OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

June 4, 2001

ADVANCE SHEET NO. 20

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

(Charleston, Judge Donald W. Beatty)

2001-UP-284 State v. Tori E. Rowlinson
(York, Judge John C. Hayes, III)

2001-UP-285 Morgan v. Prettl Electric
(Anderson, Judge Joseph J. Watson)

2001-UP-286 State v. Dereck Carlton Capers
(Charleston, Judge Daniel E. Martin, Sr.)

2001-UP-287 State v. Robert Lee Clark
(Greenville, Judge Lee S. Alford)

2001-UP-288 State v. Brian Asbury
(Orangeburg, Judge James C. Williams)

2001-UP-289 State v. Vlynncio M. Drayton
(Dorchester, Judge Luke N. Brown, Jr.)

2001-UP-290 State v. Marvin Nayon Smith
(Clarendon, Judge Marc H. Westbrook)

2001-UP-291 State v. Chassidy Laniece Hopkins
(Berkeley, Judge A. Victor Rawl)

2001-UP-292 Franzello v. Bankhead
(York, Judge Daniel E. Martin, Sr.)

2001-UP-293 In the Interest of: Marcus Dewitt M.
(Florence, Judge Mary E. Buchan)

2001-UP-294 State v. Robert Cameron Johnson
(Fairfield, Judge Paul E. Short, Jr.)

2001-UP-295 State v. Abdulla Washington
(Dorchester, Judge Luke N. Brown, Jr.)

2001-UP-296 State v. Michael Benninger
(Georgetown, Judge Howard P. King)

2001-UP-297 State v. Otis Ulysses Dow
(Clarendon, Judge Howard P. King)

2001-UP-298 State v. Charles Henry Bennett
(Horry, Judge Rodney A. Peeples)

2001-UP-299 State v. Cedric McClinton
(York, Judge Lee S. Alford)

2001-UP-300 Robert L. Mathis, Jr. v. State
(Horry, Judge Howard P. King)

2001-UP-301 State v. Kenneth Benson
(Spartanburg, Judge John W. Kittredge)

2001-UP-302 State v. Wade Angel
(Greenville, Judge John W. Kittredge)

2001-UP-303 Branham v. Fairfield Real Estate Co.
(Fairfield, Claude S. Coleman, Special Referee)

2001-UP-304 Jack Arnold McIntyre v. State
(Darlington, Judge Edward B. Cottingham)

2001-UP-305 State v. Johnny M. Abrams
(Sumter, Judge Daniel F. Pieper)

2001-UP-306 State v. Shawn Christopher Cheney
(Georgetown, Judge Paula H. Thomas)

2001-UP-307 State v. Joseph T. McQuatters
(Lexington, Judge L. Henry McKellar)

2001-UP-308 State v. Barinyegia Wiwuga
(Charleston, Judge Paul E. Short, Jr.)

2001-UP-309 State v. David W. Matthews
(Spartanburg, Judge J. Derham Cole)

2001-UP-310 State v. Jimmy Lamont Hunt
(Horry, Jduge Sidney T. Floyd)

2001-UP-311 State v. Johnny R. Poynter
(Anderson, Judge J. Nicholson, Jr.)

2001-UP-312 Hazel v. Montgomery Ward

(Charleston, Judge J. Derham Cole)

PETITIONS FOR REHEARING

3282 - SCDSS v. Basnight		Pending
3299 - SC Property & Casualty v. Yensen	(2)	Pending
3321 - Andrade v. Johnson		Pending
3329 - SC Dept. of Consumer Affairs v. Rent-A-Center		Pending
3330 - Bowen v. Bowen		Pending
3332 - SC Farm Bureau v. Kelly		Pending
3333 - State v. Dennis Zulfer		Pending
3335 - Joye v. Yon		Pending
3336 - SCDSS v. Cummings		Pending
3337 - Brunson v. Stewart		Pending
3338 - Simons v. Longbranch Farms		Pending
2001-UP-123 - SC Farm Bureau v. Rabon (Op. withdrawn & substituted)	(2)	Denied
2001-UP-131 - Ivester v. Ivester		Pending
2001-UP-156 - Employers Ins. v. Whitakers Inc.		Pending
2001-UP-159 - State v. Darnell Hunter		Pending
2001-UP-176 - Ledbetter v. Ledbetter		Pending
2001-UP-199 - Summerford v. Collins Properties		Pending
2001-UP-123 SC Farm Bureau v. Rabon (Op. withdrawn & substituted)		Denied
2001-UP-200 Cooper v. Parsons (Op. withdrawn & substituted)		Denied

2001-UP-212 - Singletary v. La-Z-Boy	Pending
2001-UP-220 - State v. Jimmy Lee Brown	Pending
2001-UP-232 - State v. Robert Darrell Watson	Pending
2001-UP-235 - State v. Robert McCrorey, III and Robert Dimitry McCrorey	Pending
2001-UP-237 - Roe v. James	Pending
2001-UP-239 - State v. Billy Ray Jackson	Pending
2001-UP-248 - Thomason v. Barrett	(2) Pending
2001-UP-249 - Hinkle V. National Casualty	Pending
2001-UP-250 - State v. Stephen Glover	Pending
2001-UP-252 - Marlboro County DSS v. Chestnut	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson	Pending
3102 - Gibson v. Spartanburg Sch. Dist.	Denied
3216 - State v. Jose Gustavo Castineira	Pending
3217 - State v. Juan Carlos Vasquez	Pending
3218 - State v. Johnny Harold Harris	Pending
3220 - State v. Timothy James Hammitt	Pending
3231 - Hawkins v. Bruno Yacht Sales	Pending
3242 - Kuznik v. Bees Ferry	Pending
3248 - Rogers v. Norfolk Southern Corp.	Pending
3252 - Barnacle Broadcast v. Baker Broadcast	Pending
3254 - Carolina First v. Whittle	Pending

3255 - State v. Larry Covington	Pending
3256 - Lydia v. Horton	Pending
3257 - State v. Scott Harrison	Pending
3264 - R&G Construction v. Lowcountry Regional	Pending
3267 - Jeffords v. Lesesne	Pending
3270 - Boddie-Noell v. 42 Magnolia Partnership	Pending
3271 - Gaskins v. Souther Farm Bureau	Pending
3272 - Watson v. Chapman	Pending
3273 - Duke Power v. Laurens Elec. Coop	Pending
3274 - Pressley v. Lancaster County	Pending
3276 - State v. Florence Evans	Pending
3280 - Pee v. AVM, Inc.	Pending
3284 - Bale v. SCDOT	Pending
3289 - Olson v. Faculty House	(2) Pending
3290 - State v. Salley Parker & Tim Kirby	Pending
3292 - Davis v. O-C Law Enforcement Comm.	Pending
3293 - Wiedemann v. Town of Hilton Head	Pending
3294 - State v. Nathaniel Williams	Pending
3297 - Silvester .v Spring Valley Country Club	Pending
3398 - Lockridge v. Santens of America, Inc.	Pending
3300 - Ferguson v. Charleston/Lincoln	Pending
3307 - Curcio v. Catepillar	Pending
3311 - SC Farm Bureau v. Wilson	Pending

3314 - State v. Minyard Lee Woody		Pending
3315 - State v. Ronald L. Woodruff		Pending
3319 - Breeden v. TCW, Inc.	(2)	Pending
2000-UP-503 - Joseph Gibbs v. State		Pending
2000-UP-595 - Frank Brewster v. State		Pending
2000-UP-601 - Johnson v. Williams		Pending
2000-UP-607 - State v. Lawrence Barron		Pending
2000-UP-653 - Patel v. Patel	(2)	Pending
2000-UP-655 - State v. Quentin L. Smith		Pending
2000-UP-656 - Martin v. SCDC		Pending
2000-UP-664 - Osteraas v. City of Beaufort		Pending
2000-UP-697 - Clark v. Piemonte Foods		Pending
2000-UP-706 - State v. Spencer Utsey		Pending
2000-UP-708 - Federal National v. Abrams		Pending
2000-UP-717 - City of Myrtle Beach v. Eller Media Co.		Pending
2000-UP-719 - Adams v. Eckerd Drugs		Pending
2000-UP-724 - SCDSS v. Poston		Pending
2000-UP-729 - State v. Dan Temple, Jr.		Pending
2000-UP-738 - State v. Mikell Pinckney		Pending
2000-UP-766 - Baldwin v. Peoples		Pending
2000-UP-775 - State v. Leroy Bookman, Jr.		Pending
2001-UP-015 - Milton v. A-1 Financial Services		Pending
2001-UP-019 - Baker v. Baker		Pending

2001-UP-022 - Thomas v. Peacock		Pending
2001-UP-049 - Johnson v. Palmetto Eye		Pending
2001-UP-050 - Robinson v. Venture Capital		Pending
2001-UP-066 - SCDSS v. Duncan		Pending
2001-UP-069 - SCDSS v. Taylor		Pending
2001-UP-076 - McDowell v. McDowell		Pending
2001-UP-078 - State v. James Mercer		Pending
2001-UP-091 - Boulevard Dev. V. City of Myrtle Beach		Pending
2001-UP-092 - State v. Robert Dean Whitt		Pending
2001-UP-111 - State v. James Tice		Pending
2001-UP-114 - McAbee v. McAbee		Pending
2001-UP-122 - State v. Robert Brooks Johnston		Pending
2001-UP-124 - State v. Darren S. Simmons	(2)	Pending
2001-UP-125 - Spade v. Berdish		Pending
2001-UP-126 - Ewing v. Mundy		Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carol C. Poole, Respondent,

v.

Incentives Unlimited, Inc. d/b/a Dunlap Motivation and Travel, Petitioner,

and

Incentives Unlimited, Inc. d/b/a Dunlap Motivation and Travel, Third-Party Plaintiff,

v.

Northshore Travel, Inc., Third-Party Defendant.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Thomas J. Ervin, Circuit Court Judge
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 25299
Heard April 5, 2001 - Filed June 4, 2001

AFFIRMED

D. Garrison Hill, of Hill & Hill, L.L.C., of Greenville, for petitioner.

Chris B. Roberts, of Brown, Massey, Evans, McLeod & Haynsworth, P.A., of Greenville, for respondent.

CHIEF JUSTICE TOAL: This Court granted Incentives Unlimited's d/b/a Dunlap Motivation and Travel's ("Incentives") petition for a writ of certiorari to review the Court of Appeals' decision in *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999).

FACTUAL/ PROCEDURAL BACKGROUND

Carol C. Poole ("Poole") began working as an at-will travel agent for Incentives in 1992. Three and a half years later, in April 1996, Incentives asked Poole to sign an "Employment Agreement" which consisted solely of a covenant not to compete. Poole alleges she was told she had to sign the agreement in order to remain employed. Incentives states in return for signing the covenant, Poole "received continued employment" with the company. Poole signed the Employment Agreement on April 30, 1996.

In November 1996, Poole left Incentives and began working for another travel agency. Incentives refused to transfer cruise bookings for Poole and five of her friends, causing them to re-book the cruise at an increased cost. Poole then sued Incentives to recover the increased costs. Incentives answered and counterclaimed, seeking an order temporarily enjoining Poole from violating the covenant not to compete and seeking damages for the alleged breach of the covenant. The trial court denied the request for a temporary injunction.

Subsequently, both parties moved for summary judgment, and these motions were heard before the trial judge in February 1998. The trial judge, by order dated March 3, 1998, granted summary judgment to Poole on the ground the covenant not to compete was unenforceable and invalid since: (1) it was not supported by consideration; and (2) it was not witnessed by a disinterested party as required by S.C. Code Ann. § 41-19-50 (Law Co-op. 1976).[1] The Court of Appeals affirmed, holding the covenant was invalid and unenforceable due to a lack of consideration. The Court of Appeals did not address the applicability of section 41-19-50. Incentives was granted certiorari, and the issues before this Court are:

> I. Did the Court of Appeals err in holding continued at-will employment is insufficient consideration to support a covenant not to compete entered into during an ongoing employment relationship?
>
> II. Did the Court of Appeals err in refusing to address the applicability of Section 41-19-50 to the case at hand?

LAW/ ANALYSIS

I. Covenant Not to Compete

Incentives argues continued at-will employment is sufficient consideration for a covenant not to compete entered into during an ongoing employment relationship. Poole argues separate consideration, in addition to continued at-will employment, is need for the covenant to be enforceable. We agree with Poole.

In *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942), this Court set forth the following standard for determining the validity of a covenant not to compete:

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[1]Although in effect at the time Poole and Incentives signed the covenant, this section was repealed by Act. No. 289 of 1996.

> It is well settled that while contracts in general restraint of trade are against public policy and void, yet those in partial restraint, founded upon a valid consideration and reasonable in their operation, are valid and binding. The test which generally is laid down by which it may be determined whether a contract is reasonable is whether it affords a fair protection for the interests of the party in whose favor it is made, without being so large in its operation as to interfere with the interests of the public.

Id. at 498-499, 21 S.E.2d at 186 (internal citations omitted).

This Court also announced the criteria for determining the validity of a covenant not to compete in *South Carolina Fin. Corp. of Anderson v. Westside Finance Co.*, 236 S.C. 109, 113 S.E.2d 329 (1960). "A covenant not to compete is enforceable if it is not detrimental to the public interest, . . . is reasonably limited as to time and territory, and is supported by *valuable consideration*." *Id.* at 119, 113 S.E.2d at 334 (emphasis added). Furthermore, this Court has stressed, "It is well settled that a restrictive covenant not to engage in a competitive business ancillary to a contract of employment, will be upheld and enforced if, *inter alia*, it is *supported by a valuable consideration*." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 72, 119 S.E.2d 533, 542 (1961) (emphasis added); *see also Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (a covenant not to compete must be supported by valuable consideration). Finally, such covenants will be critically examined and construed against the employer. *Carolina Chem. Equip. Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996).

The question in this case involves whether the covenant not to compete executed by Poole and Incentives is supported by valuable consideration. Incentives argues the consideration was continued at-will employment. Poole argues in order for a covenant entered into after the inception of employment to be enforceable, it must be supported by *separate* consideration, not simply continued employment.

This Court has clearly held "a covenant not to compete may be enforced

where the consideration is based solely upon the at-will employment itself." *Riedman Corporation v. Jarosh*, 290 S.C. 252, 252, 349 S.E.2d 404, 404 (1986). However, the covenant in that case was entered into at the inception of employment. Therefore, the covenant passes the threshold validity test because it was exchanged for a promise of initial employment. The more difficult question becomes whether continued at-will employment is sufficient consideration to enforce a covenant entered into days, months, or even years after the initial employment offer.

In *Kerrigan, supra*, this Court addressed a covenant entered into between employee Kerrigan and employer Standard Register thirteen years after the inception of employment. This Court found the covenant enforceable. *Kerrigan, supra*. However, the facts are distinguishable from the instant case. When Kerrigan signed the covenant, he received a change in duties, change in pay, and change in position. Therefore, the consideration was not simply continued employment, but also an increase in pay and a change in duties.

We are persuaded by jurisdictions, such as North Carolina, which find that ordinarily employment is a sufficient consideration to support a restrictive negative covenant, but where the employment contract is supported by the purported consideration of continued employment, there is no consideration when the contract containing the covenant is exacted after several years employment and the employee's duties and position are left unchanged. *Kadis v. Britt*, 29 S.E.2d 543 (N.C. 1944). Therefore, we adopt the rule that when a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.

In the instant case, Poole's duties, position, and salary were left unchanged. Therefore, the covenant was unenforceable for lack of consideration.

II. Section 41-19-50

Incentives argues the Court of Appeals erred in refusing to address its argument that S.C. Code Ann. § 41-19-50: (1) was inapplicable to civil cases;

and (2) had been repealed by the General Assembly. We disagree.

The Court of Appeals did not err in refusing to address this issue because, in light of its finding that the agreement was unenforceable for lack of consideration, a ruling on section 41-19-50 was unnecessary. For the same reason, this Court does not address this issue.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision is **AFFIRMED**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Arthur Eugene Graddick, Appellant.

Appeal From Charleston County
Costa M. Pleicones, Circuit Court Judge

Opinion No. 25300
Heard April 24, 2001 - Filed June 4, 2001

AFFIRMED

Michael S. Seekings and W. Peter Beck, both of Charleston, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor David Price Schwacke, of North Charleston, for respondent.

JUSTICE BURNETT: Appellant appeals his conviction for the murder of Richard Allen Brown. We affirm.

DISCUSSION

I. Did the trial court err in denying defense counsel's motion to be relieved?

Appellant argues he was unfairly prejudiced and denied effective assistance of counsel because the trial court denied defense counsel's motion to be relieved. We disagree. The trial court did not deny the motion. Rather, defense counsel withdrew the motion, leaving nothing for the trial court to rule upon.

However, the record contains a *pro se* letter addressed to the trial court four days before the start of appellant's trial asking for help firing his attorney. The record contains no action by the court in response to this letter. The State argues the court properly took no action on this letter in the absence of a request by trial counsel that the motion be renewed. In support of this statement, the State cites State v. Stuckey, 333 S.C. 56, 58, 508 S.E.2d 564, 564 (1998), which held "[s]ince there is no right to hybrid representation, substantive documents filed *pro se* by a person represented by counsel are not accepted unless submitted by counsel." However, Stuckey goes on to state, "Nothing in this order shall be construed to limit any party's right to file a *pro se* motion seeking to relieve his counsel." Id., 508 S.E.2d at 565. The rule against hybrid representation does not bar *pro se* motions to relieve counsel.

Nevertheless, there is no reversible error here. A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. State v. Hyman, 276 S.C. 559, 562, 281 S.E.2d 209, 211 (1981), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Appellant bears the burden to show satisfactory cause for removal. Id. Appellant made only the most conclusory

arguments why counsel should have been relieved: "Mr. Runyon is not representing my interests and is not fully prepared for this case. I do not feel comfortable going to court with him as my lawyer." The trial court did not abuse its discretion in refusing to grant appellant's request for new counsel mere days before the start of appellant's trial for murder.

II. Did the trial court err in permitting the State to cross-examine a witness about his prior intention not to testify?

Appellant argues the trial court committed prejudicial error in permitting the State to question a defense witness concerning the witness's earlier intention not to testify. We disagree.

David Greene was also charged in connection with the death of the victim. He initially indicated his intent to invoke his Fifth Amendment privilege against self-incrimination, but ultimately agreed to testify as a defense witness. The State requested permission to cross-examine Greene about his prior intention not to testify for the purpose of "explain[ing] why the state did not call him." The trial court expressed some concern that "if [the Solicitor] is seeking to use it as making the guy look bad, then it may be a problem if Arthur Graddick doesn't take the witness stand." However, the court granted the Solicitor permission to ask Greene if he had previously refused to testify for the State.

On cross-examination, the Solicitor asked Greene whether he had changed his mind at the last minute about testifying. Greene responded:

> We talked about that. And I told [my attorney] when I was going to lunch that I was going to think about this. And I don't see why – I don't see the reason why not – I shouldn't be testifying, because I was right there. And I know I do have two charges pending against me. And I'm going to be honest with you, I know I didn't do nothing and I know Arthur didn't do nothing, that's why I'm up here telling y'all the truth.

Appellant asserts this line of questioning improperly drew attention to his own decision not to testify.

The Fifth Amendment to the United States Constitution provides in part that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.[1] As a corollary of the right to remain silent, a prosecutorial comment upon a defendant's failure to testify at trial is constitutionally impermissible. Griffin v. California, 380 U.S. 609 (1965); State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Because neither party is entitled to draw any inference from a witness's invocation of privilege, it is desirable the jury not know that a witness has invoked the privilege against self-incrimination. State v. Hughes, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997).

The trial court did not abuse its discretion in allowing the questioning. Cf. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) (a trial court's ruling concerning the scope of cross-examination of a witness to test his credibility should not be disturbed on appeal absent a manifest abuse of discretion). The express purpose of the questioning was to explain why the State did not call Greene as a witness. Nothing in the record indicates this purpose was a subterfuge. Cf. State v. Hughes, 328 S.C. 146, 153, 493 S.E.2d 821, 824 (1997) (witness may not be called *solely* for the sake of having witness invoke privilege against self-incrimination, for the purpose of permitting jury to infer wrongdoing from that assertion). Although Greene stated he had no reason not to testify because he and appellant were innocent, this commentary – even if it can be characterized as a comment on appellant's failure to testify – cannot fairly be attributed to the State. The Solicitor did not elicit the commentary, nor did she highlight the remarks in any way. In her closing argument, the Solicitor vigorously assailed Greene's

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[1]This provision governs state as well as federal criminal proceedings. Malloy v. Hogan, 378 U.S. 1 (1964). Moreover, Article I, Section 12, of the South Carolina Constitution contains similar language.

credibility without reference to his decision to testify. The trial court committed no error in permitting the questioning.

III. Did the trial court's circumstantial evidence charge place improper significance on direct evidence?

Appellant contends the trial court's circumstantial evidence charge improperly placed greater significance on direct evidence than on circumstantial evidence, contrary to State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). We disagree.

The trial court's circumstantial evidence charge was a hybrid of the traditional circumstantial evidence charge[2] and the charge approved in Grippon. Grippon recommended a circumstantial evidence charge which emphasizes the lack of distinction between the weight to be given to direct and circumstantial evidence. Id. at 83-84, 489 S.E.2d at 464. The trial court expressly instructed the jury that "circumstantial evidence is just as competent or capable of proving a fact in issue as is direct evidence." Grippon did not invalidate the traditional circumstantial evidence charge. See State v. Needs, 333 S.C. 134, 155, n.13, 508 S.E.2d 857, 868, n.13 (1998). Reviewing the charge as a whole, it is an accurate statement of the law. See Grippon, 327 S.C. at 82-83, 489 S.E.2d at 463 (jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error).

CONCLUSION

Appellant's remaining issues are disposed of pursuant to Rule 220, SCACR, and the following authorities: State v. Mitchell, 286 S.C. 572,

[2]The charge contained none of the language disapproved in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991), and State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995).

336 S.E.2d 150 (1985) (improper introduction of hearsay evidence constitutes reversible error only if its admission is prejudicial to the defendant); State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996) (jury instruction on "mere presence" generally applicable in cases of accomplice liability or constructive possession of contraband).

Appellant's conviction for murder is **AFFIRMED**.

TOAL, C.J., MOORE, WALLER, JJ., and Acting Justice John L. Breeden, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina,

Respondent,

v.

Thomas Ray Ballington,

Appellant.

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3346
Heard April 3, 2001 - Filed May 29, 2001

AFFIRMED

S. Jahue Moore and Heath P. Taylor, both of Wilson, Moore, Taylor & Thomas, of West Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Tracey C. Green, all of Columbia;

and Solicitor Donald V. Myers, of Lexington, for respondent.

HEARN, C.J.: Thomas Ray Ballington was convicted of murdering his wife, Edna Lynn Ballington (Wife). He was sentenced to life imprisonment. He appeals, arguing that (1) because a magistrate reduced the grand jury's murder indictment to a charge of manslaughter, the court of general sessions lacked jurisdiction to try him for murder; (2) the trial court erred in admitting an incriminating statement he made to police; and (3) the trial court erred in failing to grant his directed verdict motion. We affirm.

FACTS

Sometime after 2:00 p.m. on September 24, 1998, West Columbia firefighters arrived at Ballington's residence in response to a 911 call that a person inside was unconscious. Ballington was waiting for them in the yard. He unlocked the front door and directed them to Wife lying face down behind the door at the foot of the stairs. The firefighters found no pulse or other signs of life, so they moved her to an area with more room and began CPR. There was one shoe underneath her, and one shoe on the stairs. She had marks on her face and neck. Ballington had a scratch on his face. The firefighters noticed an indentation on the wall.

Emergency medical service (EMS) personnel soon arrived, continued CPR, and prepared to transport Wife to the hospital, although it appeared she had been dead for some time. She had marks on her neck consistent with something pressing against her airway, blood in her airway, blood around her nose and mouth, and bruises of various ages. Ballington told an EMS worker he had been with his wife that morning and was supposed to meet her at home. When he arrived, he found her at the base of the stairway.

Mike Robinson with the Lexington County Sheriff's Department arrived while EMS personnel worked on Wife. Robinson spoke with Ballington who said he had been to lunch with Wife and left her at the home at approximately 12:45 p.m. He returned to work and later learned from Wife's

employer that she had not returned to work. On his way home, his vehicle broke down, and he found a ride back to his workplace where he borrowed a car. When he arrived home, he found Wife lying on her stomach at the foot of the stairs. He turned her over, called 911, and attempted to administer mouth-to-mouth, but blood came out of her nose. He then tried to clean her face and clear her airway. Shortly thereafter, the firefighters arrived on the scene. When Officer Robinson asked Ballington about the scratch on his face, he first stated he had a skin condition and then said he did not know how he received the mark.

Detective Scotty Frier arrived and began speaking with Ballington, who repeated the events as he described them to Robinson. At Detective Frier's suggestion, the two talked further in a patrol car. The detective, aware Wife's injuries were not consistent with a fall, began asking more detailed questions. When Ballington explained he and Wife had been separated for months and she lived outside the marital home, Detective Frier decided to advise him of his Miranda[1] rights. Ballington acknowledged those rights on a printed form and chose to proceed with the interview. He recounted his earlier version of events. Detective Frier then spoke with another officer who reiterated the evidence indicated a struggle rather than a fall. Detective Frier decided to place Ballington under arrest for criminal domestic violence.

At the police station, Detective Frier informed Ballington his rights were still in effect and they continued to talk. Detective Frier explained Ballington's version of events was not consistent with the evidence and that Wife's injuries were completely inconsistent with a fall. Detective Frier told Ballington that he was going to have to tell the truth about what happened.

Approximately an hour and fifteen minutes after Ballington arrived at the station, he admitted killing Wife. He gave a statement that he and Wife were in the home after lunch looking for financial papers she needed. She told him she was going to seek full custody of their young son, Austin. He became upset because he loved Austin and had lost custody of another son to his former

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

wife. Wife gave him "a cold look" when he asked why she would do that to him. He then grabbed her from behind and placed his arm around her neck. After he let go, she fought back and warned he would never see Austin again. Ballington later reflected in his statement, "Maybe that's when I lost it." He again held her around her neck with his arm. As she tried to free herself, they fell into the wall, and she went limp. He said he could not detect a pulse and did not know whether she was alive or dead when he left the home.

DISCUSSION

I. Jurisdiction of Murder Charge

Ballington argues a magistrate reduced the grand jury's murder indictment to a charge of manslaughter and the trial court thus should not have tried him on the greater offense. We disagree.

Ballington requested a preliminary hearing after his arrest. However, before a preliminary hearing was held, the grand jury indicted Ballington for murder. Upon Ballington's motion, a circuit court judge issued an order granting him a post-indictment preliminary hearing. Ballington had not received that hearing when his case was called to trial several months later. In a hearing on pre-trial motions, he indicated he hoped to use the preliminary hearing as a discovery tool. The circuit court judge granted Ballington's request for a preliminary hearing. At that hearing, defense counsel argued Ballington should be tried for manslaughter rather than murder because there was no probable cause that the crime was premeditated. The magistrate agreed to "send it back up as a manslaughter."

At the beginning of his trial, Ballington attempted to plead guilty to voluntary manslaughter. His attorney argued the magistrate's decision "had the effect of modifying the indictment." The trial court, however, agreed with the State that the indictment, rather than the magistrate's ruling, controlled. The court then tried Ballington for murder. On appeal, Ballington argues this was error.

Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a), SCRCrimP. If a defendant makes a timely request for a hearing, one should be held within ten days. Rule 2(a)-(b), SCRCrimP. However, the hearing "shall not be held . . . if the defendant is indicted by a grand jury . . . before the preliminary hearing is held." Rule 2(b), SCRCrimP; see also State v. Hawkins, 310 S.C. 50, 54-55, 425 S.E.2d 50, 53 (Ct. App. 1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held). Furthermore, a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Thus, although Ballington may have timely requested a preliminary hearing, his right to have the hearing ended with the grand jury's indictment.

Furthermore, the circuit court judge could not restore the right to a preliminary hearing by ordering a post-indictment preliminary hearing. The trial court obtained jurisdiction over Ballington by way of the grand jury's indictment. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury. . . .").[2]

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[2] Ballington argued at trial and appears to argue on appeal that the circuit court judge's order granting him a post-indictment preliminary hearing and giving the magistrate all powers appurtenant to that office is the law of the case because the State did not appeal the order. As a result, Ballington contends the solicitor could not argue at trial and on appeal that the hearing was limited strictly to discovery issues. An unappealed order, right or wrong, is ordinarily law of the case. Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000). However, intermediate orders are appealable only when they involve the merits or impair a substantial right. See S.C. Code Ann. § 14-3-330(2)-(3) (1976). Examples of pre-trial orders the State may appeal immediately are: (1) the suppression of evidence where the suppression significantly impairs the prosecution, (2) the exclusion of an entire class of persons from serving on a jury venire, and (3) the refusal to allow the State to

Rule 2, SCRCrimP terminates a magistrate's jurisdiction over a non-magistrate level offense when the defendant is indicted by a grand jury. Murder is not an offense within the magistrate court's jurisdiction. S.C. Code § 22-3-540 (1989) (stating magistrates have exclusive jurisdiction of all criminal cases where the punishment does not exceed a $100 fine or thirty days imprisonment); S.C. Code Ann. § 22-3-550 (1989) (stating magistrates have jurisdiction over offenses subject to fines or forfeitures of no more than $200 or thirty days imprisonment); S.C. Code Ann. § 22-3-545 (Supp. 2000) (stating cases involving crimes punishable by no more than $5,000, one year imprisonment, or both may be transferred from general sessions to magistrate's court); S.C. Code Ann. § 16-3-20 (Supp. 2000) (stating murder is punishable by death, life imprisonment, or a mandatory minimum term of thirty years imprisonment). The magistrate in this case was without jurisdiction to reduce the grand jury's indictment from murder to manslaughter. Accordingly, Ballington's argument that the magistrate's reduction of the charge to manslaughter prevented the circuit court from trying him for murder is unavailing.

II. Ballington's Inculpatory Statement

Ballington also asserts the trial court erred in denying his motion to suppress his inculpatory statement to the police because he confessed only after Detective Frier indicated he would eventually have to tell police the truth. We disagree.

The test of the admissibility of a confession is voluntariness. State

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withdraw a plea offer. See State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) (allowing appeal of suppression of evidence); State v. Royster, 181 S.C. 269, 273, 186 S.E. 921, 923 (1936) (finding exclusion of class of persons from jury venire immediately appealable); Reed v. Becka, 333 S.C. 676, 681, 511 S.E.2d 396, 399 (Ct. App. 1999) (holding refusal to allow withdrawal of plea offer is directly appealable). The circuit court judge's order granting Ballington a preliminary hearing did not involve the merits of the case or impair a substantial right. Therefore, it was not directly appealable and did not become the law of the case through the State's failure to immediately appeal it.

v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996) ("A confession is not admissible unless it was voluntarily made."). A determination of voluntariness requires examination of the totality of the circumstances. Id. at 243, 471 S.E.2d at 694-95. To introduce the statement made after a defendant has been advised of his rights, the State must prove by a preponderance of the evidence he voluntarily waived those rights. State v. Reed, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998). "Once a voluntary waiver of the Miranda rights is made, that waiver continues until the individual being questioned indicates that he wants to revoke the waiver and remain silent or circumstances exist which establish that his 'will has been overborne and his capacity for self-determination critically impaired.'" State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (quoting State v. Moultrie, 273 S.C. 60, 61-62, 254 S.E.2d 294, 294-95 (1979)). On appeal, the trial court's findings of fact regarding the voluntariness of a statement will not be disturbed absent an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998).

At a pre-trial hearing to determine the voluntariness of Ballington's statements, the defense called Dr. Harold Morgan, a forensic psychiatrist. Dr. Morgan testified that although Ballington's cognitive abilities were intact on the day his wife died, his behavior indicated he was not rational. Ballington contends Detective Frier's admonition to tell the truth contradicted his right to remain silent, and when considered in light of his mental state, rendered his confession involuntary. However, Ballington's own expert testified his statements, although irrationally made, were voluntary. The detective merely advised Ballington his earlier statements were not consistent with the physical evidence, and that he should be honest. We do not believe Ballington's will was overborne by the detective's comment, even considering his irrational mental state.[3] Considering the totality of the circumstances, the State proved by a

[3] Federal courts have held it is permissible to tell a suspect he must tell the truth if he is going to say anything. See United States v. Braxton, 112 F.3d 777, 782 (4th Cir. 1997) (stating officer's statement of the sentence a suspect could receive if he did not tell the truth did not render subsequent confession invalid; officer did not indicate suspect had a duty to speak but merely said if he did speak, he must tell the truth); United States v. Vera, 701 F.2d 1349, 1364

preponderance of the evidence that Ballington's confession was voluntary and the trial court thus properly admitted it.

III. Directed Verdict

Finally, Ballington argues the trial court should have directed a verdict of not guilty on the murder charge. He admits he killed Wife, but argues the State failed to show he killed her with malice aforethought. We disagree.

In ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). The trial judge should grant a directed verdict motion where the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984). However, the judge should deny the motion if there is any direct or substantial circumstantial evidence which reasonably tends to prove the accused's guilt, or from which his guilt may be fairly and logically deduced. Fennell, 340 S.C. at 270, 531 S.E.2d at 514. When reviewing the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State. Mitchell, 341 S.C. at 409, 535 S.E.2d at 127.

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (1985). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). Malice may be implied by the use of brute force. State v. McLemore, 310 S.C. 91, 92, 425 S.E.2d 752, 753 (Ct. App. 1992). It may also be implied by the use of a deadly weapon. Id. Under some circumstances, a fist or hand may be considered a deadly weapon. State v. Bennett, 328 S.C. 262-63, 493 S.E.2d

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(11th Cir. 1983) ("[A] mere admonition to the accused to tell the truth does not render a confession involuntary."); Rivers v. United States, 400 F.2d 935, 943 (5th Cir. 1968) (stating officer's admonition to suspect to tell the truth did not render statement invalid).

845, 851 (1997); State v. Davis, 309 S.C. 326, 343, 422 S.E.2d 133, 144 (1992), overruled on other grounds by State v. Brightman, 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999). Finally, "'[e]ven though malice must be aforethought,'" there is no requirement that it "'must exist for any appreciable length of time before the commission of the act.'" State v. Fuller, 229 S.C. 439, 446, 93 S.E.2d 463, 467 (1956).

Wife died of strangulation. An x-shaped abrasion on the front of her neck likely resulted from pressure placed against the seam of her blouse and her attempts to free herself. A fingernail impression was also located on her neck. The pressure on her neck was intense enough, or lasted long enough, to cause hemorrhages in the whites of both her eyes. Bruises to her neck muscles indicate she was strangled for a long time past consciousness. She had blunt-force injuries on her left and right cheeks, and above her left eye. Some of those injuries appeared to have been caused by fingertips or knuckles. A small blunt-force trauma located on her right ear may have caused her to lose balance or consciousness. An abrasion appeared on her left collar bone. Bruises on her right shoulder were consistent with strong pressure applied by knuckles or fingertips. She suffered numerous bruises to her arms and abrasions to her left hand, indicating she tried to defend herself. Additionally, small bruises and abrasions were found on top of her feet and a small bruise was located on her right leg.

This evidence permits the conclusion that Wife was severely beaten and strangled for an extended period of time. Viewed in the light most favorable to the State, we find the testimony regarding Wife's injuries, as well as the force necessary to cause these injuries, constituted sufficient evidence of malice to support the trial court's refusal to grant a directed verdict.

In addition, evidence Ballington attempted to cover up how his wife died suggests he killed her with a wicked or depraved spirit. See Arnold v. State, 309 S.C. 157, 169, 420 S.E.2d 834, 841 (1992) (including attempt by defendant to mislead police as to who committed crime as one indicator of malice); see also State v. Judge, 38 S.E.2d 715, 719, 208 S.C. 497, 505 (1946) (defining malice as "a wicked condition of the heart . . . a wicked purpose . . . a performed

purpose to do a wrongful act"). Ballington left his home after attacking Wife and went back to his workplace. While there, he washed his shirt and a bloody towel. When he learned she had not returned to work, he asked her employers if they had tried phoning her at his home. When Ballington borrowed a car to return home, he said he was concerned because he could not reach Wife by phone. He said she had been ill. Ballington then returned to the home and led authorities to believe his wife fell down the stairs. The location of one shoe on a stair several steps above her body permits the inference he placed it there to stage a fall. In addition to Wife's injuries and the force necessary to inflict them, Ballington's attempt to mislead others as to the cause of his wife's death is also evidence he killed her with malice.

CONCLUSION

For the reasons discussed, Ballington's conviction and sentence are

AFFIRMED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Debra F. Hill,

Respondent,

v.

Norman Dwayne Dotts,

Appellant.

Appeal From Florence County
Hicks B. Harwell, Circuit Court Judge

Opinion No. 3347
Heard March 6, 2001 - Filed May 29, 2001

AFFIRMED

Michael M. Nunn, of Aiken, Nunn, Elliott & Tyler, of Florence, for appellant.

Gary I. Finklea, of The Hyman Law Firm, of Florence, for respondent.

CURETON, J.: In this default action, Norman Dotts appeals from the entry of a default judgment. We affirm.

FACTS/PROCEDURAL BACKGROUND

On January 27, 1999, Debra Hill and Norman Dotts were involved in an automobile accident in Florence, South Carolina. Allegedly, Dotts entered an intersection against a red light and collided with Hill. At the time of the accident, Dotts was driving his uncle's car with his uncle as a passenger. As a result of the accident, Hill and her son were injured and her car was damaged beyond repair.

On April 29, 1999, Hill filed a summons and complaint against Dotts. Dotts was served on May 10, 1999. In a cover letter, Hill's attorney instructed Dotts to contact his insurance agent.

On May 17, 1999, Dotts's mother wrote Hill's attorney a letter on Dotts's behalf. The letter stated:

> In answer to your Complaint, I did not have insurance. I was driving my uncle's car. I am very sorry about Mrs. Hill and my uncle. It wasn't something I had planned to happen.

Other than the above-referenced letter, Dotts did not answer the summons and complaint.

On June 24, 1999, Hill filed a motion for entry of default against Dotts pursuant to Rule 55(a), SCRCP. Hill also requested a default judgment against Dotts under Rule 55(b)(2) and asked that the matter be referred to a special referee for a damages hearing. The circuit court granted Hill's motion.

On August 3, 1999, the special referee held a damages hearing. Although provided with notice of the hearing, Dotts did not appear. By order dated August 4, 1999, the special referee awarded Hill $20,000 for personal injury and $8,081 for property damage.

After receiving the special referee's order, Dotts filed a Motion for Relief from Default Judgment under Rule 60(b), SCRCP arguing the May 17th letter

was a timely answer or, alternatively, the judgment should be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect upon the showing of a meritorious defense. After a hearing, the circuit court denied the motion. This appeal followed.

LAW/ANALYSIS

The power to set aside a default is exercised within the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Frank Ulmer Lumber Co. v. Patterson, 272 S.C. 208, 250 S.E.2d 121 (1978); Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Estate of Weeks, 329 S.C. at 259, 495 S.E.2d at 459.

Consideration of the May 17th Letter As An Answer

Dotts argues the circuit court erred in entering a judgment of default against him because the May 17th letter to Hill's attorney constituted an answer to the complaint.

Fundamentally, an answer is "[t]he response of a defendant to the plaintiff's complaint, denying in part or in whole the allegations made by the plaintiff." Black's Law Dictionary 91 (6th ed. 1991). In form, an answer "shall state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies." Rule 8(b), SCRCP. Furthermore, each denial "shall fairly meet the substance of the averments denied." Id. Where the defendant "is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial." Id. As with all pleadings, an answer "shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRCP.

Dotts maintains his May 17th letter qualifies as an answer pursuant to our supreme court's decision in Frank Ulmer Lumber, 272 S.C. 208, 250 S.E.2d 121. We disagree.

In Frank Ulmer Lumber, the plaintiff-lumberyard brought an action against a defendant-contractor to collect the balance owed on the contractor's account. In response to the lumberyard's summons and complaint, the contractor hand delivered a letter to the lumberyard's attorney which expressly denied owing any money to the lumberyard and set forth specific reasons why he was not responsible for the purported debt. Thereafter, the lumberyard obtained a default judgment against the contractor on the ground that the contractor had not answered the complaint. The circuit court later set aside the default judgment and allowed the contractor to file a proper answer. In upholding the lower court, the supreme court held that although the letter failed to meet the endorsement and filing requirements of a proper answer, "suffice it to say the proper sanction to be imposed for failure to comply [with the pre-SCRCP pleading requirements] is not judgment by default." Id. at 211, 250 S.E.2d at 123.

The instant action is factually distinguishable from the Frank Ulmer Lumber decision in that the letter at issue there expressly denied the plaintiff's allegations, whereas the letter sub judice does not. Dotts's letter does not mention or deny any of the fourteen specific allegations of negligence and recklessness set forth in Hill's complaint. Instead, the letter merely offers an apology for the accident. Even under the liberal standard of Frank Ulmer Lumber, such a reply does not constitute a denial, either specific or general, to Hill's allegations. Accordingly, the circuit court properly refused to consider it as such.

Consideration of the May 17th Letter As An Appearance

Dotts also maintains the May 17th letter was a general appearance, entitling him to notice of the default judgment hearing. This issue is not preserved for appellate review as it was not addressed in the circuit court's order. See Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997) (holding that an issue must be raised to and ruled upon by the trial court to be

preserved for appellate review). The only place in the record where the letter is discussed as an appearance is where Hill's attorney argues it is not an answer, but is, at most, a notice of appearance. This statement by Hill's attorney is insufficient for appellate review of the issue. See Germain v. Nichol, 278 S.C. 508, 299 S.E.2d 335 (1983) (holding that an appellant has the burden of providing the court with a sufficient record upon which to make a decision).

Setting Aside Default Judgment on Grounds of Mistake and Excusable Neglect

Finally, Dotts argues the circuit court should have set aside the default judgment pursuant to Rule 60(b), SCRCP because his failure to answer the complaint was the result of mistake and excusable neglect. We disagree.

A "court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . ." Rule 60(b)(1), SCRCP. In determining whether a default judgment should be set aside under Rule 60(b)(1), "[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)).[1]

[1] The default factors were originally utilized to help determine whether an *entry of default* should be set aside for "good cause shown" pursuant to Rule 55(c), SCRCP. Wham v. Shearson Lehman Bros., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). Later, they were also found to be relevant in determining whether a *default judgment* should be set aside pursuant to Rule 60(b), SCRCP. New Hampshire Ins. Co., 312 S.C. 47, 435 S.E.2d 377. Although applicable to both rules, the factors are applied with greater liberality within the context of Rule 55(c) vis-à-vis Rule 60(b). See 10A Charles Alan Wright et al., Federal Practice & Procedure: Civil § 2694 at 117 (3d ed. 1998) ("[C]ourts uniformly consider [the factors] . . . when determining whether to set aside default entries as well as default judgments. Of course, in practice the requirements are more liberally interpreted when used on a motion for relief from a default entry.").

Dotts has failed to satisfy the fourth factor, the reason for the failure to act promptly. He erroneously believes his failure to understand the legal process is a sufficient reason to excuse his tardy reply. We disagree.

"[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). "It is always a matter of regret that a party should not have his day in court. However, . . . [where] the appellant was duly served with the summons and complaint, [i]t was his duty to answer the complaint . . . . [Therefore,] [h]e must suffer the consequence of his failure to answer." Williams v. Ray, 232 S.C. 373, 383-84, 102 S.E.2d 368, 373 (1958); see also Bissonette v. Joseph, 170 S.C. 407, 170 S.E. 467 (1933) (refusing to vacate a default judgment on the ground of excusable neglect where the defendant in an automobile collision case forwarded the summons to his insurance carrier which then failed to serve notice of appearance until after the plaintiff had obtained judgment). Accordingly, Dotts's failure to understand the legal process is not excusable neglect under Rule 60(b).

Dotts also maintains his belief that he was uninsured was a sufficient reason to set aside the default judgment; however, his insured status was not relevant to the allegations set forth in the complaint. Therefore, a mistake concerning the existence of insurance coverage for the accident was not germane to his failure to answer.

Because Dotts failed to answer the complaint and did not have sufficient grounds to set aside the default judgment under Rule 60(b)(1), SCRCP, the order of the circuit court is

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The disparate application of the default factors reflects the different standards of the two rules. "The standard for granting relief from an entry of default is good cause under Rule 55(c) . . . while the standard is more rigorous for granting relief from a default judgment under Rule 60(b) . . . ." Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987).

AFFIRMED.

HEARN, C.J. and SHULER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angela J. Thomas,

Appellant,

v.

Kevin M. Thomas,

Respondent.

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 3348
Heard April 2, 2001 - Filed May 29, 2001

AFFIRMED

James T. McLaren and C. Dixon Lee, III, of McLaren & Lee, of Columbia; and Timothy S. Mirshak, of Augusta, GA, for appellant.

Thomas P. Murphy, of Smith & Murphy, of North Augusta; and Robert L. Widener, of McNair Law Firm, of Columbia, for respondent.

CURETON, J.: In this divorce action, Angela J. Thomas (the

wife) appeals from the family court's identification of marital debt and award of equitable distribution. We affirm.

FACTS

The wife and Kevin M. Thomas (the husband) were married in May of 1992. No children were born to the marriage; however, both parties were previously married and have children from their prior marriages. Each party was forty years old at the time of trial. Neither party complained of significant health problems.

During the marriage, the wife was employed as a clerk at the Veterans Administration Hospital in Augusta, Georgia, earning approximately $19,800 annually. The Husband had been employed at D.S.M. Chemical for approximately seventeen years and was earning between $40,000 and $50,000 per year at the time of the marriage. In 1993, the parties purchased a home in Belvedere, South Carolina.

The wife testified she purchased lottery tickets in Georgia beginning in 1993 or 1994 with her pocket money from her earnings. The husband testified the wife's pocket money, like his, came from the parties' joint account. The husband claimed he originally purchased their lottery tickets, but when the parties moved to their new home, it was more convenient for the wife to pick up the tickets.

In August of 1995, the wife won approximately $9,000,000 in the Georgia Lottery payable in twenty annual installments. The husband testified the parties agreed to claim the proceeds in the wife's name to prevent the husband's ex-wife from requesting additional child support.

After winning the lottery, the wife immediately terminated her employment. The husband terminated his employment approximately one year later. At the time of the hearing, the husband intended to resume employment.

The parties spent over $40,000 of the lottery proceeds to make

improvements to the marital home, which was titled solely in the husband's name. The parties opened joint investment accounts, funding them with lottery proceeds. They also purchased a $225,000 home on Lake Thurmond. The parties jointly titled the lake property following their practice of treating the lottery funds as jointly owned funds.

The parties also used the lottery funds to make several loans to family members. The bulk of the loans had not been repaid at the time of the hearing. In a separate civil action in the Court of Common Pleas, the husband's mother, Nancy June Thomas, alleged the parties entered into an agreement with her to fund her retirement out of the lottery proceeds. The husband admitted the alleged indebtedness. The wife disputed her involvement but admitted her mother-in-law quit her job based on the husband's promise. The husband continued to work for one year and paid his mother's retirement out of his employment earnings. The parties then paid the retirement out of the lottery proceeds until just before their separation.

The wife testified the husband abused alcohol throughout the marriage. The husband admitted attending counseling with the wife, during which he admitted he drank too much. The parties also had problems throughout the marriage arising from their respective children.

On or about November 4, 1997, the husband had been drinking and the parties argued. The wife poked the husband in the eye. The husband knocked her arm away from him, slapping the wife in the face. He then pushed away from the kitchen table, knocking a chair through the window. The parties separated the date of this incident.

Although the parties filed joint tax returns throughout the marriage, the wife filed a 1997 "Single" tax return, claiming the lottery installment for that year as individual income and paying the taxes. Shortly after the separation, the wife instituted this action against the husband seeking, among other things, a divorce on the ground of physical cruelty or, in the alternative, an order of separate maintenance. The husband answered, denying the wife was entitled to a divorce on the ground alleged in her complaint, and counterclaimed seeking, among other things, the identification, valuation, and equitable distribution of

marital property. At trial, the family court granted the husband leave to amend his complaint to include a plea for divorce on the ground of continuous separation for one year.

By order dated June 9, 1999, the family court granted the husband a divorce on the ground of one year continuous separation and divided the marital estate, including the remaining lottery proceeds, equally between the parties.[1] The family court concluded the debt to the husband's mother was a marital debt and ordered the husband to be solely responsible for the payment thereof. With the exception of issues not pertinent to this appeal, the wife's post-trial motion for reconsideration was denied. This appeal followed.

On appeal, the wife asserts the family court erred in failing to award her a larger share of the marital estate. Specifically, she asserts the court erred (1) in failing to properly apply the relevant statutory factors in determining equitable division of the lottery proceeds, and (2) in considering the alleged agreement to fund the retirement of the husband's mother as a marital debt.

STANDARD OF REVIEW

In appeals from the family court, this Court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992). This broad scope of review does not, however, require this Court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 279 S.E.2d 616 (1981). Neither are we required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Woodall v. Woodall, 322 S.C. 7, 471 S.E.2d 154 (1996).

[1] At the time of the hearing, the parties were entitled to fifteen annual lottery payments of $447,000 and a final payment of $485,000.

DISCUSSION

Lottery Proceeds

The wife argues the family court erred in awarding the husband 50% of the marital property, in particular, the lottery proceeds. We disagree.

The apportionment of marital property is within the family court's discretion and will not be disturbed on appeal absent an abuse of discretion. Murphy v. Murphy, 319 S.C. 324, 461 S.E.2d 39 (1995). South Carolina Code Annotated Section 20-7-472 (Supp. 2000) lists fifteen factors for the court to consider in making an equitable apportionment of the marital estate. The statute vests in the family court the discretion to decide the weight to assign to the various factors. Even if the family court fails to specifically address each of the factors set forth in the apportionment statute, the award will be upheld on appeal if it can be determined that the family court addressed the factors with sufficiency for an appellate court to conclude the family court was cognizant of the required factors. Walker v. Walker, 295 S.C. 286, 368 S.E.2d 89 (Ct. App. 1988). On review, this Court looks to the overall fairness of the apportionment, and if the end result is equitable, that this Court might have weighed specific factors differently than the family court is irrelevant. Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988).

The wife correctly notes that in reaching its determination as to equitable distribution of the lottery proceeds, the family court applied the principles espoused in Ullah v. Ullah, 555 N.Y.S.2d 834 (App. Div. 1990). In Ullah the New York Supreme Court determined that lottery proceeds represent a fortuitous windfall not created by the efforts of either party; therefore, it divided the proceeds equally among the parties without consideration of equitable factors governing distribution.

Ullah represents one of two distinct views that have emerged concerning the equitable distribution of lottery proceeds. The other view, represented by Alston v. Alston, 629 A.2d 70 (Md. 1993), "holds that the court should apply the factors guiding equitable distribution of all other assets to arrive at an appropriate

distribution decision." Devane v. Devane, 655 A.2d 970, 971 (N.J. Super. Ct. App. Div. 1995).

The wife asserts that rather than applying the fortuitous circumstances rule, the family court should have applied the statutory factors relevant to an award of equitable distribution. We agree with the wife that in determining the equitable division of the lottery proceeds, the statutory factors generally guiding equitable distribution of marital property, as enumerated in section 20-7-742, should be applied. We decline, however, to reverse the family court's equitable distribution award.

It is evident from the family court's order that the court was cognizant of the statutory factors. The court stated: "[t]hose factors were considered by the court in arriving at its decision" regarding equitable distribution of the marital assets aside from the lottery proceeds. The court specifically made findings of fact regarding the length of the marriage, the age and health of the parties, the parties' respective work and educational histories, their prior support obligations, and the wife's allegation as to alcohol and physical abuse on the husband's part as contributing factors in the breakdown of the marriage.

The wife further argues consideration of the third statutory factor mandates an award to her of greater than fifty percent of the lottery proceeds because she purchased the lottery ticket. The third statutory factor requires the consideration of each spouse's contribution to the "acquisition, preservation, depreciation, or appreciation in value of the marital property . . . [including] the quality of the contribution as well as its factual existence." S.C. Code Ann. § 20-7-472(3) (Supp. 2000). However, there was evidence that the purchase of lottery tickets by both parties utilizing marital funds was a continuous course of action throughout the marriage. Until their separation, the parties treated the lottery proceeds as marital property. The mere fact the wife purchased the winning ticket does not convince us she made a special contribution entitling her to a larger share of the lottery proceeds.

Applying the family court's consideration of the statutory factors to the division of the lottery proceeds, we hold an equal distribution was fair and

equitable under the facts and circumstances of this case.

Debt Owed to the Husband's Mother

The wife also asserts the family court erred in considering the alleged agreement to retire the husband's mother as marital debt.[2] Specifically, the wife asserts the husband was awarded a larger share of the marital estate to offset the obligation to his mother. We find no reversible error.

Marital debt is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt. Hardy v. Hardy, 311 S.C. 433, 429 S.E.2d 811 (1992). In equitably dividing a marital estate, the family court is to consider the net estate, and must apportion marital debt in conjunction with the apportionment of assets. Id. The same rules of fairness and equity which apply to the equitable division of marital property also apply to the division of marital debts. Id.

The family court stated in the divorce decree that "[a]ny alleged indebtedness owing by the parties to [the husband's mother] constitutes a marital indebtedness and is a debt incurred for the joint benefit of the parties . . . ." However, at the hearing on the wife's motion for reconsideration, the court ruled it did not rely on the alleged agreement in determining the award of equitable distribution. At the request of the husband, the court's oral ruling was incorporated into the order denying the wife's motion to reconsider. There is no indication the family court increased the husband's share of the marital estate to accommodate the debt. Thus, any error in classifying the debt as marital was harmless, causing no prejudice to the wife. Our review of the record convinces us the family court's equal division of the net marital estate was fair and equitable.

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[2] We render no opinion whether the family court had jurisdiction to consider the claim of the husband's mother that was pending in circuit court.

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

AFFIRMED.

HEARN, C.J., and SHULER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Rhodes and Jeanette Rhodes,

Respondents,

v.

William Marvin McDonald, formerly d/b/a Southern Vinyl Siding Insulation and Manufacturing Company and Bill Gillespie and Southern Insulation Company,

Defendants,

of whom Bill Gillespie and Southern Insulation Company are,

Appellants.

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

Opinion No. 3349
Heard May 9, 2001 - Filed June 4, 2001

AFFIRMED IN PART AND REVERSED IN PART

Scott D. Robinson, of Liberty, for appellants.

Robin Stilwell, of Hunter, Tomaszek & Stilwell, of Greenville, for respondents.

GOOLSBY, J.: James and Jeanette Rhodes brought this action against Bill Gillespie in his individual capacity and against Southern Insulation Company seeking actual and punitive damages for breach of contract and breach of certain implied warranties. A jury awarded the Rhodeses actual and punitive damages. Gillespie and Southern Insulation appeal, arguing the trial court erred in failing to grant their motions for directed verdict as to Gillespie's individual liability and as to the availability of punitive damages in the breach of contract and breach of implied warranty causes of action. They also contend the trial court erred in submitting an improper special verdict form to the jury. We affirm in part and reverse in part.

Background Facts/Procedural History

Gillespie owns and operates Southern Insulation Company. In July 1992, the Rhodeses contracted with Southern Insulation to install vinyl siding on their mobile home and to extend the roof over their kitchen. The contract price, including finance charges, totaled $10,834.20.

According to Mrs. Rhodes, shortly after workmen installed the siding, she complained to William McDonald, Gillespie's stepson and employee, about the siding being "all wavy looking." McDonald

assured her "it would settle down." The problem with the siding, however, became worse as it separated from the window casings and pulled apart in other places. In addition to the siding problem, "the roof bowed up." These problems prompted her to make dozens of telephone calls to the company office over the next several months.

Eventually, Gillespie came to the Rhodeses' house and promised to fix the problems but did not. After several more phone calls from Mrs. Rhodes, Gillespie returned to the Rhodeses' house. Using profanity, Gillespie once more promised Mrs. Rhodes that he would attend to the problems. Workmen later came and tried nailing the siding into place. In December 1996, Mrs. Rhodes went to Gillespie's office and discussed with him the problems that they continued to have with the roofing and siding. As Mrs. Rhodes left his office, Gillespie "followed [her] all the way outside cussing [her]." Shortly after that, the Rhodeses instituted this action.

At trial, Gillespie testified he had no knowledge of the problems that the Rhodeses were having with their home until they filed the instant action. The only complaint Mrs. Rhodes ever made to him concerned some shutters that she said had faded. He went to her house and advised her how to contact the manufacturer and file a warranty claim with it.

Chris Wimpey, the Rhodeses' expert witness, inspected the home in October 1997. He set the cost of all necessary repairs at $11,464.00.

At the start of trial, Gillespie moved to strike the Rhodeses' claim for punitive damages on the ground that punitive damages were not recoverable on breach of contract and breach of implied warranty causes of action. The trial court denied the motion. At the conclusion of all evidence, Gillespie moved for directed verdicts on all counts and reiterated the motion to strike punitive damages as unrecoverable. Additionally, Gillespie moved for a directed verdict as

to his individual liability. The trial court denied these motions as well. The case went to the jury with instructions to use special interrogatories to register its verdict.

The jury found in favor of the Rhodeses on all causes of action and awarded them $11,464.50 in actual damages and $27,500.00 in punitive damages.

Discussion

I.

Gillespie and Southern Insulation contend the trial court erred in failing to grant their motion for a directed verdict as to the unavailability of punitive damages on the breach of implied warranty claims. We agree the trial court should not have submitted the issue of punitive damages to the jury.

South Carolina Code sections 36-2-714 and -715 define what damages a buyer may recover under the Uniform Commercial Code for a breach of warranty. Section 36-2-714 states:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of § 36-2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special

> circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section (§ 36-2-715) may also be recovered.[1]

Section 36-2-715 states:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.[2]

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[1] S.C. Code Ann. § 36-2-714 (1976).

[2] S.C. Code Ann. § 36-2-715 (1976).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.[3] Where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself.[4]

In our view, the plain language of sections 36-2-714 and 36-2-715 evidences an intent on the part of the legislature to limit damages recoverable for breach of warranty to actual, incidental, and consequential damages. Had the legislature intended that punitive damages be available in breach of warranty cases, they could easily have included a provision providing for the recovery of damages of that kind.

We are further convinced the legislature intended to preclude the recovery of punitive damages in breach of warranty cases by the language of South Carolina Code section 36-1-106(1), that provides, in part, that "neither consequential or special nor penal damages may be had except as specifically provided in the act or by other rule of law."[5] The Uniform Commercial Code does not provide anywhere for their recovery in such cases; nor does some "other rule of law" do so. Indeed, the official comment to section 36-1-106 states that one of the purposes of that section is "to make clear that compensatory damages are limited to compensation [and that] [t]hey do not include consequential damages or special damages, or penal damages."[6]

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[3] Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998).

[4] South Carolina Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 136, 538 S.E.2d 285, 288-89 (Ct. App. 2000).

[5] S.C. Code Ann. § 36-1-106 (1976).

[6] S.C. Code Ann. § 36-1-106 cmt. 1 (1976); see also Novosel v. Northway Motor Car Corp., 460 F. Supp. 541 (N.D.N.Y. 1978) (noting that punitive damages are not recoverable); Sims v. Ryland Group,

We are aware, as noted by the Rhodeses on appeal, that in South Carolina punitive damages are available in breach of contract cases where the breach is accompanied by a fraudulent act.[7] That, however, is not the case before us here.[8]

We therefore reverse the award of punitive damages.

II.

Gillespie next contends the trial court erred in failing to direct a verdict in his favor as to his individual liability. We disagree. It is uncontested Southern Insulation was not incorporated at the time of the contract. Gillespie cites no authority indicating owners of unincorporated companies are entitled to protection from individual liability in the same manner as officers of incorporated entities. Indeed, the general rule is to the contrary.[9]

Inc., 378 A.2d 1 (Md. 1977) (holding punitive damages not recoverable under 2-715); cf. 11 S.C. Juris. Damages §§ 47, 70 (1992) (citing language of the statute).

[7] See, e.g., Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997).

[8] As to their theories of liability, the Rhodeses pled: "Defendants have breached the implied warranties of merchantability, habitability, and fitness for particular purpose as construed by the statutory and case law of this state."

[9] See 18A Am. Jur. 2d. Corporations § 154 (1985) (noting that sole proprietors are responsible for debts and obligations of their businesses).

III.

Finally, Gillespie and Southern Insulation level an attack on the trial court's submission of special interrogatories to the jury, arguing the form could have led the jury to believe it could award punitive damages on either the breach of contract cause of action or the breach of implied warranty causes of action. This argument was not presented in the first instance to the trial court and, therefore, is not preserved for appellate review.[10] In any case, because we have vacated the award of punitive damages, the issue is now moot.

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and CONNOR, J., concur.

[10] Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mictronics, Inc.,

Respondent,

v.

South Carolina Department of Revenue,

Appellant.

Appeal From Charleston County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3350
Heard April 5, 2001 - Filed June 4, 2001

AFFIRMED

General Counsel and Deputy Director Harry T. Cooper, Chief Counsel Revenue Litigation Ronald W. Urban Jr., and Counsel of Regulatory Litigation Jeffrey M. Nelson, all of Columbia, for appellant.

George J. Morris, of Charleston, for respondent.

HEARN, C.J.: The South Carolina Department of Revenue (DOR) appeals an order reversing the administrative law judge's refusal to reopen Mictronics, Inc.'s case claiming a tax exemption. We affirm.

PROCEDURAL BACKGROUND

Mictronics, Inc. (Mictronics) filed a request for a contested case hearing with the Administrative Law Judge Division (ALJD) claiming it was entitled to an exemption from the South Carolina sales and use tax. Mictronics filed a prehearing statement as directed by the administrative law judge (ALJ). On March 7, 1996, the parties were served with notice of a hearing scheduled for May 14.

Due to a conflict in his schedule, the ALJ rescheduled the hearing for May 22 by issuing an order and amended notice of hearing dated April 26. Additionally, a member of the ALJ's staff telephoned Mictronics and spoke with its president, Thomas Blocker, telling him the hearing was rescheduled. Blocker understood the hearing to be rescheduled for June 22 and made a note in his file to that effect. DOR's counsel received a similar phone call, but understood the rescheduled hearing date to be May 22.

Because of Blocker's misunderstanding about the date of the rescheduled hearing, Mictronics did not appear at the May 22 hearing. The ALJ issued an order dismissing the action with prejudice and treating Mictronics' failure to appear at the hearing as a default under Rule 23, SCRALJD. Blocker received this order of dismissal and immediately wrote the ALJ stating he had mistaken the date of the hearing. Blocker apologized for the mistake and requested the matter be reopened with a new hearing date. The ALJ denied this request.

Mictronics appealed the denial of the motion to reopen to the circuit court which issued an order remanding the case to the ALJD to make findings of fact and draw conclusions of law about whether Mictronics should be relieved of its default. Pursuant to the circuit court's order, a hearing was held before the ALJ. The ALJ treated Mictronics' request to reopen as a motion for

reconsideration under Rule 29, SCRALJD, and concluded that Mictronics received adequate notice of the hearing and that its failure to attend could not be excused based on mistake, inadvertence, surprise, or excusable neglect.

Mictronics again appealed the ALJ's order to the circuit court which reversed the ALJ's order and remanded the matter to the ALJD for a hearing on the merits. The circuit court found the ALJ abused his discretion in applying the excusable neglect standard of Rule 60(b), SCRCP instead of the good cause standard referenced in Rule 55(c), SCRCP. This appeal follows.

DISCUSSION

Mictronics appealed to the circuit court only from the denial of the motion to reopen, not the underlying dismissal. DOR now appeals from the circuit court's reversal of the ALJ's order, arguing the circuit court exceeded its authority in reversing the ALJ's order. We disagree.

Appeals from the ALJD must be conducted according to the South Carolina Administrative Procedures Act. See S.C. Code Ann.§ 1-23-380 (Supp. 2000). Section 1-23-380(A)(6) provides in relevant part:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) *arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*

(emphasis added). An abuse of discretion occurs when a court's decision is controlled by an error of law or is without evidentiary support. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).

The circuit court reversed the ALJ because it thought the ALJ applied the wrong standard in considering the motion to reopen. The circuit court believed the motion should be governed by Rule 55, SCRCP, rather than the more stringent standard required by Rule 60, SCRCP. We disagree.

Initially, we note the ALJD rules define default differently than the rules of civil procedure. Under Rule 23, SCRALJD, default occurs when either party fails to prosecute or defend an action. Rule 55 allows entry of default against "a party against whom a judgment for affirmative relief is sought [that] has failed to plead or otherwise defend." In this case, Mictronics was the plaintiff and not the defending party as contemplated by Rule 55. Therefore, the circuit court erred in instructing the ALJ to reconsider his order applying the good cause standard of Rule 55(c).

Although we disagree with the circuit court's logic, we agree with its result. This court may affirm for any reason appearing in the record pursuant to Rule 220(c), SCACR, and I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723-24 (2000).

We find the motion to reopen falls under Rule 29(D), SCRALJD. The relevant portion of this rule reads: "Any party may move for reconsideration of a final decision of an administrative law judge in a contested case, subject to the grounds for relief set forth in Rule 60(b)(1 through 5), SCRCP. . . ." The ALJ's order dismissing Mictronics' claim with prejudice was a final order. Thus, under the ALJD rules, it appears the only grounds for reconsideration are those contained in Rule 60(b), SCRCP.

No South Carolina case discusses the Rule 60(b)(1) standards as applied to Rule 29(D), SCRALJD. For that reason, we look to cases interpreting Rule 60(b) generally. Under Rule 60(b)(1), SCRCP, a party may be relieved

from a final order for "mistake, inadvertence, surprise, or excusable neglect." In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party. New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)).

Here, Mictronics made an error with respect to the hearing date and immediately sought relief from the dismissal. In Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986), this court found that a trial judge abused his discretion in refusing to grant a motion to set aside a default judgment granted after an answer was received one day late.[1] The court there held that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief." 288 S.C. at 61, 339 S.E.2d at 525. This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. Id.; see also Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 153, 399 S.E.2d 439, 440 (Ct. App. 1990) (finding sanction dismissing counterclaim too severe). We find no evidence in the record that the mistake was anything but a good faith error, as shown by Blocker's explanation coupled with his speed in asking the ALJ for relief.

Moreover, it appears that Mictronics had a meritorious defense. To establish a meritorious defense, a party is not required to show an absolute defense. Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be

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[1] Columbia Pools, Inc. arose under S.C. Code Ann. § 15-27-130 (1976) which was later repealed and replaced by Rule 60, SCRCP. See Sijon v. Green, 289 S.C. 126, 127, 345 S.E.2d 246, 247 (1986).

> only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978). We find Mictronics' prehearing statement outlining its tax exemption on certain subcontracts meets the standard for a meritorious defense.

It appears from the record that DOR will suffer no prejudice should this case proceed for a determination on the merits. Here, DOR has no substantial stake in this windfall, and the resolution of the case on its merits has not been substantially delayed by the parties' actions. Given Mictronics' good faith mistake, its swift action to try to remedy the situation, the existence of a meritorious defense, and the lack of prejudice to DOR, we find the ALJ abused his discretion by refusing to reopen the case. Therefore, we affirm the circuit court's order reversing the ALJ's denial of the motion to reopen and remanding the case to the ALJD for an adjudication on the merits.

AFFIRMED.

GOOLSBY and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ray H. Chewning, Jr.,

Appellant,

v.

Ford Motor Company, David J. Bickerstaff, and David J. Bickerstaff and Associates, Inc.,

Defendants,

Of whom Ford Motor Company is,

Respondent.

Appeal From Kershaw County
James R. Barber, III, Circuit Court Judge

Opinion No. 3351
Heard May 7, 2001 - Filed June 4, 2001

REVERSED & REMANDED

A. Camden Lewis, Mark W. Hardee and Ariail E. King, all of Lewis, Babcock & Hawkins, of Columbia, for appellant.

Robert H. Brunson, Elizabeth Scott Moise and Susan M. Glenn, all of Nelson, Mullins, Riley & Scarborough, of Columbia; Paul F. Hultin and Edward C. Stewart, both of Wheeler, Trigg & Kennedy, of Denver, CO, for respondent.

HEARN, C.J.: Ray H. Chewning, Jr. filed this action in equity for fraud and for fraud upon the court against Ford Motor Company (Ford), David Bickerstaff, and David Bickerstaff and Associates, Incorporated (collectively, Defendants), to set aside a judgment in an earlier products liability case. The circuit court granted Defendants' motion for judgment on the pleadings, concluding the complaint alleged intrinsic fraud which cannot serve as the basis for vacating a judgment after more than one year. As an additional sustaining ground, the court held Chewning failed to plead fraud with specificity as required by Rule 9(b), SCRCP. Chewning appeals. We reverse.

FACTS/PROCEDURAL HISTORY

In April 1990, Chewning suffered injuries in a rollover crash of his Ford Bronco II. He filed a products liability claim against Ford and the car dealership that sold him the automobile. After a sixteen-day trial in 1993, a jury returned a verdict in favor of Ford. The trial court denied Chewning's motion for judgment notwithstanding the verdict or a new trial.

Within one year of the judgment, Chewning sought relief pursuant to Rule 60(b)(1) and (3), SCRCP, on the grounds of newly discovered evidence and fraud, alleging Bickerstaff, the former design engineer for Ford's Light Truck Engineering Department and one of Ford's witnesses, committed perjury during the trial. This motion was denied.

In 1998, Chewning brought this independent action, asserting several causes of action including fraud upon the court. The Defendants removed the case to the United States District Court for South Carolina. The district court dismissed all of Chewning's claims except his action for fraud upon the court. Chewning v. Ford Motor Co., 35 F. Supp. 2d 487 (D.S.C.

1998). The district court remanded the fraud upon the court claim together with "such other related claims in equity, if any, as the state court may allow to be added by amendment." Id. at 492.

Chewning refiled his case in the circuit court asserting causes of action for fraud upon the court and an independent action in equity for fraud. In his amended complaint, Chewning alleged the judgment in the original products liability case should be vacated because:

> (1) Defendants' and Ford's attorneys knowingly purchased and used the false testimony of BICKERSTAFF in favor of FORD during FORD'S defense of the BRONCO II CASES and concealed this from Plaintiffs and
>
> (2) FORD fraudulently concealed, hid and misrepresented to the Plaintiffs and the Courts about the existence and location of documents . . . that provide evidence that was favorable to Plaintiffs' cases and evidence that FORD knew, or should have known, would harm Plaintiffs' defense.

Among other allegations, Chewning contends Ford and its attorneys bought favorable and untruthful testimony from Bickerstaff. While at Ford, Bickerstaff criticized the Bronco II and recommended certain unimplemented corrective measures. Curiously, when litigation arose concerning the Bronco II, Bickerstaff, then a member of an engineering consulting firm, agreed to testify as a witness "in Ford's favor" in exchange for large sums of money. Chewning alleges this scheme persisted through multiple trials and depositions until a memo detailing Ford's and Chewning's arrangement was discovered.

The Defendants successfully filed a motion to dismiss under Rule 12(b)(6), SCRCP. This appeal follows.

STANDARD OF REVIEW

Generally, a ruling on a motion to dismiss under Rule 12(b)(6), SCRCP, must be based solely on the allegations contained in the complaint. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." Jarrell v. Petoseed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

DISCUSSION[1]

Chewning argues the circuit court erred in dismissing his claim as untimely. We agree. Under Rule 60(b), SCRCP, a party may seek to set aside a final judgment for fraud upon the court. This right is independent of the Rule 60(b)(3) ground for relief for fraud, misrepresentation, or other misconduct by an adverse party. Relief for fraud upon the court is not subject to the one year limit placed on relief under Rule 60(b)(3). See H. Lightsey & J. Flanagan, South Carolina Civil Procedure 407 (2d ed. 1985). Therefore, we find the circuit court erred in dismissing Chewning's claim as untimely under Rule 60(b)(3).

Chewning also argues the circuit court erred in its application of the law of extrinsic and intrinsic fraud. We agree because we find the facts asserted in the amended complaint constitute a valid claim for relief for fraud upon the court.

Fraud upon the court is "fraud which . . . subvert[s] the integrity of the Court itself, *or is a fraud perpetrated by officers of the court* so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988) (emphasis added) (quoting Lightsey & Flanagan, supra, at 408). It has also been defined as "fraud that

[1] On appeal, Chewning only argues the dismissal of his fraud upon the court action.

does, or at least attempts to, defile the court itself . . . ." 12 Moore's Federal Practice § 60.21[4][a] (3d. ed. 2000). Historically, after the period to claim relief under Rule 60(b)(1) through (3), SCRCP, has expired, courts have required a showing of extrinsic fraud to vacate a judgment. See Hagy v. Pruitt, 339 S.C. 425, 430, 529 S.E.2d 714, 717 (2000); Evans, 294 S.C. at 529, 366 S.E.2d at 46.

South Carolina law maintains a distinction between intrinsic and extrinsic fraud. Mr. G v. Mrs. G, 320 S.C. 305, 307-08, 465 S.E.2d 101, 102-03 (Ct. App. 1995) (Hearn, J. dissenting). "Intrinsic fraud refers to fraud presented and considered in the judgment assailed, including perjury and forged documents presented at trial." Evans, 294 S.C. at 529, 366 S.E.2d at 46. It is fraud which "goes to the merits of the prior proceeding which the moving party should have guarded against at the time." City of San Francisco v. Cartagena, 41 Cal. Rptr. 2d 797, 801 (Cal. Ct. App. 1995), quoted with approval in Mr. G, 320 S.C. at 308, 465 S.E.2d at 103. By contrast, extrinsic fraud "refers to frauds collateral or external to the matter tried such as bribery or other misleading acts which prevent the movant from presenting all of his case or deprives one of the opportunity to be heard." Lightsey & Flanagan, supra, at 486; see also Hilton Head Ctr., Inc. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) ("Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.").

Here, Chewning alleges that Ford's attorneys collaborated in a deliberate scheme to purchase testimony in a series of cases involving Bronco II rollovers. Ordinarily, perjury is intrinsic, rather than extrinsic, fraud. Hagy, 339 S.C. at 432, 529 S.E.2d at 718 (2000); Rycroft v. Tanguay, 279 S.C. 76, 79, 302 S.E.2d 327, 329 (1983); Corley v. Centennial Constr. Co., 247 S.C. 179, 189, 146 S.E.2d 609, 614 (1966). Chewning argues, however, that because he alleges Ford's attorneys suborned the perjured testimony, it is in fact extrinsic fraud and thus a basis to set aside the underlying verdict. We agree.

This court has previously refused to carve out an attorney fraud exception to the intrinsic/extrinsic fraud rule. Bankers Trust Co. v. Braten, 317 S.C. 547, 552, 455 S.E.2d 199, 202 (Ct. App. 1995). However, Chewning's inability to present his full case at trial distinguishes this case from Bankers

Trust. There, the alleged attorney fraud was discovered during the pendency of the original trial, and the falsity of the statement in question was argued at the summary judgment stage and on appeal. Id. We decline to apply the reasoning of Bankers Trust to this case because when the complaint is viewed in the light most favorable to Chewning, it does not appear he had the opportunity to litigate the issue of attorney involvement in perjury at trial.

Chewning alleges a scheme of perjury and failure to produce documents perpetuated by attorneys. In Davis v. Davis, 236 S.C. 277, 113 S.E.2d 819 (1960), fraud on the court, specifically distinguished from fraud as now contemplated by Rule 60(b)(3), was found where an attorney in a divorce action did not file the opposing side's answer and then represented to the court that the opposing party was in default. Affirming the trial court's decision to vacate the default decree, the court found, "This reasonably may be held to have been extrinsic fraud upon her and upon the court." Id. at 281, 113 S.E.2d 821. This holding is consistent with attorney disciplinary opinions finding attorney misrepresentations to be fraud upon the court. See, e.g., *In re* Celsor, 330 S.C. 497, 501, 499 S.E.2d 809, 811 (1998) (finding improper signature without valid power of attorney, notarization of that signature, and misrepresentation to court to be fraud upon the court); *In re* Jennings, 321 S.C. 440, 446, 468 S.E.2d 869, 873 (1996) (holding forgery of signature on court document is fraud upon the court). Therefore, we find Chewning has alleged sufficient facts to show extrinsic fraud upon the court.

Moreover, federal jurisprudence supports this holding. Because Rule 60(b), SCRCP was modeled after Rule 60(b), FRCP, we take instruction from federal cases discussing fraud upon the court. The seminal case on this topic is Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). In Hazel-Atlas, the Supreme Court set aside a judgment after more than one year because it found a party and its attorneys engaged in "a deliberately planned and carefully executed scheme to defraud" the patent office and the circuit court of appeals. Id. at 245. As a result, the Court held it would be manifestly unconscionable to allow the judgment to stand. Id.

Although perjury alone will not serve to vacate a judgment, it is considered fraud upon the court when it involves or is suborned by an attorney.

See generally Moore's Federal Practice, supra, at § 60.21[4][b] & [c]. "Involvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court." Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982); see also Meindl v. Genesys Pac. Techs., Inc., 204 F.3d 124, 130 (4th Cir.) ("[F]raud upon the court includes fraud by bribing a judge, or tampering with a jury, or fraud by an officer of the court, including an attorney."); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987) ("A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony."). In Great Coastal, the court did not find fraud upon the court because it determined the behavior complained of involved primarily the two parties and did not show either a plan to subvert the judicial process or a threat of public injury. Here, the complaint alleges an ongoing plot between Ford, Ford's attorneys, and a witness to hide the truth in a series of products liability cases. If proven, these facts would constitute a scheme resulting in harm to the public at large and would result in the type of fraud envisioned in Hazel-Atlas and Great Coastal.

As an additional sustaining ground, the trial court found that Chewning's amended complaint did not satisfy Rule 9(b), SCRCP, because Chewning did not "identify any alleged perjured testimony by Bickerstaff in the underlying products liability trial, only subsequent testimony from cases after Chewning's." We disagree. After a careful analysis of the complaint, we find that Chewning did plead with specificity that Bickerstaff gave untruthful testimony at Chewning's trial that the Bronco II "was designed in a safe and reliable manner." Therefore, we find the trial judge erred in finding this as an additional sustaining ground.

In considering relief from a final judgment, "the balance is drawn between finality of judgments, on the one hand, and preserving the court's fundamental purpose of providing a fair and just resolution of disputes, on the other." Hagy, 331 S.C. at 221, 500 S.E.2d at 172. Based on Davis and federal jurisprudence, we find Chewning's complaint states a claim for fraud upon the court. If Chewning's allegations are true, it would be manifestly unjust for the original judgment to stand. Accordingly, we reverse the circuit judge's

dismissal order and remand the fraud upon the court claim for proceedings consistent with this opinion.

REVERSED & REMANDED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex parte: Louie E. Moore, formerly doing business as Fairfield Real Estate Company, Inc.,

Appellant,

and

Britt Rowe, Purchaser, and Community Federal Savings & Loan Association,

Respondents.

In re:

Jerry W. Branham,
Plaintiff,

v.

Fairfield Real Estate Company, Inc., Theophilus L. Davis, Peggy K. Branham, Betty Portee, Abraham Khalil, The Bank of Ridgeway, and Community Federal Savings & Loan Association,
Defendants.

Appeal From Fairfield County
Claude S. Coleman, Special Referee

Opinion No. 3352
Heard May 8, 2001 - Filed June 4, 2001

REVERSED

Leonard R. Jordan, Jr., of Berry, Quackenbush & Stuart, of Columbia, for appellant.

Robert E. Stepp and Laura W. Robinson, both of Sowell, Gray, Stepp & Laffitte, of Columbia; and R. Westmoreland Clarkson, of Winnsboro, for respondent Community Federal Savings & Loan Association.

Walter B. Todd, Jr., and J. Derrick Jackson, both of Todd, Holloway & Ward, of Columbia, for respondent Britt Rowe.

ANDERSON, J.: This appeal involves a special referee's conduct at a mortgage foreclosure sale. Louie E. Moore ("Moore") was the highest bidder at the foreclosure sale of certain real estate owned by Fairfield Real Estate Company, Inc. ("Fairfield"), at which time Moore was the president and sole shareholder of Fairfield. The referee then announced Moore was required to tender his earnest money to the court within fifteen minutes of the closing of the first sale. After Moore could not tender his deposit within the allotted time limit, the referee re-auctioned the property. Moore objected to the second sale and moved to confirm the first sale. Moore's objections were denied. Moore appeals. We reverse.

FACTS/PROCEDURAL BACKGROUND

Certain property owned by Fairfield[1] was foreclosed on by one of Fairfield's mortgagors, Jerry W. Branham.[2] By order filed December 18, 1998, the special referee ordered the subject property[3] to be sold at public sale, with

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[1] Fairfield Real Estate Company, Inc. was formerly Fairfield Oil Company. The company changed its name by filing its Articles of Amendment to its Articles of Incorporation on October 12, 1988.

[2] Branham was a former shareholder in Fairfield. He sold his stake to the company in 1986. Fairfield gave Branham a series of notes and mortgages in exchange for his interest. Fairfield eventually defaulted on its obligation to Branham. Branham consequently pursued foreclosure. This foreclosure action and the priorities of several mortgage liens on the subject property is the subject of a separate appeal filed by Jerry Branham on January 19, 1999. By unpublished opinion, we affirmed the referee's findings and order of sale under his Order of Foreclosure filed December 18, 1998. Branham v. Fairfield Real Estate Co., Op. No. 2001-UP-303 (S.C. Ct. App. filed May 31, 2001).

[3] The property is described as:

> All those piece, parcel or lots of land containing collectively 33.03 acres, more or less, lying, being and situate at, and near, the intersection of S.C. Hwy No. 34 and Secondary Rd S-20-159, approximately two (2) miles Southeast of the Town of Ridgeway in the County of Fairfield, State of South Carolina. Said parcels being more particularly shown and designated as Parcel No. 8 containing 9.99 acres, parcel No. 26 containing 9.00 acres, and parcel No. 27 containing 14.04 acres, and that portion of parcel No. 21 containing approximately 1.75 acres representing the fifty foot wide driveway running from S-20-159 to the southwestern corner of Parcel No. 22, all as more

no deficiency judgment requested. The referee stated in the fourth paragraph in his judgment order that the sale was:

> A. FOR CASH: The Special Referee will require a deposit of 5% on the amount of the bid (in cash or equivalent), same to be applied on the purchase price only upon compliance with the bid, but in the case of non-compliance within 30 days, same to be forfeited and applied to the costs and the first mortgage lien.

The Amended Notice of Sale filed January 27, 1999, reiterated the "terms of sale" which were, in part:

> A. FOR CASH. The Special Referee will require a deposit of five (5%) per cent of the amount bid (in cash or equivalent), the same to be applied on the purchase price upon compliance with the bid, but in case of noncompliance within 30 days after the date of the sale, same to be forfeited and applied to costs and the first mortgage lien.

The referee conducted the foreclosure sale on March 1, 1999. Moore, formerly doing business as Fairfield, Britt Rowe ("Rowe"), and other bidders attended the sale. Moore offered the highest bid of $96,000 for the subject 33.03 acre tract, which was approximately $11,000 more than Rowe's second place bid. Upon Moore's being declared the highest bidder, the special referee

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> particularly shown on a plat made by Carl A. Holland, Jr. dated March 24, 1987 recorded in Plat Cabinet "B" at Page 350 in the office of the Clerk of Court for Fairfield County.
>
> Being a portion of the property conveyed to Fairfield Real Estate Company, Inc. formerly Fairfield Oil Company by deed of David Dubose Gailland, II recorded September 23, 1986 in Deed Book "IW" at Page 289.

ordered Moore to produce his 5% deposit of $4,800 within five minutes.[4] When Moore proffered he could not secure his funding immediately, the special referee allowed Moore fifteen minutes to secure the deposit.

Moore was unable to secure financing within this fifteen minute allowance. Moore testified in a subsequent hearing that he was unable to reach his financier, Craig McMaster, a member of the board of trustees for Community Federal Savings & Loan Association ("Community"). Thereafter, the referee reopened the bidding without Moore's participation, whereupon Rowe offered the highest bid of $84,000. Rowe posted a cashier's check worth 5% of his bid with the court within fifteen minutes of the close of the second bidding. At approximately 4:30-4:45 p.m. on the day of the sale, Moore posted 5% of his bid from the first sale with the Fairfield County Clerk of Court.

On March 11, 1999, Moore filed an objection to the confirmation of the second sale of the property and moved to confirm the initial foreclosure sale. A hearing before the referee was held March 25, 1999, in which Moore's motions were denied by order filed April 22, 1999. Moore moved to alter or amend the special referee's order on May 3, 1999.

At the hearing, the referee waived recitation of the facts, stating they were not in dispute and that he knew all the relevant facts from participating in the prior case proceedings. Also, the referee admitted he treated Moore differently than other bidders on the property because:

> [Moore is] the one that's had five years to make his payments. He's the one that has not made his payments. He's the reason we [were] selling the property.

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[4] Since the referee had no recollection of first requiring Moore to tender his deposit within five minutes of the close of bidding, this requirement was presented by testimony from Alan W. Pullen, president of Community.

Additional relevant exchanges with the court are repeated below:

Moore's Counsel: Well, again, I don't think that [who the bidder was is] an issue that matters. And again, I have a feeling that the Court is taking the position that because the bidder happen [sic] to be the owner of the property[,] he should be treated more strictly and severely than a bidder who is not.

The Court: Let me tell you what the facts are clearly in this case, Mr. Jordan. Mr. Moore failed to pay three debts of written notes. Mr. Moore sold contracts of sale of real estate for the subject property that was subject to two mortgages to innocent third parties. In addition to that, Mr. Moore sold those contracts and received money from them without selling the underlying land or obtain [sic] a release from those mortgages. All of that's in the records[,] and **in my opinion[,] because of that this court has some judgment and discretion as to what time period it's going to allow that person**, as known through these proceedings not outside of anything that took place in this case, **as to what I'm going to allow him to come up with the money**, what time period to come up with the money. Does that sound unreasonable to you?

Moore's Counsel: Your Honor … it sounds like to me you're treating him differently because he is the

owner and because he is a defaulting borrower.

The Court: No, sir.

. . . .

The Court: My concern, I'm not going to keep beating a dead horse[,] but … and this don't need to be on the record. To me[,] the whole issue is and I think throughout this circuit, **as a referee**, right or wrong, **you typically exercise some discretion** in, within the requirements of the deed, making that deposit. And I think normally[,] it's everything from when you walk back to the attorney's office or you do like Mr. Moore was, how long is it going to take you to have the money. I can get it here by such and such. If Mr. Moore had had an attorney that would stand as a member of the Bar and indicate to me that he had the money and he would have it in my office at 5:00 o'clock[,] I don't think we would have been here. But what you, Mr. Jordan, are asking me to accept is that here's a man that all along had the full amount, whatever he was going to bid, had that money available. **Does it not make sense that he would have gone and made arrangements to catch up those two mortgages if he would have had the money available to him? I mean, why, if he had $98,000.00 he could have brought things current months ago. And I know I'm getting beyond what**

we're hearing today[,] but isn't that just common sense.

Moore's Counsel: That's what I'm saying. It appears to be some $140,000 worth of ….

The Court: That's the principal too. No, sir, he could have brought them current.

Moore's Counsel: Well, what I'm saying is that if he bought the property back at $96,000.00[,] he has therefore saved what amounts to maybe $45,000, $50,000.

The Court: By beating his credit.

Moore's Counsel: Well, okay, here we go again, Your Honor. This the whole point. I think you're treating Mr. Moore differently because he, in fact, seems to be a guy who beats his credit.

The Court: **I'm treating him differently because he had absolutely no credit worthiness based on the debts in this case.**

. . . .

The Court: The Court's not trying to protect anybody. The only thing I'm trying to ensure is that somebody … the purpose of a bid is that you're going to come up with the rest of your money. If you don't[,] then it's some detriment to you. And again, in that

Hudson case,[5] if such a person can resell the property being at a profit or finds that he's made a profitable purchase[,] then he makes his check good and complies with his bid, otherwise he does nothing and there's not [sic] redress to him. And that's talking about a personal check or certified check, but isn't that really what the issue is? Let's assume Mr. Moore had not come up with the money, he would be out absolutely nothing.

Moore's Counsel: Oh, certainly. In other counties[,] he might be doing jail time, Judge. I suspect the way you feel about him[,] he probably would be.

The Court: Don't tempt me. I'd rather stay silent on that.

(emphasis added).

Additionally, Alan W. Pullen, president of Community, who attended the foreclosure sale, testified he was surprised at the referee's time limit requirement applied after Moore's successful bid. He averred he had never witnessed an immediate compliance requirement and that the standard practice in many counties require the deposit paid at the end of the day of the sale. Pullen stated the normal practice in Fairfield County is to allow successful bidders to tender their deposits by 5:00 p.m. the same day of the sale.

On March 31, 1999, Rowe tendered the balance of his bid price on the property to the Clerk of Court for Fairfield County. The special referee confirmed the second sale by order filed April 22, 1999, and orally denied

[5] Hudson v. Inman, 179 S.C. 399, 184 S.E.2d 102 (1935).

reconsideration of this order on September 29, 1999. On October 6, 1999, Moore filed his notice of appeal. Thereafter, on October 18, 1999, Moore petitioned the South Carolina Court of Appeals for a writ of supersedeas; however, this petition was withdrawn March 6, 2000.

In a letter addressed to all interested parties dated March 8, 2000, the referee stated: "Unless a Motion or other appropriate proceeding is filed objecting to such recording [of the deed to Rowe] and disbursement, I intend to file and disburse on March 17, 2000." The record contains no further correspondence to the referee. Thereafter, the deed to Rowe and the accounting of the special referee were filed March 23, 2000. Community, the first priority lienholder on the property that was sold, moved to dismiss Moore's appeal on the ground it has become moot. Community's motion was denied by this Court on May 17, 2000.[6]

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[6] Community argues again on appeal that this issue is moot. A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 195 S.E.2d 713 (1973), cited in Arnold v. Association of Citadel Men, 337 S.C. 265, 523 S.E.2d 757 (1999). This is true when some event occurs making it impossible for the reviewing court to grant effectual relief. Id. However, a foreclosure sale that was improperly conducted so as to prejudice interested parties is void and, therefore, the sale may be set aside by the reviewing court. Howell v. Gibson, 208 S.C. 19, 37 S.E.2d 271 (1946) (holding a mistake or surprise in connection with the sale is grounds for setting it aside provided the mistake is harmful and not a mistake of law or one due to the negligence of the party complaining) (citation omitted); Farr v. Sims, 9 S.C. Eq. (Rich. Cas.) 122, 134 (1832) ("If the Sheriff fraudulently sells a debtor's property, his sale, it is conceded, is void. If the sale is void, must not his deed to the purchaser be void also? * * * I apprehend the sale and deed are both nullities."); Federal Nat'l Mort. Ass'n v. Brooks, 304 S.C. 506, 405 S.E.2d 604 (Ct. App. 1991) (ruling judicial sale was set aside because, in part, the clerk of court, not the designated foreclosure referee, advertised and conducted the sale). Moore's action is not moot.

STANDARD OF REVIEW

A real estate foreclosure is an action in equity. MI Co., Ltd. v. McLean, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997); Dockside Ass'n v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (1987); Jean Hoefer Toal et al., Appellate Practice in South Carolina 194 (1999). In an action in equity referred to a master-in-equity or a special referee for final judgment, this Court may take its own view of the preponderance of the evidence although it is not required to disregard the findings of the master or referee. Lewis v. Premium Inv. Corp., 341 S.C. 539, 535 S.E.2d 139 (Ct. App. 2000) cert. granted.

LAW/ANALYSIS

Moore argues the referee erred by prescribing the theretofore unannounced fifteen minute time limit for depositing the earnest money with the court after the close of the first sale of the Fairfield property. We agree.

The terms and conditions of a judicial sale are controlled by the court order, Rule 71, SCRCP, the practice and custom of the county in which the property is being sold, and by statute. See Federal Nat'l Mortgage Assoc. v. Brooks, 304 S.C. 506, 405 S.E.2d 604 (Ct. App. 1991); Charles B. Simmons Jr., A Primer for Mortgage Foreclosures in South Carolina, 6 S.C. Lawyer 29, 31 (May/Jun 1995).

At a minimum, the trial court's order of judgment shall contain: (1) a sufficient legal description of the property being sold; (2) a provision for the necessary legal advertisement; (3) the time and location of the sale; (4) notice of any senior liens, taxes, or other rights to which the property to be sold is subject; (5) the amount of good faith deposit necessary at the time of the sale; and (6) the date that compliance must be made with the bid. Rule 71(b), SCRCP; see also S.C. Code Ann. § 15-39-660 (1977) (reciting substantially

similar requirements that must be advertised); Farr v. Sims, 9 S.C. Eq. (Rich. Cas.) 122 (1832) (noting minimum requirements for notice to the public for a judicial sale); 47 Am. Jur. 2d Judicial Sales §74 (1995) ("A notice of sale should give the title of the cause, describe the property to be sold, and state the date, hour, place, and terms of the sale. As a practical matter, a notice is sufficient if it gives the title of the cause and the date of the decree and states that the sale will be made in pursuance of the decree.").

Essentially, through this order, the trial court is fulfilling its duty to properly inform the public of every material element of the judicial sale. That is, "[t]o enable persons to buy, they ought to be apprised of the terms on which the property is to be sold." Farr, 9 S.C. Eq. at 131. Thus, the courts reviewing a judicial sale should guard against any undue surprise or partiality affecting the sale. "[A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale or stifle or suppress free competition among bidders, is contrary to public policy, vitiates the sale, and constitutes ground for setting it aside upon the complaint of the injured party." Ex parte Keller, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937) (citation omitted).

This being said, we reiterate the well-established rule for South Carolina foreclosure sales that:

> A judicial sale should not be set aside except for cogent reasons. The purpose of the law and of the proceedings in which a sale has been decreed is that it shall be final. As was said in Farrow v. Farrow, 88 S.C. 333, 70 S.E. 459 [1911], the successful bidder makes himself a party to the cause, and, except where title to the property is defective, or where he can show fraud, misrepresentation, mistake, or other circumstances of unfairness in the sale, he may be compelled by the court to perform his contract of purchase. In the absence of such circumstances, therefore, his contract should be upheld. These principles are well established. Henry v. Blakely, 216 S.C. 13, 56 S.E.2d 581 [1949]; Appeal of Paslay, 230 S.C. 55, 94 S.E.2d 57 [1956].

Spillers v. Clay, 233 S.C. 99, 104, 103 S.E.2d 759, 761-62 (1958) (citations omitted); see also Federal Nat'l Mortgage Ass'n v. Brooks, 304 S.C. 506, 510, 405 S.E.2d 604, 606 (Ct. App. 1991) ("[W]here there are other circumstances tending to show the sale should, in good conscience, be set aside, disparity between the accepted bid and the fair value of the property[7] as disclosed by the evidence is a proper factor to be considered by the court in arriving at its decision.") (citation omitted); Brownlee v. Miller, 208 S.C. 252, 265, 37 S.E.2d 658, 664 (1946) ("It is the established rule of this jurisdiction to uphold judicial sales, when regularly made, 'when it can be done without violating principle or doing injustice.'") (citation omitted).

"'But the circumstances impeaching the fairness of the transaction should relate to the **conduct of the officer making the sale**, as in Farr v. Sims, [citation omitted], or to the conduct of the purchaser participating in the attempt to stifle competition or affected with notice thereof [citations omitted].'" In re Wallace, 179 S.C. 480, 484, 184 S.E. 849, 851 (1936) (emphasis added) (citation omitted); Metropolitan Life Ins. Co. v. Sansbury, 164 S.C. 452, 162 S.E. 579 (1932); Hughes v. Wilburn, 156 S.C. 443, 153 S.E. 487 (1930); Ex parte Cooley, 69 S.C. 143, 48 S.E. 92 (1904). That is, "where a party in interest has

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[7] When consideration is so inadequate that it shocks the conscience of the court, the sale is void and will be set aside. See Hamilton v. Patterson, 236 S.C. 487, 494, 115 S.E.2d 68, 71 (1960) ("It is well settled in this State 'that inadequacy of price, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale.'") (citation omitted); Hughes v. Wilburn, 156 S.C. 443, 153 S.E. 487 (1930) (ruling a bid one-eightieth of the inventoried value of the property was so grossly inadequate as to be shocking to the court); Peoples Fed. Sav. & Loan Ass'n v. Graham, 291 S.C. 178, 352 S.E.2d 511 (Ct. App. 1987) (holding sale price of $48,100, received for mortgaged property subsequently appraised at $73,000, was not so inadequate as to shock the conscience or to give rise to inference of fraud so as to require that judicial sale be set aside).

been misled to his detriment by the officer making the sale, **through no fault of his own**, relief may be had." Hudson v. Inman, 179 S.C. 399, 406, 184 S.E. 102, 105 (1936) (emphasis in original) (quoting Bonham v. Cave, 102 S.C. 308, 311-12, 86 S.E. 681, 682 (1915)); see also 50A C.J.S. Judicial Sales § 79 (1997) ("A mistake or some surprise or accident in connection with a judicial sale is ground for setting it aside, either before or after confirmation, provided the mistake was an injurious one, and would result in no substantial hardship other than rescinding the bargain.").

In this appeal, we must analyze the special referee's actions in conjunction with his order of sale. Although the referee acted as his own selling officer, he was still bound by the limits of his written decree of sale. When the public has been informed through the order and the advertisements, the rules of the foreclosure sale are set.[8] See Ex parte Keller, 185 S.C. 283, 194 S.E. 15 (1937) (recognizing the legal principle that an order of sale is a public document, and all bidders, as well as other persons, are charged with notice of its terms); Hudson v. Inman, 179 S.C. 399, 184 S.E. 102 (1936); see also Federal Nat'l Mortgage Ass'n v. Brooks, 304 S.C. 506, 405 S.E.2d 604 (Ct. App. 1991) (stating the purchaser should principally rely on, and is on notice of, the terms

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[8] In limited circumstances, however, a court ordering the foreclosure sale may amend its own order. Thus, for example, in In re Receivership of Great Western Beet Sugar Co., 125 P. 799 (Idaho 1912), the receiver auctioning property was given leave to extend the time period for the successful bidder to tender his twenty five percent deposit. The decree originally required the receiver to "promptly collect any cash payment required" at the time of sale. Id. at 801. However, the appellate court found the trial court could reasonably extend the time to comply "where no injury is done to any one by failure of the purchaser to pay at once the sum due on his bid." Id. That is, "a trial judge in equity … has discretionary power to modify all orders affecting such sale by subsequent orders." Id.; cf. Goethe v. Cleland, 323 S.C. 50, 448 S.E.2d 574 (Ct. App. 1994) (stating a special referee retains jurisdiction over foreclosure proceedings after the sale of the property to correct clerical errors in its judgment order of sale).

provided in the foreclosure decree).

Generally, "[i]n the conduct of a judicial sale, the selling officer acts in a ministerial capacity as the arm of the court to carry out its orders." Brooks, 304 S.C. at 510, 405 S.E.2d at 606 (citation omitted). "He in no way acts in a judicial capacity." Id. Thus, the selling officer has no authority to modify the terms and conditions of the foreclosure decree in any material way. Id.; see also 47 Am. Jur. 2d Judicial Sales §114 (1995) ("Since the officer conducting the sale must abide by the terms and conditions of the decree or order of sale, he or she may not alter the terms as set forth in the order of sale.") (footnotes omitted). The officer has very little discretion and must conduct the sale within the confines of the decree.

The amended foreclosure order of the Fairfield property set forth, in relevant part, that the sale was:

> FOR CASH. The Special Referee will require a deposit of five (5%) per cent of the amount bid (in cash or equivalent), the same to be applied on the purchase price upon compliance with the bid, but in case of noncompliance within 30 days after the date of the sale, same to be forfeited and applied to costs and the first mortgage lien.

Clearly, by these terms, the purchaser was required to tender his entire bid within a set time after the foreclosure sale. He was also required to tender a deposit at some point to prove his good faith bid on the property. However, we read no requirement that the purchaser was to tender this deposit immediately after the hammer falls closing the sale. This provision says nothing of the timing requirements for a sale. In fact, the exact timing of a judicial sale is not set by statute; rather, under the direction of a master[9] or other appropriate court officer, the sale is conducted on the day of sale between "eleven and five

[9] Referees abide by the same provisions for masters. S.C. Code Ann. § 15-39-635 (Supp. 2000).

o'clock." S.C. Code Ann. § 15-39-690 (1977); Rule 71(b), SCRCP. However, the officer may prevent sales before they start by giving notice that the sales for that day have been closed. S.C. Code Ann. § 15-39-690 (1977); see also Pickett v. Pickett, 11 S.C. Eq. (2 Hill Eq.) 470 (1836) (holding subsequent sale of property after sheriff announced he would sell no more property that day was void).

When, as in the case at hand, the foreclosing creditor waives his right to a deficiency judgment, the sale is deemed closed on the day of sale and the advertisement of sale should state "that no personal or deficiency judgment is demanded and that the bidding will not remain open after the sale **but that compliance with the bid may be made immediately**." S.C. Code Ann. § 15-39-760 (1977); see also Goethe v. Cleland, 323 S.C. 50, 448 S.E.2d 574 (Ct. App. 1994) (stating where no deficiency judgment is requested, the bidding in the foreclosure sale need not remain open for thirty days to allow for upset bids); Rule 71(b), SCRCP ("Unless the pleadings state that no personal or deficiency judgment is demanded or any right to such judgment is expressly waived in writing, the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale exclusive of the day of the sale.").

Here, however, the referee did not require immediate compliance for the bid either in his order or in his amended notice of sale; instead, the referee required compliance within thirty days after the date of the sale. Without further explanation, the referee also stated in his order that he "will require a deposit of 5% on the amount of the bid (in cash or equivalent)." A decree of sale may require a good faith deposit or guaranty of cash "at the conclusion of the bidding." S.C. Code Ann. § 15-39-740 (1977). However, this earnest money is not required prior to the conclusion of the bidding and can be no more than 5% of the bid price. Id. "Such a deposit is a proper safeguard against spurious bidding upon the one hand and an aid in carrying into effect the terms of sale upon the other." Ex parte Floyd, 145 S.C. 364, 375, 142 S.E. 805, 808 (1928); see also Hudson v. Inman, 179 S.C. 399, 184 S.E. 102 (1936) (stating the requirement of an earnest money deposit promotes the purchasing party's compliance with the terms of sale). Thus, for example:

> To allow a person who is not financially responsible to give a worthless check as a deposit places such person in the advantageous position of complying with his bid at his pleasure. If such person can resell the property bid in at a profit, or finds that he has made a profitable purchase, then he makes his check good and complies with his bid; otherwise, he does nothing and there is no redress.

Hudson, 179 S.C. at 403, 184 S.E. at 104; see also 47 Am. Jur. 2d Judicial Sales §134 (1995) ("The requirement of a deposit of cash or other security by prospective bidders, to insure compliance with the contract of sale on the part of one whose bid is accepted, is customary.") (footnote omitted).

As with the referee's authority to set and advertise the timing for compliance with the bid, the referee may establish a time for the earnest money deposit. Here, the special referee's order was silent as to the time when the earnest money deposit was required to be paid. Lacking such guidance, Moore, as the prevailing bidder, had a reasonable time within which to tender his deposit. The law does not require immediate compliance without warning. The earnest payment merely illustrates the prospective purchaser's bona fide assurance to the court that he fully intends to perform under the purchase contract.

Here, Moore bid on the property expecting he would have a reasonable time within which to tender his earnest payment to the court. Instead, he was "stunned," as were others, by the referee's pronouncement of an immediate tender requirement. Moore testified he attempted to reach his financier within the fifteen minute window to cover his 5% earnest obligation. Although he was unable to deposit his money within the newly prescribed time limit, Moore did, in fact, tender the requisite deposit by 4:30-4:45 p.m. on the same day of the sale. The only evidence contrary to Moore's good faith efforts to comply is the referee's acknowledged different treatment of Moore as a credit risk. We find it was unreasonable for the referee to spring the restrictive time limit on the parties, without notice, and after conducting the sale under different terms.

In Farr v. Sims, 9 S.C. Eq. (Rich. Cas.) 122 (1832), the Court of Appeals found a judicial sale void where the advertisement stated the sale was for cash, but the officer demanded payment in specie upon request of a creditor. The Court noted:

> This was a short notice; but if the Sheriff had advertised the sale to be for specie, it might have availed to protect them both [the sheriff and the creditor] from legal censure. As it was, however, the Sheriff gave no such notice until the day of sale, and this failure of duty, on his part, must also attach to the creditor; for, in effecting the sale, the Sheriff is the agent of the creditor, the debtor, and the purchaser, and his acts may, more or less, affect them all.

Id. at 131.

When the officer changed the conditions of the sale, "[i]t was, in fact, a sale without being advertised, for one of the most important conditions of the sale was not disclosed in the advertisement. In this respect, the sale was void, for want of authority on the part of the Sheriff to sell." Id.

In Ex parte Keller, 185 S.C. 283, 194 S.E. 15 (1937), the master supplemented the foreclosure decree with a condition not found in the decree. Quoting McMaster v. Arthur, 33 S.C. 512, 515, 12 S.E. 308, 309 (1890), the Keller Court stated:

> The master supplemented the order of the court by a condition not found in said order, to-wit, that the land should be sold subject to the claim of the homestead. **This addition to the order was made by the master on the day of sale**, when Crawford & Co., attorneys of the petitioner, gave notice of this claim. But by what authority could the master thus supplement said order? We know of none; and, even admitting for this case, that, had the order been carried out according to its terms, the result might have been different, yet, said order not having been executed, the matter stands as if there had been no sale. **It was a void sale, the master having no**

> **authority to sell as he did** (Baily v. Baily, [30 S.C. Eq.] (9 Rich. Eq.) [392], 395 [1857]), and consequently the petitioner was not bound to pay in her bid.

Id. at 294, 194 S.E. at 20 (emphasis added), cited with approval by Federal Nat'l Mortgage Ass'n v. Brooks, 304 S.C. 506, 405 S.E.2d 604 (Ct. App. 1991).

The Keller Court also explained that the open-ended statutory provision for the purchasing party's compliance guarantees the purchasing party a reasonable time to tender his bid, if due the day of sale, or his earnest money, if no specific time is given. The sale order required the successful bidder to tender 3% of his bid with the court "immediately after the sale as evidence of good faith." Id. at 289, 194 S.E. at 18. Among other problems, the appellant failed to accompany his winning bid with a contemporaneous earnest money deposit. The Court thus interpreted the timing requirement and concluded:

> It follows that even had the bid of appellant been a legal bid, he could not be declared the highest bidder not having complied with the terms of the order of sale, bottomed upon the statute, by filing with the special referee the necessary deposit either in cash or certified check, **immediately following his bid, or within a reasonable time thereafter on that day**.

Id. at 296, 194 S.E. at 21 (emphasis added).

Stated another way, a purchaser who has demonstrated the prima facie intent to comply with the earnest deposit may deposit this sum with the court no later than by the end of the day of sale at 5:00 p.m. Where the party is on notice of a set time when compliance must be made, on the other hand, he is effectively estopped from denying the efficacy of the mandate. See Hudson v. Inman, 179 S.C. 399, 404, 184 S.E. 102, 104 (1936) ("[A] bidder not complying with the terms of the decree and the advertisement will not be heard to complain that he was lulled into security in not being required publicly to comply with the terms

of the decree and advertisement of the sale of the property."); see also Ex parte Floyd, 145 S.C. 364, 379, 142 S.E. 805, 810 (1928) (holding that since the decree required the purchaser to deposit his earnest money before 4 o'clock on the day of sale, "then it was equally necessary that the purchaser at the second sale [at 4 o'clock] make the required deposit immediately. Otherwise it was wholly unnecessary to have a resale, for the manifest purpose of requiring the deposit and providing for the resale was to have in hand the deposit before 4 o'clock, or immediately thereafter.").

Delving further, we note Keller is merely restating the basic tenets of the common law. We find an early expression of this most basic principle in Seymour v. Preston, 17 S.C. Eq. (Speers Eq.) 481 (1844). In Seymour, the sheriff of Charleston conducted a foreclosure sale wherein Seymour made the highest bid equal to the mortgage debt on the property with nothing left for the junior judgment lienholders. However, Seymour did not timely tender his bid. He did not tender his bid until after receiving notice that the purchaser at a second sale of the property had already complied with his bid. Although the court found Seymour had forfeited his right under the contract of sale by not complying with his bid, the court conclusively re-emphasized that Seymour could have secured the property by complying with his bid on the day of sale. The court explains:

> [N]o one will be found hardy enough to contend, that if one agree[s] to sell property to another for cash [in an analogous private sale], and the purchaser offer[s] him the money two months after, the seller would be bound to perform his part of the contract; and that is this case. By the law and usage regulating sheriff's, and other official sales, a purchaser at a sale for cash, must pay the money **on the day of sale**. I know … that it frequently happens that the officer making the sales takes upon himself to allow the purchaser a short time to pay the money, and there is no impropriety in it, when it is done with the assent of the creditor and the debtor, … [but] if the purchaser has neglected to pay the purchase money, he has forfeited his right under the contract of sale, certainly he is not entitled to favor.

Seymour, 17 S.C. Eq. at 485 (emphasis added), cited in 50A C.J.S. Judicial Sales § 38 (1997) ("In the absence of a statute otherwise providing, when the sale is for cash, payment in cash should be made on the day of sale in order to entitle the purchaser to have the sale confirmed.").

Thus, "in the absence of fraud or collusion, we do not think that a failure to comply literally with the terms of sale as to the cash payment, **the moment the hammer falls**, is such failure in itself as will in every case forfeit the bid." Yates v. Gridley, 16 S.C. 496, 502 (1882) (emphasis added).

Our review of the record reveals Moore tried, in good faith, to comply with the special referee's surprise edict after the fact that he should tender his earnest money fifteen minutes after the close of the bidding. Thereafter, by 4:30-4:45 p.m. the same day of sale, Moore deposited his earnest money with the court as proof of the veracity of his bid. This assurance, however, was too late to appease the referee for the property had already been resold. The referee's support for the resale, however, came not from the efforts of the successful bidder before him or based on any provisions, in fairness, disclosed to the prospective purchasers before the auction; rather, the referee's reaction came from his own knowledge of the proceedings leading up to the foreclosure sale.

The referee admits he "[treated Moore] differently because [Moore] had absolutely no credit worthiness based on the debts in this case." We agree Moore's standing as a debtor is a proper factor for the court to consider. Nevertheless, while it is valid for the selling officer to require guaranteed funds to discourage spurious bids, the officer has no discretion to make surprise announcements that have a chilling effect on the bidding. See Hamrick v. Summey, 282 S.C. 424, 320 S.E.2d 703 (1984).

In Hamrick, all of the persons attending a creditor's auction were recognized by the sellers except for the highest bidder. Under the rules of the auction, a successful bidder was required to make a 20% deposit on the day of sale by cash or check approved by the seller. However, since the highest bidder

was unknown, the officer refused to accept his check unless he signed an agreement to bring certified funds two days later. The unknown bidder refused to comply with this requirement. The property was then resold and the Circuit Court confirmed the second sale. On appeal, the Supreme Court found "[t]here was no discrimination against [the unknown bidder] in seeking to have him pledge certificates of deposit on the Monday following the sale, but this was merely an effort to give some strength and credibility to his bid." Id. at 429, 320 S.E.2d at 706. That is, accepting the unknown bidder's uncertified check "would have jeopardized the entire sale." Id.

If the purchaser is ready and willing to secure his deposit in compliance with his bid, the selling officer can not change the terms for the judicial sale. "All that the Court can require, therefore, is, that he should do now, what he ought to have done then; give [security] according to the terms of the sale." Young v. Teague, 8 S.C. Eq. (Bail. Eq.) 13, 20 (1830); see also 50A C.J.S. Judicial Sales § 40 (1997) ("If, however, the purchaser was always ready and willing to furnish the security required by the order of sale, the failure of the commissioner to take it is not ground for setting the sale aside, but the purchaser will be required to comply.") (citing Teague, 8 S.C. Eq. at 20).

In Teague, the purchaser was ready and willing to execute his bond on the property, but the commissioner declined to take it "because he thought it an unnecessary expense." Teague, 8 S.C. Eq. at 15-16. The commissioner delivered titles to the purchaser; thereafter, other attendees at the sale sought to set aside these deeds arguing they had intended to bid more for the property at the auction themselves. However, because the purchaser's minor non-compliance was caused by the selling officer and "[i]t appears [the purchaser] did not refuse [to comply], but on the contrary was ready and willing to comply," the sale to him was valid. Id. at 20.

Even if the referee's surprise edict was a valid amendment to his order, we find the referee's strict construction of the order's limitations is unwarranted. To defeat the first sale of the Fairfield property, the referee relies on our statutory requirement that a purchaser must comply with every requirement dictated in the judgment order to honor the sales contract. That is:

> If the purchaser shall fail to comply with the terms aforesaid[,] the [officer] shall proceed to resell at the risk of the defaulting purchaser either on the same or some subsequent sale day, as the plaintiff may direct, and, in the absence of any direction by the plaintiff, the [officer] shall resell on the same day, if practicable, and if not on the next succeeding sale day, making in every such case proclamation that he is reselling at the risk of such defaulting former purchaser.

S.C. Code Ann. § 15-39-710 (1977); see also Metropolitan Life Ins. Co. v. Sansbury, 164 S.C. 452, 162 S.E. 579 (1932).

This statutory limitation has been in effect in South Carolina for more than a century. However,

> [this statute] was not intended to prevent a bona fide purchaser from receiving title because he was not prepared to comply with his bid at the moment the hammer fell to 'shell out the cash.' In this day of banks, drafts, and checks, it is not to be expected that a bidder at sheriffs' sales should be laden down with rolls of currency with which to comply with his bid. It is not progressive and in keeping with the spirit of the age. It is not equitable.

Brown v. Barnwell Mfg. Co., 46 S.C. 415, 420, 24 S.E. 191, 193 (1896).

In Brown, a certain lot was knocked down to the attorney for Simon Brown. After compiling the documents of the sale, the sheriff asked the attorney to comply with his bid immediately, extended to approximately two hours after the sale. The attorney tried to reach Brown to no avail, during which time the property was resold. The Brown Court found this strict construction of the statute was unwarranted. The tribunal explained:

> Under all the circumstances, it seems to this court that the sheriff should have, at least, allowed the attorney all the time possible

> **before the expiration of the legal hours of sale, on the day when the property was sold**, for complying with his bid; especially when the attorney was taken by surprise by the requirement of strict compliance with the terms of sale.

Id. at 425-26, 24 S.E. at 195 (emphasis added).

CONCLUSION

We rule that a purchaser at a foreclosure sale has until 5 o'clock p.m. on the sales date **unless** the order of the court and the notice of sale **specifically** provide for a different payment time for the deposit.

We find the special referee's surprise amendment to his order of sale after the close of the bidding was invalid. The referee's action does not comport with our understanding of the fairness inherently necessary in a foreclosure sale or with the common law that, unless modified by the decree, does not require an immediate tender of the purchaser's deposit the moment the hammer falls. Without pre-announced limits, the highest bidder at a foreclosure sale who has the manifest intent to comply with his bid has until the end of the day of sale to tender his earnest deposit with the court.

The referee erred in setting aside the first sale of the property prematurely. Thus, the second sale is invalid and should be set aside. Although an innocent third party who bids and wins at the second foreclosure sale "should not be punished for the fraud of another [that voids this sale], he shall not avail himself of it." Farr v. Sims, 9 S.C. Eq. (Rich. Cas.) 122, 133 (1832) (quoting Robson v. Calze, 1 Doug. 228). For the foregoing reasons, we find the decision of the special referee is

REVERSED.

HUFF, J., concurs.

SHULER, J., concurring in result only.

SHULER, J., concurring in result only: Although I concur in the ultimate judgment of the Court, I write separately to express my concern over the wisdom of adopting a bright-line rule of 5:00 p.m. on the day of the foreclosure sale for deposits to be made, in the absence of any specific provisions in the order or notice of sale. In my view, this Court has neither the authority nor legal support to establish such a rule.

Initially, because the requirements for a judicial sale are governed primarily by statute and Rule 71, SCRCP, and no provision sets forth a precise time for the payment of bid deposits, I believe the establishment of a five o'clock deadline is wholly within the province of our Legislature. See Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("[I]t is not the province of [a court] to perform legislative functions.").

Moreover, our case law is clear that the rules regarding such matters are discretionary with the selling authority, subject only to a requirement of reasonableness. See Ex Parte Keller v. Hutto, 185 S.C. 283, 289, 296, 194 S.E. 15, 21 (1937) (interpreting the phrase "immediately after the sale" in a judicial sale order referencing a required 3% good faith deposit to mean either "immediately following [the] bid, or *within a reasonable time thereafter* on that day") (emphasis added); Harrington v. Blackston, 311 S.C. 459, 464-65, 429 S.E.2d 826, 830 (Ct. App. 1993) ("Except to the extent controlled by statute, the terms of a judicial sale are within the discretion of the court ordering the sale.").

Reasonableness, in turn, depends on the circumstances of each sale. See Ex Parte Floyd v. Carmon, 145 S.C. 364, 367, 142 S.E. 805, 807 (1928) (holding that even where the terms of a judicial sale order specified $500 be deposited on the bid "before 4 o'clock p.m. on the day of [the] sale," the time for paying the deposit could be extended in the master's discretion where warranted by the facts and circumstances, including the parties' waiver of any time requirement); Brown v. Barnwell Mfg. Co., 46 S.C. 415, 422, 424-26, 24 S.E. 191, 193-95 (1896) (in holding that "[u]nder all the circumstances . . . the sheriff should have, at least, allowed the purchaser all the time possible before the expiration of the legal hours of sale, on the day when the property was sold, for complying with his bid . . .," the supreme court, regarding appellant's

exception (7), wherein it was claimed the trial court erred in "holding and concluding *as a matter of law* that the [purchaser] had until the expiration of the legal hours of sale within which time to comply with the bid," stated: "A careful consideration of the decree of the circuit judge satisfies us that the seventh [and other] exceptions were taken under a misapprehension of said decree. *The language of the circuit court was intended merely to illustrate the spirit of our statute* relating to resales by sheriffs.") (emphasis added); Yates v. Gridley, 16 S.C. 496, 497, 504 (1882) (affirming sale to purchaser who failed to comply with exact terms of judicial sale, i.e., "cash sufficient to pay costs and disbursements of suit," by paying such not on the day of sale in December but sometime in January; supreme court held the fact that the terms of the sale were not immediately complied with when they were met "within so short a time afterwards" was insufficient to annul purchaser's deed).

In addition, I think the decision to craft such a rule would conflict with S.C. Code Ann. § 15-39-690 (1977), which states: "The hours of [a judicial] sale shall be between eleven and five o'clock." If, under the terms of the statute a judicial sale can occur as late as 5:00 p.m. on the date of sale, then, under the proposed rule, a purchaser would have no time to make the required deposit.

Finally, I believe an absolute five o'clock deadline would not comport with standard principles of equity governing judicial sales. Accordingly, because the statutory scheme governing foreclosure sales is silent and our cases in the past have imposed a reasonableness requirement but not an absolute deadline, I would decline to do so now.