Judicial Merit Selection Commission

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M E D I A R E L E A S E
February 12, 2009

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A vacancy will exist in the office currently held by the Honorable Marvin Frank Kittrell, Chief Judge of the Administrative Law Court, Seat 1, upon Judge Kittrell's retirement on or before June 30, 2009. The successor will fill the subsequent full term that will expire June 30, 2014.

A vacancy exists in the office formerly held by the Honorable Paige J. Gossett, Judge of the Administrative Law Court, Seat 5, upon her resignation October 24, 2008. The successor will fill the unexpired term that expires June 30, 2013.

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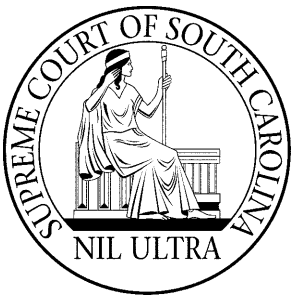

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
February 17, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Historic Charleston Holdings, LLC, Respondent,

v.

Gerard Mallon, Dixie Holdings, LLC, and Dixie Developers, LLC, Defendants,

Of whom Gerard Mallon is the, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Mikell R. Scarborough, Circuit Court Judge

Opinion No. 26601
Heard May 7, 2008 – Filed February 17, 2009

REVERSED

Deborah Harrison Sheffield, of Columbia, for Petitioner.

Charles P. Summerall IV, of Buist Moore Smythe & McGee, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: This appeal arises out of a master-in-equity's order to dissolve a limited-liability company (LLC). The master distributed the remaining assets of the company between its two members, Appellant Gerard Mallon ("Mallon") and Respondent Historic Charleston Holdings ("HCH"), and awarded HCH prejudgment interest and attorneys fees. The court of appeals reversed the master's judgment and remanded the case for a full accounting of the LLC. This Court granted certiorari and we reverse.

FACTUAL/PROCEDURAL BACKGROUND

Mallon, HCH, and William Storen formed Dixie Holdings, LLC ("Dixie") in June 1998 for the purpose of acquiring, owning, and developing property in Charleston. Priestly Coker ("Coker"), who along with his wife comprised the entire membership of HCH, handled the financial accounting and management of properties acquired by Dixie; Mallon, the owner of a construction company, handled repairs and renovations to the properties; and Storen, a licensed realtor, acted as the real estate agent for the properties Dixie placed for sale. Mallon and HCH each held a 49.5% share of Dixie and Storen apparently held 1%.[1]

Mallon and HCH were also equal members in Dixie Developers, LLC ("Dixie Developers"), a company organized just one month prior to the organization of Dixie for the similar purpose of acquiring, owning, and developing property in Charleston. Although Dixie and Dixie Developers were distinct entities, the funds of the two companies were held in a single bank account under the name of Dixie Developers, on which both Coker and Mallon had signatory authority.

[1] The parties' testimony on various aspects of Dixie's business arrangement, particularly with regard to Storen, was vague and often conflicting. Because Storen's participation is irrelevant to the issues before this Court, we do not attempt to parse out the details of Mallon's and HCH's business relationship with Storen.

Dixie initially acquired four properties: 10 Felix Street, 12 Felix Street, 15 Felix Street, and 22 Felix Street. The sale of 12 Felix occurred in December 1998, and 10 Felix was sold in April 1999 after both had been repaired and renovated. The proceeds from the sale of these properties were used to reimburse authorized expense items associated with the particular piece of property being sold, and the net proceeds were equally distributed to HCH and Mallon. Meanwhile, Dixie Developers also acquired three properties which it renovated and placed for sale.

In late 1999, Mallon and Storen made the first of multiple requests from Coker for a full financial accounting of Dixie as well as copies of the company's bank records. The computer printouts and documents provided by Coker, which Coker testified comprised his entire financial record collection, were apparently unsatisfactory to Mallon and Storen. Thereafter, in December 1999, Mallon, Storen, and Coker met to discuss their differences regarding the accounting for Dixie. An agreement signed by the parties at the meeting stated that sales of Dixie's property would continue "while these matters are being dealt with" and further provided for the sales proceeds to be held in an escrow account in the meantime.

Around this same time, HCH sold its interest in Dixie Developers to Mallon, giving Mallon 100% interest in that company. The sale price of HCH's interest purportedly reflected HCH's one-half interest in the company minus HCH's share of Mallon's authorized expenses related to Dixie Developers' properties, all three of which had sold prior to the buy-out.

Following the December 1999 agreement between Mallon, Storen, and Coker, Dixie sold its remaining two properties. Number 15 Felix sold first in April 2000, and Mallon placed the net proceeds totaling $41,845.30 into a new Dixie Developers account he had opened as the now-sole member of that entity. Mallon refused HCH's demands to place the sale proceeds from 15 Felix into a "proper escrow account" in Dixie's name in accordance with the parties' earlier agreement. When 22 Felix later sold in December 2001, HCH and Mallon agreed to an equal distribution of the net proceeds without first placing the funds in escrow.

In October 2002, Storen dissociated from Dixie, leaving Mallon and HCH each with 50% of the company. That same month, unable to resolve their differences on the financial accounting and bank records for Dixie, and further unable to compel Mallon to move the sale proceeds from 15 Felix to an agreeable escrow arrangement or otherwise distribute HCH's share of the proceeds, HCH filed a civil claim against Mallon, Dixie, and Dixie Developers, individually and in a derivative capacity as a member of Dixie. The complaint sought a judicial dissolution of Dixie along with a full financial accounting of both Dixie and Dixie Developers, injunctive relief for Mallon's diversion of the 15 Felix proceeds, a declaratory judgment as to HCH's rights as a member of Dixie, prejudgment interest, and attorneys' fees.

Mallon initially responded to HCH's complaint in a *pro se* letter in November 2002 indicating he was interested in submitting the issue to binding arbitration. After further communication, Mallon retained counsel, and the parties referred the case to a master-in-equity in May 2003. Around this same time, Mallon issued a memorandum alleging he was entitled to reimbursement for construction work he performed and other miscellaneous expenses associated with properties he owned with HCH. Mallon formally asserted these charges in October 2003 when pursuant to the master's consent order, Mallon filed an amended answer in which he argued, among other things, that he was entitled to set off the proceeds from the sale of 15 Felix in the amount of his alleged expenses. Mallon's itemization of his expenditures included charges associated with each of the Felix Street properties acquired by Dixie, as well as charges associated with the three properties acquired by Dixie Developers.

At trial, the master-in-equity found that HCH was entitled to one-half of the 15 Felix sale proceeds, plus pre-judgment interest on HCH's share of the proceeds. The master further ordered the dissolution and termination of Dixie within thirty days and awarded HCH statutory costs and attorneys' fees and costs.

On appeal, the court of appeals reversed the master's award to HCH of one-half of the 15 Felix proceeds and prejudgment interest, and remanded the

case for a formal accounting of Dixie. *See Historic Charleston Holdings v. Mallon*, 365 S.C. 524, 617 S.E.2d 388 (Ct. App. 2005). The court also held that the master did not abuse his discretion in awarding attorneys' fees. *Id.* The court of appeals dismissed Mallon's other arguments on grounds of issue preservation. *Id.* This Court granted certiorari to review the decision of the court of appeals, and Mallon raises the following issues for review:

I. Is Mallon entitled to a full accounting for Dixie Holdings and Dixie Developers?

II. Is HCH entitled to one-half of the proceeds from the sale of 15 Felix Street?

III. Did the master err in holding that the relief granted to HCH was justified by Mallon's wrongful dissociation from Dixie?

IV. Did the master err in excluding evidence of Coker's self-dealing and misappropriation of Dixie's funds?

V. Did the master err in awarding prejudgment interest because the amount awarded HCH was not liquidated?

VI. Did the court of appeals err in holding that the master properly awarded HCH statutory costs and attorneys' fees?

LAW/ANALYSIS

I. Accounting

Mallon argues that he is entitled to a full accounting for Dixie Holdings and Dixie Developers. Specifically, Mallon contends that a full accounting is necessary to the dissolution and distribution of assets of Dixie and that the scope of the action should not be limited to a determination of the parties' rights with respect to the proceeds from the sale of 15 Felix. We disagree.

An action for an accounting sounds in equity. Therefore, this Court may review the record and make findings in accordance with its own view of the preponderance of the evidence. *See Lawson v. Rogers*, 312 S.C. 492, 495, 435 S.E.2d 853, 855 (1993).[2]

Noting that an operating agreement is a binding contract that governs the affairs of an LLC, *see* S.C. Code Ann. §33-44-103 (2006), the court of appeals held that section 12.6 of Dixie's operating agreement, which provides that each of Dixie's members "shall be furnished with a statement setting forth the assets and liabilities of the Company as of the date of the complete liquidation," entitled the parties to a formal accounting of Dixie. In our view, this was error. While we acknowledge that Section 12.6 requires a "statement" of assets and liabilities, we would distinguish this requirement from the equitable remedy of "accounting" sought by the parties in the instant case, which refers to "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." 1 Am. Jur. 2d *Accounts and Accounting* § 52 (2005).[3] Accordingly, we find no prevailing

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[2] The court of appeals remanded this case for a formal accounting of Dixie, but held that Mallon's request for an accounting for Dixie Developers and all Mallon's remaining issues except a subpart of the attorneys' fees issue were not preserved for appeal. Unless otherwise noted, we find that each of these issues were raised to and ruled upon by the master and that the court of appeals therefore erred in dismissing them on preservation grounds, *see I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (acknowledging that an issue raised to and ruled upon by the lower court is preserved for appellate review), and we proceed with an analysis of their merits in the interest of judicial economy. *See S. Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (deciding an issue on appeal in the interest of judicial economy).

[3] *See also* Carmen Harper Thomas, Note, *Limited Liability Companies Are Off and Running:* Historic Charleston Holdings, LLC v. Mallon, *Accountings, and Derivative Actions in LLC Litigation*, 57 S.C. L. Rev. 441, 453 (2006).

requirement in the operating agreement obligating the Court to order a remedy in the form of a judicial accounting of Dixie.

Moreover, even if, as the dissent argues, the "statement of assets and liabilities" provided for in the operating agreement entitles Mallon and HCH to a formal judicial accounting, we find that Mallon and Coker (on behalf of HCH) waived this right by refusing to effectively communicate and cooperate with one another, and further failing to independently resolve the matter when both had access to Dixie's bank records.[4] *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992) (defining a waiver as a voluntary and intentional abandonment or relinquishment of a known right by a party who possessed actual or constructive knowledge of its rights, or of all the material facts upon which they depended).[5]

Additionally, we can find no provision in the LLC Act requiring a court to order a complete accounting under the circumstances. Rather, we find that the LLC Act grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members. *See* S.C. Code Ann. §§ 33-44-410 cmt., -801 cmt. (2006). Accordingly, we hold that

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[4] Mallon and Storen testified that they requested financial documents from Coker multiple times, and that when Coker finally complied, the documents provided were inadequate and incomplete. Mallon, however, as co-signatory on the first Dixie Developers bank account, was equally capable of acquiring the bank records and, upon receiving Dixie's financial documents from Coker, taking the documents to a certified public accountant for an accounting. Mallon claimed to have done this much, but refused to name the accountant and never produced any documents generated out of this review.

[5] We also question the dissent's interpretation of the operating agreement to require that an accounting be provided "prior to dissolution." Under the express terms of the agreement, the financial statement is to be furnished "as of the date of complete liquidation." *See also* Thomas, *supra* note 3, at 454.

Mallon is not entitled to a full accounting of Dixie or Dixie Developers, and that this Court may determine the appropriate remedy in its discretion.

To this end, we believe that a full financial accounting of both Dixie and Dixie Developers is not the appropriate remedy in this matter. First, HCH's only purpose in naming Dixie Developers as a party to the immediate action was because the funds which HCH sought were in a Dixie Developers bank account that was inaccessible to HCH. Otherwise, Dixie Developers is a completely separate entity from Dixie, and therefore, any right to an accounting for Dixie Developers is irrelevant in this case.

Second, as explained more fully in Section II, we find that the only contentious issue remaining incidental to the dissolution of Dixie is the distribution of approximately $42,000 from the sale of 15 Felix. The record reveals that Dixie's last business transaction occurred nearly seven years ago with the sale of 22 Felix in December 2001. In the meantime, neither the parties nor any creditors have asserted any legitimate outstanding liabilities incurred by Dixie, nor are there any other Dixie assets to which any member is legitimately claiming entitlement. Because the source of the parties' dispute is a relatively small sum of money generated from a single real estate transaction – the sale of 15 Felix – in April 2000, we find that a full financial accounting would unnecessarily prolong this otherwise simple matter. *See* 1 Am. Jur. 2d *Accounts and Accounting* § 56 (2005) (noting that an accounting is an appropriate remedy when the accounts at issue are complicated or mutual).

For these reasons, we hold that a full accounting of either Dixie or Dixie Developers is neither required nor necessary in this action and that the proper resolution in this matter is for this Court to make a single determination of the parties' rights with respect to the proceeds from the sale of 15 Felix. Accordingly, we reverse the decision of the court of appeals remanding the case for a full accounting of Dixie.

II. Distribution of sale proceeds from 15 Felix

Mallon argues that HCH is not entitled to one-half of the proceeds from 15 Felix. Specifically, Mallon contends that he is entitled to set-off of the 15 Felix proceeds for nearly $10,000 in additional charges for construction work and miscellaneous expenses related to each of Dixie's Felix Street properties, and another $90,000 in similar outstanding charges associated with Dixie Developers' properties. We disagree.

Because the underlying action primarily arises in the Court's equity jurisdiction, we review the master's determination of the parties' rights with respect to the 15 Felix proceeds de novo. *See Elias v. Firemen's Ins. Co.*, 309 S.C. 129, 132, 420 S.E.2d 504, 505 (1992) (finding that an action may be legal or equitable, depending upon whether law or equity would have had jurisdiction if there had been no declaratory judgment procedure).

Mallon initially raised the issue of his additional expenses associated with Dixie Developers and each of Dixie's Felix Street properties in May 2003 and did not formally assert the right to set-off for these additional expenses until he filed his amended (and untimely) answer, without prejudice to HCH's rights, in October 2003. The preceding February, however, Mallon failed to respond to HCH's Requests for Admission, which included the admission that "HCH is entitled to about 50% of said proceeds." Rule 36, SCRCP, provides that a matter is deemed admitted when the party served fails to respond with a written answer or objection regarding the admission. Although the matter could be resolved at this juncture under Rule 36, we proceed with an analysis of Mallon's right to set-off, thereby providing additional legal and equitable grounds for the Court's conclusion.

a. Additional expenses associated with Dixie Developers

Mallon asserts that he underwrote the cost of numerous building repair projects and incurred other miscellaneous expenses, totaling nearly $90,000 with respect to Dixie Developers' properties. We hold that Mallon is not

entitled to set-off of the funds at issue for charges associated with Dixie Developers based on the theories of accord and satisfaction and mutuality.

The elements of an accord and satisfaction are an agreement between the parties to settle a dispute, and the payment of the consideration which supports the agreement. *Wilson v. Builders Transp., Inc.*, 330 S.C. 287, 297, 498 S.E.2d 674, 680 (Ct. App. 1998). To constitute accord and satisfaction, there must have been a meeting of the minds. *Tremont Constr. Co. Inc. v. Dunlap*, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992). In our opinion, Mallon's December 1999 buy-out of HCH's interest in Dixie Developers constitutes an act of accord and satisfaction with respect to HCH's liability for charges associated with the Dixie Developers properties. The amendment to the Dixie Developers operating agreement made pursuant to the buy-out, and reflecting Mallon's 100% ownership clearly indicates the parties' agreement to wind up their business relationship through Mallon's purchase of HCH's interest for fair value. The circumstances surrounding the negotiation of the terms of the buy-out are further evidence of the parties meeting of the minds in this regard. Although HCH and Mallon originally negotiated a price of $80,000 for HCH's interest in Dixie Developers, Mallon asserted additional charges related to the Dixie Developers property shortly thereafter. After further negotiations, the parties agreed on an adjusted purchase price of $63,500, and HCH refunded the difference to Mallon. For these reasons, we hold that the buy-out constituted an accord and satisfaction of any liability to Dixie Developers on the part of HCH, and therefore, Mallon is not entitled to set-off for expenses alleged after the fact.

Lack of mutuality is an additional theory prohibiting the set-off of Mallon's alleged charges related to Dixie Developers from the proceeds of 15 Felix. The general rule governing set-off provides that the demands to be set off must be mutual, and that debts accruing in different rights cannot be set off against each other. *Puerifoy v. Gamble*, 145 S.C. 1, 11, 142 S.E. 788, 791 (1927). In our view, HCH's alleged debt to Mallon for Dixie Developers' work and Mallon's withholding of HCH's proceeds from the sale of 15 Felix, a Dixie property, are clearly not mutual demands. The two companies were distinct entities, set up at different times by different members, and at no time had any shared ownership of the properties they listed for sale. Although the

companies apparently shared a bank account during the time that HCH was still a member of Dixie Developers, we find this to be more indicative of poor fiscal management skills than mutuality. Otherwise, Dixie Developers is a completely separate entity from Dixie, and Mallon is not entitled to set off his expenses associated with Dixie Developers from the proceeds of property belonging to Dixie.[6]

b. Additional expenses associated with Felix Street properties

Mallon's asserts that he is entitled to reimbursement for nearly $10,000 in construction work and miscellaneous expenses associated with Dixie's Felix Street properties. We hold that that under theories of laches and waiver, Mallon is not entitled to set-off of the 15 Felix proceeds for expenses associated with the development of the Felix Street properties.

Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. *See Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007).

A timeline of the relevant events is instructive to the Court's analysis. Number 12 Felix sold in December 1998, 10 Felix in April 1999, 15 Felix in April 2000, and 22 Felix in December 2001. The record reveals that except

[6] Mallon points out that the lack of strict mutuality does not *per se* prohibit a court exercising its equity jurisdiction from allowing set-off. *See W. M. Kirkland, Inc. v. Providence Wash. Ins. Co.*, 264 S.C. 573, 581, 216 S.E.2d 518, 521 (1975). However, considering the lack of strict mutuality in conjunction with the accord and satisfaction that occurred between the parties with respect to Dixie Developers' financial affairs, this Court is fully justified in refusing to permit an equitable set-off under the circumstances.

for the distribution of the 15 Felix proceeds at issue here, Mallon and HCH unconditionally agreed on a fifty-fifty distribution of proceeds at the closings for each of the Felix Street properties. The record also reveals that Mallon and HCH had established a course of dealing in each of their business ventures for reimbursement of additional expenses.[7] Pursuant to this course of dealing, Mallon would produce an itemized request for reimbursement, and HCH would tender the appropriate payment through either an adjustment in the standard distribution of sale proceeds at closing, or with a separate check for the total costs.[8]

Given this established course of dealing between the parties, Mallon's May 2003 demand for reimbursement for charges associated with the Felix Street properties – a three-year-plus delay from the date of sale of three of the properties, and a twenty-month delay from the date of sale of the fourth property – is unreasonable. Furthermore, HCH relied on Mallon's delay to its detriment by not seeking timely reimbursement of its own expenses in developing the property and by further agreeing to sell the properties at a specified price in anticipation of a certain profit. Accordingly, the doctrine of laches bars Mallon from setting off HCH's one-half interest in the 15 Felix proceeds with untimely allegations of his outstanding expenses on the Felix Street properties.

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[7] Aside from their relationship through Dixie and Dixie Developers, Mallon and HCH appear to have also jointly owned numerous other pieces of property for real estate development purposes.

[8] The record contains at least two documents representative of the parties' course of dealing: (1) a September 1999 addendum to a settlement statement explaining the uneven distribution of funds from the sale of a Dixie Developers property to Mallon and Coker due to Mallon's expenses in performing construction and repair work on the property; and (2) a May 1999 reimbursement check from HCH to Mallon based on an itemized list of Mallon's expenses associated with their shared real estate assets, including several of the Felix Street properties.

To the extent that the clause in Dixie's operating agreement providing for reimbursement "for all authorized, direct out-of-pocket expenses incurred by [members] on behalf of the Company," entitles Mallon to recoup his expenses at this late date, we hold that Mallon has waived this right by untimely asserting the alleged expenses and in a manner totally inconsistent with the parties' prior course of dealing. *See Janasik*, 307 S.C. at 344, 415 S.E.2d at 387-88 (defining waiver as the voluntary and intentional abandonment or relinquishment of a known right by a party that knew of its rights, or of all the material facts upon which they depended).

For these reasons, we find that Mallon is not entitled to set-off for his latent expenses, and that therefore, Mallon and HCH are each entitled to half of the proceeds from 15 Felix representing their respective interests in Dixie.

III. Relief based on Mallon's wrongful dissociation

Mallon argues that the master erred in holding that the relief granted to HCH was justified by Mallon's wrongful dissociation from Dixie. We agree, but hold that the master's error was harmless.

To warrant reversal based on the admissibility of evidence, an appellant must prove both the error of the ruling and the resulting prejudice. *Connor v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). The substance of the instant litigation involves matters of accounting and distribution incidental to the judicial dissolution of Dixie. Mallon's dissociation, which did not even occur until after HCH filed its complaint, is completely irrelevant and therefore, the master erred in basing his remedy on Mallon's allegedly wrongful dissociation. However, because there were additional legitimate grounds upon which the master granted relief to HCH, we hold the error was harmless.

IV. Exclusion of evidence of Coker's self-dealing

Mallon argues that the master erred in excluding evidence of Coker's self-dealing and misappropriation of Dixie's funds. We disagree.

The admission of evidence is a matter left to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. *Hanahan v. Simpson*, 326 S.C. 140, 155, 485 S.E.2d 903, 911 (1997). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004).

In this case, the parties agreed to provide each other all documents to be presented at trial by November 21, 2003. On the last working day before trial in January 2004, Mallon alleged for the first time in an amended pre-trial brief that Coker misappropriated Dixie funds and engaged in self-dealing. The master granted HCH's motion in limine to exclude all "new documents" and sustained each of HCH's objections to Mallon's trial testimony which attempted to justify improperly escrowing the 15 Felix proceeds based on his alleged discovery of Coker's misappropriation of Dixie funds. Citing *Scott v. Greenville Housing Authority*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003), the master found that exclusion of evidence of Coker's self-dealing was proper because the rules of discovery "mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party."

In deciding what sanction to impose for failure to disclose evidence during the discovery process under Rule 37, SCRCP, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). In the order, the master noted Mallon's earlier failure to respond to HCH's requests for admission, along with both parties' stipulation that they had agreed to exchange their entire files on the case on or before November 21, 2003. Although Mallon asserts that HCH would not have been prejudiced by the evidence of Coker's self-dealing because it came from documents provided to Mallon by HCH itself, Mallon neglects to consider the prejudicial effect of an "ambush" at trial. For these reasons, we hold that the master did not abuse his discretion in excluding evidence of self-dealing by Coker.

V. Award of pre-judgment interest

Mallon argues that the master erred in awarding prejudgment interest on the distribution to HCH because the sum was not liquidated. We agree.

The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law. *Butler Contr., Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006). Generally, prejudgment interest may not be recovered on an unliquidated claim in the absence of agreement or statute. *Id.* The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest. Rather, the proper test is "whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.*

The award of prejudgment interest will not be disturbed on appeal unless the trial court committed an abuse of discretion. *Jacobs v. Am. Mut. Fire Ins. Co.*, 287 S.C. 541, 544, 340 S.E.2d 142, 143 (1986). In this case, the master awarded prejudgment interest because "[HCH] is entitled to half of the funds, and because [HCH] has not had access to the funds for almost four years now." We find that this ruling conflicts with this Court's established law, and is not reasonably supported by the evidence in the record.

The record reveals that the disagreement between Mallon and Coker over Coker's method of accounting led to the escrow of the 15 Felix proceeds at issue in the instant case. Prior to the sale of 15 Felix, the net proceeds from the sales of Dixie's property had been divided fifty-fifty. The logical conclusion to be drawn from this pattern of events is that the members of Dixie were contemplating a future distribution of the escrowed funds that, depending on the outcome of a complete accounting, may not have been the standard fifty-fifty split. Under these circumstances, we find that the measure of recovery for prejudgment interest was unliquidated at the time the parties'

claims to the proceeds arose, and accordingly, we hold that the master erred in awarding prejudgment interest to HCH.

VI. Attorneys' fees

Mallon argues that the court of appeals erred in upholding the master's award of statutory attorneys' fees to HCH. We agree.

Attorney's fees are not recoverable unless authorized by contract or statute. *See Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997). In this case, the master awarded HCH attorneys' fees pursuant to S.C. Code Ann. § 33-44-1104 (2006), which authorizes the award of reasonable costs and attorneys' fees to a plaintiff who prevails, in whole or in part, in a derivative action for an LLC. A claim for statutory attorneys' fees is an action at law resting within the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion. *Patel*, 359 S.C. at 533, 599 S.E.2d at 123.

Mallon argues that it is inequitable to award HCH attorneys' fees because Coker's failure to fulfill his responsibilities under the operating agreement necessitated the instant action. The court of appeals rejected this argument, ruling instead that Mallon's actions brought about the case, and therefore held that the master's award of attorneys' fees did not amount to an abuse of discretion. We disagree.

The award of statutory attorneys' fees does not fall within a court's equitable jurisdiction. *See Harvey v. S.C. Dep't of Corrections*, 338 S.C. 500, 507, 527 S.E.2d 765, 769 (Ct. App. 2000) (holding that where the right to relief is entirely statutory, the action is one at law). Therefore, we hold that the court of appeals erred in affirming the master's award on these grounds. We note, however, that even if the award of attorneys' fees in this case sounded in equity, in our opinion, the equities fall in favor of each side bearing responsibility for their own attorneys' fees because both parties won on some matters and lost on others, and neither entered the instant litigation with clean hands.

Rather, as a matter of law, we find that HCH failed to properly plead the instant case as a shareholder derivative action as required by the relevant attorneys' fee statute, and accordingly, we hold that the master committed an abuse of discretion in awarding attorneys' fees under the attorneys' fee provision of the LLC Act. Our courts have held that "[i]t is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)). Although in the instant case, HCH submitted a verified complaint declaring in the opening sentence that HCH brought the action "individually and in a derivative capacity," the complaint nevertheless failed to plead with particularity the allegations necessary to state a complaint in a shareholder derivative action. *See* Rule 23(b), SCRCP. Furthermore, the relief granted by the master was entirely personal to HCH in that the master ordered the distribution of HCH's interest in the Felix Street proceeds directly to HCH instead of an initial return of the converted funds in whole to Dixie as an entity. *See also Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) (determining that a suit may be classified as a shareholder derivative action "if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder"). For these reasons, we cannot construe the complaint to be a prayer for derivative relief on behalf of Dixie. *See also* Rule 8(f), SCRCP (providing that pleadings should be construed "to do substantial justice to all parties").

Because HCH failed to plead the instant case as a shareholder derivative action, we hold that the master erred in awarding attorneys' fees under § 33-44-1104 of the LLC Act. Accordingly, we reverse the decision of the court of appeals and hold that Mallon and HCH are responsible for their own attorneys' fees in this matter.[9]

[9] In light of our holding, we need not address Mallon's remaining evidentiary arguments regarding the master's award of attorneys' fees. *See Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address additional issues if the resolution of another issue is dispositive).

CONCLUSION

For the foregoing reasons, we hold that a full accounting of Dixie and Dixie Developers is not required and that HCH is entitled to one-half of the proceeds from the sale of 15 Felix. We further hold that the master's grant of relief based on Mallon's allegedly wrongful dissociation from Dixie was harmless error and that the master did not err in excluding evidence of Coker's self-dealing. Finally, we hold that HCH is not entitled to either prejudgment interest or statutory attorneys' fees in this matter. This dispute began in 2000, nearly eight years ago, and involves a relatively small amount of money and a small number of members. Although we respect the dissent's position, in our view, remanding this case after years of litigation for a full accounting is not required by law or equity or by the parties' agreement and no beneficial purpose would be served in prolonging this case. Accordingly, we reverse the decision of the court of appeals.

WALLER, J., and Acting Justices James E. Moore and James E. Lockemy, concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent from part I and part II of the majority opinion.

I agree with the majority in their finding that the master committed harmless error in holding that the relief granted to HCH was justified by Mallon's dissociation from Dixie. I also agree with the majority's finding that the master did not abuse his discretion in excluding evidence of self-dealing and misappropriation of Dixie's funds by Coker. Moreover, I agree with the majority that the master erred in awarding prejudgment interest to HCH, because the amount awarded HCH was not liquidated at the time the parties' claims to the proceeds arose. Furthermore, I agree with the majority that HCH failed to plead the instant case as a shareholder derivative action; therefore, the master erred in awarding attorney's fees under § 33-44-1104 (2006) of the LLC Act. However, I respectfully disagree with the majority's finding that Mallon is not entitled to a full accounting for Dixie Holdings, and that HCH is entitled to one-half of the proceeds from the sale of 15 Felix Street.

Pursuant to S.C. Code Ann. § 33-44-103 (2006), operating agreements are binding contracts which are superior to statutory authority where they are in place. Statutory law; however, will apply if the operating agreement is silent as to some matter. Therefore, when a court is deciding a controversy between limited liability company members, it must first evaluate the operating agreement regarding a particular issue prior to looking to the statutory law governing areas not covered by the agreement.

Section 12.6 of the Dixie Holdings' operating agreement is relevant to Mallon's claims for reimbursement and the need for a full accounting. The section, entitled "Final Accounting," states that "each of the members shall be furnished with a statement setting forth the assets and liabilities of the Company as of the date of the complete liquidation," and "[u]pon compliance by the Company with the foregoing distribution plan, the Members shall cease to be such, and they shall execute and cause to be filed any and all documents necessary with respect to termination and cancellation."

Dixie Holdings' operating agreement thus requires an accounting prior to dissolution.[10] Because the operating agreement required an accounting, and since operating agreements govern the affairs of the company and the conduct of its business according to § 33-44-103 (2006) of the LLC Act, an accounting is necessary prior to the dissolution of Dixie Holdings' and the distribution of the $41,845.30 from the sale of 15 Felix Street.

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[10] I disagree with the majority's assertion that the operating agreement does not require an accounting prior to dissolution. In construing a contract, this Court's main concern is to ascertain and give effect to the intention of the parties. D.A. Davis Const. Co., Inc. v. Palmetto Properties, Inc., 281 S.C. 415, 315 S.E.2d 370 (1984). The order of the sentences in section 12.6 suggests the chronology of the actions. The section sets forth the accounting requirement and then provides that "[u]pon the compliance by the Company with the foregoing distribution plan" the Company will terminate. This suggests that the accounting should be completed before dissolution. Reading the policy in this way also produces a more reasonable result, since an accounting prior to liquidation may have an impact upon distribution, while an accounting after liquidation will not. "Common sense and good faith are leading touchstones of construction of provisions of contract; where one construction makes provisions unusual or extraordinary and another construction, which is equally consistent with language employed, would make it reasonable, fair, and just, latter construction must prevail." C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n, 296 S.C. 373, 373 S.E.2d 584 (1988). Finally, in ascertaining the intent of the parties, we may examine the situation of the parties as well as their purposes at the time the contract was entered into. Klutts Resort Realty, Inc. v. Down'Round Development Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). As noted above, the parties met and signed the operating agreement in part due to dissatisfaction with Coker's responses to multiple requests by Mallon and Storen for full financial accounting of Dixie. Given the events leading up to the meeting, it is unlikely that the parties intended for the operating agreement to require a final accounting after dissolution, at which point the assets would be distributed. The more logical reading is that the provision was meant to provide Mallon and Storen with assurances that they were receiving their fair share of the assets.

Even if an accounting were not mandatory according to the operating agreement, a full accounting would have been necessary according to statute under the facts of this case. Pursuant to § 33-44-410 (a)(1) (2006) of the S.C. Code, a member is entitled to maintain a suit for an accounting. When that request is made in the context of an action winding up the business of a limited liability company, courts are required to determine the assets, discharge obligations to creditors, and distribute the surplus to members. S.C. Code Ann. § 33-44-806 (a) (2006). In order to complete the winding up of Dixie Holdings, I would hold that a full accounting is required and necessary under the LLC Act even if it were not required by the agreement.

Further, I respectfully disagree with the majority that Mallon waived his right to an accounting. As defined by Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992), a waiver is a voluntary and intentional abandonment or relinquishment of a known right.

The majority finds that Mallon waived his right to an accounting by failing to independently resolve the matter when he and Coker both had access to the bank records. I respectfully disagree. Dixie Holdings' operating agreement does not list each Member's role within the limited liability company. Each member; however, carried out specific duties: Coker performed accounting and financial related services, Storen acted as the real estate agent, and Mallon renovated the properties. Mallon was also a co-signatory on the first Dixie Developers bank account and equally capable of acquiring the bank records. Having access to the bank records is not the equivalent of an accounting. In order to complete a formal accounting necessary for the dissolution of a company, one must have access to all financial documents such as the company's income statements and balance sheets. Since Mallon did not have access to all documents necessary to compete a full accounting he could not have waived this right. Moreover, there is no evidence of a voluntary and intentional relinquishment of Mallon's contractual statutory rights.

Both HCH and Mallon in their pleadings requested a full accounting. In his answer, Mallon asserted "an accounting is appropriate for both parties, and that Coker, who acted as the financial officer of Dixie [Holdings] has repeatedly and improperly failed to prepare a proper accounting, which should now be done." Therefore, there is no evidence that Mallon voluntarily and intentionally abandoned his right to an accounting.

In conclusion, I am in agreement with the Court of Appeals holding that this case should be remanded for a full accounting of the LLC, and the proceeds from the sale of 15 Felix Street should be held in an escrow account, in accordance with the operating agreement, for the benefit of Dixie Holdings until a final accounting is performed and the appropriate amounts distributed accordingly.

For the reasons stated above, the Court of Appeals decision should be affirmed in part, reversed in part, and the matter remanded to the master for a full accounting.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Glenn Oliver Gray, Respondent.

Opinion No. 26602
Heard December 4, 2008 – Filed February 17, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: This is an attorney disciplinary matter involving a grievance against Glenn Oliver Gray (Respondent) by his former law firm for engaging in improper billing and reimbursement requests. After a hearing before the Commission on Lawyer Conduct Full Panel (Panel), the Panel recommended that Respondent, who admitted to the alleged misconduct, be suspended for a period of not more than 180 days.

The Office of Disciplinary Counsel (ODC) appeals and argues that the facts and similar case law warrant a harsher sanction. We agree and impose a nine-month suspension. In addition, Respondent is to: (1) pay the costs of this disciplinary proceeding; (2) reimburse the law firm for improper travel requests; (3) continue counseling for one year after the date of his suspension, during which time his therapist shall file a report every six months with the ODC documenting

Respondent's progress; and (4) appear before the Committee on Character and Fitness before his reinstatement.

FACTS

After being admitted to the South Carolina Bar in 1989, Respondent moved to New York to practice law. Respondent was admitted to the New York Bar and New Jersey Bar in 1990. In 2001, Respondent moved back to South Carolina when he was hired as an associate by the Law Firm. In December 2003, Respondent's group manager expressed concern to the Law Firm's management committee regarding Respondent's performance. Based on Respondent's year-end performance evaluation, the management committee formalized an "exit strategy," which would provide for Respondent to continue working at the firm for a period of time in order that Respondent could pursue other employment. In preparation for the meeting with Respondent, a member of the management committee accessed Respondent's "timekeeper's records." In doing so, he found a number of improper billing entries in which there were discrepancies between the time billed and the time actually spent on the item. Based on this discovery, the management committee determined that the appropriate course of action was to immediately terminate Respondent on February 4, 2004.

After Respondent's termination, members of the management committee conducted an audit of Respondent's time entries and reimbursement requests from January 1, 2003, through February 4, 2004. During their investigation, they found a file in Respondent's desk containing old airline tickets, altered copies of those tickets, blank reimbursement forms, scissors, tape, and "white-out" solution.

Due to Respondent's actions, the Law Firm filed a letter with the ODC on May 25, 2004. In this letter, the Law Firm outlined Respondent's misconduct leading up to his termination and explained the results of Respondent's post-termination audit. According to the Law Firm, this investigation revealed "excessive and fictitious time entries on client files during the audit period" and "fictitious travel

invoices and tickets." In light of this improper billing, the Law Firm claimed it reimbursed $14,163.31 to the affected clients. The Law Firm also discovered that it had reimbursed Respondent in excess of $600 based on his fictitious travel invoices and airline tickets.

Following a full investigation, the investigative panel authorized formal charges against Respondent. On June 18, 2007, the ODC filed formal charges against Respondent. In his initial Response dated July 18, 2007, Respondent admitted misconduct but denied some of the charges. In an Amended Response, Respondent again admitted misconduct but also admitted to all of the charges. Additionally, Respondent requested that he only be sanctioned to a definite suspension of 180 days.

On December 12, 2007, the Panel conducted a hearing. At the hearing, Disciplinary Counsel presented two members of the Law Firm as witnesses. The first witness, a member of the firm's management committee, explained in detail what transpired before and after Respondent's termination. He testified that in conducting an audit of Respondent's time records he discovered that Respondent had billed more than necessary for his travel and the work performed on clients' cases. He made the decision to further investigate into Respondent's case files after he found billing irregularities. In executing this decision, he searched Respondent's office the morning after Respondent's termination, which led to the discovery of a folder containing materials used to "doctor" the firm's reimbursement forms. Upon further investigation, he determined that Respondent had improperly charged clients and the firm for travel time, travel expenses, airline tickets, and mileage.

A second member of the firm testified he also got involved in the audit of Respondent's files. He testified he was "tasked" with retrieving the original time slips from Respondent's office on February 3, 2004. Around 7:30 p.m. that evening, he went into Respondent's office and found Respondent's time records next to his computer. He then proceeded to copy these records, return the originals, and then left the office around 9:00 p.m. When he returned to his office the next

morning around 7:00 a.m., he discovered that the copies he had made the night before were missing from his desk. He also discovered that the original time records were no longer in Respondent's office. After checking with the Law Firm's building security, it was discovered that Respondent had been let into the building some time during the evening of February 3rd.

Although this second witness testified he reviewed Respondent's billing records, he stated he primarily focused on Respondent's improper reimbursement requests as evidenced by the file folder found in Respondent's desk. Based on his investigation, he testified to the following examples of improper reimbursement requests: on several occasions Respondent had altered hotel bills so that he would be reimbursed for a greater amount than was actually charged; Respondent had submitted the same airline ticket or travel expenses twice for reimbursement; and Respondent had altered airline tickets for an amount greater than the actual cost of the ticket.

As part of his case, Respondent called two character witnesses who testified Respondent has a reputation as a "person of honesty" and "he is a truth teller." Both testified as to Respondent's good reputation in his church and in the community. Based upon their knowledge of Respondent, both witnesses believed the allegations of misconduct were "out of character" for Respondent.

Respondent, the final witness at the hearing, testified regarding the details of his law career leading up to his employment as an associate with the Law Firm. When questioned about the misconduct allegations, Respondent admitted to the misconduct and did not dispute the amount the Law Firm calculated for the improper billing and reimbursements. He further admitted that he did in fact alter the amounts and did so while at work and at home. Respondent, however, could not give an estimate as to the amount of time it took for him to alter the documents. Additionally, he claimed that he sent the firm a certified check in the amount of $669.20 for travel reimbursements that had been paid to him. He also denied that he took his original time records and the copies from the Law Firm the night before his

termination. Respondent believed that a sanction of a definite suspension of 180 days would be appropriate.

After the hearing, the Panel found Respondent engaged in misconduct in violation of the following Rules of Professional Conduct (RPC), Rule 407, SCACR: Rule 1.5, RPC (fees); Rule 8.4(a), RPC (misconduct); Rule 8.4(d), RPC (misconduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e), RPC (misconduct that is prejudicial to the administration of justice). The Panel also found Respondent violated the following Rules for Lawyer Disciplinary Enforcement (RDLE), Rule 413, SCACR: Rule (7)(a)(1) (violates the RPC, Rule 407, SCACR); Rule 7(a)(5) (engages in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law;); and Rule 7(a)(6) (violates the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

Based on these admitted violations of misconduct, the Panel recommended a sanction of definite suspension for a period of 180 days. In making this recommendation, the Panel primarily relied on this Court's decision of In the Matter of Lee, 370 S.C. 501, 636 S.E.2d 624 (2006) (holding suspension for 180 days was appropriate sanction for attorney who overcharged client by charging fees for traveling to depositions in which he had participated by telephone from his law firm's office).

DISCUSSION

The ODC challenges the Panel's recommendation of a definite suspension of 180 days. Although the ODC urges this Court to adopt the Panel's findings of fact and conclusions of law, it requests that this Court impose a sanction of: (1) a definite suspension for at least 180 days; (2) a requirement that Respondent be examined by the Committee on Character and Fitness prior to his reinstatement; (3) a requirement that Respondent reimburse the Law Firm in the amount of $14,163.31;

and (4) a requirement that Respondent pay to Disciplinary Counsel the costs of the proceeding in the amount of $1,124.29.

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." In the Matter of Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses." In the Matter of Marshall, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998). "However, this Court may make its own findings of fact and conclusions of law." Id. Furthermore, a disciplinary violation must be proven by clear and convincing evidence. In the Matter of Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); see Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

Because Respondent admitted to all of the allegations of misconduct, the only question before the Court is whether to accept the Panel's recommended sanction of a definite suspension of 180 days.

We believe a more severe sanction is warranted. First, Respondent's case is distinguishable from In the Matter of Lee, which the Panel primarily relied upon in making its recommendation. In the Matter of Lee, 370 S.C. 501, 636 S.E.2d 624 (2006). In Lee, the attorney was a shareholder in a law firm mainly engaged in representing clients insured by liability insurance companies. On approximately nineteen occasions, the attorney overcharged the insurance carrier by including or causing to be included in its billing statement attorney fees for traveling to depositions held out of town. The attorney, however, knew he had participated in the depositions by telephone at the law firm's office. Additionally, the attorney overcharged the insurance carrier for costs by billing the carrier for mileage for traveling to the depositions on approximately seventeen of the nineteen occasions. When the overcharges were discovered, the

attorney admitted to the misconduct and immediately wrote a personal check to the law firm for $10,279.40, the amount the law firm was to reimburse the insurance carrier. The attorney and a senior partner immediately prepared a report for the ODC documenting the attorney's misconduct. The next day, the attorney and a senior partner traveled out of state to the home office of the insurance carrier to report the misconduct and provide the carrier with the ODC report. This Court sanctioned the attorney to a definite suspension of 180 days. The Court reasoned that the attorney had no prior disciplinary history and had been fully forthcoming during the investigation of his misconduct. The Court, however, conditioned attorney's readmission on his appearance before the Committee on Character and Fitness to determine whether he had the "requisite character and fitness to practice law in this state." In the Matter of Lee, 370 S.C. at 505, 636 S.E.2d at 626.

Turning to the facts of the instant case, Respondent over a period of one year engaged in a pattern of conduct that was deliberate, purposeful, deceitful, and fraudulent. Not only did Respondent overcharge clients for his time, he also altered documents to falsify reimbursement expenses. Furthermore, unlike Lee, Respondent never self-reported his misconduct to the ODC. Accordingly, we conclude that Respondent's conduct warrants a sanction of definite suspension of nine months. Cf. In the Matter of Martin, 374 S.C. 36, 647 S.E.2d 218 (2007) (holding six-month suspension was the appropriate sanction where attorney allocated time and charges to insurance company's files on which the time billed had not been spent); In the Matter of Jennings, 321 S.C. 440, 468 S.E.2d 869 (1996) (finding disbarment was warranted by misconduct including misrepresentation regarding billing of several clients, lack of candor toward the tribunal, destroying documents regarding improper billing, forging signature on satisfaction of judgment, misleading family court judge, and improperly filing lien for attorney's fees).

Secondly, we find that Respondent should be required to reimburse a portion of the $14,163.31 amount that the Law Firm claims it is owed as a result of Respondent's actions. See Rule 7(b)(7), RLDE, Rule 413, SCACR (stating an additional sanction for misconduct may

include restitution to persons financially injured). Although Respondent does not dispute that these fees are "due and owed" to the Law Firm, we do not believe that Respondent should be responsible for the entire amount. Because the Law Firm essentially returned money to clients that it collected and was not entitled to as a result of Respondent's improper time/billing entries, we find the Law Firm did not experience a financial deficit for its reimbursement to these clients with respect to improper billing. However, the $14,163.31 amount also includes fictitious travel expenses which would warrant reimbursement from Respondent to the Law Firm. At oral argument, the parties agreed this amount totaled $669.20. Respondent claimed he sent the Law Firm a certified check in the amount of $669.20 for the improper travel reimbursements that had been paid to him. However, at oral argument Respondent stated that he never received proof that the Law Firm accepted the check. Accordingly, we find that for Respondent to satisfy this requirement he must provide the ODC with proof that the Law Firm has received the check.

Thirdly, we find Respondent should be required to reimburse Disciplinary Counsel for the costs of these proceedings in the amount of $1,124.29. Although Disciplinary Counsel did not specifically request this relief at the hearing before the Panel, counsel incorporated a request for costs in its notice to Respondent of the formal charges. See In the Matter of Thompson, 343 S.C. 1, 13, 539 S.E.2d 396, 402 (2000) ("The assessment of costs is in the discretion of the Court."); Rule 27(e)(3), RLDE, Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct."); Rule 7(b)(8), RLDE, Rule 413, SCACR (stating sanctions for misconduct may include the "assessment of the costs of the proceedings, including the cost of hearings, investigations, service of process and court reporter services").

Finally, we agree with Disciplinary Counsel's request that Respondent be required to appear before the Committee on Character and Fitness prior to his reinstatement. See Rule 7(b)(10), RLDE, Rule 413, SCACR (the Supreme Court may impose "any other sanction or requirement" as it deems appropriate). As previously stated,

Respondent's actions were a deliberate attempt to defraud the Law Firm and its clients. Respondent, however, has yet to provide any explanation for his conduct. Because this lack of explanation indicates an issue with respect to Respondent's character, we believe it should be addressed prior to his reinstatement.[1]

In conjunction, we find that Respondent should continue to attend the psychological counseling that he is currently receiving for a period of one year beginning from the date of his suspension. During this one-year period, Respondent's therapist shall file a report with the ODC every six months documenting Respondent's progress. In the event the reports required by this order are not filed or Respondent fails to make satisfactory progress with his counseling, the ODC shall immediately notify this Court.

CONCLUSION

After a thorough review of the record, we agree with the ODC that a harsher sanction than a 180-day suspension is warranted. Because we are not bound by the Panel's recommendation but rather administer the sanction we deem appropriate, we impose a suspension from the practice of law of nine months. In the Matter of Thompson, 343 S.C. at 11, 539 S.E.2d at 401. Within ninety (90) days of the filing of this opinion, Respondent shall also pay the costs of this proceeding

[1] Because we have sanctioned Respondent to a definite suspension of nine months, we note that pursuant to Rule 33, RLDE, Respondent is required to appear before the Committee on Character and Fitness prior to his reinstatement. See Rule 33(g), RLDE, Rule 413, SCACR ("Within 180 days of the matter being referred to the Committee on Character and Fitness, the Committee shall conduct a hearing. If the petition for reinstatement is withdrawn after the start of the hearing, the lawyer must wait two years from the date the petition is withdrawn to reapply for reinstatement. At the hearing before the Committee, the lawyer shall have the burden of demonstrating by clear and convincing evidence that the lawyer has met each of the criteria in paragraph (f).").

in the amount of $1,124.29, and reimburse the Law Firm in the amount of $669.20 if he has not already provided the ODC proof that the Law Firm received his certified check. Additionally, Respondent shall continue the counseling that he is currently receiving for a period of one year beginning from the date of this opinion. During this time, Respondent's therapist shall file a report every six months with the ODC documenting Respondent's progress. Finally, as a condition of seeking reinstatement under Rule 33, RLDE, Rule 413, SCACR, Respondent must appear before the Committee on Character and Fitness for the purpose of determining whether he has the requisite character and fitness to resume the practice of law in this state. Within fifteen (15) days of the filing of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Samuel Stokes, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 26603
Heard May 6, 2008 – Filed February 17, 2009

AFFIRMED

Tricia A. Blanchette, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

JUSTICE WALLER: Appellant Samuel Stokes appeals his convictions for murder, first degree burglary, and assault with intent to kill. Appellant argues the trial court erred by admitting a State witness's prior

inconsistent statement as well as evidence of prior bad acts. We find no error and therefore affirm.

FACTS

On the night of October 6, 2003, Spartanburg police responded to a 9-1-1 call that someone had been shot at a home on Briarcliff Road. When police arrived, they found Catrina Cohen hysterical on her front porch. In the master bedroom, the police found Nicholas Thomas with his head in the lap of his mother, Brenda Nelson. Nicholas had been shot through the head; he later died at the hospital.[1]

Appellant was tried in August 2006.[2] Catrina, who was Nicholas's fiancée,[3] testified that on October 6, 2003, she was at home with Nicholas, Brenda, and her three children when intruders kicked in the door. Catrina, who was in the bedroom with Nicholas at the time, heard shots being fired, then heard someone ask where the money and car keys were, and Brenda reply, "we don't have anything." Nicholas reached for a gun from under the mattress, and Catrina hid in the closet. She could see people enter the room and go through shoe boxes, but she could not see their faces.[4] When she came out of the closet, Nicholas was lying on the floor in a puddle of blood.

The crime scene was processed that night, but police also went back to the scene on October 23, 2003. At that time, they retrieved a bullet that fell on the floor from the bedroom curtain. The bullet appeared to have blood and hair on it.

On December 21, 2003, appellant was apprehended in North Carolina while pumping gas into a rental car. The North Carolina narcotics agent who made the arrest found a .357 Ruger pistol under the front driver's side seat.

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[1] The pathologist testified at trial that Nicholas died from a single "in and out" gunshot wound to the head.

[2] A trial the previous year resulted in a mistrial due to a hung jury.

[3] Catrina and Nicholas had been a couple for 13 years and had a son together.

[4] At least one person had a red bandana tied around his face.

A SLED firearms expert testified at trial that the bloody bullet found in Catrina's bedroom definitively matched the .357 pistol found with appellant.

Prior Inconsistent Statement

At trial, the State called appellant's uncle, Kenneth Brown. Brown acknowledged he was serving a 62-year federal sentence for armed bank robbery. The State attempted to elicit testimony from Brown regarding a statement he made to police on November 26, 2003, after police had apprehended him. Brown admitted he was taken to the hospital by police after a car chase, but he specifically denied having a conversation at the hospital with Detective John Parris.

Brown escaped from police custody while in the hospital.[5] He was later captured in Florida and extradited to South Carolina. On January 2, 2004, while housed in the Lexington County jail, Brown gave Detective Parris a written statement. While on the stand, the State presented this three-page statement to Brown for his review; Brown, however, denied making this statement as well.[6]

Although defense counsel cross-examined Brown about his prior criminal record, he did not ask Brown any questions about his alleged statements to police.

The State subsequently called Detective Parris to the stand and offered Brown's written statement under Rule 613(b), SCRE, as extrinsic evidence of a prior inconsistent statement.

Appellant objected. During the discussion on appellant's objection – out of the presence of the jury – the trial court noted that Brown had been on the stand and available for cross-examination. Moreover, the trial court

[5] On the stand, Brown denied he had escaped, but instead maintained he was "mistakenly released." Detective Parris later testified that Brown escaped from custody, while handcuffed, by crawling through the ceiling of a hospital restroom.

[6] The written statement reflects that Brown's attorney was present and signed the statement as a witness.

specifically offered defense counsel the opportunity to recall Brown for further cross-examination or as a witness in the defense case. Counsel rejected the trial court's offer, contending that this would force appellant to ask about the substance of the statement prior to the State bringing up the details of the statement. Counsel further argued that if he questioned Brown and he continued to deny making the statement, appellant would be denied "effective cross-examination." When the trial court again offered to produce Brown because he was still under subpoena, counsel declined, stating that Brown was "a loose cannon," and therefore counsel had "no idea what he will say once he takes that stand."

The trial court allowed the statement to be admitted as evidence and published to the jury. Essentially, Brown relayed to Detective Parris that on November 26, 2003, appellant told Brown that he (i.e., appellant) was involved in the October 6, 2003, shooting.

The statement reads as follows, in pertinent part:

> On 11/26/03 I was at the BP station. I pick up [appellant] and Tony, they got into the car and once they was in, [appellant] & Tony that is Tony ask Sam you do have everything right, and [appellant] said nigger everything is in the bookpack. Tony out the bookpack and pull out a black gun, and was playing with it, as he was checking it out. At this time [appellant] stated yes that's that nigger shit, he almost had me, but my nigger Tony took his ass out, shot his ass right in the fucking head. At this time I am wondering what are they talking about, and [appellant] say that dud[e] on [street], and I remember reading about it in the newspaper, and people was talking about it. At this time I said to them both I know you all didn't. At this time I just went into a panic state.
>
> I remember reading about [it] in the newspaper in Oct. 2003. On the I saw them, I saw a black auto[matic] handgun and it cam[e] from the killing of the guy they killed. [Appellant] told me that the gun came from the killing of Nicklos, the nigger that they kill

> with the .357 gun. [Appellant] said that he almost kill him if Tony had not shot him with the .357 gun.…

On cross-examination, defense counsel elicited testimony from Detective Parris which explained that while Brown was in the hospital on November 26, 2003, he volunteered information that the black gun used (by Brown) in the robbery committed that same day was taken from the Briarcliff Road residence on October 6, 2003, and that appellant was the person involved in the murder there. In other words, Brown told Detective Parris that appellant was responsible for the murder, and that he (i.e., Brown) was not connected to that crime.

Other Bad Acts Evidence

In addition to the evidence regarding the crimes committed on October 6, 2003, the following evidence associated with an October 18, 2003, shooting was also admitted at trial, over appellant's objection. The victim of this shooting, Chi Yeung, was shot in the leg. Yeung did not testify at trial, but several other witnesses connected appellant to the shooting.

First, Christina Phouachinth[7] testified that appellant left her home with Yeung, Jorge Enrique Sihavong ("K"), and Tony Nguyen.[8] K testified that he was driving a green Honda with appellant, Yeung, and Nguyen as passengers. Appellant directed him to an apartment house; when they arrived, appellant and Yeung exited the car and went into an apartment. Shortly thereafter, K was let in to the apartment by another man and saw Yeung looking "scared." K heard someone say "Don't move," and he ran out of the apartment. K testified that he heard gunshots; when he reached the car, he told Nguyen to run, and K continued running away. After a few shots, K turned around and saw appellant pointing "a big chrome shiny gun" at him. K later identified appellant to police as the person who shot at him.

[7] Christina is the mother of appellant's child, and appellant had been visiting the child on October 18, 2003.

[8] Tony Nguyen is **not** the same Tony referenced in Brown's statement.

In addition, Nguyen testified that he heard gunshots shortly after appellant, Yeung, and K went inside the apartment. He then saw K running out the door and heard K tell him to run for his life. Thereafter, Nguyen saw appellant pointing a pistol at K. Nguyen ran and hid in the woods, but later identified appellant to police.

As police responded to a report of gunshots fired, they were flagged down by Yeung who was driving the green Honda. Yeung's upper right leg was bleeding, and he was sent to the hospital. Just prior to Yeung's release from the hospital, a police officer was obtaining a statement from him. When Yeung got off the gurney he had been laying on, the officer found a bullet lying on the bloody sheets. This bullet was later matched to the .357 retrieved from the car appellant was filling up when police apprehended him in North Carolina.

When police searched the apartment that Yeung had been in, they found three prescription medicine bottles in appellant's name. The medicine bottles listed appellant's address as one that was different from the apartment in which they were found.

At the conclusion of testimony, the trial court instructed the jury on the "hand of one, hand of all" theory. The trial court refused appellant's request to instruct the jury that Brown's statement could be used only for impeachment.

The jury found appellant guilty of all charges. The trial court sentenced appellant to life for murder, life for burglary, and ten years for assault with intent to kill. The sentences were to run concurrent to each other, but consecutive to the sentences appellant was already serving.[9]

ISSUES

1. Was appellant's right to confrontation violated by the admission of Brown's prior inconsistent statement?

[9] Based on the events of October 18, 2003, appellant entered an Alford plea to three counts of assault of a high and aggravated nature.

2. Did the trial court err by admitting evidence of the October 18, 2003, shooting pursuant to Rule 404(b), SCRE?

DISCUSSION

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. E.g., State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id.

1. Confrontation Clause

Appellant argues his right to confrontation was violated when the trial court admitted Brown's written statement pursuant to Rule 613, SCRE. We disagree.

Under the rules of evidence, a prior inconsistent statement may be admitted when the proper foundation has been laid:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

Rule 613(b), SCRE. A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982).

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. This right to confront and

cross-examine witnesses "is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987).

Because Brown denied the written statement while on the stand, appellant maintains he was denied **effective** cross-examination of Brown, and therefore, the admission of the written statement violated his right to confrontation. Appellant cites two of this Court's cases to support his argument: State v. Pfirman, 300 S.C. 84, 386 S.E.2d 461 (1989); and Simpkins v. State, 303 S.C. 364, 401 S.E. 2d 142 (1991). The State argues that Pfirman and Simpkins are no longer good law in light of the United States Supreme Court's (USSC) decision in Crawford v. Washington, 541 U.S. 36 (2004).[10]

In Pfirman, the defendant appealed from an armed robbery conviction. When he was arrested, the defendant told police that his cousin, Oliver Goff, had committed the robbery. Goff, who was also arrested, implicated the defendant as the robber, and said he (Goff) had been the lookout. The State called Goff at trial, but Goff testified he did not remember giving a statement to police. Over appellant's objection, the State was allowed to introduce Goff's statement into evidence through the testimony of the police officer who had questioned Goff upon his arrest.

This Court found the trial court had erred in admitting the statement as substantive evidence.[11] Although recognizing that "a prior inconsistent statement may be used as substantive evidence when the declarant testifies at trial and is subject to cross-examination," the Pfirman Court nevertheless held that when "the declarant refuses to admit the statement imputed to him, the accused is denied **effective** cross-examination in violation of his confrontation rights." Pfirman, 300 S.C. at 85-86, 386 S.E.2d at 462 (citing Douglas v. Alabama, 380 U.S. 415 (1965)) (emphasis added).

[10] We granted the State's motion to argue against the precedent of these two cases.

[11] This 1989 case was decided prior to the rules of evidence being adopted, and therefore, a Rule 613, SCRE, analysis was not conducted.

In Simpkins, the Court cited Pfirman as support for the petitioner's ineffective assistance of appellate counsel claim. The petitioner in Simpkins had been convicted of first degree criminal sexual conduct with a minor, where the victim was his eight-year-old daughter. When called to the stand at trial, "[t]he child gave no response or responded negatively to the Solicitor's repeated questions regarding a sexual assault by petitioner." Simpkins, 303 S.C. at 366, 401 S.E.2d at 142. Defense counsel attempted cross-examination, but "received no response to questions regarding a sexual assault by petitioner." Id. The State then put the guardian ad litem (GAL) on the stand who testified that the child had identified the petitioner as her abuser. On appeal, counsel did not argue that the GAL's hearsay testimony was improperly admitted.

The Simpkins Court found admission of the GAL's testimony had been erroneous and explained as follows:

> [T]he mere fact the declarant (the victim) testified in this case does not cure the error in admitting [the GAL's] hearsay testimony. The victim refused to accuse petitioner and in effect declined to admit the out-of-court statement attributed to her by [the GAL]. Petitioner was denied **effective** cross-examination of the victim regarding this crucial evidence supplied by [the GAL]. Cf. State v. Pfirman, 300 S.C. 84, 386 S.E.2d 461 (1989).

Simpkins, 303 S.C. at 368, 401 S.E.2d at 143-44 (citation omitted, emphasis added).

Appellant therefore argues that pursuant to Pfirman and Simpkins, when a declarant refuses to admit the statement imputed to him, the accused is denied effective cross-examination in violation of his confrontation rights. We agree with the State, however, that the USSC's subsequent decision in Crawford sheds a new light on this Confrontation Clause issue.

In Crawford, the USSC held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior

opportunity to cross-examine the declarant. Id. at 54. Statements taken by police officers in the course of interrogations are considered testimonial. Id. at 52-53. The USSC noted, however, "that when the declarant appears for cross-examination at trial, the Confrontation Clause places **no constraints at all** on the use of his prior testimonial statements." Id. at 59 n.9 (emphasis added). The Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id.

In our opinion, Crawford clearly establishes there is no Confrontation Clause violation in the instant case because Brown was available at trial and subject to cross-examination. The trial court even offered to allow Brown to be recalled to the stand in light of its decision to admit the statement under Rule 613(b), SCRE. Appellant maintains the trial court's offer improperly shifted the burden of addressing the substance of the prior statement away from the State. He also contends it would have been ineffective for trial counsel to introduce the substance of the statement through cross-examination. Appellant, however, misses the point of what is constitutionally guaranteed by the Confrontation Clause.

The USSC explained the "purposes of confrontation" in California v. Green, 399 U.S. 149 (1970). Confrontation:

> (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
> (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth';
> [and]
> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (footnote omitted).

Furthermore, as to cross-examination specifically, the Confrontation Clause "guarantees only an **opportunity** for effective cross-examination, not

cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." United States v. Owens, 484 U.S. 554, 559 (1988) (internal quotation marks and citations omitted; emphasis in original). Indeed, the opponent's opportunity for cross-examination has been deemed the "main and essential purpose of confrontation." Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985) (internal quotation marks and citation omitted); see also Kentucky v. Stincer, 482 U.S. 730, 739 (1987) (describing the Confrontation Clause's "functional purpose" as "ensuring a defendant an opportunity for cross-examination").

> Cross-examination allows the accused the opportunity:
> [N]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Douglas v. Alabama, 380 U.S. 415, 419 (1965); (quoting Mattox v. United States, 156 U.S. 237, 242 (1895))

Thus, it is the **opportunity** to cross-examine that is constitutionally protected. In the instant case, appellant had that opportunity. It is undisputed Brown appeared at trial, was available for cross-examination, and could have been recalled after the statement was admitted.[12]

Instead, appellant's trial counsel **chose** not to cross-examine on this subject. Although trial counsel apparently decided that such cross-examination would be to appellant's detriment, this does not amount to a violation of appellant's right to confrontation. See Crawford, supra

[12] We note Brown was not restricted in any way from testifying, for example, by claiming protection of the Fifth Amendment. Cf. Douglas v. Alabama, 380 U.S. 415, 419 (1965) (where a co-defendant invoked his Fifth Amendment privilege but the substance of his confession was nevertheless effectively admitted, the USSC held that the petitioner's inability to cross-examine the co-defendant about the alleged confession "plainly denied him the right of cross-examination secured by the Confrontation Clause").

(Confrontation Clause implicated only when declarant is unavailable); California v. Green, 399 U.S. at 161 ("none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial"); United States v. Owens, 484 U.S. at 559 (the Confrontation Clause guarantees the opportunity for effective cross-examination, but "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish").[13]

Accordingly, we hold the trial court did not err by admitting Brown's written statement. Clearly, the State laid the proper foundation for the admission of the extrinsic evidence of the written statement. See Rule 613(b), SCRE. The State advised Brown of the substance of the statement by showing him the three-page statement while on the stand; Brown was also advised of the time and place the statement was allegedly made, and the person to whom it was made. Id. Brown was given the opportunity to explain or deny the statement, and he chose to deny making the statement.

[13] Furthermore, other state courts faced with this issue have also concluded there is no Confrontation Clause violation where the witness is present at trial. See, e.g., Johnson v. State, 878 A.2d 422, 429 (Del. 2005) ("The mere fact that [the witness's] recollection was limited does not make her unavailable for cross-examination for Confrontation Clause purposes."); People v. Sharp, 825 N.E.2d 706, 713 (Ill. Ct. App. 2005) (where child victim "was present for cross-examination and answered defense counsel's questions, the confrontation clause places absolutely no constraints on the use of [her] prior statements"); State v. Holliday, 745 N.W.2d 556, 568 (Minn. 2008) ("The Confrontation Clause is satisfied by a declarant's appearance at trial for cross-examination, and it is for the factfinder to evaluate a declarant's credibility."); State v. Price, 146 P.3d 1183, 1192 (Wash. 2006) ("when a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged events or the prior statements, this provides the defendant sufficient opportunity for cross-examination to satisfy the confrontation clause"); State v. Nelis, 733 N.W.2d 619, 628 (Wis. 2007) (where Chief of Police testified about prior inconsistent statements of another witness who had already testified, the court held there was no Confrontation Clause violation because witness had testified at trial and it had not been shown that witness was unable to be recalled to the stand).

Id. Thus, the statement was admissible under Rule 613(b), SCRE, and no Confrontation Clause violation resulted from this admission.

Finally, to the extent Pfirman and Simpkins hold that where a declarant refuses to admit the statement imputed to him, the accused is denied effective cross-examination in violation of his confrontation rights, we overrule these two cases. See Crawford, supra.

2. Evidence of Other Crimes

Appellant also argues that the trial court erroneously admitted evidence of the October 18, 2003, shooting to prove identity. Appellant contends the evidence was not clear and convincing and does not logically connect to the charges in the instant case. He also argues the evidence was more prejudicial than probative. We disagree.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible "to show motive, **identity**, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE (emphasis added). The evidence admitted "must logically relate to the crime with which the defendant has been charged." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000).

Where the defendant was not convicted of the prior crime, evidence of the bad act must be clear and convincing.[14] Id. Nonetheless, even if bad act evidence is clear and convincing and falls within the Rule 404(b) exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Rule 403, SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). "Unfair prejudice means an undue tendency to

[14] "Clear and convincing" evidence is an intermediate degree of proof "which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Anonymous v. State Bd. of Med. Examiners, 329 S.C. 371, 375 n.2, 496 S.E.2d 17, 18 n.2 (1998); accord Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 266 n.4, 478 S.E.2d 282, 283 n. 4 (1996).

suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Finally, the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990).

Here, the evidence of other crimes stemmed from the subsequent shooting incident which occurred on October 18, 2003. The testimony from Christina, K, and Nguyen established that appellant was together with K, Nguyen, and Yeung on the night in question. The testimony of K and Nguyen demonstrated that appellant was shooting at K. Yeung, who did not testify at trial, was discovered by police with a bullet wound in his leg, and the bullet found on Yeung's hospital gurney matched the gun found in the car appellant was fueling when he was apprehended in North Carolina in December 2003. Finally, medicine bottles belonging to appellant were found in the apartment Yeung entered.

Reviewing all this evidence, we find the State clearly linked the gun that was used in the October 18, 2003, shooting to appellant. The forensic evidence positively showed that **this same gun** was used in the October 6, 2003, break-in because the bullet that fell from the curtain in the bedroom where Nicholas was shot also matched the gun. Since the victims in the instant case were unable to identify their attackers, this connection was highly probative on the issue of the identity of at least one of the intruders from the October 6, 2003, incident. Thus, the evidence from the subsequent shooting was logically related to the instant case. See State v. Beck, supra.

In other words, the positive identification of appellant by K and Nguyen, and the forensic evidence linking the bullet from Yeung's leg to the gun found with appellant in December 2003, connect appellant to the crimes of the instant case because the same weapon was used in both crimes. See State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("The fact that the same weapon was used in both the barbershop and cab driver murders goes to show appellant's identity as the barbershop killer.").

Appellant contends that because Yeung did not testify at trial, and therefore appellant was not specifically identified as the person who shot Yeung, the evidence failed to meet the clear and convincing standard. While the evidence did not necessarily conclusively establish appellant was the trigger man, it nevertheless did serve to connect appellant to the gun. Because the gun was used in both the October 6 and October 18 shootings, and this same gun was found with appellant when police apprehended him, the relevant connection regarding identity was effectively made. Id.

Appellant further contends the prejudicial value of the evidence outweighed its probative value because it showed appellant "might be a violent person who may possess a gun." In our opinion, however, the evidence was not offered to show appellant's bad character, but rather was introduced to connect appellant to the weapon that was used on October 6, 2003, to kill Nicholas. Furthermore, although this evidence certainly was prejudicial to appellant, we find it was not "unduly" prejudicial. State v. Beck, 342 S.C. at 137, 536 S.E.2d at 683; see also State v. Dickerson, 341 S.C. at 400, 535 S.E.2d at 123 ("Unfair prejudice means an undue tendency to suggest decision on an improper basis.").

Accordingly, we hold the trial court did not err by allowing this evidence at trial.

CONCLUSION

In sum, we affirm appellant's convictions. The trial court did not err in admitting evidence of appellant's prior bad acts because they were probative on the issue of identity. Additionally, the trial court correctly found that the admission of Brown's prior inconsistent statement did not violate appellant's right to confront his witnesses. Accordingly, we affirm.

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Respondent,

v.

Berry Scott Bolin, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4497
Heard January 21, 2009 – Filed February 5, 2009

AFFIRMED

Leland B. Greeley, of Rock Hill, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Kevin S. Brackett, of York, for Respondent.

PIEPER, J.: In this criminal matter, Berry Scott Bolin (Bolin) asserts the trial court erred in (1) denying a requested jury charge on certain provisions of the "Castle Doctrine" contained in Section 16-11-440 of the

South Carolina Code, and (2) denying his motion for a directed verdict. We affirm.

FACTS/PROCEDURAL HISTORY

On the night of February 18, 2006, Bolin and several other individuals were guests in the home of Bradley Deal (Deal). Travis Falls (Falls), Holly McCarter (McCarter), Bobby Hovis (Hovis), and two others decided to drive to Deal's home to attack Deal, his brother, and various other people at the home.

Falls, having been released on bond only a few days earlier for charges of assault and battery on Deal, was under a bond provision forbidding any contact with Deal or his home. Despite the bond provision, Falls and the others drove to Deal's home, pulling up on the roadside just past the front of the driveway. Upon Falls' arrival, people began to rush outside of Deal's home, including Bolin. Falls and the others exited the car and proceeded up the driveway. One of the men yelled to start a fight and threw a beer bottle onto the driveway, shattering the bottle. As this was occurring, a fight ensued near the car between McCarter and Lori Moss (Moss), who was also a guest at Deal's home. Falls joined the fight and hit Moss, knocking her to the ground.

As Bolin exited the home, he heard someone yell to get a gun. Bolin went to his truck parked in the yard in front of Deal's home and retrieved a pistol stored in the glove compartment of the truck. Bolin heard gunfire near the car and to his side. Falls and several others ran to their car and got inside. As they entered the vehicle, Bolin heard more shots being fired near the car.[1] McCarter got in the driver's seat with Falls directly behind her while Hovis sat in the rear passenger seat next to Falls.

As the car began to pull away, Bolin and another individual who was standing beside Bolin fired several shots at the vehicle. A bullet of the same

[1] At oral argument, Bolin's counsel acknowledged that the record contained no evidence Bolin saw gunfire or gun smoke coming from the car; the record only suggests Bolin heard gunfire.

caliber as Bolin's pistol shattered the rear window, passed through Falls' wrist and hit Hovis in the head. The car proceeded away from the scene and headed to the Clover Police Department. An ambulance was dispatched and Falls and Hovis were taken to the hospital. Hovis was pronounced dead at the hospital; Falls received treatment and was released.

On May 18, 2006, Bolin was indicted by the York County Grand Jury on charges of murder, assault and battery with intent to kill, discharging a weapon into an occupied vehicle, unlawful possession of a pistol, and possession of a weapon during the commission of a violent offense. The case was tried before a jury on August 28, 2006. Prior to trial, the court quashed the indictment of unlawful possession of a pistol and the case proceeded on the remaining indictments.

At the close of the State's case, Bolin moved for a directed verdict on all indictments asserting Section 16-11-440(C) of the South Carolina Code. The motion was denied and the case proceeded. Following closing arguments, the court instructed the jury on the law of the case. Although requested by Bolin, the court refused to charge the jury on the presumptions contained in § 16-11-440(A) and (E). The jury returned a verdict finding Bolin guilty of voluntary manslaughter, assault and battery of a high and aggravated nature, and discharging a weapon into an occupied vehicle. Bolin received concurrent sentences of thirty years. This appeal followed.

LAW/ANALYSIS

Bolin asserts the circuit court erred in refusing to instruct the jury on the legal presumptions contained in Section 16-11-440 of the South Carolina Code (Supp. 2008), also referred to as the Protection of Persons and Property Act (the Act). Specifically, Bolin asserts that the Act, which codified the common law Castle Doctrine and substantively expanded the law of self defense in this State, should have been applied in the instant case.[2] We disagree.

[2] Bolin requested the jury to be charged on § 16-11-440(A) and (E) based on the assumption that pursuant to § 16-11-440(E), the aggressor intended to commit an unlawful act and that pursuant to § 16-11-440(A), Bolin was,

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Thus, in interpreting statutes, we look to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161(citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

Where the legislative intent is not clear, we adhere to the presumption that statutory enactments are to be given prospective rather than retroactive application. See State v. Varner, 310 S.C. 264, 266, 423 S.E.2d 133, 134 (1992). The exception to the presumption of prospective operation arises when the statute is remedial or procedural in nature. State v. Davis, 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 352 n. 2, 520 S.E.2d 614, 616 n. 2 (1999). However, as indicated, legislative intent is paramount in determining whether a statute will have prospective or retroactive application. Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

Turning to the case at bar, the Act went into effect on June 9, 2006, four months after the events leading to the instant matter. Thus, in order for the Act to apply, the legislature must have either intended the Act to be retroactive or, in the absence of such legislative intent, the Act must fall under the exception to the presumption of prospective application by being remedial or procedural. Here, as indicated in this court's recent holding in State v. Dickey, __ S.C. __, 669 S.E.2d 917 (Ct. App. 2008), there is no evidence of legislative intent that the Act be applied retroactively. Id. at __,

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therefore, acting within reasonable fear of imminent peril of death or great bodily injury to himself or another. See S.C. Code Ann. § 16-11-440(A), (E) (Supp. 2008).

669 S.E.2d at 928. In fact, the plain language of the Act specifically indicates the legislature's intent that the Act be applied prospectively. Id. Section 4 of the Act expressly provides:

> The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

2006 S.C. Act No. 379 § 4. By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective. Dickey, __ at __, 669 S.E.2d at 928. Thus, because the legislature clearly and unambiguously specified the Act be applied prospectively, the Act cannot be applied retroactively to Bolin's case.[3] See id. (holding retroactive application of the Act to prosecution that was pending before the effective date of the Act was precluded because the Act is prospective). Therefore, the trial court committed no error in refusing the requested charge.

[3] Given that the legislature clearly specified the Act to apply prospectively, we need not determine whether the Act is remedial or procedural in nature. Notwithstanding, Dickey resolved this issue by holding the Act is neither remedial nor procedural. Dickey, __ at __, 669 S.E.2d at 928.

Because we find the Act does not retroactively apply to Bolin's case, we need not address Bolin's remaining argument concerning the court's refusal to direct a verdict based upon § 16-11-450 of the Act. Additionally, counsel withdrew this ground of appeal at oral argument and proceeded only with the jury charge issue.

CONCLUSION

Accordingly, for the foregoing reasons, the order of the circuit court is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deborah J. Clegg, as Personal Representative of the Estate of Allison Clegg, Respondent,

v.

Elliot M. Lambrecht, Douglas A. Lambrecht, Rhett Barker, Jan Horan, and Anna C. Lambrecht, Defendants, Of Whom Douglas A. Lambrecht is the Appellant.

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

Opinion No. 4498
Heard December 2, 2008 – Filed February 5, 2009

AFFIRMED

John E. North, Jr. and Pamela K. Black, both of Beaufort, for Appellant.

H. Fred Kuhn, Jr., of Beaufort and Richardson Wieters, of Hilton Head, for Respondent.

PIEPER, J.: The appellant, Douglas Lambrecht (Lambrecht), appeals the denial of a motion to impose sanctions under Rule 11, SCRCP, or pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (FPSA).[1] We affirm.

FACTS

On July 27, 2002, Deborah Clegg (Clegg) filed a complaint as personal representative of her deceased daughter, Allison Clegg, against Lambrecht.[2] Clegg alleged her daughter was killed when Lambrecht's son, Elliot Lambrecht (Elliot), crashed a vehicle into a tree. Clegg argued Lambrecht, as the father of Elliot, was liable based on a negligent entrustment cause of action.

At the time of the accident, Elliot was nineteen years old, living in his own residence. Elliot owned the vehicle involved in the accident, though Lambrecht co-signed on the car loan.

Before the accident, the state suspended Elliot's driver's license. Consequently, Elliot parked his vehicle at Lambrecht's house. A few weeks thereafter, Elliot asked Lambrecht to give Elliot's sister, Anna, the keys to Elliot's car because her vehicle had broken down. Lambrecht agreed and Anna picked the car up from Lambrecht's house, taking it to her home in Beaufort, South Carolina. Several weeks later, Elliot traveled with a friend to Beaufort to retrieve the vehicle. Although Elliot's driver's license was still suspended, he nonetheless drove the vehicle, picked up Allison Clegg, and crashed into a tree resulting in Allison's death.

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[1] The legislature amended the FPSA in 2005. The amended law became effective July 1, 2005, and is applicable to causes of action arising on or after that date. The instant cause of action arose before July 1, 2005; therefore, the FPSA, prior to the 2005 amendment, is applicable in this case.

[2] The complaint also listed Elliot Lambrecht as a defendant.

Prior to trial, Lambrecht moved for summary judgment. The trial court granted the motion, concluding Lambrecht had no duty to control Elliot's conduct because it was uncontroverted that Elliot was an emancipated adult. Further, the court concluded Clegg presented no evidence Lambrecht owned or controlled the vehicle involved in the accident. Subsequently, Lambrecht filed a motion to impose sanctions pursuant to the FPSA and pursuant to Rule 11 of the South Carolina Rules of Civil Procedure. The trial court first denied the motion; subsequently, in its denial of the motion to alter or amend, the court specified Clegg's claims were filed in good faith and were reasonable. This appeal followed.

STANDARD OF REVIEW

A request to impose sanctions under the FPSA is treated as a proceeding in equity. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). Once we have determined the facts based upon our own view of the preponderance of the evidence, we next determine whether the trial court abused its discretion. Father v. South Carolina Dep't of Soc. Servs., 353 S.C. 254, 261, 578 S.E.2d 11, 14-15 (2003). An abuse of discretion occurs when the trial court's ruling is based upon an error of law or when based upon factual conclusions without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

DISCUSSION

Lambrecht contends the trial court erred in refusing to impose sanctions by: (1) failing to set forth findings of fact and conclusions of law in its order denying sanctions; (2) using the competence of counsel and the good faith of counsel as the standard for evaluating frivolity; (3) ruling Clegg acted in good faith without an evidentiary basis; (4) failing to find sanctions were mandatory; and (5) failing to award attorney's fees.

Under Rule 11, SCRCP, an attorney may be sanctioned for filing a pleading in bad faith. Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008); Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996).

The rule further provides an attorney may be sanctioned whether or not there are good grounds to support a claim if it was filed for an impermissible purpose such as harassment or unnecessary delay. Johnson v. Dailey, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995).

Prior to being amended, the FPSA stated:

> Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:
>
> (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and
>
> (2) the proceedings have terminated in the favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. §§ 15-36-10(1), (2) (2005).[3]

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[3] Under the amended § 15-36-10 of the South Carolina Code (Supp. 2008), an attorney may be sanctioned for:

> (a) filing a frivolous pleading, motion, or document if:
>
> . . . .
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement,

Under the former FPSA, an action was proper if the party reasonably believed in the existence of the facts upon which his claim was based and:

> (1) reasonably believes that under those facts his claim may be valid under the existing or developing law; or

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> initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(A)(4)(a)(ii)-(iv) (Supp. 2008).

The current statute also directs a court to take into account the following factors when determining whether an attorney has violated the FPSA:

> (1) the number of parties;
> (2) the complexity of the claims and defenses;
> (3) the length of time available to the attorney . . . to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
> (4) information disclosed or undisclosed to the attorney . . . through discovery and adequate investigation;
> (5) previous violations of the provisions of this section;
> (6) the response, if any, of the attorney . . . to the allegation that he violated the provisions of this section; and
> (7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E)(1)-(7) (Supp. 2008).

. . . .

(3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party.

S.C. Code Ann. §§ 15-36-20(1), (3) (2005).[4]

Lambrecht first argues the trial court erred in refusing to award sanctions by failing to set forth findings of fact and conclusions of law in its order denying sanctions. We disagree.

Rule 52(a) of the South Carolina Rules of Civil Procedure governs all actions tried upon the facts without a jury. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002). The rule indicates a trial court acting without a jury is required to find facts and separately state conclusions of law which constitute the grounds for the court's action. Id.; Rule 52(a), SCRCP. The rule is directorial in nature and if "a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." Luckabaugh, 351 S.C. at 131, 568 S.E.2d at 342 (quoting Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)). The findings must be sufficient enough for an appellate court to ensure the law has been faithfully executed. Id. However, Rule 52(a) further indicates that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)." Rule 52(a), SCRCP (emphasis added). Under Rule 41(b), SCRCP, if a court renders a judgment on the merits against the plaintiff, the court "shall make findings as provided in Rule 52(a)." Here, the trial court simply denied a motion for sanctions; therefore, the trial court was not required to state its findings of fact or conclusions of law to support its denial of sanctions.

[4] Though applicable to the case herein, § 15-36-20 of the South Carolina Code (2005) was repealed in the 2005 amendments to the FPSA.

Notwithstanding, the trial court actually made findings to address the Rule 11, SCRCP, and the FPSA grounds raised by Lambrecht as his basis for sanctions; therefore, even if required, the trial court adequately stated its basis for denying sanctions. Specifically, in its order, the trial court first indicated it denied sanctions because Clegg's claims against Lambrecht were filed in good faith. Consistent with this type of finding, Rule 11, SCRCP, provides an attorney may be sanctioned for filing a claim in bad faith. [5] Gregory, 378 S.C. 430 at 437, 663 S.E.2d at 50. Moreover, a claim was not frivolous under the former FPSA if an attorney believed in "good faith" the action was not intended to harass or to injure the other party. S.C. Code Ann. § 15-36-20(3) (2005). Consequently, the trial court appropriately considered whether Clegg filed her claim in good faith.

The trial court also denied sanctions because it found Clegg's claim was reasonable. The former FPSA did not require the trial court to state explicitly its grounds for denying sanctions.[6] However, it did instruct a trial court, when determining whether a lawsuit was frivolous, to analyze whether a party reasonably believed "under [the] facts his claim may be valid under the

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[5] Our state supreme court has previously indicated the standard for Rule 11, SCRCP, sanctions is essentially the same as for sanctions under the former FPSA. See Father, 353 S.C. at 261, 578 S.E.2d at 15 (stating evaluation of sanctions under the former FPSA and Rule 11, SCRCP, essentially the same); In re Beard, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004). However, this language is not controlling precedent as to the application of the amended FPSA. Father and In re Beard, for instance, were issued prior to the legislature amending the FPSA and consequently, do not reflect the "reasonable attorney" paradigm implemented by the amendments to the FPSA. Compare S.C. Code Ann. § 15-36-10 (Supp. 2008), with S.C Code Ann. §§ 15-36-10, 15-36-20 (2005). Absent the legislature amending Rule 11, SCRCP, to reflect changes made to the FPSA, the analysis for sanctions under the rule will not necessarily be the same as the analysis under the amended FPSA due to the subjective versus objective components.

[6] The amended FPSA also does not require courts to make explicit findings.

existing or developing law." S.C. Code Ann. § 15-36-20(1) (2005).[7] Accordingly, the trial court appropriately considered whether Clegg's claim was reasonable. Therefore, the trial court did not err on this asserted ground.

Lambrecht further contends the trial court erred in using the competence of counsel and the good faith of counsel as its criteria for evaluating frivolity. We disagree. Under Rule 11, SCRCP, and the former FPSA, a good faith analysis was appropriate.[8] The rule indicates "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." Rule 11(a), SCRCP (emphasis added); see Gregory, 378 S.C. at 437, 663 S.E.2d at 50 (stating under Rule 11, SCRCP, "[t]he party and/or attorney may . . . be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it."). By requiring an attorney to attest to the best of his or her knowledge and belief that there is good ground to support the matter, the rule effectively requires attorneys to file claims in good faith. Moreover, the FPSA, before being amended, provided, in part, that a claim was not frivolous if the attorney believed in "good faith" the cause of action was not intended merely for an impermissible purpose. S.C. Code Ann. § 15-36-20(3) (2005). Consequently, the trial court did not abuse its discretion in denying sanctions on the basis it referenced the competence and good faith of counsel. We read

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[7] Under the pertinent section of the amended FPSA, the analysis, in part, is whether a reasonable attorney, would believe, under the same facts, a claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (Supp. 2008).

[8] The amended FPSA permits a court to take into account "other factors the court considers just, equitable, or appropriate under the circumstances." S.C. Code Ann. § 15-36-10(E)(7) (Supp. 2008). Arguably, even under the amended FPSA, it would not be inappropriate for a court to consider good faith; however, since the amended FPSA is not applicable herein, we need not make this determination.

the court's amended order only as its written attempt to demonstrate that both Rule 11 and the FPSA were at issue; thus, both standards considered by the court were cited in its order reflecting the court's understanding of the different sanction mechanisms before it. Accordingly, the trial court did not abuse its discretion in denying sanctions on the basis it referenced the competence and good faith of counsel.

Lambrecht argues, in the alternative, the trial court had no evidentiary basis for ruling Clegg acted in good faith. In essence, Lambrecht argues Clegg's failure to file a brief opposing sanctions demonstrated an absence of evidence Clegg acted in good faith. This argument has no merit because it incorrectly suggests the party opposing sanctions has the burden to demonstrate sanctions are not warranted; instead, the party moving for the imposition of sanctions has the burden to establish grounds for sanctions by a preponderance of the evidence. Rutland v. Holler, Dennis, Corbett, Ormond, & Garner (Law Firm), 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct. App. 2006).[9] Moreover, the trial judge who denied the motion for sanctions was

[9] The evidence also supports the trial court's finding that Clegg filed her claim in good faith. While Lambrecht argues the claim became frivolous when Clegg discovered Lambrecht did not own the vehicle involved in the accident, ownership alone is not dispositive of a negligent entrustment claim. See USAA Prop. & Cas. Ins. v. Clegg, 377 S.C. 643, 657, n.7, 661 S.E.2d 791, 798, n.7 (2008) (stating a negligent entrustment claim may lie against "the owner or one in control of the vehicle" involved in an accident) (quoting Am. Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981)) (emphasis added); see also Corbett v. Weaver, __ S.C. __, 669 S.E.2d 615 (Ct. App. 2008). Additionally, although Lambrecht contends Elliot's emancipation destroyed the negligent entrustment claim, emancipation merely suggests a lack of control over the subject person, which while potentially relevant, does not necessarily address whether the defendant had ownership or control over the vehicle involved in the accident. See Passmore, 275 S.C. at 621, 274 S.E.2d at 418. Nevertheless, despite Lambrecht's possession of the vehicle's keys and the vehicle being parked at his residence for a period of time, the trial court apparently concluded Lambrecht did not have control of the vehicle at or near the time of the

also the trial judge who granted summary judgment in Lambrecht's favor; therefore, he was particularly familiar with the substance of the underlying case. See Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000) (stating in an equity case, an appellate court is not required to disregard the findings of the trial judge who was in a better position to judge credibility). Accordingly, the trial court did not err based on Clegg's failure to put forth evidence demonstrating her claims were not frivolous.

Lambrecht also contends the trial court erred in refusing to award sanctions because sanctions were mandatory under the FPSA. We disagree. Under the former FPSA, "[u]pon a finding that a person has violated the provisions of this chapter, the court shall determine the appropriate fees and costs and enter judgment accordingly." S.C. Code Ann. § 15-36-50 (2005).[10] Here, the trial court found no violation warranting sanctions. Therefore, an award of sanctions was not mandatory. As such, the trial court did not abuse its discretion in denying sanctions.

Lambrecht's final argument is the trial court erred by failing to award attorney's fees he incurred in defense of Clegg's claims against him as sanctions. Because we conclude the trial court did not abuse its discretion in denying sanctions, we need not address whether attorney's fees should have been awarded. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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accident and that the negligent entrustment claim therefore should be dismissed. Thus, notwithstanding its ultimate disposition, factual support does appear in the record for the trial court to have concluded Clegg filed the claim in good faith. See Johnson, 318 S.C. at 323, 457 S.E.2d at 616 (holding the trial court did not abuse its discretion in denying sanctions, asserted under Rule 11, SCRCP, where sufficient facts in the record supported a conclusion counsel did not act in bad faith).

[10] Under the amended FPSA, if a sanction is imposed the court "shall report its findings to the South Carolina Commission of Lawyer Conduct" and to our state's supreme court. S.C. Code Ann §§ 15-36-10(H), (M) (Supp. 2008).

CONCLUSION

Based upon the foregoing, the denial of sanctions is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter L. Proctor, Appellant,

v.

Teresa Spires, Respondent.

Appeal From Orangeburg County
Anne Gue Jones, Family Court Judge

Opinion No. 4499
Heard January 7, 2009 – Filed February 10, 2009

REVERSED AND REMANDED

James Shadd, III, of Columbia, for Appellant.

E. T. Moore, Jr., of Barnwell, for Respondent.

Ariel Townsend Rosamond, of Orangeburg, Guardian ad Litem.

PER CURIAM: Peter L. Proctor (Father) appeals from the family court's order finding he willfully failed to support his child and terminating his parental rights. We reverse and remand.

FACTS

In 2003, Father and Teresa Spires (Mother) had a sexual relationship. The parties ended their sexual relationship but maintained contact, and at some point, Mother told Father she was pregnant. However, Mother spoke to Father in January 2004 and denied being pregnant. On May 14, 2004, Mother gave birth to a child (Child), and at that time, Mother claimed she believed the Child belonged to a man other than Father. After learning of the Child's birth through a third party, Father repeatedly attempted to contact Mother, but she refused to speak with him. In December of 2004, Father left a Christmas gift for the Child under the Christmas tree at Mother's church. In late 2004 or early 2005, Father went to the church and saw the Child there with Mother's parents. Upon seeing Father, Mother's parents took the Child and left.

Subsequently, Mother married another man she was seeing around the same time as Father, believing this man was the Child's father; however, a paternity test proved he was not the Child's father.[1] In December 2004, Mother filed sexual assault charges against Father alleging the Child resulted from Father forcibly raping Mother. In May 2005, law enforcement contacted Father concerning the sexual assault charges and the allegation of paternity. Father did not contact Mother about the Child because of the alleged sexual assault.[2] On two separate occasions, Mother applied for child support from Father through the South Carolina Department of Social Services; however, she terminated both applications before paternity was established or an order for support was entered.

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[1] Father has not taken a paternity test to prove he is the Child's father.

[2] In its order, the family court found Father did not willfully fail to visit the Child. The court noted it found credible Father's "testimony that he was reluctant to contact [Mother] directly after he learned he was being investigated for her allegation that he had sexually assaulted her." The court also noted Father would have had to directly contact Mother to arrange any visitation with the Child.

In April 2006, Father filed suit seeking a determination of paternity and visitation rights with the Child. Father offered to pay child support if Mother allowed him visitation with the Child. Mother counter-claimed seeking termination of Father's parental rights (TPR). Following a temporary hearing on July 17, 2006, the family court appointed a guardian ad litem, required both parties to submit to drug testing, and held in abeyance the issues of child support, visitation, and attorney's fees. Mother tested negative for drugs, but Father tested positive for cocaine. The family court ordered Father to submit to two additional drug tests, both of which came back negative.

This matter was tried on December 11, 2007. The family court found Mother's testimony that Father had sexually assaulted her was not credible. The family court terminated Father's parental rights, holding Father had willfully failed to support the Child for more than six months and termination was in the Child's best interest. Father filed this expedited appeal.

LAW/ANAYLSIS

On appeal, Father argues the family court erred in finding he willfully failed to support the Child. We agree.

Although "the grounds for TPR must be proved by clear and convincing evidence," an appellate court may examine the entire record in a TPR case "to determine facts in accordance with its own view of the evidence." Stinecipher v. Ballington, 366 S.C. 92, 97, 620 S.E.2d 93, 96 (Ct. App. 2005). Despite this broad scope of review, the appellate court should not necessarily disregard the findings of the family court because it was in a better position to evaluate the credibility of the witnesses and to assign weight to their testimony. Charleston County Dep't of Soc. Servs. v. Jackson, 368 S.C. 87, 95, 627 S.E.2d 765, 770 (Ct. App. 2006).

In South Carolina, procedures for TPR are governed by statute. See S.C. Code Ann. §§ 63-7-2510 to -2620 (Supp. 2008). Statutory grounds for TPR include the parent's willful failure to support the child, when:

> The child has lived outside the home of either parent for a period of six months, and during that time the parent has wil[l]fully failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wil[l]fully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

S.C. Code Ann. § 63-7-2570(4) (Supp. 2008).

> Whether a parent's failure to support a child is "willful" within the meaning of the statute is a question of intent to be determined in each case from all the facts and circumstances. Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as "willful" because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent.

S.C. Dep't of Soc. Servs. v. Seegars, 367 S.C. 623, 630, 627 S.E.2d 718, 721-22 (2006) (internal citations omitted).

The family court erred in finding clear and convincing evidence proved Father willfully failed to support the Child. The record is devoid of evidence Father's non-payment of any child support prior to July 17, 2006, was willful. Rather, the evidence indicates Father's efforts to inquire into his possible relationship with the Child were thwarted by Mother when she: (1) refused to communicate with Father; (2) refused to admit the Child was Father's until he

filed this suit; (3) prevented Father from contacting her by accusing him of criminal sexual conduct; and (4) withdrew both applications for child support before paternity could be determined or a support order established. Father was not obligated to pay child support after July 17, 2006, because the family court's order of that date held the issue of child support in abeyance. In addition, no prior support order existed. The family court's order following trial terminated Father's parental rights as well as his parental responsibilities. Consequently, the family court erred in finding Father willfully failed to support the Child and in terminating Father's parental rights.[3]

CONCLUSION

Therefore, we reverse and remand this case to the family court to make a determination on visitation, child support, attorney's fees, and guardian ad litem's fees.

REVERSED AND REMANDED.

HEARN, C.J., and SHORT and KONDUROS, JJ., concur.

[3] Due to our disposition of Father's first issue, we need not address the issue of whether TPR was in the Child's best interest. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stanley D. Floyd, Deceased Employee, Appellant/Respondent,

v.

C.B. Askins & Co. Contractors, Employer, and AIU Insurance Company, Carrier, Respondents/Appellants.

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 4500
Heard December 12 2008 – Filed February 10, 2009

AFFIRMED IN PART AND REVERSED IN PART

Steve Wukela, Jr., of Florence, for Appellant/Respondent.

Peter H. Dworjanyn, Christian Stegmaier and Amy L. Neuschafer, all of Columbia, for Respondents/Appellants.

KONDUROS, J.: The widow of Stanley D. Floyd (Claimant), Harriett A. Floyd, appeals the circuit court's ruling limiting her husband's worker's compensation award upon his death from an unrelated cause. C.B. Askins & Co. Contractors and its insurer, AIU Insurance Company, (collectively Carrier) cross-appeal the circuit court's failure to deduct attorney's fees from Claimant's award pursuant to an agreement between the parties. We affirm in part and reverse in part.

FACTS

Claimant received a serious, physical brain injury when he was involved in a bulldozer accident while employed with C.B. Askins & Co. Contractors. The parties stipulated Claimant was permanently and totally disabled pursuant to section 42-9-10 of the South Carolina Code (Supp. 2008), and he was awarded benefits for the remainder of his life. Claimant's remaining life expectancy was determined to be 18.99 years meaning he was awarded benefits for 987.48 weeks. The parties also agreed by consent order Carrier would pay the sum of $57,500 in attorney's fees to be deducted from the end of Claimant's award pursuant to Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (1995). Claimant received 254 weeks of benefits but then died from an unrelated aneurism in his abdomen.

Upon Claimant's death, Mrs. Floyd claimed she was entitled to the balance of 987.48 weeks compensation pursuant to section 42-9-280 of the South Carolina Code (1985). Section 42-9-280 provides the next of kin of a claimant who dies from an unrelated injury may receive the balance of unpaid compensation if the award was made pursuant to the second paragraph of section 42-9-10 or section 42-9-30 of the South Carolina Code (Supp. 2008). Also relying upon section 42-9-280, Carrier stopped payment of Claimant's benefits at the time of his death. However, prior to the hearing before the single commissioner, Carrier acceded Mrs. Floyd should receive the balance of five-hundred weeks' compensation.

The single commissioner found Mrs. Floyd was entitled to the commuted value of the balance of Claimant's lifetime award minus a credit

for attorney's fees paid by Carrier. The Appellate Panel affirmed the payment of benefits, but limited the amount to the balance of five-hundred weeks. Claimant appealed. The circuit court affirmed the Appellate Panel and found Carrier was not allowed a credit for attorney's fees.

On appeal to this court, Mrs. Floyd contends she is entitled to the full balance of 987.48 weeks of compensation. Carrier cross-appeals claiming the circuit court erred in failing to award it credit for attorney's fees as provided for in the consent order between Claimant and Carrier.

STANDARD OF REVIEW

An appellate court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. Libery Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 299 (Ct. App. 2005). Statutory interpretation is a question of law. Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 593, 567 S.E.2d 510, 512 (Ct. App. 2002).

LAW/ANALYSIS

I. Compensation to Mrs. Floyd

Mrs. Floyd argues she is entitled to the balance of compensation remaining on Claimant's lifetime award. We disagree.

Section 42-9-10 of the South Carolina Code (Supp. 2008) is composed of four paragraphs, (A)-(D). Paragraph (A) limits a claimant's award to a maximum of five-hundred weeks even for total, permanent disability. Paragraph (B) provides "[t]he loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section." Consequently, an injury listed in Paragraph (B) would entitle the claimant to the maximum allowable award of five-hundred weeks.

Paragraph (C) provides the only exception to this limitation.

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Id.

Section 42-9-280 of the South Carolina Code (1985) addresses situations like the one in this case in which an injured claimant later dies from a cause unrelated to the workplace injury.

> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30[1] and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

§ 42-9-280.

In Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006), our supreme court addressed the interpretation of this statute and elucidated the basis for the operation of these statutes together. In Stone, the claimant was found to be permanently and totally disabled pursuant specifically to section 42-9-10(A). 367 S.C. at 583 n.1, 627 S.E.2d at 698 n.1. Upon

[1] This section addresses injuries to scheduled members.

Stone's death from an unrelated cause, Stone's widow contended she was entitled to the balance of her husband's benefits. Id. at 578, 627 S.E.2d at 696. The court stated:

> The language of § 42-9-280 is plain. The legislature, as is its prerogative, determined that dependent survivors should received all benefits due an injured worker who lost the use of a scheduled member (§ 42-9-30), or "lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof" (second paragraph of § 42-9-10), i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of § 42-9-10, should not. The legislative distinction between "physical loss" and "wage loss" appears in other workers' compensation statutes as well.
>
> Professor Larson notes that since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments. In construing a workers' compensation statute, "the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Section 42-9-280 specifically provides for the inheritability of two types of awards only.

Stone, 367 S.C. at 585-86, 627 S.E.2d at 700 (internal citations omitted).

In the present case, Claimant's injury was serious and catastrophic. However, his award was made pursuant to paragraph (C) of section 42-9-10. Section 42-9-280 does not include awards made under paragraph (C) among those that survive a claimant's death from an unrelated cause.

Section 42-9-10(A), at issue in Stone, focuses on situations in which a claimant's "incapacity for work resulting from an injury is total." Likewise, paragraph (C) seems to focus on a claimant's inability to earn a wage as opposed to a physical loss. The statute conditions the lifetime award of benefits upon a finding of total and permanent disability. See § 42-9-10(C) ("[A]ny person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage . . . shall receive benefits for life.").

Claimants suffering catastrophic injuries like Claimant's may require specialized healthcare without the means to earn a wage. The award of compensation for a claimant's life expectancy seems to recognize this reality. If so, it is also logical benefits would terminate upon such a claimant's death from an unrelated cause.

Carrier does not appeal the circuit court's award of the balance of five-hundred weeks' compensation. Therefore, that ruling is the law of the case and is affirmed. See First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

II. Attorney's Fees

Carrier argues the circuit court erred in failing to credit attorney's fees to them when a consent order to that effect was entered into by the parties. We agree.

Deducting fees paid by a carrier to a claimant's attorney from the end of a lifetime award is proper under Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (1995). This was the arrangement agreed to by the parties via consent order. Mrs. Floyd argues the consent order only applied if Claimant was receiving lifetime compensation. Therefore, she contends, when Carrier agreed only to payment of the balance of five-hundred weeks' compensation, the consent order became inapplicable. This position is unpersuasive.

We recognize Claimant's untimely passing and other circumstances in this case changed his compensation from a lifetime award to one of a fixed duration; however, we do not believe that negates the agreement by the parties regarding the credit of attorney's fees.[2] According to the record and statements at oral argument, slightly more than 126 weeks of compensation is owed to Mrs. Floyd. Therefore, Carrier owes sufficient money to permit the credit without requiring any reimbursement from Mrs. Floyd.[3] Consequently, we find Carrier is entitled to a credit for attorney's fees paid on behalf of Claimant.

CONCLUSION

Based upon the precedent set forth in Stone and a plain reading of the relevant statutes, we find Mrs. Floyd is not entitled to the balance of her husband's lifetime benefits. Because the award of the balance of five-hundred weeks' compensation is not appealed, we affirm that finding as it is the law of the case.

With respect to attorney's fees, we reverse the circuit court because the allowance of a credit for attorney's fees, pursuant to the agreement of the parties and the circumstances of this case, is appropriate. Therefore, the order of the circuit court is

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and SHORT, J., concur.

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[2] A claimant and a carrier may agree that the claimant's attorney's fees, paid by the carrier, will be deducted from an award of a fixed duration greater than one hundred weeks. See id. at 469, 458 S.E.2d at 538 (finding section 42-9-10 and 25A S.C. Code Ann. Regs. 67-1207 (1982), when read together, permit the lump sum award of attorney's fees).

[3] We are not called upon to consider whether repayment of attorney's fees may be required when the credit for attorney's fees is greater than the amount due the claimant; thus, we decline to do so.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

2003-CP-26-01786

Horry County, a body politic, Appellant,

v.

Michael R. Ray, Park-Ray Landscape, Inc., Horry County State Bank, Coastal Federal Savings Bank, Coastal Management Associates, Inc., ARS, and United Video, Defendants,

of whom Horry County State Bank is Respondent.

2003-CP-26-05799

Horry County State Bank, a South Carolina Corporation, Respondent,

v.

Park-Ray Landscape, Inc., Michael R. Ray, Individually and as Officer of Park Ray Landscape, Inc., Horry County, a body politic, Branch Banking & Trust, S.C. Department of Revenue, Coastal Federal Bank, Sunbelt Rentals, Inc., United Video, Coastal Management Associates, Inc., Jill Allen, Ernest Holt, Walter Nalepa, and Margaret Dvores, on behalf of themselves and others similarly situated and derivatively as homeowners in Oakmont at River Oaks Homeowner's Assn. Inc., Defendants,

of whom Horry County, a body politic is Appellant.

Appeal From Horry County
Ralph P. Stroman, Special Referee

Opinion No. 4501
Heard December 3, 2008 – Filed February 10, 2009

AFFIRMED

John B. McCutcheon, Mary Ruth M. Baxter and Lisa A. Thomas, all of Conway, for Appellant.

Andrew C. English, III, of Columbia and Carroll D. Padgett, Jr., of Loris, for Respondent.

KONDUROS, J.: Horry County (the County) appeals the special referee's order finding the County failed to establish an equitable lien on certain property and giving priority to Horry County State Bank's mortgage. We affirm.

FACTS

Branch Banking and Trust Company (BB&T) initiated a foreclosure action against certain property in Horry County. The property was sold by the County at auction to Michael R. Ray as representative of Park-Ray Landscape, Inc. (Park-Ray). Ray issued a cashier's check to the County as payment for his bid on the property. By all accounts, the check appeared on its face to be regular and valid. The County disbursed funds to BB&T in satisfaction of its outstanding mortgage on the property before the check cleared. The County then discovered the cashier's check from Park-Ray had been dishonored. On July 31, 2002, the County filed a lis pendens on the property. Within a few days, Park-Ray delivered a second cashier's check to the County. That check was subsequently found to be fraudulent as was the first check. On August 1, Park-Ray gave a mortgage on the property to Horry County State Bank (HCSB). HCSB investigated the title to the property and on August 19 recorded its mortgage. The County cancelled its lis pendens on August 27.[1]

Park-Ray defaulted on the mortgage held by HCSB and HCSB sold the property. The proceeds from that sale are being held in escrow by HCSB subject to the County's claim to the proceeds. At trial before the special referee, the attorneys who handled the loan closing testified the title examiner's documents indicated a lis pendens was filed against the property

[1] The County filed several more lis pendens over the course of the next ten months. However, none of those seem to be important with respect to HCSB's constructive or actual knowledge in this case.

on July 31. They further testified the examination sheet did not indicate the lis pendens had been removed. The special referee determined the lis pendens filed by the County was invalid and ineffective because the County did not commence a lawsuit within twenty days after the filing of the lis pendens. Consequently, the County's claim to the proceeds did not take priority over the claim of HCSB. The special referee further found the County did not meet the requirements to establish an equitable lien on the property that would take priority over HCSB's mortgage. This appeal followed.

STANDARD OF REVIEW

The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence. Williams v. Wilson, 349 S.C. 336, 339-40, 563 S.E.2d 320, 322 (2002). "An action to establish an equitable lien and to establish lien priorities is an action in equity." Fibkins v. Fibkins, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct. App. 1990) (citations omitted). "By the same token, an action to foreclose a mortgage is an action in equity." Id.

LAW/ANALYSIS

I. Constructive and Actual Notice

The County contends the special referee erred in finding the lis pendens did not provide notice to HCSB of the County's interest in the property. We disagree.

Section 15-11-10 of the South Carolina Code (2005) sets forth the timing requirements for filing a notice of lis pendens. In an action affecting the title to real property, a party may file, not more than twenty days before filing a complaint, notice of the pendency of an action containing the names of the parties, the object of the action, and the description of the property affected. Id.

Section 15-11-20 of the South Carolina Code (2005) explains the effect of filing a lis pendens.

> From the time of filing only, the pendency of the action shall be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action. For the purposes of this section, an action shall be deemed to be pending from the time of filing such notice.

Id.

"The purpose of a notice of pendency of an action is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 16, 567 S.E.2d 881, 889 (Ct. App. 2002). "Generally, the filing of a lis pendens places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved." Id. at 17, 567 S.E.2d at 889.

> The lis pendens mechanism is not designed to aid either side in a dispute between private parties. Rather, lis pendens is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, i.e., the fact of a suit involving property. Thus, it notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights.

Id. (quoting 51 Am. Jur. 2d Lis Pendens § 2 (2000)).

The special referee relied on South Carolina National Bank v. Cook, 291 S.C. 530, 354 S.E.2d 562 (1987), in awarding the disputed funds to HCSB. In Cook, Myrtle Beach Lumber Company, Inc. (the Lumber Company) filed a notice of lis pendens on November 8, 1977 but did not file its summons and complaint until more than twenty days later on December 1, 1977. Id. at 531, 354 S.E.2d at 562. On December 5, 1977, South Carolina National Bank obtained a judgment lien against the owner of a one half interest in the property. Id. Eventually, as a result of the litigation instituted by the Lumber Company, the property was deeded to the Lumber Company, who conveyed it to the Cooks. Id. When SCN sought to foreclose its judgment lien, the Cooks argued SCN's interest in the property was subordinate to their own. Id. at 532, 354 S.E.2d at 562. The supreme court disagreed stating: "Since the legislature clearly intended that a lis pendens not be filed more than twenty days before the complaint, we hold the premature filing of the lis pendens rendered it invalid. Since the lis pendens filed by Lumber Company was ineffective, SCN was not bound by the prior proceedings and its lien was not extinguished." Id. at 532-33, 354 S.E.2d at 563.

Likewise, in the case before us, the County failed to file a summons and complaint within the twenty day period as required by statute. Therefore, the lis pendens was rendered invalid and could not have provided constructive notice of any claim by the County to HCSB.

The County argues even if HCSB was not put on constructive notice by the lis pendens, HCSB had actual notice of the County's interest in the property. We disagree.

The County argues the chain of title contained several red flags, in addition to the lis pendens, that provided actual notice to HCSB of the County's claim. First, the outstanding mortgage of BB&T was not marked satisfied. However, the Statement of Disbursement from the master-in-equity indicated the initial sale of the property was final and that the funds had been

disbursed to BB&T.[2] The deed conveying the property to Park-Ray appeared normal and was duly recorded. Furthermore, according to the closing attorneys' testimony in the record, their services were procured by Ray and Park-Ray.[3] We are reluctant to impute whatever knowledge may have been revealed by the title examination to HCSB when it is unclear who actually represented HCSB's interests in the closing. See Costas v. First Fed. Sav. & Loan Ass'n, 283 S.C. 94, 99, 321 S.E.2d 51, 54 (1984) (finding knowledge of closing attorney was not imputed to bank when attorney was procured and paid by the borrower and was not under the sole direction of the bank).

Even if the title examination put HCSB on inquiry notice[4] of the County's claim, it appears any inquiry would have resulted in assurances from the County that the matter had been or was about to be resolved.[5] The County's attorney testified that once a second cashier's check was issued in early August, he "figured everything was taken care of." Believing the matter to be resolved, the County did not file a lawsuit and ultimately canceled the lis pendens on August 27.[6] At the time of HCSB's title search, the full extent

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[2] According to HCSB, it is "commonplace" for attorneys in Horry County to rely upon the Master's Deed and the Order of the Master with respect to a mortgage that remains unsatisfied following a foreclosure sale.

[3] According the closing attorneys' testimony, their law firm had represented Ray and Park-Ray on some other legal matters, and he inquired with the firm about handling the closing of the loan from HCSB.

[4] Inquiry notice is a form of constructive notice that may have the same effect as actual notice. See Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998).

[5] We do not make a finding regarding whether the lis pendens would have provided actual or inquiry notice to HCSB under circumstances other than those existing in this case.

[6] The County's attorney did attempt to investigate the matter by speaking with Ray and corresponding with several attorneys named by Ray. In fact, the County received faxed correspondence purportedly from an Atlanta attorney stating the problem with the first cashier's check was an internal banking error and a second check was on its way. In hindsight, it appears from the record those faxes may have actually been prepared and sent by Ray.

of Ray's fraudulent conduct was not known to the County and could not have been discovered by HCSB. Therefore, we cannot conclude the lis pendens or unsatisfied mortgage functioned to provide actual notice to HCSB of the County's claim.

II. Equitable Lien

The County also contends the special referee erred in finding it failed to establish an equitable lien with priority over HCSB's mortgage against the property. We disagree.

With respect to the County's interest, it is arguable Park-Ray's conduct gave rise to an equitable lien against the property. An equitable lien is "neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing." Fibkins v. Fibkins, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct. App. 1990) (quoting Carolina Attractions, Inc., v. Courtney, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985)). "An equitable lien is a 'mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered, but even though not judicially recognized until a judgment declaring its existence, it relates back to the time it was created by the conduct of the parties.' " Id. (quoting Am. Jur. 2d Liens § 22 (1970)).

Whether an equitable lien exists that would take priority over HCSB's interest must be considered in conjunction with other well-recognized equitable principles. When "one of two innocent parties must suffer loss, it must fall on the party who, by incautious and misplaced confidence, has occasioned it or placed it in the power of a third party to perpetrate the fraud by which the loss has happened." MI Co. v. McLean, 325 S.C. 616, 624, 482 S.E.2d 597, 601 (Ct. App. 1997) (quoting City Council of Charleston v. Ryan, 22 S.C. 339 (1884)). Had the County not disbursed funds to BB&T prematurely without verifying the existence of the funds, it would not be injured. We are mindful Ray is primarily responsible for the parties' injuries; however, as between the County and HCSB, we conclude the County must

bear the consequences of its conduct. Therefore, we cannot accord any potential interest of the County priority over the mortgage of HCSB.

Based on all of the foregoing, the order of the special referee is

AFFIRMED.

SHORT, J., and CURETON, A.J., concur.