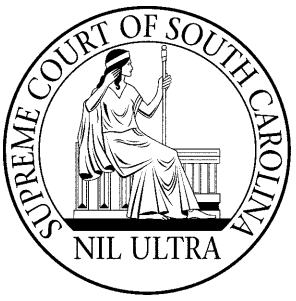

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
March 20, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brad Keith Sigmon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-136506

ON WRIT OF CERTIORARI

Appeal from Greenville County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27233
Submitted October 15, 2012 – Filed March 20, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, and William H. Ehlies, II, of Greenville, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody Jane Brown, all of Columbia for Respondent.

JUSTICE HEARN: A jury convicted Brad Keith Sigmon of two counts of murder and burglary in the first degree, and it subsequently sentenced him to death. His convictions and sentences were affirmed on direct appeal in *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005). We granted certiorari to review the circuit court's dismissal of Sigmon's application for post-conviction relief (PCR) and now affirm.

FACTUAL/PROCEDURAL BACKGROUND

Sigmon and Rebecca "Becky" Larke were in an intimate relationship for approximately three years. They were living together in her trailer when she informed Sigmon she did not want to see him anymore. Becky's parents, Gladys and David Larke, lived next door to them in a trailer on the same property. David also informed Sigmon that Becky wanted him to move out and served him with eviction papers, stating Sigmon had to leave within two weeks. Becky subsequently moved in with her parents. Sigmon believed she had begun a new relationship and although he pleaded with her to come back, she refused. Sigmon became increasingly obsessed with Becky, stalking her in an attempt to verify she was seeing another man.

About a week after Becky asked him to leave, Sigmon was drinking and smoking crack cocaine with his friend, Eugene Strube, in Becky's trailer. At some point in the evening, Sigmon decided he would go to the Larkes' home the following morning after Becky left to take her children to school and tie up Becky's parents. When Becky returned home, Sigmon intended to kidnap her and disappear with her, but he did not want her parents to be able to call the authorities. Sigmon and Strube eventually ran out of crack and Strube fell asleep.

In the morning, after they saw Becky leave, Strube and Sigmon exited the trailer. However, Strube changed his mind about helping Sigmon and left. Sigmon grabbed a baseball bat from beneath his trailer and entered the Larkes' trailer. Upon seeing Sigmon, David told his wife to bring him his gun, and Sigmon hit him in the back of the head several times with the bat. Sigmon then saw Gladys, ran after her into the living room, and hit her several times in the head. He returned to the kitchen where David lay and hit him several more times with the bat because he was still moving. He then went back to Gladys, saw that she was still moving, and hit her several more times.

Sigmon retrieved David's gun and waited for Becky to return home. When Becky arrived, Sigmon brandished the gun, took her car keys, and forced her in her car. He intended to pick up his own car and drive to North Carolina with Becky. However, she managed to jump out of the car and tried to run away. Sigmon pulled over and chased after her, shooting her several times. When he realized he was out of bullets, he got back in her car and fled. Although Becky was injured, she survived the assault and told the witnesses who came to her aid that Sigmon told her he had either tied up or killed her parents. Police officers were dispatched to the Larkes' home where the bodies were discovered.

A manhunt ensued and Sigmon was eventually captured in Gatlinburg, Tennessee after he called his mother, who was assisting the police in locating him. He was arrested without incident and taken into custody by the Gatlinburg police department where he confessed to murdering the Larkes and kidnapping and shooting Becky. He admitted that he intended to kill Becky and then kill himself. Officers from Greenville arrived to transfer him back to Greenville, but, at Sigmon's request, they took his statement before leaving Tennessee. He again confessed to his crimes and stated his plan had been to kill Becky and himself.

Sigmon was indicted for two counts of murder; assault and battery with intent to kill; kidnapping and possession of a firearm during the commission of a violent crime; first degree burglary; and grand larceny. The case proceeded to trial only on the murder and first degree burglary charges. Sigmon conceded guilt and presented no evidence in his defense. The State presented expert testimony that both of the Larkes died as a result of blunt force trauma to the head, describing the severity of their wounds. Both sustained nine lacerations to the head, causing hemorrhaging and filling the sinuses with blood, so that they were breathing in blood as they died. It was estimated that both lived for three to five minutes before dying from their wounds. Additionally, both sustained defensive wounds to their forearms. The jury ultimately found Sigmon guilty.

During the penalty phase, the defense presented testimony regarding Sigmon's mental state, such as his issues with childhood abandonment and neglect that affected the development of his social mores and overall judgment, as well as evidence of an extensive history of drug use stemming from his "recurrent major depressive disorder" or his "chemical dependency disorders." Sigmon additionally presented evidence that he was adapting to prison life and that he was not a problematic or difficult prisoner. Sigmon testified he was sorry for the crimes and admitted he probably deserved to die.

The court charged the jury to consider three factors in aggravation: that two or more persons were killed, that the murder was committed during the commission of a burglary, and that the murder was committed with physical torture. It also charged the jury to consider four statutory mitigating circumstances: that the defendant had no prior history of criminal convictions involving the use of violence against another person; the murder was committed while the defendant was under the influence of emotional or mental disturbance; the capacity of the defendant to appreciate the criminality of his conduct, or conform his conduct to the law was substantially impaired; and the defendant was provoked by the victim. Although Sigmon requested a charge on the statutory mitigating circumstance of age or mentality, the judge declined to give that charge, noting mental state would be covered by the other mitigating circumstances he charged.

The jury ultimately sentenced Sigmon to death. On direct appeal, this Court affirmed Sigmon's convictions and sentences. *Sigmon*, 366 S.C. 552, 623 S.E.2d 648. Sigmon subsequently filed an application for PCR. The State filed a return and motion to dismiss, and Sigmon amended his application, arguing his counsel provided ineffective assistance in failing to properly preserve various issues for appellate review, failing to adequately present evidence of his mental state, and attempting to blame the victims for the crimes. Sigmon moved for summary judgment, submitting depositions of his trial attorneys. At the hearing, the PCR court ultimately dismissed Sigmon's application. We granted Sigmon's petition for a writ of certiorari on the following issues:

I. Did the PCR court err in failing to find trial counsel ineffective when they failed to object to the solicitor's reference to his own opinion of the death penalty during his closing statement?

II. Did the PCR court err in finding trial counsel was not ineffective for failing to argue that the trial court was required to charge the jury on the statutory mitigating factor of the age and mentality of the defendant at the time of the crime under Section 16-3-20(C)(b)(7) of the South Carolina Code (2003) because evidence in the record showed Sigmon was intoxicated during the commission of the crimes?

III. Did the PCR court err in failing to find trial counsel ineffective for failing to object to the trial court's charge on non-statutory mitigation?

STANDARD OF REVIEW

To prevail in a PCR action, an applicant must satisfy a two prong test: he must first show his counsel's performance fell below an objective standard of reasonableness, and he is then required to prove he suffered prejudice as a result of counsel's deficient performance. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "However, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted).

When a defendant challenges a death sentence, prejudice is established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Rhodes v. State*, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

The applicant in a PCR hearing bears the burden of establishing his entitlement to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). We will uphold the PCR court's findings if supported by evidence of probative value within the record and we will only reverse where there is an error of law. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

LAW/ANALYSIS

I. CLOSING ARGUMENT

Sigmon argues the trial court erred in not finding his counsel ineffective for failing to object to the State's closing arguments because the Solicitor expressed his own opinion as to why the death penalty was the appropriate punishment and thereby injected an arbitrary factor into the proceedings in violation of the Eighth Amendment and Section 16-3-25(C)(1) of the South Carolina Code (2003). We disagree.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor . . . ." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 338, 503 S.E.2d at 166-67.

During his closing argument, the solicitor stated:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.* And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.
>
> ….
>
> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

(emphasis added). Trial counsel did not object.

When deposed for the PCR hearing, counsel stated he considered this personal reference inappropriate, and it was his understanding that such statements would be inadmissible. He further noted that if he had not objected to it, it was either because he "missed it or was oblivious." Nevertheless, the PCR court concluded that the statements would not justify an objection because they did not diminish the role of the jury in rendering a death sentence nor were they inflammatory. Instead, it found the closing argument was overall tailored to the facts within the record regarding the specific crimes at issue.

Although within this portion of the closing the solicitor appears to be asking the jurors to accord some weight to his determination of the appropriateness of the death penalty, we do not believe the statements are objectionable within the context of his entire argument. Sigmon relies on *Woomer* in arguing that the comments were inadmissible. In *Woomer*, we reversed a death sentence on direct appeal where the solicitor's argument plainly attempted to minimize the jurors' sense of responsibility in choosing death. *Woomer*, 277 S.C. at 175, 284 S.E.2d at 360. We held the solicitor's statements were inadmissible because he repeatedly stated that he himself had undertaken the same difficult process. Specifically, he stated:

> [T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.

Id. at 175, 284 S.E.2d at 359. Unlike the statements in that case, we do not find the solicitor's comments here diminished the role of the jury in sentencing Sigmon to death. Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence. His statements were not designed to diminish the jury's role and therefore, did not result in the prejudice identified in *Woomer*.

Instead, we find the statements more akin to those we upheld on direct appeal in *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990), where the solicitor told the jury that "if this [wasn't] a case in which a jury should impose the death

penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none." *Id.* at 33, 393 S.E.2d at 372 (alterations in original). He further implored the jury to "do what is right," stating "if it was not right in this case, it was never right." We held that these statements were easily distinguishable from the statements in *Woomer*, noting they did not lessen the role of the jury in sentencing death by mentioning the solicitor's role in the process and did not contain the solicitor's personal opinions. As *Bell* illustrates, the solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury.

Furthermore, examining the closing argument as a whole, we find the solicitor often emphasized the important role the jury played in determining the appropriate sentence. He acknowledged that this was a "tough decision for [it] to have to make" but that it was "a responsibility that the government places upon its citizens." Although Sigmon makes much of the solicitor's frequent references to the fact that he represented the State, we fail to discern the error. The jurors were aware the State brought the charges against Sigmon and knew the State was asking for the death penalty. It is reasonable to assume that the jury therefore inferred that the solicitor believed death was the appropriate sentence.

II. STATUTORY MITIGATING CIRCUMSTANCES

Sigmon also argues his trial counsel were ineffective in failing to obtain a charge on the statutory mitigating circumstance of age or mentality because evidence at trial established he was intoxicated at the time of the murders. We disagree.

We have held that where there is evidence that the defendant was intoxicated at the time the crime was committed, the trial judge is *required* to submit the mitigating circumstances in section 16-3-20(C)(b)(2), (6), and (7). *State v. Vasquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). Sigmon contends evidence in the record clearly demonstrates he was intoxicated at the time of the murders and his trial attorneys were ineffective for not making this argument to obtain the charge of statutory mitigation for age or mentality. However, we find

there is evidence of probative value supporting the PCR court's finding that Sigmon was not intoxicated at the time of the murders.

During the penalty phase, counsel requested a charge pursuant to section 16-3-20(C)(b)(7) on "the age or mentality of the defendant at the time of the crime" based on the evidence presented as to Sigmon's mental state at the time of the murders. This mitigating circumstance would be in addition to the other mitigating circumstances the court charged under section 16-3-20(C)(b): that (1) "[t]he defendant has no significant history of prior criminal conviction involving the use of violence against another person;" that (2) "[t]he murder was committed while defendant was under the influence of mental or emotional disturbance;" (6) that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" and that (8) "[t]he defendant was provoked by the victim into committing the murder." The trial court declined to charge (7), concluding any inference from mental state was encapsulated in (6).

In his deposition for Sigmon's PCR hearing, trial counsel admitted that upon reading the statute anew, it did appear that subsection (7) was substantively different from subsection (6), but also stated he had "no knowledge or memory of distinction on these issues then or now." He further stated that at trial he thought "the facts were the thing that would carry the day, not any charge [the court] happened to give about mitigation." The PCR court ultimately found there was insufficient evidence of intoxication at the time of the crime to require charges pursuant to section 16-3-20(C)(b)(2), (6), and (7) and thus found that it was not ineffective assistance to only obtain charges on (2) and (6).

Although the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes. At trial, Sigmon presented evidence through testimony of Strube and Dr. Morton that the night before he committed the crimes he smoked crack cocaine and consumed alcohol. Dr. Morton testified that given Sigmon's history of drug use, the effect of the substances could last up to twenty-eight days. However, his testimony focused on Sigmon's other mental instabilities, such as his recurrent major depressive disorder and his chemical dependency disorders, and their psychological effects; it did not pertain to whether Sigmon was intoxicated at the time of the crime. Furthermore, Strube testified that on the night before the murders, he and Sigmon were smoking crack cocaine and drinking beer, but ran

out of crack at some point in the evening, and Strube went to sleep. Although this supports the conclusion that Sigmon ingested crack and alcohol in the evening and possibly into the early morning, it does not necessarily indicate Sigmon was still intoxicated when he entered the Larkes' home the next morning.

Additionally, trial counsel stated in his deposition that he did not attribute Sigmon's behavior to intoxication, but to psychological problems. He noted Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up, stating Sigmon was "wound up like a top when he committed this crime." When asked whether he considered the drug and alcohol use as evidence of Sigmon's intoxication at the time the crimes were committed, counsel responded, "I absolutely cannot tell you whether we considered intoxication . . . I don't remember ever thinking he was drunk."

Thus, the record supports the PCR court's finding that Sigmon was not intoxicated at the time of the murders, and therefore his attorneys were not ineffective for failing to argue that his intoxication warranted the charge of mitigating factor (7).

III. NON-STATUTORY MITIGATING FACTORS CHARGE

Sigmon finally argues trial counsel was ineffective for failing to object to the trial court's instructions on non-statutory mitigating circumstances because the charge disparaged the legitimacy of this type of evidence. We disagree.

"A jury instruction must be viewed in the context of the overall charge." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991). "The sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death." *Id.* at 19, 406 S.E.2d at 170.

During the sentencing phase of the trial, the court charged the jury to consider non-statutory factors of mitigation as follows:

> [A] mitigating circumstance is neither a justification or [sic] an excuse for the murder. It's [sic] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable.
>
> ….
>
> A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.

Sigmon argues the instructions improperly narrowed the evidence the jury would consider in mitigation to factors relating specifically to the crime, to the exclusion of other evidence presented, such as Sigmon's adaptability to prison life, acceptance of responsibility for his actions, and remorse for the crimes.

However, Sigmon analyzes this language in isolation. The court's overall charge to the jury included the instruction that the jury could consider:

> whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all . . . . In other words you may choose a sentence of life imprisonment if you find a statutory or non-statutory mitigating circumstance, or you may choose a sentence of life imprisonment as an act of mercy.

Thus, the court clearly indicated the jury's power to consider any circumstance in mitigation, and a reasonable juror would have known he could consider *any* reason in deciding whether to sentence Sigmon to death. We further disagree with Sigmon's contention that the charge effectively reduced the weight of non-statutory circumstances. The court did not describe those circumstances as "not provided for by law," as Sigmon contends, but instead simply distinguished them from the statutory circumstances by stating they were "not provided for by statute." The qualification seems to have been added for clarity, not to inject a hierarchy into mitigating circumstances. We therefore find trial counsel were not ineffective for not objecting to the charge.

CONCLUSION

We find Sigmon has not presented evidence that he was afforded ineffective assistance of counsel. In light of this conclusion, it is not necessary for us to reach the second prong of prejudice in analyzing Sigmon's entitlement to PCR. Accordingly, we affirm the PCR court's dismissal of Sigmon's application for post-conviction relief.

TOAL, C.J., BEATTY AND KITTREDGE, JJ, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Steven Louis Barnes, Petitioner.

Appellate Case No. 2011-186426

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Edgefield County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27234
Heard January 9, 2013 – Filed March 20, 2013

REVERSED AND REMANDED

Appellant Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Deputy Attorney General David A. Spencer, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

PER CURIAM: We granted certiorari to review an unpublished Court of Appeals' decision which affirmed the trial court's decision to have a twice deadlocked jury continue to deliberate. *State v. Barnes*, Op. No. 2010-UP-427 (S.C. Ct. App. filed October 11, 2010). We agree with petitioner that the trial court's decision violated the mandate of S.C. Code Ann. § 14-7-1330 (1976) and that the Court of Appeals erred in affirming his direct appeal, and now reverse and remand for a new trial.

FACTS

Petitioner was convicted of throwing urine on a jailor in violation of S.C. Code Ann. § 24-13-470 (2007) and received a fifteen-year sentence consecutive to the sentence he was then serving. After a one-day trial, the jury commenced deliberations at 4:42 pm. At 4:45 pm, the jury sent a note asking for a laptop.[1] After being provided with the computer, the jury foreman sent a note informing the court that the jury could not reach a verdict, and the jury returned to the courtroom at 5:38 pm. The judge, without objection, gave the jury an *Allen*[2] charge and the jury again retired at 5:45 pm.

At 6:14 pm, the judge reported receiving another note from the jury, this time requesting a recharge on direct and circumstantial evidence. After the charge, the jury retired at 6:29 pm.

Around 6:44 pm, the judge and attorneys began discussing another note sent by the jury foreman. In this note, the foreman wrote, "Eleven to one,[3] they are not going to change their mind," and "One not guilty, lock [sic], will not change their vote." The trial judge asked each attorney to state his position. The solicitor said, "I don't know if the foreman would believe in a further attempt or not. It might be worthy of discussion." Petitioner's attorney disagreed, saying:

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[1] This was to enable the jury to view a brief video tape that had been entered into evidence.

[2] *Allen v. United States*, 164 U.S. 492 (1896).

[3] We remind trial judges to inform juries that they are not to reveal the jury's numerical division.

> My position is they have been in there plenty of time. They have been back. They are not requesting any further instruction at this point.[4] They have already stated that this particular individual isn't going to change his mind. It would be extremely unfair to my client to send them back.

The judge decided to inquire further.

In the course of speaking to the jury, the judge stated:

> [Y]ou have been out for some three hours, and it's obvious that you have worked very diligently and very focused on the task at hand[5] . . . . I would have no problem whatsoever to releasing y'all from your service tonight and asking you to return in the morning . . . . That is the absolute option that I would choose to take. Sometimes I forget I'm a judge, **so I know I can order it**, but at the same time y'all are the judges of the facts in the case. **I don't want to necessarily dictate that**. But would y'all be amenable to that? . . . . would you discuss that with your fellow jurors? Do you think that would be an option, Mr. Foreman?
>
> (emphasis supplied.)

The foreman responded, "Based on the discussions in the office back there, you have the numbers, and I don't think the other person will be able to change his mind." Despite this response, the trial judge declined to declare a mistrial and excused the jury for the night. After the jury was excused, the judge permitted the parties to put anything they wished on the record. Petitioner's attorney indicated disagreement with the judge's decision since the foreman had indicated "he didn't think it would be fruitful to deliberate any further."

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[4] This is a reference to § 14-7-1330 which provides a jury that returns deadlocked a second time and does not ask for "explanation of law" may not be required to continue to deliberate unless the jury consents.

[5] This appears to be a finding that the jury had engaged in "due and thorough deliberation" which is a prerequisite to the applicability of § 14-7-1330.

The next day the jury returned a guilty verdict. Following their dismissal, the judge explained his decision with reference to § 14-7-1330. On appeal, petitioner raised the issue whether the trial judge had violated the statute, and the Court of Appeals affirmed.

ISSUE

> Did the Court of Appeals err in affirming the trial judge's decision not to grant a mistrial in light of § 14-7-1330?

ANALYSIS

Section 14-7-1330 provides:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of law.

Here, the trial judge found that the jury had not indicated that they were unwilling to continue deliberations and concluded, apparently based on the fact that they had returned the next morning as instructed, that "[o]bviously they were not" unwilling. Accordingly, we are asked to decide whether the trial judge erred in finding that the jury had consented to continued deliberations after they returned deadlocked at 6:44 pm. We find that he did, and reverse and remand for a new trial.

Section 14-7-1330 is intended "to prevent forced verdicts, and to prevent undue severity of jury service." *State v. Freely*, 105 S.C. 243, 89 S.E. 643 (1916). While there is no requirement that the judge inform the jury that its consent is necessary, we do not permit coercion. *See* cases collected in *Buff v. South Carolina Dep't of Transp.*, 342 S.C. 416, 537 S.E.2d 279 (2000). In *Buff*, we held that after the judge has *diplomatically* discussed with the twice deadlocked jury whether further deliberations would be beneficial, the jury's consent to continue is determined by its response. Here, the judge appears to have inadvertently coerced the jury when

he indicated that he could order the jury to continue to deliberate. In the context of this case, we view the foreman's diplomatic response, that is, that he did not think that further deliberations would be fruitful, as manifesting a lack of consent. That the jury did in fact return the next day does not convince us that this jury manifested consent through its conduct, especially in light of its having been told that the judge would order continued deliberations if necessary.

CONCLUSION

The trial judge abused his discretion in finding that petitioner's jury consented to continued deliberations as required by § 14-7-1330, and therefore erred in declining to declare a mistrial; and the Court of Appeals erred in affirming that decision. Petitioner's conviction and sentence are reversed, and the case remanded for a new trial.

REVERSED AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of Ajernal Danley, Deceased

Appellate Case No. 2013-000472

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), the Office of Disciplinary Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

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

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Danley, shall serve as notice to the bank or other financial institution that Joseph Preston Strom, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Joseph Preston Strom, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Danley's mail and the authority to direct that Mr. Danley's mail be delivered to Mr. Strom's office.

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

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

March 8, 2013

The Supreme Court of South Carolina

In the Matter of Philip Earle Williams, Respondent.

Appellate Case No. 2013-000521

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) and (c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has filed a return asking that the suspension be postponed , stating he is "in the process" of providing the subpoenaed documents.

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

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

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

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

Mr. Potts' appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

March 15, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roosevelt Simmons, Appellant,

v.

Berkeley Electric Cooperative Inc., and St. John's Water Company, Inc., Respondents.

Appellate Case No. 2011-192409

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5099
Heard January 8, 2013 – Filed March 20, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Edward A. Bertele, of Charleston, for Appellant.

John B. Williams, of Williams & Hulst, LLC, of Moncks Corner, for Respondent Berkeley Electric Cooperative, Inc., and Jeffrey C. Moore, of Legare Hare & Smith, of Charleston, for Respondent St. Johns Water Company, Inc.

KONDUROS, J.: Roosevelt Simmons appeals the master-in-equity's grant of summary judgment in favor of Berkeley Electric Cooperative, Inc. (Berkeley Electric) and St. John's Water Company, Inc. (St. Johns Water) in this action

regarding utility easements over his property. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

In 2003, Simmons acquired title to two parcels of land in Charleston County, TMS #283-00-00-498[1] and TMS #282-00-00-135. The two parcels are separated by Kitford Road. In 1956, Simmons's predecessor in interest, Edward Heyward, granted a seventy-five-feet-wide easement to Berkeley Electric for the "construction and maintenance of an electric transmission line or lines, towers, poles, anchors and necessary fixtures and wires attached thereto . . . ." The easement runs north to south over the northeast corner of -498. In 1972, a subsequent owner of the property, Edward Brown, granted Berkeley Electric a second easement "to place, construct, operate, repair, maintain, relocate, and replace thereon in or upon all streets, roads, or highways abutting said lands and electric transmission or distribution line or system . . . " This easement gave permission to again cross -498. According to Simmons, power lines cross -135 twice and -498 twice and unreasonably affect his ability to sell or use his property.

St. John's Water installed a water main along Kitford Road between 1977 and 1978 to service customers in that area. The water main was placed there after the water company sought and was granted an encroachment permit from Charleston County. A portion of the water main runs under -498. Simmons stated that in 2003 he was walking on -135 when he discovered water meters. This prompted him to contact St. John's Water, which indicated the water main had been in its current location for more than twenty years and customers living around Simmons's property who received water service had granted easements for lines to tap into the water main. Simmons indicated he was not aware of the location of the water main or the existence of any water lines on his property because the lines are

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[1] Simmons lost title to tract -498 in 2010, a matter that is being litigated. St. John's Water mentions this issue in its brief in a conclusory manner. We decline to address it as a possible additional sustaining ground. *See Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 252 n.3, 734 S.E.2d 161, 164 n.3 (2012) (deeming conclusory and unsupported claims abandoned); *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

underground, and the meters were covered by brush and unflagged. He further indicated his home uses well water.

Simmons filed a complaint alleging trespass and unjust enrichment and seeking a declaratory judgment that neither utility had any property rights with respect to his land. Berkeley Electric and St. John's Water filed motions for summary judgment, each arguing it had an easement over Simmons's property, thereby defeating his claims. The matter was referred to the master-in-equity for a determination of the existence of any easements but reserving the issue of damages for the circuit court should Simmons prevail.

After considering the motions and arguments, the master concluded Berkeley Electric had been granted an express easement and Simmons produced no evidence it had exceeded the scope of that easement. The master further concluded that even if Berkeley Electric had somehow exceeded the scope of the easement, the current situation had existed openly for more than twenty years, entitling Berkeley Electric to a prescriptive easement to maintain the lines and poles in their present location. Consequently, the master dismissed Simmons's claims against Berkeley Electric.

With respect to St. Johns Water, the master concluded it had an express easement to establish the water line under Simmons's property. He further found that even if it did not have an express easement, St. John's Water had acquired a prescriptive easement via the continuous use of the water main for more than twenty years and because the existence of the water main was obvious to any surrounding landowner demonstrating a minimal amount of diligence. Accordingly, the master dismissed Simmons's claims against St. John's Water. This appeal followed.

STANDARD OF REVIEW

A trial court may grant a party's motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the

light most favorable to the non-moving party." *David McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002).

LAW/ANALYSIS

I. Berkeley Electric

A. Consideration of Express Easement

Simmons contends the master erred in granting summary judgment to Berkeley Electric on an express easement theory because the argument was not part of its summary judgment motion and contrary to the order of reference. We disagree.

The record illustrates the matter of whether Berkeley Electric held an express easement was argued at the summary judgment hearing without objection. Issues not raised by the pleadings but tried by the consent of the parties are treated as if they had been raised in the pleadings. *See* Rule 15(b), SCRCP. Therefore, we conclude this issue is without merit.

Additionally, the order of reference to the master specifically indicated that the issue of "both prescriptive and/or express" easements would be considered by the master. Therefore, we find this contention to be meritless as well.

B. Consideration of Scope of Express Easement

Simmons argues the master erred in granting summary judgment to Berkeley Electric finding it did not exceed the scope of its express easements because that issue was not part of its summary judgment motion, the issue was contrary to the order of reference, and the decision was not based upon evidence in the record. We disagree.

The scope of the express easement held by Berkeley Electric was argued and considered at the summary judgment hearing without objection. Consequently, the matter was treated by the master if it had been raised in the pleadings. *See* Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Furthermore, the order of reference was broadly worded to cover issues relating not only to the existence of an easement, but its scope as well. The fact that the only issue reserved for the circuit court was damages also demonstrates that all issues related to the existence and use of any easement were before the master.

C. Scope of Express Easement

Simmons next maintains the master erred in granting summary judgment to Berkeley Electric finding it did not exceed the scope of its express easements because issues of fact regarding the scope of the easements were disputed. We disagree.

"The language of an easement determines its extent." *Plott v. Justin Enters.*, 374 S.C. 504, 513, 649 S.E.2d 92, 96 (Ct. App. 2007) (quoting *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct. App. 2001)). "'The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it.'" *Id.* at 514, 649 S.E.2d at 96 (quoting *Smith v. Comm'rs of Pub. Works of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994)). "The intention of the parties must be determined by a fair interpretation of the grant or reserve creating the easement." *Springob v. Farrar*, 334 S.C. 585, 595, 514 S.E.2d 135, 141 (Ct. App. 1999) (Anderson, J. dissenting). "It is not essential to the validity of a grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement." *Binkley*, 348 S.C. at 72, 558 S.E.2d at 909 (quoting 28A C.J.S. *Easements* § 54, at 233 (1996)).
The express easements to Berkeley Electric were broad. However, the original parties to the easements could have used more specificity if they intended the use to be more restricted. The evidence presented established the electric lines had been in their current configuration for an extended period of time. This demonstrates the easement holder and the landowners' understanding that such configuration did not exceed the intended scope of the easements. Additionally, the affidavit of Robert Bradley, a right-of-way agent for Berkeley Electric,

indicated the power lines did not exceed the scope of the easement. Therefore, we conclude the master did not err in finding Berkeley Electric had not exceeded the scope of the easements.

D. Affidavit of Robert Bradley

Simmons contends the master further erred in granting summary judgment to Berkeley Electric that it did not exceed the scope of its express easements because it relied on an affidavit that was not properly before the court. We disagree.

"As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 241, 616 S.E.2d 431, 435 (Ct. App. 2005). "The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision." *Id.* at 242, 616 S.E.2d at 435.

At the summary judgment hearing, Berkeley Electric presented the affidavit of Robert Bradley who stated the pole and power lines on Simmons's property did not go outside the seventy-five-foot easement. Simmons objected to the introduction of this affidavit arguing it was improper because it was "new matter." The thrust of Simmons's argument on appeal is that moving parties cannot serve reply affidavits at the summary judgment stage and that Bradley's affidavit contained information Berkeley Electric could have submitted with its initial summary judgment motion.

Rule 6(d) of the South Carolina Rules of Civil Procedure addresses the time for reply affidavits to be filed. "The moving party may serve reply affidavits at any time before the hearing commences." Rule 6(d), SCRCP. Bradley's affidavit was served at the Monday summary judgment hearing after Simmons's opposing affidavits were faxed to Berkeley Electric the preceding Friday afternoon. Under the circumstances, the master's consideration of Bradley's affidavit was not an abuse of discretion. Furthermore, the affidavit is not mentioned in the master's order so no clear evidence was presented that the master relied on the affidavit. Additionally, in Simmons's complaint, he did not allege Berkeley Electric exceeded the scope of the express easement it had been granted. His allegation was that the easement was unauthorized. The issue of whether power lines encroached outside the easement was not specifically asserted until Simmons's memorandum in opposition to Berkeley Electric's summary judgment motion was

filed. Therefore, Bradley's affidavit in reply, expressing an opinion as to the scope of the easement, was responsive. Based on all of the foregoing, we conclude the master did not err in considering Bradley's affidavit.

E. Proof of Prescriptive Easement[2]

Next, Simmons argues the master erred in granting summary judgment to Berkeley Electric on a prescriptive easement because issues of fact were disputed, he improperly weighed the evidence instead of finding there were disputes of material fact, and clear and convincing evidence was lacking. We disagree.

"An easement is a right given to a person to use the land of another for a specific purpose. An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription." *Kelly v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012). "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). "To establish a prescriptive easement the party asserting the right must show: (1) continued and uninterrupted use of the right for twenty years; (2) the identity of the thing enjoyed; and (3) use which is either adverse or under a claim of right." *Kelly*, 396 S.C. at 572, 722 S.E.2d at 817 (citing *Horry Cnty. v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993)). "To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use." *Id.* (quoting *Jones v. Daley*, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005)). "The party claiming a prescriptive easement bears the burden of proving all of the elements." *Id.*

Berkeley Electric presented affidavits of two long-time Berkeley Electric employees stating the power lines had been in place in the current configuration for a period of more than twenty years. In rebuttal, Simmons presented a 1981 plat, which did not show all of the power lines currently existing on his property. However, this plat was not for purposes of identifying the location of power lines or features on Simmons's property. The plat related to a neighboring owner deeding a fifty-foot right-of-way to the public and the subdivision of the property. Simmons also submitted a 1983 plat performed for Berkeley Electric that does not show all of the current power lines. However, again, this plat was not of

[2] This analysis combines Simmons's issues 5, 6, and 7 on appeal.

Simmons's property and does not purport to establish the location of all power lines. After reviewing the record, we agree with the master's conclusion that these plats did not provide contradictory evidence to the Berkeley Electric employee affidavits. Additionally, Simmons did not state in his affidavit the lines were not there during that period based on his own personal knowledge. We conclude Simmons's evidence does not raise the required scintilla of evidence to create a genuine issue of fact on this point. Additionally, the lines and poles were open and obvious and were made under a claim of right via the easements granted by previous owners. Therefore, we affirm the master's finding a prescriptive easement in Berkeley Electric's favor.

II. St. John's Water

A. Consideration of and Ruling on Express Easement

Simmons maintains the master erred by granting summary judgment to St. John's Water on an express easement because evidence was lacking and it was not requested by St. John's Water in its motion. We agree in part and disagree in part. This issue was argued by the consent of the parties at the summary judgment hearing. *See* Rule 15(b), SCRCP (issues not raised by the pleadings but tried by consent of the parties shall be treated as if they had been raised in the pleadings). However, Simmons's argument that the master erred in concluding at the summary judgment stage that St. John's Water had an easement across -498 for water lines is persuasive. The only party who could give an express easement to St. John's Water to cross -498 or -135 would be the landowner. St. John's Water presented no evidence and did not argue this was done. Therefore, we conclude the master erred in finding St. John's Water held an express easement to install the water main or water lines on Simmons's property.

B. Prescriptive Easement[3, 4]

[3] Simmons's issue 11 appears to arise from the order prepared by counsel for St. John's Water. It alludes to customer affidavits, but the record does not establish that any customer affidavits were presented at the summary judgment hearing. We do not rely on customer affidavits in reaching our decision in this case, and this apparent error in the written order does not prejudice Simmons. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

Finally, Simmons argues the master erred in granting summary judgment to St. John's Water on the basis of a prescriptive easement and dismissing his claims. We agree in part and disagree in part.

A trial court may grant a party's motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 362, 563 S.E.2d at 333.

With respect to the first requirement for a prescriptive easement, St. John's Water presented undisputed evidence a water main was placed along Kitford Road between 1977 and 1978 to service residents in the area. The affidavit of Hugh S. Miley, Jr., an engineer involved in the design, permitting, and installation of the water main, indicates the water main has remained in that location since that time, and a map illustrating the planned installation of pipe shows the water main running under -498. Consequently, St. John's Water established the water main had been in place under -498 and continuously used by the company for the required twenty-year period. Furthermore, St. John's Water established the water main was installed under a claim of right. Miley's affidavit demonstrates his belief that the encroachment permits obtained from Charleston County covered the installation of the water main as illustrated on the map. The fact the claim may have been based on a mistake does not negate the claim of right required to establish a prescriptive easement. *See Loftis v. S.C. Elec. & Gas Co.*, 361 S.C.

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[4] This analysis combines Simmons's issues 9, 10, and 12 on appeal.

434, 440, 604 S.E.2d 714, 717 (Ct. App. 2004) (finding a utility's mistaken belief it had a valid right of way to use property could constitute a "claim of right" sufficient to establish a prescriptive easement).

However, the record is unclear as to whether additional water lines allowing neighboring residents to tap into the water main are on Simmons's property and if so, how long they have been in place. Simmons asserted water lines of some type run under -135 because he located a water main there and the blue flags placed by St. John's Water after his complaint were on both -498 and -135. In its brief, St. John's Water contends no lines are located on -135 and argues this is established by a survey performed by the water company in 2008. This survey shows the location of the water main. However, the survey does not show parcel -135, nor is it clear that it addresses whether lines supplying neighboring parties cross -498. Therefore, based on Simmons's assertion that additional water lines are on -498 and -135 and a paucity of evidence as to whether that is true, a genuine issue of fact existed as to what water lines, besides the water main, are on his property and how long they may have been there. Consequently, we affirm the partial grant of summary judgment to St. John's Water that it established a prescriptive easement on Simmons's property for the water main installed between 1977 and 1978. However, any remaining claims Simmons has that St. John's Water has further trespassed on his property with additional water lines should not have been dismissed at the summary judgment stage.

CONCLUSION

We affirm the master's grant of summary judgment in favor of Berkeley Electric on the basis that it was granted an express easement over Simmons's property and that it had established a prescriptive easement for the power lines in their current configuration. We reverse the master's finding that St. John's Water had an express easement to cross Simmons's property, and affirm his determination that St. John's Water established a prescriptive easement, but only as to the water main. Consequently the master's ruling is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina, Respondent,

v.

Martin Policao, Defendant,
and A AAA Bail Bonds, Appellant,
and American Surety, Appellant.

The State of South Carolina, Respondent,

v.

Robin Cardenas, Defendant,
and A AAA Bail Bonds, Appellant,
and American Surety, Appellant.

The State of South Carolina, Respondent,

v.

Fernando Nunez, Defendant,
and A AAA Bail Bonds, Appellant,
and Bankers Insurance, Appellant.

The State of South Carolina, Respondent,

v.

Edwin Quijivix, Defendant,
and A AAA Bail Bonds, Appellant,
and American Surety, Appellant.

Appellate Case No. 2011-194306

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5100
Heard January 10, 2013 – Filed March 20, 2013

AFFIRMED

S. Jahue Moore and John C. Bradley, Jr., both of Moore, Taylor & Thomas, P.A., of West Columbia, for Appellants.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PIEPER, J.: This appeal arises out of four separate orders for bond estreatment. On appeal, Appellants A AAA Bail Bonds, American Surety, and Bankers Insurance (collectively "Appellants") argue that: (1) the trial court abused its discretion by ignoring the clear and unambiguous language of South Carolina Code section 17-15-170 (Supp. 2012) and ordering estreatment; (2) the trial court's orders of estreatment are based upon errors of law; (3) the State's efforts to estreat the bonds are barred by the equitable doctrine of laches; and (4) the trial court abused its discretion by failing to consider the factors in *Ex parte Polk*, 354 S.C. 8, 579 S.E.2d 329 (Ct. App. 2003) prior to ordering estreatment. We affirm.

FACTS

On November 19, 2008, Martin Policao was arrested by the Hanahan Police Department and charged with resisting arrest and assault upon a police officer.

Policao was released from custody pursuant to a $20,000 surety bond issued by Appellants. On January 22, 2009, Policao failed to appear at court, and a bench warrant was issued for his arrest.

On December 3, 2007, Edwin Joel Quijivix was arrested by the Hanahan Police Department and charged with possession of cocaine. Quijivix was released from custody pursuant to a $7,500 surety bond issued by Appellants. On April 17, 2008, Quijivix failed to appear at court, and a bench warrant was issued for his arrest.

On August 16, 2009, Fernando Nunez was arrested by the Hanahan Police Department and charged with unlawful carrying of a pistol. Nunez was released from custody pursuant to a $2,500 surety bond issued by Appellants. On October 26, 2009, Nunez failed to appear at court, and a bench warrant was issued for his arrest.

On April 8, 2009, Robin Annette Cardenas was arrested by the Hanahan Police Department and charged with drug possession and violation of the habitual traffic offender statute. Cardenas was released from custody pursuant to a $14,000 surety bond issued by Appellants. On April 19, 2010, Cardenas failed to appear at court, and a bench warrant was issued for her arrest.

On April 5, 2011, an assistant solicitor issued notices of forfeited recognizance for Policao, Quijivix, Nunez, and Cardenas (collectively "Defendants"). On May 19, 2011, after an estreatment hearing, the trial court issued orders of estreatment for the full amount of each bond. On June 16, 2011, Appellants received written notice of the orders of estreatment. Appellants timely filed their notice of intent to appeal the orders of estreatment. Pursuant to an order of consolidation, these matters were consolidated for purposes of appeal.

STANDARD OF REVIEW

The trial court's estreatment of a bond forfeiture will not be set aside unless there has been an abuse of discretion. *State v. Lara*, 386 S.C. 104, 107, 687 S.E.2d 26, 28 (2009). "An abuse of discretion occurs when the circuit court's ruling is based on an error of law." *Id.*

LAW/ANALYSIS

I. Statutory Compliance

Appellants argue the trial court erred by ordering estreatment of the bonds when the State did not immediately issue an estreatment notice ninety days after the issuance of the bench warrant, as Appellants contend is required by section 17-15-170. Specifically, Appellants allege that if the State had issued the notice of estreatment ninety days after the bench warrant had been issued, Appellants were more likely to have had the Defendants in custody. Appellants assert that because the notice of estreatment was not immediately given, they were unable to adequately protect their interests. We disagree.

Any person charged with a noncapital offense shall "be ordered released pending trial on his own recognizance without surety in an amount specified by the court, unless the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, or unreasonable danger to the community will result." S.C. Code Ann. § 17-15-10(A) (Supp. 2012). Also, "the circuit court judge must impose bond conditions which are sufficient to protect a victim from harassment or intimidation by the defendant or persons acting on the defendant's behalf." S.C. Code Ann. § 16-3-1525(I)(3) (2003). The court may impose certain conditions upon release, including the "execution of an appearance bond in a specified amount with good and sufficient surety or sureties approved by the court." § 17-15-10(A)(1). In lieu of requiring the entire bond amount, "the court setting bond may permit the defendant [or surety] to deposit in cash with the clerk of court an amount not to exceed ten percent of the amount of bond set." S.C. Code Ann. § 17-15-15(a) (2003). When the court permits the ten percent cash deposit and the defendant fulfills the condition of the bond, the cash deposited with the clerk of court shall be returned to the defendant or surety, except for cases where the defendant is required by the court to make restitution to the victim of his crime. § 17-15-15(a),(c). In those cases, such deposit may be used for the purpose of such restitution. § 17-15-15(c).

When a defendant defaults on the conditions of the bond by his or her failure to appear, the liability of the surety becomes conditionally fixed. *Pride v. Anders*, 266 S.C. 338, 340, 223 S.E.2d 184, 185 (1976). Upon the defendant's failure to appear, the court shall issue a bench warrant for the defendant and make available for pickup by the surety or its representative a true copy of the bench warrant

within seven days of its issuance at the clerk of court's office. S.C. Code Ann. § 38-53-70 (Supp. 2012). If the surety fails to surrender the defendant within ninety days of the issuance of the bench warrant, the bond is forfeited. *Id.*

Upon forfeiture of the bond, "the Attorney General, solicitor, magistrate, or other person acting for him immediately shall issue a notice to summon every party bound in the forfeited recognizance to appear at the next ensuing court to show cause, if he has any, why judgment should not be confirmed against him." § 17-15-170. At this bond estreatment hearing, if the surety does not give a sufficient reason for failing to perform the condition of the recognizance, then the judgment on the recognizance is confirmed. *Id.* At any time before the judgment is confirmed against a defendant or surety, "the court may direct that the judgment be remitted in whole or in part, upon conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment." § 38-53-70. When the court makes a determination as to the remission of the judgment, the court shall consider the costs to the State "resulting from the necessity to continue or terminate the defendant's trial and the efforts of law enforcement officers or agencies to locate the defendant." *Id.* The court may permit the surety to pay the estreatment in installments for a period of up to six months. *Id.* "If at any time during the period in which installments are to be paid the defendant is surrendered to the appropriate detention facility and the surety complies with the recommitment procedures, the surety is relieved of further liability." *Id.*

In *State v. Cornell*, 70 S.C. 409, 412, 50 S.E. 22, 23 (1905), our supreme court applied the 1902 version of the estreatment statute, which provided:

> Whenever such recognizance shall become forfeited by non-compliance with the condition thereof, the Attorney General, or Solicitor, or other person acting for him, shall, *without delay*, issue a notice to summon every party bound in such forfeited recognizance to be and appear at the next ensuing Court of Sessions, to show cause, if any he has, why judgment should not be confirmed against him; and if any person so bound fail to appear, or appearing, shall not give such reason for not performing the condition of such recognizance as the Court shall deem sufficient, then the judgment on such recognizance shall be confirmed.

1902 Crim. Code § 85 (emphasis added). The *Cornell* court considered the "without delay" language in the statute and concluded that the "provision is directory, merely, to the officers named, and does not affect the liability of the surety or the legality of the proceedings in this case." *Cornell*, 70 S.C. at 412, 50 S.E. at 23. The *Cornell* court found a delay of over three years did not prevent the bond from being estreated. *Id.* at 413, 50 S.E. at 23.

However, in *State v. McClinton*, our supreme court found a seven-and-a-half year delay was barred by the statute of limitations and stated:

> [T]he three-year statute of limitations for contract actions applies to actions by the State for the forfeiture of a bail bond in a criminal case. The statute begins to run thirty days after issuance of a bench warrant for a defendant's failure to appear, pursuant to the process established in Section 38–53–70.

369 S.C. 167, 175-76, 631 S.E.2d 895, 899 (2006). The *McClinton* court "rel[ied] on the more specific process set forth in Section 38-53-70, and less on the general directive in Section 17-15-170 that the State move 'immediately' for forfeiture of the bond upon noncompliance with its condition, because this language in the latter statute is merely directory." *Id.* at 175, 631 S.E.2d at 899.

In Policao's case, an assistant solicitor issued a notice of forfeited recognizance on April 5, 2011, over two years after the January 22, 2009 bench warrant was issued against him. In Quijivix's case, an assistant solicitor issued a notice of forfeited recognizance on April 5, 2011, not quite three years after the April 17, 2008 bench warrant was issued against him. In Nunez's case, an assistant solicitor issued a notice of forfeited recognizance on April 5, 2011, nearly a year and a half after the October 26, 2009 bench warrant was issued against him. In Cardenas' case, an assistant solicitor issued a notice of forfeited recognizance on April 5, 2011, nearly one year after the April 19, 2010 bench warrant was issued against her. Accordingly, none of the cases at bar involve a delay of three years or more. Based on the *McClinton* court's finding that the three-year statute of limitations applicable to forfeiture of a bail bond begins to run thirty days after the issuance of a bench warrant for purposes of the process established in section 38-53-70, the State's estreatment actions in the instant matters do not violate section 38-53-70.

As instructed by the *McClinton* court, we rely on the more specific process set forth in section 38-53-70, and less on the general directive in section 17-15-170 that the State move "immediately" for forfeiture of the bond upon noncompliance with its condition, because the language in the latter statute is merely directory. Therefore, we affirm as to this issue.

II. Laches

Appellants argue the doctrine of laches prohibits the State from estreating the bonds.

"The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." *State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010). After a review of the record, we find the doctrine of laches was not raised to or ruled upon by the trial court. Therefore, this issue is unpreserved. However, even if the issue is preserved, we alternatively affirm on the merits.

The equitable defense of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (citation omitted). "In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009).

Though the notice of estreatment in each case was filed more than ninety days after the bench warrant was issued, Appellants did not show that the delays were unreasonable, especially given the foregoing discussion regarding the three-year statute of limitations that applies to bond estreatment. Additionally, Appellants did not show the delays prejudiced them. Though Appellants asserted at trial that they felt like they probably could have had Defendants in custody had the State issued the notice of estreatment ninety days after the bench warrant was issued, there is no showing of prejudice. Appellants were liable to pay the bond upon forfeiture when Defendants failed to appear at court. Appellants were allowed the time between the issuance of the bench warrant and the estreatment hearing to find Defendants. Instead of only ninety days, Appellants had between one year and almost three

years to locate and surrender Defendants. Therefore, Appellants actually benefitted from the delay.

III. *Polk* Factors

Appellants argue the trial court abused its discretion by failing to consider the three factors in *Polk*, 354 S.C. at 13, 579 S.E.2d at 331, prior to ordering estreatment. First, Appellants assert the trial court erred by not considering the actual cost to the State prior to ordering estreatment and, instead, based its discussion of costs upon speculation and conjecture. Second, Appellants contend that the record contains no discussion or findings as to the purpose of the bond. Third, Appellants allege that the record is devoid of any discussion or findings as to the nature and willfulness of the default. Finally, Appellants argue that because they appeared before the trial court *pro se*, they had a right to expect the court to follow South Carolina law as set forth in the *Polk* case without a specific request from them that the trial court do so.

"A contemporaneous objection is required to properly preserve an error for appellate review." *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994). However, a notable exception to the general rule requiring a contemporaneous objection in order to preserve an issue for appeal is found when the record does not reveal a knowing and intelligent waiver of the right to counsel. *Ex parte Jackson*, 381 S.C. 253, 261 n.3, 672 S.E.2d 585, 589 n.3 (Ct. App. 2009).

"[T]he State's right to estreatment or forfeiture of a bail bond issued in a criminal case arises from the contract, *i.e.*, the bail bond form signed by the parties." *McClinton*, 369 S.C. at 171, 631 S.E.2d at 897. Generally, a litigant has a statutory right to proceed *pro se* in South Carolina. *See* S.C. Code Ann. § 40-5-80 (2011) ("This chapter may not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires."). A trial court in a civil proceeding is not always required to obtain a knowing and voluntary waiver of counsel from every litigant who wishes to exercise his right to represent himself. *See Washington v. Washington*, 308 S.C. 549, 551, 419 S.E.2d 779, 781 (1992) (holding the trial court did not err by allowing civil litigant to proceed *pro se* without determining whether the decision to proceed *pro se* was knowingly and voluntarily made). A right to counsel under the federal constitution arises under the Sixth Amendment or under the due process guarantee of the Fourteenth Amendment. *Id.* at 550, 419 S.E.2d at 780. When a civil proceeding involves the

deprivation of a liberty interest, a litigant shall be afforded a due process right to counsel. *Id.* at 551, 419 S.E.2d at 780-81.

A review of the record reveals Appellants did not specifically ask the trial court to consider the *Polk* factors. Additionally, Appellants did not object to the trial court's determination of the costs to the State or to the full estreatment of the bonds. We disagree with Appellants' contention that, because they appeared *pro se*, the court had a duty to consider the *Polk* factors even without a specific request from Appellants. Appellants are not criminal defendants who waived their constitutional right to counsel. Because bond estreatment is an action on a contract, it is not a civil action involving the deprivation of a liberty interest that mandates a due process right to an attorney. Therefore, we find Appellants had a right to proceed *pro se* and were responsible for preserving any issues for this court's review. *See State v. Burton*, 356 S.C. 259, 265 n. 5, 589 S.E.2d 6, 9 n. 5 (2003) ("A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law."). Because no contemporaneous objection accompanied the trial court's findings, we find this issue unpreserved. However, even if the issue is preserved, we alternatively affirm on the merits.

"[T]he following factors, at the least, should be considered [by a court] in determining whether, and to what extent, the bond should be remitted: (1) the purpose of the bond; (2) the nature and willfulness of the default; (3) any prejudice or additional expense resulting to the State." *Polk*, 354 S.C. at 13, 579 S.E.2d at 331. The overriding purpose of requiring a criminal defendant to post bond before his release from custody is to assure his appearance at trial. *State v. Workman*, 274 S.C. 341, 343, 263 S.E.2d 865, 866 (1980).

With respect to Cardenas, Appellants admitted at the estreatment hearing that they had been actively looking for her and believed she may have been in Texas. The trial court found there was clearly evidence that locating Cardenas was going to dramatically increase the cost to the State. With respect to Policao, Quijivix, and Nunez, Appellants admitted Defendants likely had left the country. The trial court found that the bond amounts of $2,500, $7,500, and $20,000 would be required for a world search for Defendants. It would be difficult for the trial court to make a determination of actual costs the State would incur in finding someone whose whereabouts were unknown. Therefore, we disagree with Appellants' argument that the trial court committed prejudicial error by not considering actual costs to

the State. The trial court discussed that the purpose of the surety is to make a defendant appear at court. The trial court also discussed bond amounts that, in its opinion, were reasonable amounts of money to assure a person's presence. At the estreatment hearing, Appellants admitted they were unable to locate Defendants long before the notice of estreatment was issued. The trial court and Appellants engaged in a dialogue regarding the fact Appellants did not report to the State that they were unable to locate Defendants. The trial court also stated that one of the obligations of the surety is to know each term of the bond. Therefore, with respect to Appellants' arguments regarding the failure of the trial court to consider the three *Polk* factors, we find the trial court did not abuse its discretion.

CONCLUSION

For the aforementioned reasons, the judgment of the trial court is hereby

AFFIRMED.

FEW, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James T. Judy, Bobby R. Judy, and Kevin Judy, Respondents,

v.

Ronnie F. Judy, J. Todd Judy, Ryan C. Judy, and Wanda B. Judy, Defendants,

Of Whom Ronnie F. Judy is the Appellant.

Appellate Case No. 2012-209028

Appeal From Dorchester County
Martin Rast Banks, Special Referee

Opinion No. 5101
Heard February 13, 2013 – Filed March 20, 2013

AFFIRMED IN PART AND REVERSED IN PART

Eric Christopher Hale, of the Law Office of Eric C. Hale, LLC, of Irmo, and Craig Robert Stanley, of the Law Office of Craig R. Stanley, of Columbia, for Appellant.

Capers G. Barr, III, of Barr Unger & McIntosh, LLC, of Charleston, for Respondents.

KONDUROS, J.: Ronnie F. Judy (Ronnie) appeals the special referee's order setting aside conveyances of property to his children pursuant to the Statute of

Elizabeth and the award of attorney's fees against him. We affirm in part and reverse in part.

FACTS

In 1998, Ronnie owned one-half interests in lands totaling in excess of 722 acres in Dorchester County. He owned, outright, lands in Dorchester County totaling in excess of 147 acres. At trial, Ronnie's brother, James (Jimmy), testified that in 1997 or 1998 he recounted to Ronnie advice he received to convey out of his name property he had inherited from his father because of his pending divorce. At the time, Ronnie was engaged in legal disputes himself. He had been sued by Larry Mills, and he was also engaged in a dispute about a piece of farming equipment that could have exposed him to a $10,000 claim. Jimmy testified Ronnie told him he intended to transfer his property to his sons, because of these threatened liabilities. On November 16, 1998, Ronnie conveyed his interest in more than 869 acres to his children, Todd and Ryan, in two separate deeds (Remote Conveyances). The consideration for the transfers was $5.00, love, and affection. He also transferred his farm equipment to them. The record demonstrates Ronnie continued to farm the land, receive revenue from it, and borrow money against it. In 2000, the Mills claim was satisfied with Ronnie paying a $14,546.49 judgment.

The relationship between Jimmy and other family members and Ronnie and his family deteriorated. Bobby and Kevin Judy, other brothers of Ronnie and Jimmy, sued Ronnie for destroying a corn crop in 2003, and the case was tried in May 2007. Jimmy sued Ronnie for destroying a man-made pond and dam in 2003. On February 7, 2007, nine days after the first call of the pond case for trial, Ronnie signed and recorded deeds (Recent Conveyances) conveying his home on a 9.29 acre tract and a nearby 10.9 acre tract to Todd for $5.00, love and affection. The pond case was tried in April 2007.[1]

On September 27, 2007, Jimmy, Bobby, and Kevin filed suit against Ronnie, Todd, and Ryan seeking to void the Remote and Recent Conveyances. On December 31,

[1] The jury held Ronnie liable for actual and punitive damages in the corn crop case. *See Judy v. Judy*, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009). The jury also found Ronnie liable in the pond case, but the verdict was reversed based on *res judicata*. *See Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011).

2008, while the case was pending, Todd conveyed to Ronnie's wife, Wanda, the same 9.29 and 10.9-acre tracts that Ronnie had conveyed to him the year before.[2]

The special referee found both the Remote and Recent Conveyances violated the Statute of Elizabeth[3] and, with respect to the Remote Conveyances, he reformed the subsequent partition deeds to substitute Ronnie as the true owner and party to the action. The special referee also assessed $7,000 in attorney's fees and $800 as a special referee fee against Ronnie and Todd based on "bad faith" and "vexatious conduct." This appeal followed.

STANDARD OF REVIEW

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

LAW/ANALYSIS

I. Avoidance of Transfers under the Statute of Elizabeth

Section 27-23-10(A) of the South Carolina Code (2007), commonly known as the Statute of Elizabeth, provides:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators

[2] Wanda was added as a party to the case.
[3] S.C. Code Ann. § 27-23-10(A) (2007).

> and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

The Statute of Elizabeth "does not limit its application to judgment creditors. Its protection also extends to other types of parties defrauded in connection with the conveyance of property." *Mathis v. Burton*, 319 S.C. 261, 264, 460 S.E.2d 406, 408 (Ct. App. 1995); s*ee also Lebovitz v. Mudd*, 293 S.C. 49, 52-53, 358 S.E.2d 698, 700 (1987) (finding complaint stated cause of action for fraudulent conveyances when plaintiffs alleged defendants made property transfers to avoid potential judgment from existing tort claim); *Dennis v. McKnight*, 161 S.C. 209, 211-12, 159 S.E. 555, 556 (1931) (finding complaint stated a cause of action for fraudulent conveyance when defendant conveyed all his property to wife with intent of placing it out of the reach of plaintiff should she recover in wrongful death action filed two weeks after conveyance).

"Subsequent creditors may have conveyances set aside when (1) the conveyance was 'voluntary,' that is, without consideration, and (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors." *Mathis*, 319 S.C. at 265, 460 S.E.2d at 408 (citing *Gentry v. Lanneau*, 54 S.C. 514, 32 S.E. 523 (1899)). "Subsequent creditors must show 'actual moral fraud,' rather than legal fraud." *Id.* at 266, 460 S.E.2d at 409. Actual moral fraud involves "a conscious intent to defeat, delay, or hinder [one's] creditors in the collection of their debts." *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 409, 1 S.E.2d 797, 808 (1939). With a voluntary inter-family transfer, the burden shifts to the transferee to establish the transfer was valid. *See Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998) ("Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony.").

With respect to the Remote Conveyances, Ronnie contends Jimmy, Bobby, and Kevin do not have standing to assert the Statute of Elizabeth because they were not subsequent creditors as contemplated by the statute at the time of the transfers. We disagree. A subsequent creditor may successfully set aside a voluntary transfer if it was made with a view toward future indebtedness *or* actual fraudulent intent on the part of the grantor to evade creditors.[4] The Remote Conveyances were voluntary, and, while Ronnie may not have had an eye toward a specific future indebtedness to his brothers, the record demonstrates he recognized putting his property in his children's names could insulate him from existing and known potential creditors. Additionally, the record demonstrates Ronnie continued to enjoy the benefits of ownership of the property by continuing to farm it, receive income from it, and borrow money against it. This is clear and convincing evidence of his intention that the conveyances be title-only transfers intended to confound or hinder creditors. *See Beaufort Venerr & Package Co. v. Hiers*, 142 S.C. 78, 98, 140 S.E. 238, 245 (1927) (Cothran, J., dissenting) (finding grantee's failure to exercise possession over property was a badge of fraud); *Hudnal v. Wilder*, 15 S.C.L. 294, 305 (Ct. App. 1827) (stating donor's continued possession, use, and exercise of ownership over property was evidence of fraudulent intent); *Maples v. Maples*, 14 S.C.Eq. 300, 311 (Ct. App. Eq. 1839) (indicating property which a vendor continued to enjoy and to which the vendee was only nominal owner bore a fraudulent character).

With respect to the Recent Conveyances, our conclusion is the same. Again, the transfers were voluntarily made to a family member. Both were made just a few months prior to the trial of the tort claims against Ronnie, and the record shows he continued to treat the properties as his own.

Even if we concluded clear and convincing evidence of actual moral fraud had not been adduced at the summary judgment stage, because the Remote and Recent Conveyances were to family members and voluntary, the burden shifted from the Jimmy, Bobby, and Kevin to the grantees to establish the bona fides of the transfers. In this case, neither Todd, Ryan, nor Wanda testified. Consequently,

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[4] *See In re Ducate*, 355 B.R. 536, 544 (D.S.C. 2006) ("The test [for voiding a conveyance] does not require fraud as to a specific creditor, only that the transfer was made with an intent to 'defraud creditors' in general. Thus, if [a] [d]ebtor transferred the property with the intention of defrauding any creditor, the second prong would be satisfied.").

they did not meet their burden to persuade the referee that the transfers were bona fide. Therefore, we affirm the special referee's grant of summary judgment regarding the Remote and Recent Conveyances.

II. Authority of Special Referee

Ronnie contends the special referee lacked the authority to reform deeds issued in partition actions filed after the Remote Conveyances were made. This issue was neither raised to nor ruled upon by the special referee. Therefore, it is unpreserved for appellate review. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that to be preserved for appellate review, an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity).

III. Attorney's Fees

Finally, Ronnie maintains the special referee erred in assessing $7,800 in fees against Todd and him. We agree in part.

"The practice of each party paying his own attorney fees is often referred to as the 'American Rule.' South Carolina follows the American Rule." 2 S.C. Jur. *Attorney Fees* § 2 (citations omitted). "As a general rule, attorney fees are not recoverable unless authorized by contract or statute." *Id.; see also Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997) (stating a party cannot recover attorney's fees unless authorized by contract or statute); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute.").

In awarding attorney's fees, the special referee relied on *Roadway Express v. Piper*, 447 U.S. 752 (1980), and the South Carolina Frivolous Proceedings Act, Section 15-36-10 of the South Carolina Code (Supp. 2012). In *Roadway Express*, the court was considering the award of costs based on the "vexatious" multiplication of court proceedings. *Id.* at 757. The vexatious conduct recited by the special referee in his order is primarily the underlying fraudulent conduct of Ronnie. However, if that behavior is a sufficient basis for an award of attorney's fees, fees would be appropriate in any Statute of Elizabeth case and our legislature has not provided for

such by statute. Therefore, we conclude the award of fees against Ronnie constituted an abuse of discretion, and is therefore reversed.[5]

CONCLUSION

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

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and WILLIAMS, JJ., concur.

[5] We need not reach the issue of whether Todd's transfer of property to Wanda during the litigation served as a sufficient basis for an award of fees against him as he is not a party to this appeal and that ruling is the law of the case. *See Godfrey v. Heller*, 311 S.C. 516, 520-21, 429 S.E.2d 859, 862 (Ct. App. 1993) (stating an unappealed ruling is the law of the case).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert E. Reeping and Annette Reeping, Appellants,

v.

JEBBCO, LLC, SASSCO, LLC, John F. Brailsford, Jr., and County of Orangeburg Delinquent Tax Office, Respondents.

Appellate Case No. 2012-208226

Appeal From Orangeburg County
Olin D. Burgdorf, Master-in-Equity

Opinion No. 5102
Heard February 13, 2013 – Filed March 20, 2013

REVERSED

W. Scott Palmer, of Santee, for Appellants.

Robert F. McCurry, Jr., of Horger Barnwell & Reid, LLP, of Orangeburg, for Respondents.

KONDUROS, J.: Robert and Annette Reeping appeal the master-in-equity's denial of their request to set aside the tax sale of their real property in Orangeburg County. We reverse.

FACTS/PROCEDURAL HISTORY

The Reepings purchased the subject property, located in Eastern Orangeburg County on the shore of Lake Marion, in 1999. They have never resided in South Carolina, and at the time of the purchase of the property, they were citizens and residents of Maryland.

In 2005, the Reepings moved to Delaware. The Reepings' address was RD2, Box 154D, Frankford, DE 19945. They notified the Orangeburg County Assessor's office, and the tax records were amended to reflect the address change. At the time, the State of Delaware was in the process of changing addresses from a rural route system to a 911 system. The Reepings were assigned the new address of 36818 Double Bridges Road, Frankford, DE 19945.

In late 2005, the Orangeburg County Treasurer sent a tax notice for the property to the Reepings at their rural route address. The notice was forwarded to their 911 address by the local post office. The Reepings sent a check for the tax payment in the amount $1,367.10 to the Orangeburg County Treasurer's Office. The check was clearly printed with the new 911 address; however, the account was entitled "Household Account for Bella Chiavari." In addition, Mrs. Reeping testified her husband included a handwritten post-it note to inform the taxing authority their address had changed. The Treasurer's Office subsequently issued a tax receipt and negotiated the check.

On May 14, 2007, the County of Orangeburg sent to the Reepings' rural route address a certified letter informing the addressee the 2006 taxes remained unpaid, and if they were not paid, the property would be sold at a tax sale. This certified notice was returned to the Orangeburg County Delinquent Tax Office by the post office in Delaware marked "undeliverable and no such number." The certified envelope was also hand marked with the Reepings' new 911 street address. This handwritten address correction appeared both on the face of the envelope and also on the reverse side on the certified mail green card. Apparently, this envelope was placed in the Delinquent Tax Collector's file, but the Reepings' account was never corrected to reflect the correct address.

Several other notices were sent to the previous rural route address, but the Reepings received none of them. A tax sale took place on December 3, 2007, and

the Delinquent Tax Collector for Orangeburg County issued a tax deed on December 4, 2008, to John F. Brailsford, Jr. in the name of JEBBCO, LLC, and SASSCO, LLC, two limited liability companies owned and operated by Brailsford. In 2009, Mrs. Reeping learned the property had been sold when she was contacted by a company offering to help her collect the excess monies from the sale.

The master determined the notice given to the Reepings sufficiently complied with the statutory notice requirements and the statute of limitations affecting actions to set aside tax sale deeds was applicable thereby barring their action. This appeal followed.

STANDARD OF REVIEW

"An action to set aside a tax sale lies in equity." *King v. James*, 388 S.C. 16, 24, 694 S.E.2d 35, 39 (Ct. App. 2010). "Our scope of review for a case heard by a [m]aster permits us to determine facts in accordance with our own view of the preponderance of the evidence. *Id.*

LAW/ANALYSIS

I. Conduct of the Tax Sale[1]

The Reepings contend the master erred in finding the delinquent tax office had complied with the statutory notice requirements for a valid tax sale. We agree.

"Tax sales must be conducted in strict compliance with statutory requirements." *In re Ryan Inv. Co.*, 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999) (citing *Dibble v. Bryant*, 274 S.C. 481, 483, 265 S.E.2d 673, 675 (1980)). "[A]ll requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded [as] mandatory and are to be strictly enforced." *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct. App. 1989) (citing *Osborne v. Vallentine*, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)). "Failure to give the required notice is a fundamental defect in the tax sale proceedings which renders the proceedings absolutely void." *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996).

[1] This discussion combines the Reepings' first and second issues on appeal.

Section 12-51-40(a) of the South Carolina Code (Supp. 2012) dictates how notice of delinquent taxes must be made to the taxpayer.

> On April first or as soon after that as practicable, mail a notice of delinquent property taxes, penalties, assessments, and costs to the defaulting taxpayer and to a grantee of record of the property, whose value generated all or part of the tax. The notice *must be mailed to the best address available,* which is either the address shown on the deed conveying the property to him, the property address, *or other corrected or forwarding address of which the officer authorized to collect delinquent taxes, penalties, and costs has actual knowledge*. The notice must specify that if the taxes, penalties, assessments, and costs are not paid, the property must be advertised and sold to satisfy the delinquency.

(emphases added).

"[W]here a statute requires notice to the owner as a condition precedent to foreclosure of a tax lien, 'the person authorized to send the notice must exercise diligence to ascertain the correct address of the property owner.'" *Benton v. Logan*, 323 S.C. 338, 341, 474 S.E.2d 446, 447 (Ct. App. 1996) (quoting *Good v. Kennedy*, 291 S.C. 204, 208, 352 S.E.2d 708, 711 (Ct. App. 1987)). "Whether the authorized person ha[s] exercised diligence depends upon the particular circumstance of each case." *Id.*

In this case, the Delinquent Tax Office was put on actual notice the Reepings were not receiving mail at their former rural route address and were provided with their new address on a returned envelope that twice noted the new 911 address. While that notation did not bear the city, state, and zip code, a minimal amount of diligence could have uncovered their city, state, and zip code had not changed. Based on the evidence presented, we conclude the Delinquent Tax Office failed to use the best address to provide notice to the Reepings in violation of the statutory notice requirements rendering the tax sale void.

II. Statute of Limitations[2]

The Reepings further argue the master erred in finding their action was barred by the statute of limitations. We agree.

Section 12-51-160 of the South Carolina Code (Supp. 2012) provides:

> In all cases of tax sale the deed of conveyance, whether executed to a private person, a corporation, or a forfeited land commission, is prima facie evidence of a good title in the holder, that all proceedings have been regular and that all legal requirements have been complied with. An action for the recovery of land sold pursuant to this chapter or for the recovery of the possession must not be maintained unless brought within two years from the date of sale as provided in Section 12-51-90(C).

In *Leysath v. Leysath*, 209 S.C. 342, 40 S.E.2d 233 (1946), the Supreme Court of South Carolina discussed the application of this statute of limitations.

> It appears to be the general rule that a short statute of limitation of the kind under consideration does not apply where, by reason of some jurisdictional defect, the tax deed is absolutely void upon its face; and perhaps the majority of the courts hold that the bar of the statute does not apply if there are jurisdictional or fundamental defects in the tax proceedings which render such proceedings absolutely void. However, in some jurisdictions a statute of this kind is more liberally construed in favor of the purchaser, and it is held that the statute applies in every case in which there has been possession under a deed which is not void on its face. But the courts following the majority rule are not in entire accord as to the jurisdictional grounds which render a tax

[2] This discussion combines the Reepings' third and fourth issues on appeal.

> deed absolutely void. In some states defects which in others are deemed jurisdictional are considered mere irregularities . . . .
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> . . . .
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> . . . We do not undertake to lay down a general rule defining those defects in tax proceedings which should be considered as mere irregularities, to which the statute under consideration would apply, and those which should be deemed jurisdictional, so as to render the statute inapplicable.

Id. at 349-51, 40 S.E.2d at 236-37.

This court considered a notice issue in *Donahue v. Ward*, 298 S.C. 75, 378 S.E.2d 261 (Ct. App. 1989), and determined it was the kind of jurisdictional defect that rendered the statute of limitations inapplicable.

> The next question presented is whether failure to give the required notice constitutes more than a mere irregularity the effect of which invalidates the tax proceeding and prevents the running of the limitations statute. It is stated "all requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded mandatory and are to be strictly enforced." *Osborne v. Vallentine,* 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941); *accord, Leysath v. Leysath,* 209 S.C. 342, 40 S.E.2d 233 (1946). We think the Legislature in requiring the Treasurer of Horry County to give a twenty day notice prior to advertising the property for sale intended such provision for the protection of the taxpayer against a sacrifice of his property. We therefore hold that failure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void.

Id. at 83, 378 S.E.2d at 265.

Based on the analytical framework set forth in *Leyseth* and its application in *Donahue*, we conclude the statute of limitations did not preclude the Reepings' claim in this case as the failure to give proper notice rendered the tax sale void.

CONCLUSION

Based on all of the foregoing, the ruling of the master is

REVERSED.

HUFF and WILLIAMS, JJ., concur.