by the pleadings and supported by the evidence. Tucker v. Reynolds, 268 S.C. 330, 233 S.E.2d 402 (1977).

[19] See 4 C.J.S. Appeal and Error § 591, at 592 (1993) ("Assigning error to one ruling or decision raises no question as to the correctness of another, and a party who has assigned one class of errors will not be allowed to argue another; hence, the scope of the question considered will be determined by the scope of the assignment and the theory presented.").

party wishes to question a trial court's directing of a verdict in an opposing party's favor, the party should appeal that particular ruling. A challenge to a failure to charge is a poor vehicle by which to challenge the grant of a directed verdict motion.[20] Appellate review of the grant of a motion for a directed verdict and of a denial or granting of a request to charge involve different considerations.[21]

AFFIRMED.

CURETON, A.J., concurs. ANDERSON, J., concurs in part and dissents in part in a separate opinion.

ANDERSON, J. (concurring in part and dissenting in part): I concur in the result reached by the majority in regard to the following issues:

1. Inconsistent Verdict; and
2. Discharge of the Jury Before Publishing the Verdict Form to Counsel in its Entirety.

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[20] Cf. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to [a] question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial."); State v. Moultrie, 316 S.C. 547, 555-56, 451 S.E.2d 34, 39 (Ct. App. 1994) (quoting State v. Lynn).

[21] See Strange v. S.C. Dep't of Highways and Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994) (holding the trial court, when ruling on a motion of directed verdict and JNOV, is "required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt."); Priest v. Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976) (holding an "alleged error in a portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial."); Tucker v. Reynolds, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977) (holding instructions to the jury should be confined to the issues made by the pleadings and supported by the evidence).

I disagree with the reasoning and analysis of the majority in regard to the issue of attractive nuisance. The holding of the majority misconstrues and misapplies the law extant in reference to the doctrine of attractive nuisance. **I VOTE to REVERSE and REMAND for trial disposition.**

FACTS/PROCEDURAL BACKGROUND

Hunt commenced this action against International Paper Company22 ("IPC") in her capacity as guardian ad litem and court-appointed representative for the late Terry Henson ("Terry"). The complaint alleged wrongful death, attractive nuisance, and unguarded dangerous condition. IPC answered, pleading affirmative defenses of comparative negligence and sole negligence of others. The issue of liability was bifurcated from the trial of punitive damages.

IPC owns and operates a canal, which runs twenty-seven miles through Georgetown County, eventually terminating in the city of Georgetown. The depth of the canal ranges from twelve to twenty feet depending on conditions. Because of the water's coloration, one looking into the water would not be able to judge the canal's depth.

Water flows through the canal assisted by a number of pumping stations to what is known as the Church Street pumping station. Located close to Georgetown High and Georgetown Middle Schools, the Church Street pumping station separates the schools from residential and commercial areas. When water reaches the Church Street pumping station, large electric pumps push the water through an underground pipe forty-two inches in diameter. The pipe runs from the pumping station to a paper mill. The pumps typically push 19,000 gallons of water per minute through the pipe, and this is the flow rate at which the pumps were operating on the day in question.

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22 Although the complaint originally included Georgetown Steel Corporation, the City of Georgetown, and Georgetown County as defendants, the case went to trial against IPC alone.

Access roads used for maintenance are located along the entire length of the canal. Employees of IPC traverse these roads inspecting the canal Monday through Friday. With the exception of some small areas near the schools, the canal is not fenced. Although an employee testified IPC put up no trespassing signs when the canal was first constructed, the signs "didn't stay." IPC does not dispute there were no warning signs in place at the time of the events in question.

On April 25, 1998, ten-year-old Terry and his older brother went to the home of Terry's friend, Donnie Lippert. Another friend, Dustin, had been riding his go-cart near the canal and wanted to show the boys a "dirt jumping hill." With this in mind, the boys walked to the canal. Upon arriving, they entered the canal property via a dirt path located along a fence protecting the Church Street pumping station.

The boys eventually walked towards a pipe that crosses the canal. The pipe extends from the bank on one side of the canal, runs across the water, and into the bank on the other side of the canal. Metal bracing, which serves as support for the pipe, gives it a bridge-type look. Due to the construction, the pipe is known as the "pipe bridge."

Donnie testified that Terry saw the pipe and wanted to walk across it to the other side of the canal. Arriving on the other side, the boys found a cast net and Terry decided he could use the rope from the cast net to "hold on while he got into the water." After being in the water for a short period of time, Terry attempted to climb out using the metal support structure. Although his friends were grasping the rope and he was clenching onto the metal supports, Terry slipped and his friends were unable to hold on to the rope.

Donnie averred that even though the water looked calm, after the boys lost their grip on the rope, Terry was swept down the canal very quickly. Terry's brother declared that Terry traveled so fast down the canal towards the Church Street pumping station they were unable to reach him in time to help. It is undisputed Terry drowned.

IPC stipulated (1) it knew of at least three other drownings that have taken

place in the canal; and (2) two of victims were good swimmers.

At trial, IPC moved for, and was granted, a directed verdict on the applicability of the attractive nuisance doctrine to the facts of the case. The trial court ruled, "The case law indicates that the reason they needed to have gone [to the canal] was that they were attracted by this nuisance, it was attractive nuisance and the evidence in this case is clear they went [to the canal] for another purpose and then went to this, this site." Hunt argues the ruling was error.

ISSUE

Did the trial court err in granting a directed verdict and failing to charge attractive nuisance where the decedent was attracted to the water in which he drowned, but entered the property for another reason?

STANDARD OF REVIEW

"The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-629 (Ct. App. 1999) (citing Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996)); accord Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002); South Carolina State Highway Dep't v. Clarkson, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697-98 (1976).

A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to the defendant's liability. Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). "[T]he court may direct a verdict in favor of the defendant when the testimony affords no basis for a recovery in favor of the plaintiff." Hillhouse v. Jennings, 60 S.C. 392, 401, 599 S.E. 596, 599 (1901). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Swinton Creek Nursery v. Edisto Farm Credit, ACA,

334 S.C. 469, 476-77, 514 S.E.2d 126, 130 (1999); Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 860 (Ct. App. 2001). However, if the evidence as a whole is susceptible of more than one reasonable inference, the case must be submitted to the jury. Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998); Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 426, 489 S.E.2d 223, 223 (Ct. App. 1997); see also Heyward v. Christmas, 352 S.C. 298, 305, 573 S.E.2d 845, 848 (Ct. App. 2002) (finding if the evidence is susceptible of more than one reasonable inference, a jury issue is created and the court may not grant a directed verdict).

On appeal from an order granting a directed verdict, the appellate court views the evidence and all reasonable inferences from the evidence in a light most favorable to the party against whom the directed verdict was granted. Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003) ("When considering a directed verdict . . . motion, the trial court is required to view the evidence and the inferences that can be drawn from that evidence in the light most favorable to the nonmoving party."); Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 213, 236 (2002) ("In ruling on directed verdict . . . motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) ("A trial judge, when ruling on a motion for directed verdict, must view the evidence in the light most favorable to the non-moving party."); Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 860 (Ct. App. 2001) ("In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party."). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); see Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003) ("In ruling on motions for directed verdict . . . , the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt.").

When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002); Pond Place Partners v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002); Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct. App. 2000). The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997); Hurd v. Williamsburg County, 353 S.C. 596, 609, 579 S.E.2d 136, 143 (Ct. App. 2003). Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 848 (Ct. App. 1997). Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. Bell v. Bank of Abbeville, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947); Small, 329 S.C. at 461, 494 S.E.2d at 848. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation. Hanahan, 326 S.C. at 149, 485 S.E.2d at 908; Small, 329 S.C. at 461, 494 S.E.2d at 848.

This does not mean the court should ignore facts unfavorable to the opposing party. Long v. Norris & Assocs., Ltd., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000); Love v. Gamble, 316 S.C. 203, 208, 448 S.E.2d 876, 879 (Ct. App. 1994). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Hurd, 353 S.C. at 609, 579 S.E.2d at 143; Pond Place Partners, Inc., 351 S.C. at 15, 567 S.E.2d at 888. This court can only reverse the trial court when there is no evidence to support the ruling below. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). Essentially, our court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor. Harvey, 350 S.C. at 309, 566 S.E.2d at 532; Hanahan, 326 S.C. at 149, 485 S.E.2d at 908; Hurd, 353 S.C. at 608, 579 S.E.2d at 142.

LAW/ANALYSIS

ATTRACTIVE NUISANCE

Appellant professes the trial court erred by granting IPC's directed verdict motion as to the cause of action for attractive nuisance. Specifically, Appellant argues the trial court erroneously concluded South Carolina case law requires a plaintiff alleging attractive nuisance to be attracted to the property by the instrumentality which causes injury or death. Appellant contends this conclusion reads the attractive nuisance case law too narrowly. Appellant's position is that, although the boys were attracted to the canal property for a reason unrelated to the canal itself, once on the property, they were attracted to the water in which Terry drowned and this is sufficient to support the cause of action. I agree.

The origins of the attractive nuisance doctrine in South Carolina can be traced to the 1885 decision in Bridger v. Asheville & Spartanburg R.R. Co. 25 S.C. 24 (1885). In Bridger, a case concerning injuries to a minor, our Supreme Court adopted the position championed in what has come to be known as the "turntable cases." Id.; see, e.g., R.R. Co. v. Stout, 84 U.S. 657, 21 L. Ed. 745 (1873) (holding that a child could recover for injuries caused as a result of the failure of the railroad company to keep its turntable locked or guarded). In ruling that the question of liability was for the jury, the Bridger Court placed emphasis on the fact that "there was testimony that the turntable was a dangerous machine; that it was left and located in an exposed place, easily accessible, unguarded, unfenced and unlocked and that the plaintiff was of that age when he was incapable of . . . appreciating [its] danger." 25 S.C. at 29.

Following Bridger, South Carolina courts have had many opportunities to develop the doctrine of attractive nuisance. See Franks v. S. Cotton Oil Co., 78 S.C. 10, 58 S.E. 960 (1907); McLendon v. Hampton Cotton Mills Co., 109 S.C. 238, 95 S.E. 781 (1917); Sexton v. Noll Constr. Co., 108 S.C. 516, 95 S.E. 129 (1918); Renno v. Seaboard Air Line Ry., 120 S.C. 7, 112 S.E. 439 (1922); Hart v. Union Mfg. & Power Co., 157 S.C. 174, 154 S.E. 118 (1930); Bannister v. F.W. Poe Mfg. Co., 162 S.C. 1, 160 S.E. 138 (1931); Hancock v. Aiken Mills,

Inc., 180 S.C. 93, 185 S.E. 188 (1936); Perrin v. Rainwater, 186 S.C. 181, 195 S.E. 283 (1938); Daniels v. Timmons, 216 S.C. 539, 59 S.E.2d 149 (1950); Bush v. Aiken Elec. Co-op., Inc., 226 S.C. 442, 85 S.E.2d 716 (1955).

Expanding on the ideals expressed in Bridger, Franks v. Southern Cotton Oil Co., 78 S.C. 10, 58 S.E. 960 (1907), articulated what would become the foundation of our current law on the doctrine. In Franks, the Court sustained a denial of defendant's demurrer with regard to a complaint alleging attractive nuisance, when a child under ten years old drowned in a reservoir located on defendant's property, where young children were known to play. Id. at 12, 58 S.E. at 963. In reaching its decision, the Court adopted the following excerpt from Thompson on Negligence § 1030:

> We now come to a class of decisions which hold the landowner liable in damages in the case of children injured by dangerous things suffered to exist unguarded on his premises, where they are accustomed to some [sic] with or without license. These decisions proceed on one or the other of two grounds: (1) That where the owner or occupier of grounds brings or artificially creates something thereon which from its nature is especially attractive to children, and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. (2) That although the dangerous thing may not be what is termed an 'attractive nuisance'--that is to say, may not have especial attraction for children by reason of their childish instincts--yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them.

Id. at 15, 58 S.E. at 963 (emphasis added).

The attractive nuisance aspect of the Franks decision did not depend on

whether the child was actually attracted to the property on which he was injured, rather the question was whether the landowner maintained a dangerous condition on his property that appealed to "childish instincts and impulses." Id. at 13, 58 S.E. at 962 (citation omitted). Although collateral to the issue currently being addressed, in the years following the decision, several courts recognized the alternate ground for recovery based not on the attractiveness of instrumentality, but its dangerousness. See, e.g., Everett v. White, 245 S.C. 331, 140 S.E.2d 582 (1965) (reaffirming adoption of the doctrine).

A review of cases applying the attractive nuisance doctrine articulated in Franks proves instructive. In Hayes v. Southern Power Co., 95 S.C. 230, 78 S.E. 956 (1913), the Court upheld a jury verdict based upon attractive nuisance where defendant maintained live electrical wires just inside a window of a building, near which children were known to play. Id. at 233, 78 S.E. at 958. The Court based its decision primarily on the principles articulated in Franks. Id. at 239, 78 S.E. at 960. The decision does not question why the injured child was on the property of the defendant.

In Hart v. Union Manufacturing & Power Co., 157 S.C. 174, 154 S.E. 118 (1930), a young child was electrocuted after climbing a metal electrical tower. Id. at 181-82, 154 S.E. at 121. There was no evidence the child was attracted to the defendant's property because of the existence of the dangerous tower itself. Instead, testimony showed it was common knowledge that the area in which the tower was located was "peculiarly attractive to children." Id. at 183, 154 S.E. at 121. Although there was no direct evidence proving the defendant knew children played around the tower, the Court held the jury could infer knowledge from the fact that "[a]ll about the tower were indications that the grounds were used constantly by children at play." Id. at 185, 154 S.E. at 122.

The court's ruling in the instant case and IPC's position on appeal – that the child must be attracted to the property by the device that causes injury – appear to be based primarily on the Supreme Court's decision in Hancock v. Aiken Mills, Inc., 180 S.C. 93, 185 S.E. 188 (1936). In Hancock, a thirteen-year-old boy was seriously burned after standing near a fire built in the yard of his home by the defendants. Id. at 95, 185 S.E. at 189. The child testified he went near the fire to report on a personal errand to one of the defendants, not

because he was attracted to it. Id. at 100, 185 S.E. at 191.

The Hancock Court relied primarily on the decision in Sexton v. Noll Construction Co., 108 S.C. 516, 95 S.E. 129 (1918), to find these facts did not support a cause of action for attractive nuisance. In Sexton, children were attracted to a mound of sand situated on a vacant lot. Id. at 520, 95 S.E. at 130. The attraction consisted of "rolling down" the hill, an activity which, taken alone, involves little danger. Id. However, a "pot" of boiling asphalt was located nearby. Id. As the plaintiff was leaving the sand mound, he walked by the pot and was injured when some of the asphalt sprayed onto him. Id. at 521, 95 S.E. at 130. The Court reversed a verdict for the plaintiff based on the absence of proximate cause. Id. at 522-523, 95 S.E. at 131. The Court explained that "the plaintiff . . . was not playing with the pot at the time of injury; nor was his conduct influenced in any respect by reason of the fact that the pot was obviously dangerous on account of its exposed condition." Id. (citation omitted). The Court based its decision on the lack of attraction to the instrumentality causing injury, not that the child was on the property for another reason.

After determining the reasoning of Sexton disposed of the attractive nuisance issue, the Hancock Court cited authorities from other jurisdictions in support of its conclusion. 180 S.C. at 103-104, 185 S.E. at 193. While this authority stands for the proposition championed by IPC and the trial court – i.e., that a plaintiff cannot recover unless he or she goes onto the property by reason of the attraction to the device which is found to be the attractive nuisance –, such authority was not necessary to the decision in the case. Id.

Although in the past this position was accepted by a number of jurisdictions, see United Zinc & Chemical Co. v. Britt, 258 U.S. 268, 42 S.Ct. 299, 66 L.Ed. 615 (1922) (holding same), the principle is now generally rejected. See Restatement (Second) of Torts § 339 cmt. b (1965). Section 339 of the Restatement provides:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

As the drafters of the Restatement explain, "[i]t is now recognized by most of the courts that the basis of the rule is merely the ordinary negligence basis of a duty of reasonable care not to inflict foreseeable harm on another, and that the fact that the child is a trespasser is merely one of the facts to be taken into consideration." Restatement (Second) of Torts § 339 cmt. b; see also 62 Am. Jur. 2d Premises §§ 313, 316 (1990) (noting attractiveness requirement has been relegated to little importance, or more commonly, disposed of altogether).

Pre-Hancock cases demonstrate and post-Hancock cases confirm South Carolina has never been one of the few jurisdictions which adhere to this rule. In Perrin v. Rainwater, 186 S.C. 181, 195 S.E. 283 (1938), a cause of action under attractive nuisance was stated when a seven-year-old girl, while on appellant's property for dance class, was attracted to a fire escape and fell to her death. Id. at 185-186, 195 S.E. at 284.

Similarly, in Daniels v. Timmons, 216 S.C. 539, 59 S.E.2d 149 (1950), tenants in an apartment complex stated a cause of action for attractive nuisance, when their fifteen-month-old son was attracted to and injured by a defective stairway located on the rented property. Id.; see also Lynch v. Motel Enters., Inc., 248 S.C. 490, 151 S.E.2d 435 (1966) (finding it a jury question whether or not child was attracted to the pool in which he drowned).

In Kirven v. Askins, 253 S.C. 110, 169 S.E.2d 139 (1969), a child was injured by being struck with a clod of dirt or clay while on the property of the defendant. Id. at 112, 169 S.E.2d at 139. Although it was known to all parties that children frequented the premises, there was no evidence to suggest the children were attracted to the premises by the desire to throw dirt clods. Id. at 113-114, 169 S.E.2d at 140. The main issue in Kirven concerned whether the clods of dirt could be considered "unreasonably dangerous to children." Id. at 115, 169 S.E.2d at 141. Based on the facts of the case, the Court found that a clod of dirt "was not a dangerous thing or instrumentality as is required to establish liability under either the attractive nuisance doctrine or the alternate ground of recovery stated in Everett v. White." Id. at 117, 169 S.E.2d at 141.

Concerning the prerequisites for sustaining a cause of action based on attractive nuisance, the Kirven Court explicated: "[I]t is necessary that the condition or instrumentality which caused the injury, should have actually attracted the child into danger. It follows that the doctrine is not applicable where the injured child went into the dangerous situation for some other reason." Id. at 117, 169 S.E.2d at 142. Had the Court stopped its commentary here, I would be in total agreement, as this is a correct interpretation of the law of attractive nuisance as it has developed in South Carolina. However, the Court went on to quote the language from Hancock requiring the child to be on the property because of the attractiveness of the instrumentality causing injury. Id.

A review of the facts in the current case elucidates the contrariety of the two statements. It is undisputed the children went to the canal property for a reason unrelated to the canal itself and there were no signs warning of the dangers posed by the water or effective fencing to prevent unsuspecting children from coming into contact with it. One of the boys testified that once on the property, Terry saw the pipe bridge and wanted to walk across it. He further

maintained that upon finding a cast net on the other side of the pipe bridge, Terry got the idea to tie the rope from the net around his waist so he could enter the water of the canal.

Under the first explanation in Kirven, Terry would clearly meet the prerequisites for maintaining an attractive nuisance action. Explicably, the "instrumentality which caused the injury . . . actually attracted the child into danger." Kirven, 253 S.C. at 117, 169 S.E.2d at 142. Terry was attracted to the pipe bridge, and it was the accessibility of this pipe bridge, coupled with the latent dangerousness of the water in the canal, that created the danger. Furthermore, there is no evidence that Terry went into the dangerous situation, i.e., onto the pipe bridge and into the water, "for any other reason" than his attraction to the water.

Alternatively, if the second proposition is followed, the fact that Terry was attracted to the dangerous condition has no consequence whatsoever even if IPC knew children often frequented the property. Once it is determined Terry and his friends entered the property without the canal in mind, the analysis ends. To follow this position would undermine nearly every case decided to date in South Carolina. It would emasculate the idea that the doctrine of attractive nuisance is one "based upon humanity and the wholesome maxim, 'Sic utere tuo ut alienum non laedas' [(So use your own as to not injure another's property)]." Franks v. S. Cotton Oil Co., 78 S.C. 10, 19, 58 S.E. 960, 963 (1907).

Therefore, I find that the trial court erred in granting a directed verdict as to Terry's cause of action for attractive nuisance. The issue should have been submitted to the jury.

Finally, IPC asserts as an additional sustaining ground that, even if the trial court erred in not sending the attractive nuisance cause of action to the jury, this error is harmless. Specifically, IPC argues, "[W]hile the Plaintiff may have lost the attractive nuisance doctrine, she retained the similar unguarded condition cause of action."

Juxtaposition of the theories of "attractive nuisance" and "unguarded condition" demonstrates with clarity the dissimilarities of elements in each

theory. In contrariety to the argument of IPC, there is no amalgamation of these theories in this case. An academic review of the law of attractive nuisance reveals a separate and distinct cognizable theory of the common law with venerable origins.

Because it is axiomatic that a party may bring as many causes of action as he or she may have, I find this argument to be without merit. See Rule 8, SCRCP (noting a party may state as many separate causes of action as he has regardless of their consistency).

CONCLUSION

Based on an illogical and strait-jacket analysis, the majority engrafts on the doctrine of attractive nuisance an exception: the child was **not** attracted to the venue by the dangerous condition. This ill-conceived notion and idea ignores the reality of the case sub judice. Incipiently, the child visited the venue for "hill jumping purposes" but was attracted to the dangerous condition existing at the venue: "the canal."

The factual duality of this case, i.e., the initial non-attraction and the actual attraction to the dangerous condition proves the necessity to recognize the position articulated by § 339 of the Restatement (Second) of Torts (1965).

Relying upon Hancock v. Aiken Mills, Inc., 180 S.C. 93, 185 S.E. 188 (1936), the majority eviscerates the basic doctrine of attractive nuisance. The factual dissimilarities of Hancock and the present case dissuade the Court from any precedential impact of Hancock. Additionally, the actual holding in Hancock does **not** give credence to the conclusion that the doctrine of attractive nuisance has no efficacy if there is no initial attraction of the child to the dangerous condition.

An academic review of Hancock leads to the ineluctable conclusion that a venue may be bifurcated in the originality of the attraction and the attraction of an actual dangerous condition at the same site.

The holding of the majority renders the attractive nuisance doctrine

impotent and non-utilitarian. This result is neither warranted nor desirable in South Carolina jurisprudence.

The most troubling and vexatious aspect of the ruling of the majority is the failure to recognize the attraction of the child to this dangerous condition existing on the property. Several children have already drowned in this canal; yet, the majority creates a legalistic and protective barrier against the application of the doctrine of attractive nuisance.

Accordingly, based on the foregoing, I **VOTE** to **AFFIRM IN PART, REVERSE IN PART, and REMAND** for trial disposition.

STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Darryl Arthur, Appellant.

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 3746
Submitted January 12, 2004 – Filed February 23, 2004

AFFIRMED

Chief Attorney Daniel T. Stacey, of the Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General David A. Spencer; and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

KITTREDGE, J.: This appeal presents the question of whether the offense of tampering with a motor vehicle[1] (auto-tampering) is a lesser-included offense of breaking into a motor vehicle[2] (auto-breaking). We hold it is not and affirm Darryl Arthur's convictions and sentence.

FACTS

Arthur broke into the vehicle of Michael Hendrix, a lieutenant with the City of Columbia Police Department, while the vehicle was in the parking lot of the Department's North Region Headquarters. Arthur gained entry by breaking into the driver's side rear window. A pair of night vision binoculars was discovered missing from the vehicle. In the rear of the vehicle was a fishing rod with a lure, known as "torpedo plug," attached. While in the vehicle, it appears Arthur caught his hand in the fishing lure because blood was found in the vehicle.

The crime was quickly discovered and a police radio dispatch was given, alerting officers of the incident. Officer Allen Barber, who was in the area of the police department parking lot, heard the radio broadcast and observed Arthur walking away from the parking lot. As Officer Barber circled the area, he observed Arthur in the area of nearby apartments. Arthur was observed leaning into a vehicle's passenger side window. When Officer Barber approached, the vehicle "pulled off." Arthur "put his hands up," revealing blood on his hands. Arthur then fled, and a foot pursuit ensued. Arthur was eventually apprehended and, following a struggle, placed in custody. Arthur's DNA matched the blood found in the vehicle near the fishing lure. The night vision binoculars were not recovered.

Arthur was convicted of breaking into a motor vehicle, for which he was sentenced to prison for five years, and resisting arrest, for which he received a consecutive sentence of one year imprisonment. Arthur was found not guilty of larceny.

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[1] S.C. Code Ann. § 16-21-90 (Supp. 2003)
[2] S.C. Code Ann. § 16-13-160 (Supp. 2003)

Regarding the charge of auto-breaking, Arthur requested the trial court charge the jury on the offense of auto-tampering. Arthur asserted the State had not proven the item stolen from the vehicle was connected to Arthur. The trial court denied Arthur's request. Arthur appeals.

LAW/ANALYSIS

Arthur argues the trial court erred in failing to give a jury charge on the purported lesser-included offense of auto-tampering. We disagree.

"The test for determining if a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000) (citing Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000); Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997); Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995); State v. Bland, 318 S.C. 315, 457 S.E.2d 611 (1995)). We find the offense of auto-breaking does not contain all the elements of auto-tampering. Accordingly, we conclude auto-tampering is not a lesser-included offense of auto-breaking.

Section 16-13-160 concerns the felony offense of auto-breaking:

> (A) It is unlawful for a person to:
>
> (1) break or attempt to break into a motor vehicle or its compartment with the intent to steal it or anything of value from it, or attached or annexed to it, or used in connection with it or in the perpetration of any criminal offense
>
> . . .

S.C. Code Ann. § 16-13-160 (2003) (emphasis added).

Section 16-21-90, in contrast, concerns the separate offense of auto-tampering:

> A person who, with intent and without right to do so, damages a vehicle or damages or removes any of its parts or components is guilty of a misdemeanor.
>
> A person who, without right to do so and with intent to commit a crime, tampers with a vehicle or goes in or on it or works or attempts to work any of its parts or components or sets or attempts to set it in motion is guilty of a misdemeanor.

S.C. Code Ann. § 16-21-90 (2003).

To satisfy the first paragraph of the auto-tampering statute, one must either intentionally damage a vehicle or intentionally damage or remove vehicle parts. The auto-breaking statute, however, contains neither damage nor removal elements. The essence of the auto-breaking offense is the breaking into, or the attempt to break into, a vehicle with the intent to steal it or anything of value from it. As such, the conduct described in the first paragraph of the auto-tampering statute cannot be considered a lesser-included offense of auto-breaking.

The second paragraph of the auto-tampering statute lists four additional means by which an individual can violate the statute: (1) tampering with the vehicle; (2) going in or on the vehicle; (3) working or attempting to work any of the vehicle's parts or components; and (4) setting or attempting to set the vehicle in motion. Similar to our findings regarding the first paragraph of section 16-21-90, we find the offense of auto-breaking does not include any of these four types of conduct. While it logically follows that auto-tampering includes the intentional tampering with a vehicle, auto-breaking does not include mere tampering. Moreover, auto-breaking embraces an attempt, while the auto-tampering statute reaches only completed acts. Next, auto-tampering could include an element of "going in or on" the vehicle. Such element does not exist in auto-breaking, as one need not actually touch the vehicle to be convicted of that crime. Similarly, the "working" or attempting to work any of the vehicle's components is not contained in auto breaking, and one need not work components in order to break into a vehicle. Auto-

breaking could involve a vehicle's component parts, but only in the context of stealing, or attempting to steal, "anything . . . attached or annexed to" the vehicle. S.C. Code Ann. § 16-13-160. Finally, auto-tampering also could include the act of setting or attempting to set the vehicle in motion. Such conduct clearly does not fall under the "break or attempt to break into" language of the auto-breaking statute. Therefore, the four modes of conduct described in the second paragraph of section 16-21-90 cannot be properly considered as lesser-included offenses of section 16-13-160.

CONCLUSION

Auto-tampering is not a lesser-included offense of auto-breaking. The trial court properly refused to charge the auto-tampering statute. Arthur's convictions and sentences are

AFFIRMED.

HEARN, C.J. and HOWARD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RIM Associates, a South Carolina general partnership, Respondent,

v.

John E. Blackwell, Appellant.

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

Opinion No. 3747
Heard October 8, 2003 – Filed February 23, 2004

REVERSED

G. Dana Sinkler, Mark S. Sharpe, Paul E. Tinkler, R. Bruce Wallace, all of Charleston, for Appellant.

Richard S. Rosen and Daniel F. Blanchard, III, both of Charleston, for Respondent.

BEATTY, J.: RIM Associates, a South Carolina general partnership, sued John Blackwell, a partner, seeking contribution for an alleged partnership debt the partnership had incurred as a result of a debt owed to Blackwell. The trial court ordered Blackwell to make a contribution. We reverse.

FACTS

John Blackwell's company, R.I. of North Charleston ("R.I."), owned a Ramada Inn. In 1985, Everett Smith, Joe Edens and James Finley ("the partners") decided to purchase the hotel. Blackwell agreed to sell the hotel for 4.575 million dollars. As part of the purchase price, R.I. accepted a note of 1.3 million dollars ("the Blackwell note"). Blackwell also received a twenty-five percent partnership interest in RIM Associates ("RIM"), the partnership formed by Blackwell and the partners "to invest in, own, and operate" the hotel. The partners financed the transaction by taking out a bank loan for the 3.275 million dollar balance owed to Blackwell. The partners did not place any capital in the transaction, but they guaranteed seventy-five percent of the Blackwell Note.

RIM fell behind on its payments on the Blackwell note and, in 1989, Blackwell and RIM renegotiated its terms. Blackwell extended the maturity date of the Blackwell note and the partners guaranteed it one hundred percent. The parties contemporaneously entered into an indemnification agreement ("the 1989 agreement") that provided in part:

> The Partners acknowledge and agree that each Partner, as the owner of a twenty-five (25%) interest in the Partnership, is responsible for twenty-five (25%) of the Partnership indebtedness and each Partner agrees to indemnify and hold the others harmless from liability for such Partner's share of any such indebtedness . . . .

> Edens, Smith, and Finley have, in the Note Modification, agreed to jointly and severally guarantee the payment of the Note in its entirety. It is agreed, however, that the indebtedness evidenced by the Note and any other Partnership indebtedness in excess of the amounts above set forth shall remain Partnership debts, the payment of which shall continue to be the obligation of the Partnership, but Blackwell shall have no personal liability therefor other than to the extent of his interest in the Partnership and Edens, Smith and Finley shall not have the right to require contribution from Blackwell on account of any payment which they may have to make on the Note. Any such payment(s) shall be deemed to be a capital contribution(s) to the Partnership by the party making the same.[1]

(emphasis added).

Notwithstanding the 1989 agreement, RIM again fell behind on its payments. In 1997, Blackwell sued the partners for repayment as guarantors of the Blackwell note. The partners brought a third party complaint against RIM, seeking indemnification for the amounts due under the Blackwell note. The partners then caused RIM to bring suit against Blackwell seeking contribution from him in case RIM was required to indemnify the partners.

The parties reached a settlement in April or June of 1999 ("the 1999 settlement").[2] The 1999 settlement provided in part:

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[1] The Partnership Agreement prohibited the withdrawal of capital contributions.

[2] The partners contend that the parties reached a settlement on April 9, as per a letter from Blackwell to the partners. Blackwell disputed the settlement, but the trial judge found in his June 11 Order that the parties

> 1) The guarantors would pay $2 million including principal, interest, attorney's fees, and costs, to John and Hazel Blackwell. John and Hazel will satisfy the Note.
>
> 2) All of the pending litigation against John and Hazel Blackwell will be dismissed with prejudice.
>
> 3) John Blackwell will remain in the Partnership.
>
> 4) The Partnership will not attempt to borrow the money to pay John and Hazel except with the prior written approval of John Blackwell.

(emphasis added).

Following the court-ordered 1999 settlement, Blackwell moved to amend the order to include that "John Blackwell cannot be required to respond to a capital call as a result of the settlement found by the Court." The judge refused, reasoning that "[the] issue may have been raised by [Blackwell] but it is a post-settlement issue and not properly before this court at this time." On July 14, Edens and Smith paid two million dollars pursuant to the 1999 settlement. Finley did not contribute any funds.[3]

On August 5, the trial judge ordered "[t]he action . . . ended and dismissed with prejudice as [to] all parties." RIM moved to amend the order. As a result, the trial judge rescinded that order and issued a second order that dismissed with prejudice all causes of action "by and

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had reached a settlement. However, the specific date of the settlement and its terms were not clear. Instead, they are gleaned from the court's June 11 and July 1, 1999 Orders. Blackwell is appealing neither order.

[3] Jim Finley has died; RIM is now suing his estate.

against" Blackwell "asserted within the action," all claims by RIM "in the Amended Fourth Party Complaint," and all actions by Blackwell. The trial judge also dismissed all actions by the individual partners Eden, Smith, and Finley against RIM but without prejudice.

In April 2000, RIM sued Blackwell. RIM's Amended Complaint claimed breach of the partnership agreement and sought contribution and specific performance. Following a bench trial, the court found:

> The Partnership did not "borrow" the money to pay the settlement in violation of the settlement agreement and did not receive monies from Smith and Edens.
>
> Blackwell was obligated to make a contribution to the Partnership to fund the expenses of his own settlement.
>
> The 1989 agreement, which expressly prohibits any such contribution, had been rescinded by the Blackwell settlement.
>
> The Partnership did not assert these claims in the prior litigation.
>
> The Partnership claims were not barred by the dismissal with prejudice.
>
> The Partnership was entitled to recover attorneys fees and costs.

The trial judge ruled that Blackwell had breached his contractual and statutory obligations to make contributions under the partnership agreement and the South Carolina Uniform Partnership Act. Blackwell appeals.

ISSUES

Blackwell raises eight exceptions to the trial judge's rulings, but those exceptions can be condensed in the following six issues:

I. Did the trial court err in finding that the partnership is authorized to bring this action?
II. Did the trial court err in holding that Blackwell could be required to contribute to the payment of his own note?
III. Did the trial court err in not finding that the claims of the partnership had previously been dismissed with prejudice?
IV. Did the trial court err in not finding that the partnership borrowed the settlement funds in violation of the settlement agreement and the 1989 agreement?
V. Did the trial court err in allowing this action without first requiring an accounting?
VI. Did the trial court err in awarding attorneys' fees to the partnership?

STANDARD OF REVIEW

RIM alleged multiple legal and equitable claims against Blackwell.[4] When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. Kiriakides v. Atlas Food Sys. & Servs., Inc., 378 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000). Whether an action is at law or in equity is determined by the main purpose of the suit. Baughman v. AT&T, 298 S.C. 127, 130, 378 S.E.2d 599, 600 (1989). When equitable relief is sought, the action is one in equity. First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 574, 511 S.E.2d 372, 382 (Ct. App. 1998).

Here, RIM is seeking specific performance and contribution. Since RIM's claim is premised on the right to contribution, this action

[4] However, the parties agreed to bifurcate the trial and consented to the trial judge hearing solely the Blackwell note matter in this proceeding.

is one in equity. See Few v. Few, 239 S.C. 321, ___, 122 S.E.2d 829, 835 (1961) (noting that "the right to contribution is ordinarily enforced in equity"); Kafka v. Pope, 521 N.W.2d 174, 176 (Wis. Ct. App. 1994) (explaining that the contribution process "is based on principles of equity . . . "). Accordingly, the appellate court has "the authority to find the facts based on [its] own view of the preponderance of the evidence, but [is] not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." First Union Nat. Bank, 333 S.C. at 575, 511 S.E.2d at 383.

LAW/ANALYSIS

I. Partnership's Authority to Bring Action

Blackwell argues that the trial judge erred in ruling that RIM was authorized to bring this action against Blackwell. We disagree.

The partnership agreement states that "[i]f any Partner fails to make contributions to capital as provided for by the terms of this Agreement, the remaining Partners who are not in default shall have the right to seek and obtain damages from the defaulting Partner . . . ." Blackwell argues that language allows only the partners, and not the partnership, to sue Blackwell for damages and specific performance. However, the partnership agreement was signed in 1985, at a time when partnerships could not bring an action in their own name. See Haddock Flying Serv. v. Tisdale, 288 S.C. 62, 64, 339 S.E.2d 525, 526 (Ct. App. 1986) ("However, a partnership is not such a legal entity that it may maintain a suit in its name alone."). Had the partnership agreement stated otherwise, any such authority would have been meaningless. The legislature remedied that situation in 1986 by adopting S.C. Ann. Code § 15-5-45 (2003) which states: "Any partnership formed under the laws of this State . . . shall have the capacity . . . to sue and be sued in the courts and agencies of this State as a separate entity . . . ."

Moreover, while the partnership agreement did not authorize the partnership to sue a defaulting partner, neither did it forbid such an

action. The partnership agreement is silent on the matter. In such a situation, we look to state law to determine whether the action is permissible. See Weeks v. McWilliams, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (1987) (ruling that the dissolution of a partnership was permissible because the partnership agreement did not specifically forbid it); Creel v. Lilly, 729 A.2d 385, 397 (Md. Ct. Spec. App. 1999) ("We reiterate that [the Uniform Partnership Act] appl[ies] when there is either no partnership agreement governing the partnership's affairs, the agreement is silent on a particular point, or the agreement contains provisions contrary to law."); Piccolo v. Stagmaier, 867 S.W.2d 319, 320 (Tenn. Ct. App. 1993) (noting that when "'[t]here were no provisions in the partnership agreement relative to [an issue], the provisions of the Uniform Partnership Act apply . . .'"). As previously stated, the state of South Carolina granted partnerships the power to sue on their own behalf in 1986. Therefore, RIM can bring this action.

II. The Parties' Agreements

Blackwell argues the court erred when it ruled that the 1989 agreement was inoperative and ordered Blackwell to contribute to RIM for its payment of the Blackwell note. We agree.

In reaching its conclusion, the trial court relied heavily on the South Carolina Uniform Partnership Act, S.C. Code Ann. § 33-41-510 (1994) in reaching its decision. The Act states in pertinent part: "The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business or for the preservation of its business or property." § 33-41-510(2). But that very section subordinates that general principle to the parties' agreements, explaining that the "rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules . . . ." § 33-41-510 (emphasis added). The question then becomes what agreements existed among Blackwell, the partners, and RIM and what effect those agreements had on the issue of contribution. The record indicates that the partners had a partnership agreement, an

Amended and Restated Indemnification Agreement (the 1989 agreement), and the 1999 settlement.

The trial judge found that the parties' 1999 settlement rescinded the 1989 agreement. We find otherwise. Any modification of a written contract must satisfy all the requirements of a contract, including a meeting of the minds. First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 70, 451 S.E.2d 907, 912 (Ct. App. 1994). Here, there is no evidence of an agreement to rescind the 1989 agreement by implication or otherwise.[5] The July 1999 Order specifically states that "[t]he Amended and Restated indemnification Agreement dated 1 February, 1989 was not addressed in the settlement agreement reached by the parties and therefore it is not part of the settlement." There can be no "meeting of the minds" if the issue was not a part of the parties' agreement.

Moreover, there is no evidence that the 1989 agreement and the 1999 settlement materially contradict each other. Both documents provide that Blackwell would be a partner and share in the partnership's profits and debts, including the Blackwell note. And both documents placed restrictions on how the Blackwell note could be paid. The 1989 agreement stated: "Eden, Finley, and Smith shall not have the right to require contribution from Blackwell on account of any payment they may have to make on the Note. Any such payment(s) shall be deemed to be a capital contribution(s) to the Partnership by the party making the same." The 1999 settlement forbade RIM to borrow money to pay the Blackwell note without Blackwell's prior permission. Although Blackwell may be required to contribute to the payment of the note, the documents, when read together, limit Blackwell's contribution to pay the Blackwell note to his share of the funds generated by RIM and only if RIM did not default on the note.

[5]The parties had expressly deleted "in its entirety" their 1985 Indemnification Agreement, replacing it with the 1989 agreement. Had they wished to invalidate the 1989 agreement, they certainly could have included similar language in the 1999 settlement.

This conclusion is reinforced by RIM's pleading in the prior action. Paragraphs 37 and 39 of RIM's Amended Third Party Answer and Claims states that RIM relied on Blackwell's representation that the "[s]o-called [Blackwell note] would be a 'cash flow,' 'soft' note and would be paid from distributions from operations and refinancing of the hotel."[6] It is clear that the parties never agreed that Blackwell would make a capital call contribution to pay the Blackwell note.

III. Effect of Prior Rulings

Blackwell raises a res judicata argument, asserting that the trial court erred when it held that its November 2, 1999 Order did not bar RIM's current action seeking contribution from Blackwell. We agree.

"A case that is dismissed 'with prejudice' indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication." Nelson v. QHG of S.C., Inc., 354 S.C. 290, 311, 580 S.E.2d 171, 182 (Ct. App. 2003). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Res judicata is an affirmative defense that must be pled at trial in order to be pursued on appeal. Wagner v. Wagner, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct. App. 1985). An affirmative defense is waived if not pled. Howard v. S. C. Dep't of Highways, 343 S.C. 149, 152, 538 S.E.2d 291, 294 (Ct. App. 2000). Generally, claims or defenses not presented in the pleadings will not be considered on appeal. McNeely v. S.C. Farm Bureau Mut. Ins. Co., 259 S.C. 39, 41, 190 S.E.2d 499, 499 (1972).

On appeal, RIM insists that a res judicata defense is not available to Blackwell because he did not raise it in his Answer. Blackwell counters that the res judicata defense is preserved because RIM did not

[6] When the hotel was refinanced, RIM retained the excess proceeds and did not pay the Blackwell note.

object when Blackwell argued the issue before the trial court. Blackwell also argues that res judicata applies because the trial court ruled on the matter in the order that is currently on appeal. We find that RIM waived any valid objection it might have otherwise had by not timely objecting to Blackwell's res judicata argument. See Beall v. Doe, 281 S.C. 363, 367, 315 S.E.2d 186, 188 (Ct. App. 1984) ("We agree that, as a general rule, a former adjudication must be pled in order to make the doctrine of collateral estoppel operative in a particular case. But like most general rules, the requirement that collateral estoppel be pled has its exceptions. One such exception is 'where the matter constituting the estoppel . . . becomes an issue without objection based upon the lack of pleading.'") (citation omitted).

While we agree that the issue was preserved, we reach a different conclusion from the trial court and hold that the 1999 settlement does preclude the current claim. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co., 334 S.C. at 34 512 S.E.2d at 109. The doctrine bars not only the claims that were actually raised, but also those "issues which might have been raised in the former suit." Id. (citation omitted) (emphasis added).

The 1999 settlement stipulated that "[a]ll of the pending litigation against John and Hazel Blackwell will be dismissed with prejudice." And in a revised order, the trial court dismissed with prejudice "all causes of action and claims by and against" Blackwell that were "asserted" as well as "all claims made by RIM" in the 1999 Fourth Party Complaint. At the time, RIM had numerous claims against Blackwell, including one for "Estoppel / Breach of Partnership Agreement." RIM sought indemnification as a remedy. In its 2001 action against Blackwell, RIM again claimed "Breach of Partnership Agreement," but added a claim for contribution. The question then is whether the claim for contribution is a new and separate one, as to be beyond the reach of the 1999 settlement and the 1999 order.

RIM asserts that the contribution claim is permissible because it had not accrued and was not yet "asserted" in 1999. That argument is unavailing because the broad principle of res judicata precludes such a narrow interpretation. It is well settled that res judicata "will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." Nelson, 354 S.C. at 304, 580 S.E.2d at 178 (emphasis added). In other words, "[r]es judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties." Id. (emphasis added).

RIM correctly points out that an action for contribution had not yet ripened at the time of the settlement. See First Gen. Serv. of Charleston, Inc. v. Miller, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) (affirming the dismissal of an action for contribution where the plaintiff had not made any payment since "the right to contribution does not arise prior to payment"); Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001) (defining contribution as "the '[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear'"), *rev'd on other grounds*, Andrade v. Johnson, 356 S.C. 238, 588 S.E.2d 588 (2003); 18 Am. Jur. 2d Contribution § 19 (2004) (explaining that a party seeking contribution is entitled to recover "the amount he has paid in excess of his share … a ratable sum of the loss actually sustained"). Therefore, the right of contribution rises only after a party "has been compelled to pay what another should have paid." 18 Am. Jur. 2d Contribution § 2 (2004).

However, in this case, RIM had asked for indemnification in the earlier litigation. So RIM is merely seeking a different remedy here. "A different remedy, however, does not alter the fact that the claims are identical." Plum Creek Dev. Co., 334 S.C. at 35, 512 S.E.2d at 109 (citing 46 Am. Jur. 2d Judgments § 536 (1994) ("A claim for damages is a claim for relief rather than an assertion of a different cause of action for purposes of determining the applicability of res judicata.")). "[F]or purposes of res judicata, 'cause of action' is not the form of

action in which a claim is asserted but, rather the 'cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'" Id. at 36, 512 S.E.2d at 110 (citing 50 C.J.S. Judgment § 749 (1997)).[7] The genesis of this action and of the previous one is the collection of the Blackwell note. Additionally, the parties involved are the same. Therefore, res judicata is applicable and bars this action.

IV. Partnership's Borrowing

Blackwell argues the court erred when it found that RIM did not borrow the funds to pay the Blackwell note, in violation of the 1999 settlement. We agree.

The trial court's order compelling settlement included a stipulation from the April 9th letter that RIM would not attempt to borrow money to pay the Blackwell note, "except with the prior written approval of John Blackwell." Upon inquiry, Smith, the managing partner, concurred. Accordingly, that condition was one of the terms of the 1999 settlement.

When Smith and Edens contributed two million dollars to the partnership to pay the Blackwell note, Marty Ouzts, RIM's accountant, treated the money given to Blackwell as an advance. An advance is nothing more than a loan. See Tuller v. Nantala Park Co., 276 S.C. 667, 281 S.E.2d 474 (1981) (treating advances as money given as part of a loan); Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 336, 577 S.E.2d 468, 473 (Ct. App. 2003) (finding that a company was entitled to repayment even though the money it gave was identified as an advance). Smith, one of the partners, admitted as much during his testimony. He was asked: "In your terminology, does a loan and an advance mean two different things, or is it the same thing?" Smith responded: "I don't know of any difference." In this instance, RIM

[7] RIM could also have brought an action for exoneration whereby it could have sought contribution from Blackwell even before satisfying the Blackwell note. See 38 Am. Jur. 2d Guaranty § 124 (1994).

entered the money received from Smith and Edens as an advance, but that "advance" entitled Smith and Edens to immediate repayment. RIM clearly borrowed the money from Smith and Edens to pay its obligation under the 1999 settlement. RIM was not allowed to do so since Blackwell had not agreed to the loan in writing.

RIM argues that the payment was made directly to Blackwell by Smith and Edens as guarantors of the note. Thus, it was not a loan to RIM. If this were true, then RIM would have had no need to record, in its books, the money given to Blackwell as an advance from Edens and Smith. RIM's argument convinces this Court that the surviving guarantors of the Blackwell note were acutely cognizant of the restrictions in the 1989 agreement and the 1999 settlement and attempted to circumvent those restrictions. The only reasonable conclusion from looking at the evidence is that RIM borrowed the money to pay the Blackwell note in violation of the 1999 settlement.

Having found that the money was a "capital call" and not a loan, the trial court ordered Blackwell to contribute to RIM's payment of the Blackwell note. But the 1999 settlement exempted Blackwell from contributing to the partners for any payment made on the Blackwell note. Moreover, the 1989 agreement required any payment by the partners toward the Blackwell note be considered a capital contribution. And the partnership agreement prohibited the partners from withdrawing their capital contributions. Therefore, Blackwell had no duty to make a contribution.

CONCLUSION

We find that (1) RIM had the authority to bring the current action; (2) the 1999 settlement did not rescind the 1989 agreement, and Blackwell had no duty to contribute under that agreement; (3) the 1999 litigation precludes the current action pursuant to res judicata; and (4) RIM borrowed the money to pay the Blackwell note, in violation of the parties' agreements. Having so found, we need not reach Blackwell's remaining arguments. The trial judge's ruling is

REVERSED.

GOOLSBY and HUFF, JJ., concur.