The Supreme Court of South Carolina

In the Matter of Brian L. Burns, Petitioner

Appellate Case No. 2017-000067

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 9, 2017

The Supreme Court of South Carolina

In the Matter of Carolyn Giordano, Petitioner

Appellate Case No. 2017-000068

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 8, 2017

The Supreme Court of South Carolina

In the Matter of Stephanie Graham Esparza, Petitioner

Appellate Case No. 2017-000029

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 8, 2017

The Supreme Court of South Carolina

In the Matter of Richard Alan Miller, Petitioner

Appellate Case No. 2017-000038

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 8, 2017

The Supreme Court of South Carolina

In the Matter of Mark Joseph Scott, Petitioner

Appellate Case No. 2016-002577

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 8, 2017

The Supreme Court of South Carolina

In the Matter of Shirley J. Spira, Petitioner.
Appellate Case No. 2016-001896

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 12, 1980, Petitioner was admitted and enrolled as a member of the Bar of this State.

By letter dated August 26, 2016, Petitioner submitted her resignation from the South Carolina Bar. Although she is not currently in good standing, we accept Petitioner's resignation.

Petitioner shall promptly notify, or cause to be notified by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.[1]

Within fifteen (15) days of the issuance of this order, Petitioner shall file an affidavit with the Clerk of the Supreme Court showing that she has fully complied with the provisions of this order. The resignation of Shirley J. Spira shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 10, 2017

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[1] Petitioner previously surrendered her certificate of admission to the Clerk of the Supreme Court.

The Supreme Court of South Carolina

In the Matter of Dorothy Stefan, Petitioner.

Appellate Case No. 2016-002441

ORDER

Petitioner requests the Court reinstate her as an inactive member of the South Carolina Bar or, alternatively, accept her resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) Surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit stating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located; and

(2) Provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

The resignation of Dorothy Stefan shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

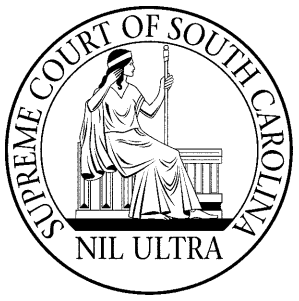
s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 9, 2017



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

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ADVANCE SHEET NO. 7
February 15, 2017
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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the Petitioners.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust

dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T. Azores and Kim O. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman, Third Party Defendants.

Appellate Case No. 2015-001555

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 27702
Heard October 20, 2016 – Filed February 15, 2017

AFFIRMED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, and William D. Herlong, of The Herlong Law Firm, LLC, of Greenville, both for Petitioners.

Randall S. Hiller, of Randall S. Hiller, P.A., of Greenville, for Respondents.

JUSTICE HEARN: In this action to enforce restrictive covenants, we affirm the court of appeals in finding Petitioners' property was not developed into discrete lots to entitle them to voting rights under the covenants. We write now only to clarify that portion of the court of appeals' opinion that may be read to conflate the terms "developed" and "improved."

DISCUSSION

The facts of this case are not in dispute and can be found in the court of appeals opinion, *Hanold v. Watson's Orchard Property Owners Ass'n, Inc.*, 412 S.C. 387, 772 S.E.2d 528 (Ct. App. 2015).

We agree with the court of appeals' conclusion that the term "developed" as contained in the restrictive covenants is unambiguous, and its plain and ordinary meaning connotes conversion of raw land into an area suitable for building, residential, or business purposes. *See, e.g., Sleasman v. City of Lacey*, 159 Wash.2d 639, 643, 151 P.3d 990, 992 (2007); Webster's Third New Int'l Dictionary 618 (3d ed. 1986). To the extent the court of appeals may have used the terms

"developed" and "improved" interchangeably, we note the terms are not synonymous and the requirements for improved land, such as the installation of utilities or buildings, are not necessary to meet the lower threshold of developed land. Therefore, we hold the court of appeals should have limited its inquiry to consider only evidence as it relates to "developed" lots, and any consideration of whether the property was "improved" was not pertinent.

However, we find any error in the application of the two terms did not affect the outcome of the case at hand, and we agree with the court of appeals' conclusion that Petitioners did not "develop" their property under the plain meaning of the restrictive covenants.

CONCLUSION

Based on the foregoing, the court of appeals' opinion is affirmed.

AFFIRMED.

BEATTY, C.J. and KITTREDGE, J., concur. Acting Justice Costa M. Pleicones, concurring in a separate opinion in which FEW, J., concurs.

ACTING JUSTICE PLEICONES: I respectfully concur in result only, and would dismiss certiorari as improvidently granted rather than affirm as modified. In my opinion, the Court of Appeals properly construed the term "developed" in the context of the document in which it appears. *E.g., Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997). I fear that by dictating the meaning of the terms "developed" and "improved," the majority may inadvertently alter the meaning of documents, *Reyhani, supra,* or create a conflict with legislative enactments. *E.g.,* S. C. Code Ann. § 29-6-10 (2) (2007) (defining "improve" in the subchapter governing payments to contractors, subcontractors, and suppliers). Because I agree with the majority that the decision of the Court of Appeals should be affirmed, I concur in that result here.

FEW, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Fredrick Scott Pfeiffer, Respondent.

Appellate Case No. 2016-002456

Opinion No. 27703
Submitted January 12, 2017 – Filed February 15, 2017

DISBARRED

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

Fredrick Scott Pfeiffer, of Greenville, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. He requests that disbarment be imposed retroactively to June 15, 2012, the date of his interim suspension. *In the Matter of Pfeiffer*, 398 S.C. 591, 730 S.E.2d 855 (2012). Respondent further agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension, and order that he pay the costs incurred in the investigation and prosecution of this

matter within thirty (30) days of the date of this opinion.[1] The facts, as set forth in the Agreement, are as follows.

Facts

In the late 1990s, Arthur M. Field approached business partners with the idea of forming a business to raise money from investors in South Carolina to send to an out-of-state parent company to use for relending and real estate development. Mr. Field and his partners created a parent company, Lancaster Resources Incorporated (LRI), in New Jersey and its subsidiary, Capital Investment Funding, LLC (CIF), in South Carolina for this purpose. CIF was primarily managed by Mr. Field. CIF collected millions of dollars from South Carolina investors and then lent that money to LRI, which in turn re-lent that money to out-of-state borrowers.

In 1998 or 1999, respondent met Mr. Field in a social setting. Subsequently, respondent began to represent CIF as a client.

In 2002, respondent and Mr. Field formed a company, Cosimo, LLC (Cosimo), for the purpose of re-lending money from CIF. The plan was as follows: Cosimo would enter into a loan agreement with a borrower agreeing to lend money to the borrower in return for a note and mortgage on real property; Cosimo would then enter into a loan agreement with CIF where CIF agreed to loan Cosimo the same amount for use in making the loan to the borrower; CIF would make the loan to Cosimo simultaneously with Cosimo making the loan to the borrower, and CIF would receive a note from Cosimo along with a conditional assignment of the note and mortgage from Cosimo to the borrower.

Respondent and Mr. Field were co-managers of Cosimo. During this time, respondent (or entities in which he had an ownership interest) had 50% ownership interest in Cosimo. In addition, respondent served as legal counsel for Cosimo. Respondent provided legal services to Cosimo in exchange for his 50% ownership interest in the company. Respondent's legal fees were therefore tied to the value and profitability of the company, making his fee contingent on the success of Cosimo's operations.

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[1] In addition, the Court grants ODC's Motion to Dismiss the allegations concerning "the Loprieno Complaint" in the Amended Formal Charges.

For several years, respondent and Mr. Field perpetuated a scheme involving misrepresentations to investors, Mr. Field's business partners, and South Carolina state agencies. The details of that scheme are set forth in a 2012 South Carolina State Grand Jury indictment charging respondent and Mr. Field with conspiracy, securities fraud, and forgery.

On September 18, 2013, respondent pled guilty to two counts of securities fraud and one count of conspiracy in connection with his dealings with Mr. Field, CIF, Cosimo, and various other entities. Respondent was sentenced to ten years in prison, suspended to six years with the last two years of the sentence to be served on house arrest, followed by five years of probation.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(d) (lawyer shall not counsel client to engage, or assist client, in conduct that lawyer knows is criminal or fraudulent); Rule 1.7 (lawyer shall not represent client if representation involves concurrent conflict of interest; concurrent conflict of interest exists if there is significant risk that representation of client will be materially limited by lawyer's personal interest); Rule 1.8(a) (lawyer shall not enter into business transaction with client or knowingly acquire an ownership or other pecuniary interest adverse to client unless: transaction and terms on which lawyer acquires interest are fair and reasonable to client and are fully disclosed and transmitted in writing in manner that can be reasonably understood by client; client is advised in writing of desirability of seeking and is given reasonable opportunity to seek advice of independent legal counsel on transaction; and client gives informed consent, in writing signed by client, to essential terms of transaction and lawyer's role in transaction, including whether lawyer is representing client in transaction); Rule 1.13(b) (if lawyer for organization knows that officer or other person associated with organization is engaged in action that is violation of law which reasonably might be imputed to organization and likely to result in substantial injury to organization, lawyer shall proceed as is reasonably necessary in best interest of organization); Rule 2.1 (in representing client, lawyer shall exercise independent professional judgment and render candid advice; in rendering advice, lawyer may refer not only to law but to other considerations such as moral, economic, social factors, relevant to client's situation); Rule 4.1(a) (in course of

representing client, lawyer shall not knowingly make false statement of material fact or law to third person); Rule 4.1(b) (in course of representing client, lawyer shall not knowingly fail to disclose material fact when disclosure is necessary to avoid assisting criminal or fraudulent act by client); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to commit criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7 (a)(4) (it shall be ground for discipline for lawyer to be convicted of crime of moral turpitude or serious crime); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or bring courts or legal profession into disrepute or conduct demonstrating unfitness to practice law); and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office taken to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to June 15, 2012, the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. Within fifteen (15) 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 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Cecil Duff Nolan, Jr., Respondent.

Appellate Case No. 2016-002497

Opinion No. 27704
Submitted January 12, 2017 – Filed February 15, 2017

PUBLIC REPRIMAND

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

Cecil Duff Nolan, Jr., of Stuttgart, Arkansas, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent is licensed to practice law in Arkansas. At all times relevant to these matters, respondent was providing or offering to provide legal services in South Carolina. Therefore, respondent is a lawyer as defined in Rule 2(q), RLDE, and is subject to the disciplinary authority of this Court and the Commission on Lawyer

Conduct pursuant to Rule 8.5(a) of the South Carolina Rules of Professional Conduct, Rule 407, SCACR.

Respondent represented intellectual property holders from Georgia. In 2009, respondent brought an infringement action on behalf of the property holders (the plaintiffs) alleging the defendant was selling a product in violation of the plaintiffs' rights. The lawsuit was originally filed in federal court in Georgia, but was removed to South Carolina because the defendant is a South Carolina business and the alleged violation occurred in South Carolina.

In the course of preparing for the litigation, respondent's private investigators travelled to locations in South Carolina to pose as customers in an effort to obtain evidence to prove that the defendant was violating the intellectual property rights of the plaintiffs. During the investigation, respondent's investigators made false statements to the defendant's employees and used tactics designed to prod the employees into making statements about the product. Respondent's investigators tape-recorded these conversations without notice to the employees.

Respondent was unaware that secret tape-recording, pretexting, and dissembling were in violation of the South Carolina Rules of Professional Conduct.[1] He acknowledges that it was incumbent upon him to research the law in South Carolina before sending his investigators to this state.

Respondent admits that the conduct of the investigators in secretly tape-recording the conversations with the defendant's employees, posing as the defendant's customers, and coercing and manipulating the defendant's employees violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 4.4(a) (in representing client, lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden third person, or use methods of obtaining evidence that violate the legal rights of third person); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to

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[1] *See In the Matter of an Anonymous Member of the Bar*, 304 S.C 342, 404 S.E.2d 513 (1991); *In the Matter of Warner*, 286 S.C. 459, 335 S.E.2d 90 (1985); and *In the Matter of an Anonymous Member of the Bar*, 283 S.C. 369, 322 S.E.2d 667 (1984).

engage in conduct prejudicial to administration of justice). Respondent further admits that he is responsible for the conduct of his investigators and, therefore, he violated the following additional provisions of the Rules of Professional Conduct: Rule 5.3(c) (lawyer shall be responsible for conduct of person that would be violation of Rules of Professional Conduct if engaged in by lawyer if lawyer orders or, with knowledge of specific conduct, ratifies conduct involved) and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another).

Respondent admits that by his conduct he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellant.

Appellate Case No. 2014-001181

Appeal From Greenville County
The Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 27705
Heard May 17, 2016 – Filed February 15, 2017

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan M. Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

JUSTICE HEARN: A Greenville County jury found Jeffrey Chapman met the statutory definition of a sexually violent predator (SVP) as set forth in South Carolina's Sexually Violent Predator Act (the Act),[1] and the trial court

[1] *See generally* S.C. Code Ann. §§ 44-48-10 to -170 (2002 & Supp. 2014); *see also* S.C. Code Ann. § 44-48-30(1) (defining an SVP as a person who "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment" and who has a qualifying sexually violent conviction).

subsequently signed an order to civilly commit Chapman. In this direct appeal, Chapman presents a novel issue of law related to the right to counsel in SVP proceedings. We hold that persons committed as SVPs have a right to the effective assistance of counsel, and they may effectuate that right by seeking a writ of habeas corpus. Therefore, although we affirm Chapman's commitment on issue preservation grounds, he may reassert his ineffective assistance of counsel claims in a future habeas proceeding.

FACTUAL/PROCEDURAL BACKGROUND

In 2005, Chapman pled guilty to one count of lewd act on a minor, involving a ten-year-old female. He was sentenced to fifteen years' imprisonment, suspended to time served and five years' probation. Approximately five years later, Chapman's probation was revoked due to "technical violations," including a failure to comply with his curfew and GPS monitoring requirements, and a circuit court judge ordered him imprisoned for five years of his original sentence.

In 2013, prior to Chapman's release from prison, the State filed a petition under the Act seeking Chapman's commitment as an SVP. In support of its petition, the State cited Chapman's four prior convictions involving sexual assaults on women, as well as the conviction for lewd act on a minor.

At Chapman's commitment trial,[2] the State presented testimony from Dr.

[2] Before opening statements, the trial court instructed the jury about the Act and fully charged the jury on the law applicable to SVP cases. The trial court did not re-charge the jury at the conclusion of the trial. *See* Rule 51, SCRCP ("[T]he court shall instruct the jury after the arguments are completed."). We note trial courts must charge the jury on the legal issues that apply to the evidence adduced at trial. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings *and developed by the evidence* in support of those issues." (emphasis added)). While preliminary jury charges may aid the jury's understanding of the trial, it is impossible to be prescient with complete accuracy, and therefore jury charges given at the beginning of trial will almost never cover all of the relevant law that will be "developed by the evidence." For this reason, trial courts should reiterate and supplement those charges at the conclusion of a trial. *See* Rule 51, SCRCP.

Marie Gehle, the chief psychologist at the South Carolina Department of Mental Health, who the court qualified as an expert in forensic and clinical psychology and SVP mental health evaluations. Dr. Gehle testified she reviewed Chapman's incarceration records, military records, and criminal history, including investigation summaries, witness statements, Chapman's statements, and sentencing sheets. Additionally, Dr. Gehle testified she interviewed Chapman and performed psychological testing, which included completing the Static-99R actuarial risk assessment tool.[3]

In explaining her findings, Dr. Gehle detailed the facts surrounding Chapman's prior sex offenses, including two sexual assault convictions in Florida in 1986, an attempted second-degree rape conviction in North Carolina in 1991, a third-degree criminal sexual conduct conviction in South Carolina in 1992, an indecent exposure conviction in South Carolina in 1997, and a lewd act on a minor conviction in South Carolina in 2005. Dr. Gehle stated Chapman's behavior in each instance appeared to be impulsive and violent. Moreover, she testified Chapman took no responsibility for his actions, instead claiming the convictions were the result of consensual sex or fabrication by the victims.

From her review of Chapman's records, psychological tests, and personal interview, Dr. Gehle concluded Chapman suffered from biastophilia,[4] anti-social personality disorder, and substance abuse disorder. As a result of the interplay of the characteristics of those diagnoses, Dr. Gehle opined that Chapman posed a high risk of reoffending.

In contrast, Chapman presented testimony from several personal acquaintances, each of whom testified to Chapman's good character. The witnesses stated that after Chapman's last conviction, his life and attitude had changed drastically as a result of him attending church. Chapman testified as well, stating drugs and alcohol had a significant effect on his life since his teenage years, and blaming substance abuse for most of his bad actions.

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[3] Dr. Gehle explained the Static-99R is an actuarial tool consisting of ten questions that "have been proven significantly related to sexual offending."

[4] According to Dr. Gehle, biastophilia occurs "when a person experiences recurrent, intense, sexually arousing fantasies, urges or behaviors involving corrosive sexual acts with non-consenting persons over a period of at least six months."

Chapman's final witness was Dr. David Price, a psychologist, who the court qualified as an expert in clinical and forensic psychology. Dr. Price testified he disagreed with Dr. Gehle's diagnoses of biastophilia and anti-social personality disorder. In part, Dr. Price stated his disagreement stemmed from Dr. Gehle's application and interpretation of the psychological tests Chapman completed, including the Static-99R test, because the test had been discredited to some degree in professional circles.

Throughout the two-day trial, Chapman's counsel did not make any motions, including a motion for a directed verdict or JNOV. Further, Chapman's counsel objected only once, during Dr. Price's voir dire.

Ultimately, the jury found Chapman met the statutory definition for an SVP, and the trial court ordered Chapman's commitment. Chapman appealed, and the Court certified the appeal pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED

I. Does a person committed as an SVP have a due process right to effective assistance of counsel?

II. If a person committed as an SVP has a right to effective assistance of counsel, when during his appeal may he raise his trial counsel's perceived errors?

III. If a person committed as an SVP has a right to effective assistance of counsel, what standard should a court use to evaluate counsel's performance?

IV. Did trial counsel's failure to object to various alleged errors during trial violate Chapman's right to effective assistance of counsel?

STANDARD OF REVIEW

"Questions of statutory construction are a matter of law." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011). The Court reviews questions of law de novo. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012).

Moreover, on appeal from a case tried before a jury in an action at law,

appellate courts may not disturb the jury's factual findings "unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). Thus, this Court's jurisdiction in those cases extends only to the correction of errors of law. *In re Care & Treatment of Gonzalez*, 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014).

LAW/ANALYSIS

I. RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Chapman argues because the Act provides him a right to assistance of counsel during all stages of SVP proceedings, he necessarily has a right to effective assistance of counsel during the proceedings. We agree.

The United States Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *accord Vitek v. Jones*, 445 U.S. 480, 491–92 (1980) (plurality opinion). Moreover, the Supreme Court found that to satisfy due process, prisoners suffering from a mental disease or defect requiring involuntary commitment must be provided with independent assistance during the commitment proceeding. *Vitek*, 445 U.S. at 496–97; *id.* at 500 (Powell, J., concurring). In accordance with these directives, section 44-48-90 of the South Carolina Code provides, "At all stages of the proceedings under [the Act], a person subject to [the Act] is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person." S.C. Code Ann. § 44-48-90(B).

We have previously recognized section 44-48-90 provides a statutory right to counsel distinct from the Sixth Amendment right to counsel afforded in criminal proceedings. *In re Care & Treatment of McCoy*, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004); *In re Care & Treatment of McCracken*, 346 S.C. 87, 96, 551 S.E.2d 235, 240 (2001). However, given the significant due process implications inherent in civil commitments, we find section 44-48-90's right to counsel is not merely a statutory right, but also a constitutional one arising under the Fourteenth Amendment and the South Carolina Constitution.[5] *Cf. Vitek*, 445 U.S. at 496–97;

[5] *See* U.S. Const. amend. XIV, § 1 (prohibiting states from "depriv[ing] any person of life, liberty, or property, without due process of law"); S.C. Const. art. I, § 3

In re Care & Treatment of Ontiberos, 287 P.3d 855, 864–65 (Kan. 2012) (examining the three due process factors espoused in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), and concluding there is a constitutional right to counsel arising under the Fourteenth Amendment and the state constitution with regards to SVP commitment proceedings); *Jenkins v. Dir. of the Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006) (holding that because of the "substantial liberty interest at stake in an involuntary civil commitment based on Virginia's [SVP] Act," persons subject to SVP proceedings have a constitutional right to counsel arising under the Fourteenth Amendment and the state constitution).[6] Lest the right ring hollow, we further hold this right to counsel is necessarily a right to effective counsel. *Accord Smith v. State*, 203 P.3d 1221, 1232–33 (Idaho 2009).[7]

Accordingly, because the Act provides Chapman with a right to counsel, he consequently has a right to effective assistance of that counsel during his SVP proceedings.

II. TIMING OF RAISING INEFFECTIVE ASSISTANCE CLAIMS

Chapman next asserts as the Act currently stands, there is no avenue in which persons committed as SVPs may raise ineffective assistance of counsel claims. Therefore, he argues, he should be able to raise his ineffective assistance claims on direct appeal. In response, the State contends Chapman may assert an ineffective assistance claim through a common law habeas proceeding. We agree with the State that, as with all unlawful confinement claims, Chapman may assert his claims that he is improperly in custody—whether due to his counsel's

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(same).

[6] To the extent *McCoy* and *McCracken* implied that the only right to counsel under the Act was a statutory one, they are hereby modified.

[7] In fact, courts considering this issue have unanimously determined that in civil commitment proceedings where there is a right to counsel, there is a consequent right to effective counsel. *See, e.g.*, *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 384 (Alaska 2007); *Smith*, 203 P.3d at 1232–33; *In re Detention of Crane*, 704 N.W.2d 437, 438 n.3 (Iowa 2005); *Ontiberos*, 287 P.3d at 863; *Commonwealth v. Ferreira*, 852 N.E.2d 1086, 1091 (Mass. App. Ct. 2006); *In re Mental Health of K.G.F.*, 29 P.3d 485, 491 (Mont. 2001); *State v. Campany*, 905 N.Y.S.2d 419, 425–26 (App. Div. 2010); *In re Commitment of Hutchinson*, 421 A.2d 261, 264 (Pa. Super. Ct. 1980); *Jenkins*, 624 S.E.2d at 460.

ineffectiveness or otherwise—via a future habeas proceeding. *See* Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 U. Chi. L. Rev. 243, 244 (1964–65) (explaining although habeas corpus has ceased to be a significant remedy in most civil litigation, it remains important in the civil commitment context).

Dating from as early as the 14th century, the right to petition a court for relief from unlawful confinement has been heralded as the highest safeguard of an individual's liberty. Literally, the phrase *habeas corpus* means "you should have the body." *Habeas corpus*, The American Heritage Dictionary (2d ed. 1985). South Carolina has recognized the writ of habeas corpus since 1787, the same year the writ was adopted into our federal constitution. *See* Oaks, *supra*, at 247–48; *McMullen v. City Council of Charleston*, 1 S.C.L. (1 Bay) 46 (1787).[8] This extraordinary writ, though seldom granted, is nonetheless available to all individuals who believe they are wrongly confined, following the exhaustion of their direct appeal and other collateral remedies. As the State has acknowledged, this Court could not deny an individual, such as Chapman, the right to file a writ of habeas corpus seeking relief from his detention. *See* S.C. Const. art. I, § 18 ("The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it.").

Notably, in the criminal context, the General Assembly removed certain claims from the immediate province of habeas relief. In doing so, the legislature provided an alternative procedure by which criminal defendants must assert claims regarding ineffective assistance of counsel: post-conviction relief (PCR). *See generally* S.C. Code Ann. §§ 17-27-10 to -160 (2014 & Supp. 2015) (the PCR Act); Blume, *supra*, at 238–44 (detailing the history of the post-conviction process, from its origins in habeas relief through the General Assembly's enactment of the PCR Act). Thus, on direct appeal, this Court will not consider claims involving

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[8] Although South Carolina did not formally adopt a habeas provision in its state constitution until after the Civil War, it was the only colony to codify the writ by the time of the American Revolution. John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. Rev. 235, 238 (Winter 1994). In fact, many scholars contend most states omitted a habeas provision from their early state constitutions not because they considered it unimportant, but because they thought a formal assertion of the writ was unnecessary given how solidly established the right to habeas corpus was in the colonies. Oaks, *supra*, at 248, 249.

ineffective assistance of counsel. *See State v. Carpenter*, 277 S.C. 309, 309–10, 286 S.E.2d 384, 384 (1982) (per curiam). Rather, those claims are limited to review during PCR. Following such review, a criminal defendant may file a petition for habeas corpus as a means of seeking final relief. *Simpson v. State*, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998) (per curiam). However, petitions for habeas relief serve only to ensure observance of fundamental constitutional rights that have been overlooked in prior proceedings. *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008); *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (stating additional judicial review after PCR is appropriate only when the judicial system has failed a defendant in such a way that to continue his imprisonment without further review would amount to a gross miscarriage of justice). As a result, habeas relief is only available when other remedies, such as PCR, are inadequate or unavailable. *Hamm v. State*, 403 S.C. 461, 464, 744 S.E.2d 503, 504 (2013).

With regards to a civil commitment under the Act, Chapman is correct in stating there is no statutory procedure, such as PCR, that would presently allow persons committed as SVPs to effectuate their right to the effective assistance of counsel. Regardless, we decline to address the merits of his claims on direct appeal for the same reasons we do not address these claims in a criminal direct appeal. *See State v. Felder*, 290 S.C. 521, 522–23, 351 S.E.2d 852, 852 (1986) (quoting *State v. Williams*, 266 S.C. 325, 337, 223 S.E.2d 38, 44 (1976)) (finding in direct appeals, the record rarely contains a factual basis for a claim that counsel's performance was deficient, because it does not reveal counsel's possible strategic explanation (or lack thereof) for taking or omitting the challenged action); *cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating in the criminal context that courts must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). Rather, an evidentiary hearing similar to a PCR hearing is necessary to explore the strategy underlying counsel's actions and omissions during an SVP trial.

Because there is no existing statutory procedure providing for such a hearing, we find Chapman's claims regarding ineffective assistance of counsel akin to other habeas claims, in that the existing relief for the claims is either inadequate (due to the lack of a fully developed record) or unavailable (due to the absence of a specified procedure in which to assert the claims). Thus, we agree with the State that persons committed under the Act may pursue their unlawful custody claims, including ineffective assistance of counsel claims, in habeas proceedings.

We emphasize that, in recognizing Chapman's right to file a habeas claim for ineffective assistance of counsel, we do not create a new framework out of whole cloth. Rather, as stated, *supra*, habeas relief is uniformly available to those imprisoned in violation of the law. *See Harrington v. Richter*, 562 U.S. 86, 91 (2011). Thus, our holding today merely declines to divest Chapman of his fundamental right to seek relief from unlawful confinement.

We note that in general, there is no right to counsel in habeas proceedings, whether criminal or civil. Thus, as a practical matter, a person committed as an SVP would ordinarily be required to assert an ineffective assistance of counsel claim in a habeas proceeding *without the assistance of counsel*. We find this result would be not only inequitable, but also the functional equivalent of denying SVPs the right to effective assistance of counsel.[9] As discussed, *supra*, the General Assembly provides persons subject to commitment under the Act with a right to counsel at "all stages of the proceedings." S.C. Code Ann. § 44-48-90. Due to the unique unfairness of requiring SVPs to pursue ineffective assistance of counsel claims without the assistance of counsel, this language must be construed as providing persons committed under the Act with a right to counsel during their first habeas proceeding. *Cf. Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (explaining successive PCR applications alleging ineffective assistance of counsel are disfavored because they allow an applicant "more than one bite at the apple," and giving examples of "rare procedural circumstances" in which a court may entertain a successive application, such as if the court dismissed the first PCR application without providing the applicant the assistance of legal counsel (citation omitted) (internal quotation marks omitted)).

We recognize this portion of our holding is perhaps an unforeseen application of the statutory language. Nonetheless, the General Assembly provided SVPs with a right to counsel, which cannot be merely a superficial right. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *see also Tempel v. S.C. State Election Comm'n*, 400 S.C. 374, 378, 735 S.E.2d 453, 455 (2012) ("This Court will not construe a statute in a way which

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[9] *Cf.* S.C. Code Ann. § 17-27-60 (providing indigent PCR applicants with a right to counsel to pursue their PCR claims); Rule 71.1(d), (g), SCRCP (providing indigent PCR applicants with counsel if their application presents a question of law or fact that will require a hearing, or if their application for relief is denied).

leads to an absurd result or renders it meaningless."); *CFRE, L.L.C. v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating in reading a statute as a whole and in harmony with its purpose, the Court must read the statute in a manner such that "'no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law'" (internal citations omitted) (internal marks omitted)). While the State conceded this during oral argument, unquestionably, the General Assembly may reevaluate an SVP's right to counsel and set forth a more comprehensive statutory scheme to address this issue.

III. STANDARD TO MEASURE EFFECTIVENESS

Chapman finally argues the ordinary standard for granting habeas relief should not apply to ineffective assistance of counsel claims arising from SVP proceedings.[10] We agree, and hold the more appropriate standard in these instances is the two-prong *Strickland* standard used to vindicate a criminal defendant's Sixth Amendment right to counsel. *See Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (describing the *Strickland* standard as requiring a PCR applicant to prove counsel's deficient performance, and the resulting prejudice).

An SVP's right to counsel arises from a constitutional right to due process similar to the rights attendant to a criminal trial.[11] *Ontiberos*, 287 P.3d at 867, 868;

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[10] *See generally Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (stating a court will normally only issue a habeas writ under limited circumstances, when there has been a violation that constitutes a denial of fundamental fairness shocking to the universal sense of justice).

[11] Justice Few would have us disregard both parties' recognition that habeas corpus is available to anyone, including Appellant, who wishes to challenge the legality of his or her confinement. The dissenting opinion mistakenly portrays the majority's actions as improperly invading the legislature's role. We would respectfully remind the dissent that this Court is tasked with interpreting and applying the law as adopted by the legislature. A necessary part of this duty is ensuring that the law comports with all constitutional requirements. Accordingly, we must avoid any application of law that does not pass constitutional muster. Were we to accept the

see also Jones v. State, 477 N.E.2d 353, 357 (Ind. Ct. App. 1985) ("In considering what constitutes effective representation, it seems reasonable to look to criminal standards for guidance. Such an approach seems justified inasmuch as the allegedly mentally ill person's liberty is at stake."); *Jenkins*, 624 S.E.2d at 460. We further note a majority of jurisdictions use the *Strickland* standard in evaluating ineffective assistance claims in a civil commitment context, "regardless of whether that court held that the person's right to effective counsel arose from statute or the constitution." *Ontiberos*, 287 P.3d at 867 (collecting cases).

Thus, in our state and others, *Strickland* is a well-known standard applied in an extensive body of case law in the criminal *and* civil contexts. *See In re Detention of T.A.H.-L.*, 97 P.3d 767, 771 (Wash. Ct. App. 2004). Indeed, the *Strickland* standard is the one most familiar to judges and attorneys, and thus results in a more consistent application in our state courts. *See Ontiberos*, 287 P.3d at 867 (citing *T.A.H.-L.*, 97 P.3d at 771). Accordingly, we find using the *Strickland* standard to evaluate ineffective assistance claims—regardless of the fact these claims must be asserted in habeas proceedings—will most consistently ensure an SVP's ability to exercise his right to the effective assistance of counsel.

IV. MERITS OF INEFFECTIVE ASSISTANCE CLAIMS

As Chapman conceded in his briefs and during oral argument, none of his ineffective assistance claims are preserved for appellate review because trial counsel failed to object to any of the alleged errors. *See Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014). Accordingly, we affirm his commitment as an SVP pursuant to Rule 220, SCACR. Our decision is without prejudice to his ineffective assistance claims, and Chapman may reassert these claims during a future habeas proceeding.

CONCLUSION

We cannot construe the Act in a manner that does not recognize an SVP's constitutional right to the effective assistance of counsel. Necessarily, if it is to have any meaning, an SVP must have an avenue to effectuate that right. Under the current framework of the Act, we hold the appropriate forum to assert the right to effective assistance of counsel is the long-recognized safeguard of due process:

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dissent's contention that we are somehow encroaching on the legislature, we would be forced to adopt an interpretation of the law that does not satisfy due process.

habeas relief.

Based on the foregoing, we affirm Chapman's commitment as an SVP.

AFFIRMED.

BEATTY, C.J., KITTREDGE, J., and Acting Justice Costa M. Pleicones, concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: This is a direct appeal from an action at law.[12] The Constitution of South Carolina sets forth the jurisdiction of the Supreme Court in such a case: "The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe." S.C. CONST. art. V, § 5. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976) ("Article V, § 5 of our Constitution . . . sets forth the jurisdiction of this Court."). Under article V, section 5, the Supreme Court has no power in this case except to correct errors of law made by the trial court. *See In re Care & Treatment of Gonzalez*, 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014) (stating in an appeal from a jury verdict in an SVP trial, "the jurisdiction of the appellate court extends merely to the correction of errors of law"); *Lozada v. S.C. Law Enf't Div.*, 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011) ("When reviewing an action at law, our scope of review is limited to the correction of errors of law."); *Townes Assocs.*, 266 S.C. at 85, 221 S.E.2d at 775 ("In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law . . . .").

The majority opinion recites this limitation on our power—citing *Gonzalez*—but then ignores its own words and projects this Court beyond our constitutional jurisdiction by writing procedural and substantive rules of law that have nothing to do with any error of law made by the trial court. These new rules do not concern the trial court's handling of this SVP trial, nor do they govern how a future trial court will conduct an SVP trial. Rather, these new rules establish a procedural and substantive scheme for resolving a completely different category of lawsuits that have never been filed. The majority's new rules to govern these future lawsuits violate the limits on our power set forth in article V, section 5 as interpreted by this Court in *Gonzalez*, *Lozada*, and *Townes Associates*, and because of that, the new rules also violate the separation of powers requirement set forth in article I, section 8 of the Constitution of South Carolina.

It requires no justification for a court to honor the constitutional limitation on judicial power—it is the law. In this case, however, the justification is clear. First, the only procedural and substantive framework in South Carolina—until now—to protect a litigant's right to effective counsel is the South Carolina

[12] The majority states in its first paragraph this is a "direct appeal." We have previously held an SVP trial is an action at law. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002).

Uniform Post-Conviction Relief Act enacted by our Legislature. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2014); *see also* 28 U.S.C. § 2255 (2016) (Federal custody; remedies on motion attacking sentence). Second, this Court has previously held, "The purpose of habeas corpus is to test the legality of the prisoner's present detention," and, "The only remedy that can be granted is release from custody." *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (citing *McCall v. State,* 247 S.C. 15, 18, 145 S.E.2d 419, 419 (1965)). Under *Gibson* and *McCall*, the only remedy available for a finding of ineffective counsel would be to release from custody a person found by a jury to be a sexually violent predator—because the courts do not have the power to grant a new trial.[13] Third, the majority's provision that the court must appoint—and the State must pay—counsel to represent the SVP in the effective counsel proceeding violates section 14-1-235 of the South Carolina Code (2017), which provides, "A judge, court, or court official shall not appoint an attorney to represent a party in a civil action unless the authority to make the appointment is provided specifically by statute."

Finally, creating a procedural and substantive scheme for future litigation of effectiveness of counsel in an SVP trial is particularly inappropriate for judicial action. To illustrate this point, I pose a few questions. First, is there any difference between the majority's new scheme and the annual review proceedings provided in section 44-48-110 of the South Carolina Code (Supp. 2016)? If not—or if the difference is only slight—can the right of effective counsel in the initial

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[13] In this event it is questionable that SVP proceedings may be reinstituted. The timetable for instituting such proceedings begins long before the person is released from confinement on the original sentence, which will necessarily have passed by the time a circuit court grants habeas corpus. *See* S.C. Code Ann. § 44-48-40(A)(1) (Supp. 2016) (requiring the multidisciplinary team be given "written notice . . . at least two hundred seventy days before" release); S.C. Code Ann. § 44-48-50 (Supp. 2016) (stating the timetable for "forward[ing] a report of the assessment to the prosecutor's review committee" is "within thirty days" of the notice in subsection 44-48-40(A)(1)); S.C. Code Ann. § 44-48-60 (Supp. 2016) (requiring the review committee to determine probable cause "within thirty days of receiving the report"); S.C. Code Ann. § 44-48-70 (Supp. 2016) (requiring the Attorney General to file the petition for SVP confinement "within thirty days of the probable cause determination"). There is no provision in the SVP Act permitting retrial after release from confinement.

commitment proceeding reach the constitutional dimension on which the majority relies? Second, does an SVP—by filing a petition for habeas corpus claiming ineffective counsel—waive his right to pursue annual review proceedings, or must the circuit court simultaneously conduct annual review proceedings and effective counsel proceedings?[14] Third, if the circuit court in annual review proceedings finds no "probable cause exists to believe that the person's mental abnormality or personality disorder has [sufficiently] changed," would that finding moot any ongoing effective counsel proceedings by making a different outcome not reasonably likely under the second prong of *Strickland*?[15] Fourth, if the circuit

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[14] Section 44-48-110 requires,

> A person committed pursuant to this chapter *must* have an examination of his mental condition performed once every year. . . . The annual report *must* be provided to the court which committed the person . . . . The court *must* conduct an annual hearing to review the status of the committed person. . . . If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence, the court *must* schedule a trial on the issue.

Id. (emphasis added).

[15] How could a circuit court find prejudice under *Strickland* if the same or another circuit judge has already found in an annual review proceeding that no probable cause exists to believe the SVP is "safe to be at large?" Further, if the judge in the effective counsel proceeding is a different judge and the annual review judge found no probable cause, is the second judge bound by the rule that "one circuit court judge may not overrule another?" *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). Conversely, if the effective counsel trial occurs first and the circuit court finds prejudice, which surely moots the probable cause hearing in the annual review proceedings, would the prospect of an annual review trial then moot any appeal from the effective counsel trial?

court must conduct simultaneous proceedings, is the counsel to be appointed pursuant to the majority opinion permitted to be—or required to be—the same counsel the SVP is entitled to in annual review proceedings pursuant to section 44-48-110?[16] Finally, there are other civil commitment proceedings as to which the committed person has a statutory right to counsel. *See* S.C. Code Ann. §§ 44-17-310 to -900 (2002 & Supp. 2016) (Care and Commitment of Mentally Ill Persons Act); § 44-17-530 (2002) (providing "the court shall appoint counsel to represent the person" subject to judicial commitment proceedings). Does the majority's new scheme apply to those committed persons as well?

Some of these questions may be invalid, and never need to be answered, but some of them are valid, and demand an answer. Whether these questions deserve answers—and if so what are the answers—are inquiries that courts are uniquely unqualified to complete. The Legislature, on the other hand, has numerous tools at its disposal to adequately address these and other problems. All of this forces the question of why this Court should create this new effective counsel scheme, especially when the annual review procedure is already in place pursuant to statute. *See* § 44-48-110. Respectfully, the majority has not answered any of these questions.

The majority suggests in footnote eleven that I do not understand this Court's duty to "ensur[e] that the law comports with all constitutional requirements." I am satisfied that I do understand this duty, and further that I understand we must exercise that duty within the constitutional limitations on our power. To respond to the majority's suggestion, I will explain how—and when—I think this Court should fulfill its duty to protect the constitutional rights of Chapman and other SVP litigants who claim they have been denied due process because they received ineffective assistance of counsel.

To begin, this Court has never heard an appeal from a circuit court's ruling as to whether an SVP defendant received effective assistance from his attorney. The trial court made no such ruling in this case. In fact, I am not aware that any

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[16] "The committed person has a right to have an attorney represent him at the [annual review probable cause] hearing . . . ," and, "At the trial, the committed person is . . . entitled to the benefit of all constitutional protections [i.e., counsel]." § 44-48-110.

SVP defendant has ever brought such a claim in any South Carolina circuit court. If an SVP brings such a claim, the first issue the circuit court will face is whether the SVP's right to annual review adequately protects the SVP's due process rights regarding the effectiveness of his counsel. No court—anywhere—not even the courts from other states cited by the majority—has ever answered that question.

If the circuit court in which the claim is brought addresses the SVP's claim, and if the aggrieved party appeals, this Court will then be required to determine whether the circuit court committed any errors of law. Then—when the questions that the majority answers in the abstract are actually contested issues in an appeal before us—we will fulfill our duty to protect the due process rights of SVP litigants, and our responsibility under article V, section 5, by determining whether the trial court committed any errors of law. Until then, we act outside of our constitutional authority if we write rules not necessary to resolve the actual case before us, even though the rules may relate to the constitutional requirement of due process.

My disagreement with the majority is not based on a misunderstanding of our duty to protect the due process rights of our citizens. Rather, my disagreement derives from my resolve to obey the constitutional limitations on our power. As the majority recognizes, "none of [Chapman's] ineffective assistance claims are preserved for review." Under this circumstance, we should affirm without any comment on rules to govern future disputes. Because I believe the law written by the majority in this case goes beyond the constitutional limits on this Court's power and falls within the exclusive province of the Legislature, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Thomas Brooks, III, Appellant,

v.

South Carolina Commission on Indigent Defense and Office of Indigent Defense, Respondents.

Appellate Case No. 2014-002477

Appeal From Richland County
D. Craig Brown, Circuit Court Judge

Opinion No. Op. 5468
Heard November 9, 2016 – Filed February 15, 2017

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

Irma Pringle Brooks, of Law Offices of Charles T. Brooks, III, of Sumter, for Appellant.

G. Murrell Smith, Jr., of Lee, Erter, Wilson, Holler & Smith, LLC, of Sumter, for Respondents.

GEATHERS, J.: Appellant Charles Brooks challenges the circuit court's order disqualifying Irma Brooks—Appellant's wife and law partner—from representing him and disqualifying Appellant from representing himself pursuant to Rule 3.7 of

the South Carolina Rules of Professional Conduct. We affirm in part, reverse in part, vacate in part, and remand.

FACTS/PROCEDURAL HISTORY

Appellant and his wife are attorneys and practice out of Appellant's law office. A substantial portion of Appellant's practice has been devoted to representing indigent clients in criminal cases, post-conviction relief actions, probation revocations, and Department of Social Services (DSS) cases. Once work was completed on an indigent defense case, Appellant and his employees would compute the amount of billable time and submit a voucher to the South Carolina Commission on Indigent Defense (the Commission)[1] for payment of fees and reimbursement of expenses.

In September 2009, the Executive Director of the Commission filed a complaint with the Office of Disciplinary Counsel (ODC) alleging suspected overbilling by Appellant via submissions of vouchers during the period of October 2006 through September 2009. In December 2009, pursuant to Appellant's request, the Commission stopped paying vouchers that continued to be submitted until a determination regarding overbilling was made. During the ODC investigation, the Commission referred the matter to the South Carolina Attorney General's office for investigation.

The Attorney General's office conducted a preliminary investigation and the special investigator interviewed Appellant, Irma Brooks, and Appellant's employees. During his interview, Appellant stated his office would submit timesheets under his name for work that Irma Brooks actually performed. Additionally, according to the special investigator's report, Appellant "would appear for a hearing on a case that Irma Brooks was working and vice versa."

[1] The South Carolina Commission on Indigent Defense is a state agency that, through its division the Office of Indigent Defense, has the obligation to pay appointed attorneys for their representation of indigent clients. *See* S.C. Code Ann. §§ 17-3-320(A); -330(A)(1) (2014). Both parties are named as respondents but for the purpose of simplicity we refer to both as "the Commission."

Office staff would send Irma Brooks vouchers for cases on which she worked for her review.

Irma Brooks stated in her interview with the special investigator that she worked on indigent defense cases even though they were assigned to Appellant by the Commission. The time spent and work she completed on indigent defense cases were noted in the case file and served as the basis for the vouchers later submitted to the Commission. The vouchers were submitted under Appellant's name because Appellant was the assigned attorney. In cases in which Appellant and Irma Brooks worked jointly, both would review vouchers for correctness prior to submitting them to the Commission. Scheherazade Charles—Appellant's employee from April 2005 to July 2007—prepared timesheets and vouchers on behalf of Irma Brooks that were submitted to the Commission under Appellant's name. The special investigator determined the vouchers were submitted under Appellant's name because Irma Brooks did not have a password or identifying number with the Commission.

Upon completion of its investigation, the Attorney General's office decided it could not prove any criminal activity beyond a reasonable doubt and declined to pursue the case. Subsequently, Appellant and ODC entered into an agreement for discipline by consent, agreeing Appellant had received $61,826.40 in excess compensation due to overbilling on indigent defense cases. As part of the agreement, Appellant requested the amount owed to him by the Commission in unpaid vouchers be reduced by $61,826.40. Our supreme court accepted the agreement and publicly reprimanded Appellant by opinion dated August 1, 2012. Appellant later determined the Commission owed him $110,522.85 in vouchers that had been submitted but not paid since the investigation began.

Appellant subsequently filed a summons and complaint against the Commission, seeking payment of vouchers for work completed on indigent defense cases. Appellant asserted he was owed $48,696.45—the amount owed by the Commission on unpaid vouchers reduced by the amount Appellant had overbilled. Attorneys Desa Ballard and Harvey M. Watson, III represented Appellant during the investigation and when the complaint was filed. The Commission answered the complaint asserting, in part, defenses based on fraud, misrepresentation, and negligence and counterclaims based on breach of contract.

In the Commission's responses to Appellant's interrogatories, it listed Irma Brooks as a witness.

In February 2013, the circuit court granted the request of Attorneys Ballard and Watson to be relieved as Appellant's counsel. Appellant thereafter continued pro se. In August 2014, Irma Brooks filed a Notice of Appearance on Appellant's behalf. In response, the Commission moved to disqualify Irma Brooks and Appellant as attorneys of record for Appellant.

The circuit court subsequently issued its ruling disqualifying Irma Brooks from representing Appellant and also Appellant from representing himself. The circuit court found Irma Brooks was a necessary witness under Rule 3.7(a) of the South Carolina Rules of Professional Conduct—which precludes a lawyer from advocating at a trial in which that lawyer is likely to be a necessary witness. Moreover, the circuit court found Irma Brooks' disqualification was not a substantial hardship to Appellant because, at that point, she had been involved in the case for only two months and the expense of hiring new counsel did not outweigh the prejudice the Commission would experience if it could not call Irma Brooks as a witness.

The circuit court also disqualified Appellant from representing himself because "[t]o allow [Appellant] to represent himself as well as be a witness would lead to a conflict with Rule 3.7." The circuit court found "there may be confusion as to whether statements made by [Appellant] as an advocate witness would be taken as proof as a fact witness or as an analysis of proof as an attorney." This appeal followed.

STANDARD OF REVIEW

A circuit court's ruling on a motion to disqualify a party's attorney is reviewed for an abuse of discretion. *See Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 347–48, 450 S.E.2d 66, 75 (Ct. App. 1994) (finding no abuse of discretion in the circuit court's ruling disqualifying an attorney from acting as an advocate but allowing the attorney to act as a witness). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or is not supported by the evidence." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 225, 781 S.E.2d 548, 556–57 (2015).

LAW/ANALYSIS

I. Irma Brooks as Attorney and Witness

Appellant argues the circuit court erred in disqualifying Irma Brooks because (1) she is not a necessary witness, (2) her disqualification would work a substantial hardship upon Appellant, and (3) Rule 3.7(b) of the South Carolina Rules of Professional Conduct allows an attorney to advocate in a trial in which another attorney from the same law firm will be a witness. Appellant further argues the circuit court erred because the right to have counsel of one's choosing is a substantial right.

Rule 3.7 of the Rules of Professional Conduct, Rule 407, SCACR, provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

The comments to Rule 3.7 describe the rationale behind the advocate witness rule. Comment 1 explains, "Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." Rule 3.7, RPC, Rule 407, SCACR. Comment 2 provides, in pertinent part:

> The opposing party has proper objection whe[n] the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.

Id. Our court has espoused this rationale, stating, "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." *Collins Entm't, Inc. v. White*, 363 S.C. 546, 564, 611 S.E.2d 262, 271 (Ct. App. 2005) (quoting *State v. Capps*, 276 S.C. 59, 65, 275 S.E.2d 872, 875 (1981) (Lewis, C.J., dissenting)). However, we also recognize the countervailing rationale that a party could call opposing counsel as a necessary witness, requiring his or her disqualification, purely for tactical or strategic reasons. *Beller v. Crow*, 742 N.W.2d 230, 234 (Neb. 2007); *Smithson v. U.S. Fid. & Guar. Co.*, 411 S.E.2d 850, 855 (W. Va. 1991).

South Carolina courts have not specifically addressed what a "necessary witness" is under Rule 3.7. Other jurisdictions with nearly identical language to Rule 3.7 find that an attorney is "likely to be a necessary witness" when the "attorney's testimony is relevant to disputed, material questions of fact" and "there is no other evidence available to prove those facts." *Clough v. Richelo*, 616 S.E.2d 888, 891–92 (Ga. Ct. App. 2005).[2] These requirements strike "a reasonable

[2] *See also Mettler v. Mettler*, 928 A.2d 631, 633 (Conn. Super. Ct. 2007) ("A necessary witness is not just someone with relevant information, however, but someone who has material information that no one else can provide."); *Beller*, 742 N.W.2d at 235 ("A party seeking to call opposing counsel can prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere."); *Teleguez v. Commonwealth*, 643 S.E.2d 708, 728 (Va. 2007) ("[A] party seeking to invoke the witness-advocate rule for disqualification purposes must prove that the proposed witness-advocate's testimony is strictly necessary." (alteration in original) (quoting *Sutherland v. Jagdmann*, No.

balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary." *Smithson*, 411 S.E.2d at 856.

We find the circuit court did not abuse its discretion in disqualifying Irma Brooks because the record includes sufficient evidence supporting the conclusion that Irma Brooks is a necessary witness. Irma Brooks' testimony is material and relevant to the issues being litigated: The Commission pleads fraud and misrepresentation, breach of contract, and negligence as defenses and counterclaims arising from Appellant's overbilling for the legal representation of indigent clients. A portion of the overbilling is directly attributable to Irma Brooks. Appellant explained some overbilling resulted from work being reported under his name when it was actually performed by Irma Brooks. Occasionally Irma Brooks would appear at hearings for DSS cases that had been assigned to Appellant and vice versa. Additionally, Irma Brooks would review vouchers for correctness for cases she worked on and for cases that she and Appellant worked jointly. Testimony from Irma Brooks would be material and relevant for determining the Commission's claims.

Further, we find Irma Brooks' testimony cannot be obtained elsewhere. *See Mettler*, 928 A.2d at 633 ("A necessary witness is not just someone with relevant information, however, but someone who has material information that no one else can provide."). Irma Brooks was an active participant in Appellant's overbilling. She worked on indigent defense cases under Appellant's name. She reviewed vouchers for her work that were submitted to the Commission under Appellant's name. We recognize she is not the only witness to these events, as at least one of Appellant's employees witnessed Irma Brooks' involvement with Appellant's overbilling. Nevertheless, no other witness would be able to provide evidence regarding the full extent of Irma Brooks' involvement with Appellant's overbilling. Furthermore, Appellant has not shown that the Commission is attempting to

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3:05CV042-JRS, 2005 U.S. Dist. LEXIS 25878, at *5 (E.D. Va. Oct. 31, 2005))); *Smithson*, 411 S.E.2d at 855 ("[A] motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney's client." (quoting *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 624 P.2d 296, 302 (Ariz. 1981))).

disqualify Irma Brooks for tactical or strategic reasons. Irma Brooks was listed on the Commission's witness list prior to her appearing on behalf of Appellant as legal counsel. For the aforementioned reasons, we find Irma Brooks is a necessary witness.

Appellant contended at oral argument that if Irma Brooks is a necessary witness, her disqualification would work a substantial hardship upon him. We find Appellant has abandoned this argument. In its order, the circuit court found it would not be a substantial hardship on Appellant to disqualify Irma Brooks. The circuit court noted Irma Brooks had only been involved in the case for two months and "the expense of hiring new counsel [did] not outweigh the prejudice that would occur to [the Commission] should they not be allowed to call Irma R. Brooks as [a] witness." Appellant did not challenge the circuit court's finding in his brief and it is therefore deemed abandoned. *See Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use . . . oral argument . . . as a vehicle to argue issues not argued in the appellant's brief."); *Gold Kist, Inc. v. Citizens and S. Nat'l Bank of S.C.*, 286 S.C. 272, 276 n.1, 333 S.E.2d 67, 70 n.1 (Ct. App. 1985) (noting exceptions not argued by appellant in its brief are deemed abandoned on appeal).

Appellant next contends the circuit court erred in disqualifying Irma Brooks because Rule 3.7(b) of the South Carolina Rules of Professional Conduct allows an attorney to advocate in a trial when another attorney from the same law firm will be a witness. Although this is a correct statement of the rule, the rule does not apply to Irma Brooks. *See* Rule 3.7(b), RPC, Rule 407, SCACR ("A lawyer may act as advocate in a trial in which *another lawyer in the lawyer's firm* is likely to be called as a witness . . . ." (emphasis added)). This rule would permit Irma Brooks to act as an advocate for Appellant if *another* attorney in Irma Brooks' law firm was testifying. However, because Irma Brooks is a necessary witness and is therefore likely to testify, Rule 3.7(b) is inapplicable and does not allow her also to act as an advocate.

Appellant also contends the circuit court abused its discretion in disqualifying Irma Brooks because of the nature of Appellant's right to have counsel of one's choosing. Appellant cites *Hagood v. Sommerville* in support of this argument. 362 S.C. 191, 607 S.E.2d 707 (2005). In *Hagood*, the circuit court gave Hagood's attorney the option to either (1) not use his employee as a witness

and remain as Hagood's counsel; or (2) withdraw due to the disqualification and allow Hagood to retain new counsel. *Id.* at 194, 607 S.E.2d at 708. The attorney withdrew. *Id.* The supreme court granted the petition for a writ of certiorari to consider whether an order granting a motion to disqualify a party's attorney was immediately appealable. *Id*. Our supreme court concluded "an order granting a motion to disqualify a party's attorney" may be immediately appealed because it affects a substantial right. *Id.* at 197, 607 S.E.2d at 710. In reaching this conclusion, the court relied on the following:

> (1) the importance of the party's right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney.

Id. Further, the court found that Rule 3.7 did not prohibit an attorney's employee from acting as a witness at a trial in which the attorney is advocating. *Id.* at 199, 607 S.E.2d at 711.

Appellant argues the policy considerations in *Hagood* apply here and are why the circuit court abused its discretion in disqualifying Irma Brooks. Although we agree that the right to have counsel of one's choosing is a substantial right, we find Appellant's reliance on *Hagood* is misplaced. The court considered the policies in *Hagood* to determine whether an order disqualifying an attorney may be immediately appealed. *Id.* at 197, 607 S.E.2d at 710; *see also EnerSys Del., Inc. v. Hopkins*, 401 S.C. 618–19, 618 738 S.E.2d 478, 479–80 (2013) (concluding the policy considerations in *Hagood* were not implicated in determining whether the *denial* of a motion to disqualify an attorney was immediately appealable). Therefore, we find the circuit court did not err in disqualifying Irma Brooks from

acting as an advocate and witness pursuant to Rule 3.7 of the South Carolina Rules of Professional Conduct.

II. Charles Brooks as Attorney and Witness

Appellant contends the circuit court erred in finding he could not act as both attorney and fact witness. The Commission argues Appellant may not proceed pro se because Appellant is an attorney. We agree with Appellant that Rule 3.7 does not prohibit a self-represented attorney from acting as both an advocate and fact witness.

The South Carolina Constitution guarantees every person the right of access to the courts. S.C. Const. art. I, § 9 provides, "All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." A litigant has a statutory right to proceed pro se in South Carolina. S.C. Code Ann. § 40-5-80 (2011) ("[The chapter regulating the practice of law] may not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires."); *Washington v. Washington*, 308 S.C. 549, 550, 419 S.E.2d 779, 780 (1992). The statutory right of self-representation is also provided to litigants under federal law. 28 U.S.C. § 1654 (2016).

Rule 3.7 of the South Carolina Rules of Professional Conduct prohibits a lawyer from acting as an advocate in a trial in which the lawyer is likely to be called as a necessary witness except under certain circumstances. Rule 3.7(a), RPC, Rule 407, SCACR. A lawyer may act as an advocate and witness in the same trial when "(1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." *Id.*

Our supreme court has not addressed whether an attorney may proceed pro se and testify as a witness without violating Rule 3.7.[3] However, the prevailing

[3] Although not binding, we acknowledge as instructive Ethics Advisory Opinion 90-07, which directly addresses the issue. "Neither the Model Rules of Professional Conduct nor the Model Code of Professional Responsibility prevent[s] a lawyer from appearing as both a witness and an advocate in his own case." S.C. Bar Ethics Advisory Comm., Op. 90-07 (1990). "[T]he text of Rule

view is that an attorney may testify in his or her own case without violating the rule. *See* Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 St. Mary's J. on Legal Malpractice & Ethics 2, 36 (2011) ("[I]n the absence of such a rule, a lawyer would be precluded from appearing pro se in any case in which she anticipated being a witness. The usual witness-advocate rule thus is not applied in situations involving pro se attorneys." (footnote omitted)). The comments to Rule 3.7 of the American Bar Association Model Rules of Professional Conduct—the rule South Carolina adopted verbatim in 1990—state "[t]he rationales of the advocate-witness rule do not apply to the pro se lawyer-litigant." Model Rules of Prof'l Conduct r. 3.7 annot. (Am. Bar Ass'n 2015). Courts in jurisdictions with nearly identical Rule 3.7 language have held that the rule is not applicable to pro se attorneys. *See Farrington v. Law Firm of Sessions, Fishman*, 687 So. 2d 997, 1000 (La. 1997) ("Rule 3.7 does not apply to the situation where the lawyer is representing himself."); *Horen v. Bd. of Educ. of the Toledo Pub. Sch. Dist.*, 882 N.E.2d 14, 21 (Ohio Ct. 2007) ("State courts have . . . held that this type of disciplinary rule is not applicable to self-representation. We agree."); *Angino v. Confederation Life Ins. Co.*, 37 Pa. D. & C. 4th 38, 44 (Pa. C.P., Dauphin Cty. 1997) ("[A] party-attorney's right to represent himself must prevail over the policy considerations underpinning [Rule 3.7]."); *Beckstead v. Deseret Roofing Co.*, 831 P.2d 130, 134 (Utah Ct. App. 1992) (concluding the prohibition against an attorney acting as an advocate and witness in the same case does not apply to a self-represented attorney).

Moreover, these courts recognize that the conduct prohibited by DR 5–101(B) and 5–102(A)—predecessor rules to Rule 3.7—did not change substantially with the adoption of Rule 3.7. *Horen*, 882 N.E.2d at 21; *Beckstead*, 831 P.2d at 134. Therefore, the case law interpreting the predecessor rules is helpful. *Beckstead*, 831 P.2d at 134. In *Farrington*, the Supreme Court of Louisiana held Rule 3.7 does not preclude lawyers from self-representation in defense of a legal malpractice action. 607 So. 2d at 1002. Critical to the ruling in *Farrington* was the rationale expressed in *Borman v. Borman*, 393 N.E.2d 847 (Mass. 1979), which rejected applying DR 5–102 to a pro se attorney. *Id.* at 1000. The *Borman* court reasoned:

3.7 and the Comments thereto reveal that it is intended to apply where the attorney is involved in the representation of a third party client. It has no express application to attorneys who appear pro se." *Id.*

> To apply DR 5-102 when the testifying advocate is a litigant in the action miscomprehends the thrust of the rule. DR 5-102 regulates lawyers who would serve as counsel and witness for a party litigant. It does not address that situation in which the lawyer [*i*]s the party litigant. Any perception by the public or determination by a jury that a lawyer litigant has twisted the truth surely would be due to his role as litigant and not, we would hope, to his occupation as a lawyer. As a party litigant, moreover, a lawyer could represent himself if he so chose. Implicit in the right of self-representation is the right of representation by retained counsel of one's choosing. A party litigant does not lose this right merely because he is a lawyer and therefore subject to DR 5–102.

893 N.E.2d at 856. (emphasis added) (footnote omitted) (citations omitted); *see also Presnick v. Esposito*, 513 A.2d 165, 167 (Conn. App. Ct. 1986) ("[T]he reasons underlying the general rule prohibiting an attorney from testifying in his client's case do not apply where the attorney is the client."); *Horen*, 882 N.E.2d at 21 ("A self-represented lawyer advances or argues only her cause. The concerns of impeachability and credibility that could potentially harm another person are not present.").

Similar to *Farrington*, we believe the rationale expressed in *Borman* supports concluding Rule 3.7 of the South Carolina Rules of Professional Conduct does not apply to a pro se attorney. We can see no reason why the constitutionally guaranteed right to self-representation should be curtailed for a pro se attorney by Rule 3.7, especially in light of the non-existent concerns over credibility and impeachability prejudicing a third party where, as here, the lawyer himself is the client. *See* S.C. Code Ann. § 40-5-80 (2011) ("[The chapter regulating the practice of law] may not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires."). Our holding is consistent with our current Rule 3.7 jurisprudence which has, to this day, only addressed the propriety of an attorney acting as an advocate and a witness on behalf of a third-party client. *See, e.g.*, *Collins Entm't, Inc.*, 363 S.C. at 564, 611 S.E.2d at 271. Therefore, we find the circuit court erred as a matter of law when it applied Rule 3.7 to Appellant and disqualified him from serving as his own counsel.

Additionally, Appellant challenges the stipulation in the circuit court's order that if he should not retain new counsel within forty-five (45) days, he "shall be allowed to represent himself, but he shall not be allowed to testify as a witness in the [t]rial unless called by [the Commission]." We vacate this portion of the circuit court's order because the restriction placed on Appellant's ability to testify is based on the circuit court's erroneous interpretation of Rule 3.7. Nevertheless, we find it important to note that, while there is not a constitutionally guaranteed right to testify in a civil case, Appellant is not prohibited from testifying and acting as his own advocate by virtue of Rule 3.7. *See Seabrook Island Prop. Owner's Ass'n v. Berger*, 365 S.C. 234, 243, 616 S.E.2d 431, 436 (Ct. App. 2005) ("[I]n the absence of due process concerns, there is no fundamental right to testify in a civil action." (alteration in original) (quoting *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375, 1381 (Colo. Ct. App. 1996))).

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

First Citizens Bank and Trust Company, Inc.,
Respondent,

v.

Park at Durbin Creek, LLC; Kenneth E. Clifton; and Linda G. Whiteman; Defendants,

Of whom Park at Durbin Creek, LLC and Kenneth E. Clifton are the Appellants.

Appellate Case No. 2014-002295

Appeal From Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5469
Heard November 17, 2016 – Filed February 15, 2017

AFFIRMED

James Calhoun Pruitt, Jr., of Pruitt & Pruitt, of Anderson, for Appellants.

James H. Cassidy, Ella McKenzie Sims Barbery, and, Joseph Owen Smith, all of Roe Cassidy Coates & Price, P.A., of Greenville, for Respondent.

WILLIAMS, J.: The Park at Durbin Creek, LLC (PDC) and Kenneth Clifton (collectively, Appellants) appeal the circuit court's decision to set aside Clifton's conveyance of property to PDC on the grounds that the conveyance violated the Statute of Elizabeth. On appeal, Appellants claim the circuit court erred in setting aside the transfer of Clifton's interest in the property to PDC when (1) the testimony of both owners of the property established a valid purpose for the transfer, and (2) the property was transferred by both owners in a single deed without any showing of fraudulent intent. Additionally, Appellants claim the circuit court erred in admitting certain testimony regarding a subsequent conveyance of Clifton's interest in PDC to a third party, Streamline Management, LLC (Streamline). We affirm.

FACTS

In 1995, Clifton and Linda Whiteman purchased approximately 370 acres (the Property) in Laurens County, South Carolina. They owned the Property in their individual names as tenants in common from 1995 until September 18, 2008. Testimony at trial established Clifton and Whiteman purchased the Property for retirement purposes. In addition to the Property, they purchased two other tracts of land in the early 1990s, which they also held as tenants in common in their individual names.

Clifton, a successful real estate developer, commonly purchased personal investment property in his name. If Clifton chose to develop the property, he would then transfer his interest in the property to a limited liability company (LLC), which he or employees of his company created. During Clifton's career, he organized over forty LLCs.

To generate capital to finance his developments, Clifton routinely borrowed money from third-party lenders. At issue in this case are three loans between Clifton and First Citizens Bank (Respondent), all generated to finance three separate development projects. The original principal amount of the three loans totaled $3,873,000. Respondent submitted evidence that none of these loans were intended to be long-term loans and Respondent continued to renew these loans as Clifton made progress payments over the years.

The real estate market began to decline in 2008. In early January 2008, Clifton sought extensions on two of his loans with Respondent that were approaching their maturity dates. Prior to agreeing to a modification of the loans' terms, Respondent

requested Clifton submit a personal financial statement. Clifton presented a financial statement dated January 23, 2008, in which he claimed a $50 million net worth, with his real estate assets comprising over $48 million of his claimed net worth. Clifton listed the Property on his financial statement. Clifton claimed he possessed a 50% interest in the Property, it was unencumbered, and it was valued at approximately $1,570,000. Respondent stated it relied upon Clifton's representations in his financial statement, and as a result, extended these two loans to mature in January 2009.

Clifton's third loan was set to mature on July 12, 2008, but Clifton also requested an extension on this loan. Less than a week prior to Respondent granting the modification on the third loan, Clifton and Whiteman transferred their interests[1] in the Property to PDC. Without knowledge of this transfer, Respondent then granted Clifton's extension request on September 22, 2008, resulting in all three loans maturing in January 2009. During this timeframe, Clifton and Whiteman transferred their interests in the other two tracts of land to LLCs. Clifton also transferred the bulk of his personal real estate holdings to other LLCs.[2] According to Respondent, it became concerned with Clifton's ability to pay the balance on the outstanding loans. Respondent requested Clifton to bring his interest payments current on the three loans and to provide additional collateral before agreeing to again extend the maturity dates on the loans. Despite Respondent's requests, Clifton failed to provide a business plan or secure additional collateral. As a result, Respondent accelerated the loans and commenced foreclosure proceedings in

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[1] As discussed *infra*, Clifton testified he and Whiteman chose to transfer their interests in the Property to PDC based upon Whiteman's longstanding concerns regarding personal liability because the Property was being leased to third parties for recreational hunting.

[2] Specifically, Clifton and Whiteman transferred property they owned in their individual names since 1993 to Gardens at Fourteen, LLC, on July 31, 2008. On September 15, 2008, Clifton transferred personal ownership of four tracts of land that he had owned since at least 2004 to Pawley Plantation, LLC. Three days later, on September 18, 2008, Clifton and Whiteman transferred property they owned in their individual names since 1992 to Pelham at Boiling Springs, LLC. The following day, on September 19, 2008, Clifton transferred ownership of his office building, which he owned individually since 1997, to Central Office, LLC. All of these transfers occurred just prior to Respondent granting Clifton a final extension.

February 2009. Respondent obtained foreclosure judgments against Clifton, and after foreclosure and deficiency sales took place, a deficiency judgment totaling $745,317.86, plus interest, was entered against Clifton.

In the midst of Respondent obtaining foreclosure judgments against Clifton, Clifton and his two daughters entered into an assignment agreement on August 5, 2009. In the assignment agreement, Clifton agreed to disassociate from PDC and transfer his membership interest in PDC to Streamline, whose sole members were Clifton's two daughters and his ex-wife. Streamline was nonexistent on the date of the assignment but was subsequently organized in January 2010. Whiteman testified she did not authorize or consent to Clifton's transfer or assignment of his membership interest in PDC to Streamline.

In October 2010, Respondent initiated supplemental proceedings against Clifton in an effort to collect on the deficiency judgment. However, by this time, all of the assets listed in Clifton's financial statement to Respondent were foreclosed upon, transferred to one of Clifton's business partners as payment for outstanding debt, or disposed of in some manner, so that Clifton had no remaining assets to pay his debts to Respondent. Respondent filed suit against Appellants and Whiteman on October 20, 2010, seeking relief under the Statute of Elizabeth[3] and alleging causes of action for fraudulent conveyance, civil conspiracy, and partition. Each party timely answered.

The circuit court held a one-day nonjury trial and subsequently issued an order to set aside the conveyance of the Property to PDC. The circuit court concluded sufficient "badges of fraud" existed to infer Clifton possessed fraudulent intent when he transferred his interest in the Property to PDC. As a result, Clifton's conveyance of his 50% interest in the Property was null and void pursuant to the Statute of Elizabeth. To that end, Clifton's subsequent conveyance of his 50% interest in PDC—a company whose only asset was the Property—to Streamline was also improper and invalid. Specifically, the circuit court concluded the attempted transfer on August 5, 2009, was void ab initio as Streamline did not exist at that time. Even assuming Clifton could have transferred his interest at that time to a nonexistent entity, the court concluded Clifton failed to obtain Whiteman's consent to the admission of new members into PDC. As a member-managed LLC,

[3] S.C. Code Ann. § 27-23-10 (2007).

Whiteman's lack of consent invalidated the Streamline transaction pursuant to section 33-44-404(c)(7) of the South Carolina Code (2006).[4] Appellants timely filed a Rule 59(e), SCRCP, motion to alter or amend, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth." *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action," and this court applies a de novo standard of review. *Id.* at 397, 735 S.E.2d at 463.

The admission and exclusion of evidence "are matters largely within the [circuit] court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion." *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 559, 556 S.E.2d 718, 725 (Ct. App. 2001). "[T]o reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown." *Id.* at 559, 556 S.E.2d at 726.

LAW/ANALYSIS

I. Statute of Elizabeth

Appellants contend the circuit court improperly invoked the Statute of Elizabeth to set aside the conveyance of the Property to PDC because Clifton made the conveyance pursuant to a legitimate purpose. We disagree.

The Statute of Elizabeth provides the following:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken . . . to be clearly and utterly void . . . .

S.C. Code Ann. § 27-23-10(A) (2007).

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[4] Section 33-44-404(c)(7) states that, in a member-managed LLC, the admission of a new member requires the consent of all members.

Our courts have set aside conveyances for existing creditors, such as Respondent, in two instances. *Mathis v. Burton*, 319 S.C. 261, 264, 460 S.E.2d 406, 407 (Ct. App. 1995).

> First, whe[n] the challenged transfer was made for [] valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. Second, where the transfer was [] made [without] valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full —not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.

Id. at 264–65, 460 S.E.2d at 408 (quoting *Durham v. Blackard*, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993)).

In this case, the circuit court found—and both parties agree—that valuable consideration was exchanged for the transfer of Clifton's interest in the Property to PDC. Accordingly, Respondent was required to establish by clear and convincing evidence that Clifton transferred the property with the "intent to delay, hinder, or defraud [Respondent]." § 27-23-10(A).

When a party denies any fraudulent intent in transferring an asset outside the reach of a creditor—as Clifton asserts in the instant case—our courts have inferred fraudulent intent if one or more of the following "badges of fraud" exist:

> [T]he insolvency or indebtedness of the transferor, [a] lack of consideration for the conveyance, [a] relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, [a] departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

Coleman v. Daniel, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973). It is generally recognized that, although the identification of one badge of fraud does not create a presumption of fraud, "whe[n] there is a concurrence of several such badges of fraud[,] an inference of fraud may be warranted." *Id.* at 209–10, 199 S.E.2d at 79–80 (quoting 37 AM. JUR. 2D *Fraudulent Conveyances* § 10 (1968)). "A badge of fraud creates a rebuttable presumption of intent to defraud." *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999).

We find the circuit court properly held Clifton transferred the Property to PDC for purposes of avoiding Respondent's claims. We further find that several "badges of fraud," as recited by our supreme court in *Coleman*, create an inference of fraud in this case. First, Clifton was originally indebted to Respondent for close to $4 million. At the time of the transfer, Clifton was still indebted to Respondent. Clifton was in the process of negotiating another extension when he transferred the Property to PDC, and thus, we find this element is satisfied. Second, Clifton, as the transferor, was also one of two members of PDC, the entity to which he was transferring the Property. As Clifton's personal interests and those of PDC were essentially one in the same, we find this element is satisfied. Third, although Clifton contests litigation was looming, we—like the circuit court—conclude Clifton was well aware that his failure to satisfy his obligations to Respondent or to successfully negotiate another modification would result in inevitable litigation. It is uncontested Clifton was behind on his payments and Clifton never presented any evidence that Respondent guaranteed it would grant him an additional modification, particularly given its previous extensions, beyond the loans' original maturity dates. Fourth, Clifton was not forthright with Respondent in how he handled the conveyance. While actively negotiating an extension on these loans, Clifton transferred the Property to PDC. However, Clifton failed to inform Respondent he transferred the Property to PDC or to submit an updated financial statement to reflect his decreased net worth in the wake of transferring numerous, personally held properties to a number of LLCs. We find this course of conduct to be secretive, particularly given Clifton's knowledge that Respondent relied upon his ownership of these properties—and the unencumbered Property in particular—when it initially agreed to modify the loans' maturity dates. Last, Clifton reserved a benefit in the Property and retained possession of the Property after the conveyance. Clifton and Whiteman were the original members of PDC, each having a 50% ownership interest in the Property. After Clifton's conveyance, PDC's only asset was the Property. As a result, Clifton retained his 50% ownership interest in the Property, despite its transfer to PDC. Therefore, of the

nine "badges of fraud," we find six of the nine factors[5] weigh in favor of finding Clifton intended to defraud Respondent of its rightful claim to the Property when he conveyed it to PDC.

Having found Respondent created a presumption of fraud, we next address whether Appellants successfully rebutted this presumption. Based upon our review of the record, we find Appellants failed to rebut this presumption. At trial, Clifton asserted he transferred the Property to PDC at the insistence of Whiteman. Clifton testified that Whiteman was "hammering" him every day to place the Property into an LLC based on her fear of the liability associated with the Property being used for recreational hunting. Renee Gilreath, Clifton's daughter, also testified they transferred the Property to PDC based on Whiteman's liability concerns as well as for legitimate business purposes. According to Whiteman, she agreed to transfer her interest in the Property to PDC due to "liability and the timing . . . because . . . [Clifton] was starting another subdivision." Whiteman denied having any knowledge of Clifton's financial uncertainties with Respondent and stated, while she agreed to transfer her interest in the Property to PDC, she never agreed to Clifton transferring his interest in the Property from PDC to Streamline.

Having heard the foregoing testimony and evidence, the circuit court concluded Clifton's testimony was not credible. The court stated Clifton and his office staff chose the timing of the transfer, and despite their joint ownership of the Property for over twenty years and Whiteman's request to transfer the Property into a LLC for years, it was not until September 2008 when Clifton was experiencing financial uncertainties with Respondent that this transfer was consummated. Further, the court acknowledged Clifton "also transferred essentially all [the] properties he owned individually into various LLCs. . . . By doing this, he essentially divested himself of any individual ownership interest in any real property which had any significant equity that could be reached by creditors." Because the Property was debt-free and had significant equity, the court concluded Clifton wanted to protect the Property from creditors, despite offering other legitimate reasons for the transfer.

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[5] The remaining three factors—which do not apply in this case—include the following: lack of consideration for the conveyance, departure from the usual method of business, and the transfer of the debtor's entire estate. *See Coleman*, 261 S.C. at 209, 199 S.E.2d at 79.

We concur with the circuit court's findings that Clifton intended to unlawfully place the Property outside Respondent's reach. Because the Statute of Elizabeth prohibits a conveyance of land with the purpose to delay, hinder, or defraud a creditor, we hold the circuit court properly concluded Clifton's conveyance of his 50% interest in the Property to PDC was null and void.

II. Division of the Deed

Appellants also contend the circuit court's decision to set aside the conveyance to PDC was improper because Whiteman and Clifton transferred the Property in a single deed. According to Appellants, voiding the sale as to Clifton effectively divided the deed, which is error when Respondent failed to prove Whiteman acted with any fraudulent intent when she transferred her interest in the Property to PDC. We disagree.

The record shows Whiteman and Clifton owned the Property as tenants in common. As tenants in common, each person owned a 50% undivided interest in the Property. *See* 6 S.C. JURIS. *Cotenancies* § 5 (1991) ("Tenants in common each own a distinct and proportionate but undivided interest or estate in the property and do not have privity of estate with each other."). As tenants in common, each cotenant may transfer his or her separate ownership interest in the property without consent or participation of the other. *See* 6 S.C. JURIS. *Cotenancies* § 37 (1991) ("In the absence of a contrary contractual provision, one cotenant may sell, lease, or mortgage his share or interest in the property to . . . third parties."). If one cotenant conveys his or her interest to a third party, the third party—as grantee—becomes a tenant in common with the remaining cotenants. *See* 6 S.C. JURIS. *Cotenancies* § 39 (1991) ("A conveyance by one cotenant to a third party . . . conveys only the interest of the cotenant, and thus his grantee becomes a tenant in common with the other cotenants."). Because "[t]he interest of a tenant in common is freely alienable . . . [it] is subject to the claims of creditors." 6 S.C. JURIS. *Cotenancies* § 6 (1991).

Accordingly, we find the conveyances of Whiteman's 50% interest and Clifton's 50% interest to PDC were each distinct transfers that Whiteman and Clifton merely chose to accomplish in a single deed. The fact they utilized one instrument to transfer their separate interests does not negate the distinct ownership interest each person possessed in the Property. As mutually exclusive conveyances, we also find that the invalidity of one does not necessarily invalidate the other. To that

end, Whiteman's intent in transferring her share of the Property to PDC is irrelevant to the circuit court's finding of fraudulent intent as to Clifton. Clifton's proportional interest is subject to the claims of his creditors, and he cannot legitimize the fraudulent transfer of his interest by lumping it together with Whiteman's presumably valid transfer of her interest. Regardless of the parties' choice of instrument to convey the Property, we find the circuit court properly set aside the conveyance pursuant to the Statute of Elizabeth.

III. Admission of Evidence

Last, Appellants contend the circuit court erred in admitting evidence of a subsequent transaction involving PDC's transfer of the Property to a third party, Streamline, because that issue was neither raised in the pleadings nor tried by consent. We find this issue is unpreserved.

As an initial matter, Respondent claims Appellants failed to properly preserve this issue for our review. Respondent contends that Appellants failed to contemporaneously object when evidence concerning the Streamline transaction was first introduced at trial. Specifically, Respondent introduced "Plaintiff's Exhibit 4" to the court, which was a conveyance timeline for certain properties owned by Clifton. Included in this exhibit was an attachment containing the PDC assignment document, in which Clifton assigned his interest in PDC to Streamline. Respondent introduced this exhibit to the court without objection from Appellants. The next time the assignment of Clifton's interest in PDC was discussed occurred during Respondent's direct examination of Whiteman when Respondent questioned Whiteman regarding her knowledge of the transfer to Streamline. Appellants failed to object to this line of questioning. It was not until Renee Gilreath's testimony that Appellants objected to any evidence or testimony concerning the Streamline transaction.

Based on our review of the record, we find Appellants failed to timely object to this evidence at trial, and thus, it is not preserved for our review. *See Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011) (finding appellants failed to object contemporaneously at trial and concluding the issue was not preserved for appellate review). Further, Appellants' subsequent objections did not cure their failure to contemporaneously object when the evidence was first introduced. *Pinkerton v. Jones*, 310 S.C. 295, 298, 423 S.E.2d 151, 153 (Ct. App. 1992) (finding belated objection to evidence that was introduced earlier in trial did not cure earlier failure to object on the same ground).

Accordingly, we find this issue is not preserved for our review.

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.