The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay South Carolina Bar License Fees and Assessments

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O R D E R

The South Carolina Bar has furnished the attached list of lawyers who were administratively suspended from the practice of law on February 1, 2008, under Rule 419(b)(1), SCACR, and remain suspended as of April 1, 2008. Pursuant to Rule 419(e)(1), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 1, 2008.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the

lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

April 15, 2008

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The Supreme Court of South Carolina

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CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF W. JAMES HOFFMEYER, PETITIONER

On January 22, 2008, Petitioner was definitely suspended from the practice of law for nine months. In the Matter of Hoffmeyer, 376 S.C. 221, 656 S.E.2d 376 (2008). He has now filed a petition to be reinstated.

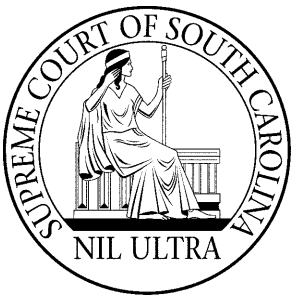
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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

These comments should be received no later than June 9, 2008.

Columbia, South Carolina

April 8, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15

April 21, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael R. Batchelor, Appellant.

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26455
Heard January 22, 2008 – Refiled April 21, 2008

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for respondent.

JUSTICE MOORE: Appellant Michael Batchelor was convicted of several charges stemming from an automobile collision in which his three minor sons were killed and three other minors were injured. The charges include two counts of felony driving under the influence (felony DUI) causing death, two counts of felony DUI causing great bodily injury, and one count of involuntary manslaughter.[1] After we issued our original opinion affirming appellant's convictions,[2] appellant petitioned for rehearing. We deny the petition for rehearing, withdraw our original opinion in this matter, and substitute it with this opinion affirming the trial court's decision.

FACTS

The facts are undisputed. Appellant's three sons—Raymond Groomes (referred to as "Ashton"), and Brandon and Drew Batchelor—lived with their mother. On July 11, 2002, they were invited along with three friends to appellant's house where appellant supplied them with alcohol. All of the boys were between the ages of thirteen and fifteen.

At some point in the afternoon, appellant and the boys left the house in appellant's pick-up truck to buy more alcohol and look for some marijuana. Appellant was driving. After veering off the side of the road, appellant decided he was too drunk to drive and he wanted Ashton to drive. Ashton, who was fifteen, did not have a driver's license or learner's permit and Ashton's friends had never seen him drive a vehicle. At appellant's insistence, Ashton took the wheel. Shortly thereafter, Ashton swerved off the

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[1]Appellant was sentenced to concurrent terms of twenty-five years and fined $25,100 for each felony DUI causing death, and two concurrent terms of fifteen years and a fine of $10,100 for felony DUI causing great bodily injury, these to run consecutive to the twenty-five-year terms. He was also convicted of three counts of unlawful conduct towards a child and given three ten-year terms and three $10,000 fines, and two counts of contributing to the delinquency of a minor for which he received two three-year terms and three $3,000 fines, all concurrent.

[2]State v. Batchelor, Op. No. 26455 (S.C. Sup. Ct. filed March 10, 2008).

side of the road and over-corrected, causing the truck to swerve into the oncoming lane and collide head-on with another vehicle. Both vehicles flipped and the truck landed upside-down with Ashton under it.

Ashton was dead at the scene. A toxicology report indicated Ashton's blood alcohol was .108 at the time of his death. Brandon and Drew died later at the hospital. The other boys and appellant were injured.[3] At the hospital, appellant told the investigating officers that Ashton was driving and that he had given the boys alcohol. Appellant himself smelled strongly of alcohol.

The State proceeded to trial on a theory of accomplice liability. It was undisputed that appellant was not driving at the time of the wreck. After he was found guilty, appellant expressed remorse that he had caused the death of his three children and serious injury to the other boys.

ISSUES

1. Should the indictments for felony DUI have been quashed?

2. Should a directed verdict have been granted?

DISCUSSION

1. Indictments

Appellant claims the four indictments for felony DUI should have been quashed. He contends that because the indictments charged him as a principal rather than as an accomplice, the grand jury was misled regarding the facts of the case.

The regularity of grand jury proceedings is presumed absent clear evidence to the contrary; the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated. Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005); State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981).

[3]The driver of the other car escaped with only minor injuries.

Here, the fact that the indictments presented to the grand jury charged appellant as a principal for felony DUI does not prove the State misinformed the grand jury that appellant was the driver at the time of the wreck. It is well-settled that an indictment charging the defendant as a principal will support a conviction based on accomplice liability. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000); State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987); State v. Cox, 258 S.C. 114, 187 S.E.2d 525 (1972); State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971); State v. Hunter, 79 S.C. 73, 60 S.E. 240 (1908). Accordingly, the State may present an indictment charging a defendant as a principal based on information of aiding and abetting the crime charged. There is no evidence the grand jury process was compromised in any way. We find no error.

2. Directed verdict

Appellant's motion for directed verdicts on the four felony DUI charges was denied. Appellant contends this was error because the indictments charged him as a principal and there is no evidence he was the driver, resulting in a material variance in proof. *See* State v. Evans, 322 S.C. 78, 470 S.E.2d 97 (1996) (material variance between the charge and the proof entitles the defendant to a directed verdict).

Felony DUI is subject to accomplice liability based on a factual scenario that includes evidence of aiding and abetting as in this case. As noted above, an accomplice may be indicted as a principal. There is no material variance in proof when the indictment charges the defendant as a principal and the evidence at trial proves he was guilty as an accomplice. Appellant's motion for directed verdicts was properly denied.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clarence D. Speaks, Jr., Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Greenville County
John W. Kittredge, Circuit Court Judge
Edward W. Miller, Post Conviction Relief Judge

Opinion No. 26469
Submitted February 21, 2008 – Filed April 14, 2008

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen C. Ratigan, all of Columbia, for Petitioner.

Deputy Chief Attorney Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the post-conviction relief (PCR) court found trial counsel ineffective for failing to request an identification instruction at trial, and therefore, granted Respondent Clarence Speaks relief. This Court granted the State's petition for a writ of certiorari, and we reverse the PCR court's decision.

FACTUAL/PROCEDURAL BACKGROUND

A grand jury indicted Respondent for assault and battery with intent to kill (ABWIK) and first-degree burglary following an incident where four people allegedly entered Belinda Sullivan's apartment and assaulted her boyfriend, Patrick Brock. At trial, Belinda testified that around 2:30 a.m., she heard a knock and cracked open the door to see Mark Jefferies, her ex-boyfriend, along with Respondent, Respondent's mother, Bonnie, and Respondent's sister, Angel. Belinda testified that Respondent, Bonnie, and Angel were Mark's cousins and that she knew them through her previous relationship with Mark. Belinda testified that all four individuals forced their way into her apartment, asked her why she let Patrick attack Mark,[1] and then proceeded upstairs to the bedroom where Patrick was sleeping. Belinda testified that once in the bedroom, Respondent began striking Patrick and eventually threw a television on Patrick. Patrick provided essentially the same testimony and identified Respondent as the person who assaulted him.

Respondent presented several witnesses to rebut Belinda's and Patrick's testimonies. Specifically, Respondent's girlfriend testified that Respondent was with her on the night of the incident, but that Respondent left her house for thirty minutes with his father. Respondent's father testified that although he and Respondent drove to Belinda's apartment, they arrived after the altercation had taken place. Angel, Bonnie, and Mark all admitted that they were present during the altercation, but testified that Mark assaulted Patrick and specifically testified that Respondent was never there. Finally,

[1] Earlier that evening, Mark and Patrick got into a physical altercation in which apparently Patrick injured Mark.

Respondent testified that he was not at Belinda's apartment during the altercation and that he did not assault Patrick. The jury found Respondent guilty of ABWIK and burglary.

At the PCR hearing, Respondent argued that trial counsel should have investigated Patrick's inability to identify him as the assailant. Respondent testified that Patrick mistook Respondent for two different people at his bond hearing, and that on a later occasion, he saw Patrick at the probation office but that Patrick did not recognize him. Additionally, Respondent alleged that the arrest warrant described the assailant as five feet, six inches and 155 pounds but that he is six feet and 200 pounds. Respondent alleged that Mark more accurately matched the description in the warrant. Trial counsel testified that Respondent never informed him that Patrick failed to recognize him at the bond hearing and that he raised identification issues at trial.

The PCR court found that the identification of Respondent as the assailant was an "integral issue" at trial. Additionally, the PCR court found numerous factors indicated that the identification of Respondent as the assailant was peculiarly suspect. Specifically, these factors included testimony that Respondent was not involved in the assault, the description of the assailant in the arrest warrant, Respondent's testimony regarding Patrick's failure to recognize him, and the likely possibility that Belinda implicated Respondent instead of Mark out of fear of Patrick's retaliation against Mark. Accordingly, the PCR court held that trial counsel was ineffective for failing to request a jury instruction on identification

This Court granted certiorari to review the PCR court's decision, and the State presents the following issue for review:

> Did the PCR court err in finding trial counsel ineffective for failing to request an identification instruction?

STANDARD OF REVIEW

In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442,

334 S.E.2d 813, 814 (1985). On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

LAW/ANALYSIS

The State argues that the PCR court erred in finding trial counsel ineffective for failing to request an identification jury charge. We agree.

In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In *United States v. Telfaire*, the court recommended "that trial courts include, as a matter of routine, an identification instruction" and provided a model identification instruction. *Id.* 469 F.2d 552, 555 n.11 (D.C. Cir. 1972). The model instruction, which emphasized that the State had to prove the accuracy of the identification of the defendant beyond a reasonable doubt, "was designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification." *State v. Jones*, 344 S.C. 48, 59, 543 S.E.2d 541, 547 (2001). In *State v. Simmons*, this Court "admonish[ed] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state." 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992).

In our opinion, there is no evidence to support the PCR court's finding that trial counsel was ineffective for failing to request an identification instruction. Specifically, we do not believe that identification was an "integral issue" at Respondent's trial. Belinda and Patrick testified that Respondent, Mark, Angel, and Bonnie entered the apartment and that Respondent assaulted Patrick. On the other hand, Respondent's witnesses testified that only Mark, Angel, and Bonnie entered the apartment, that Mark assaulted Patrick, and that Respondent was never present during the

altercation. Thus, the jury was not faced with the issue of whether Belinda and Patrick misidentified Respondent, but rather whether to believe their testimonies or instead whether to believe the defense's witnesses' testimonies.[2] Accordingly, we believe that the critical issue at trial was witness credibility, an issue on which the trial court sufficiently charged the jury. This conclusion is further supported by the PCR court's specific findings. For example, the PCR court noted that Respondent's witnesses testified that Respondent was not present during the assault and the PCR court determined that Belinda had motivation to falsely implicate Respondent.

Additionally, we believe cases in which an identification charge was relevant are readily distinguishable from this case. For example, *Simmons* involved a police officer identifying the defendant following an undercover operation, and in *Jones* and *State v. Patterson*, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999), neither victim/eyewitness identifying the defendant knew the defendant prior to the crime. Conversely, in the instant case, the State provided two eyewitnesses who unequivocally identified Respondent as the assailant. *See Jones*, 344 S.C. at 59, 543 S.E.2d at 547 (holding a *Telfaire* charge was unnecessary where the case did not involve a single witness identification and where, given the witnesses' degree of certainty, there appeared very little likelihood of mistaken identification) *and State v. Motes*, 264 S.C. 317, 326, 215 S.E.2d 190, 194 (1975) (finding no error in failing to give a *Telfaire* instruction where identification "presented no peculiar problem").

Accordingly, we hold that there is no evidence to support the PCR court's decision that trial counsel was ineffective for failing to request an identification instruction.

[2] This, in our view, is the distinction between the issue of identification and witness credibility.

CONCLUSION

For the foregoing reasons, we reverse the PCR court's order granting Respondent relief.

MOORE, WALLER, BEATTY, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, since there is evidence of probative value in the record to support the post-conviction relief (PCR) judge's finding of ineffective assistance of counsel, we should uphold his decision. E.g., Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The majority finds error in the PCR judge's finding that identification was the "integral issue" at Respondent's trial, stating that instead the "critical issue" was witness credibility. I do not understand this distinction, as the question was whether the witnesses' identification of Respondent as a participant in the crimes was credible. Moreover, the fact that two State's witnesses unequivocally identified Respondent as the assailant does not negate the importance of identification in the case, but merely highlights the centrality of the issue given that four defense witnesses, including those who admitted being present at the scene, as well as Respondent testified that he was not involved.

I would uphold the PCR judge's finding that trial counsel was ineffective in failing to request a jury charge emphasizing the State's burden to establish the accuracy of Respondent's identification beyond a reasonable doubt. Cherry v. State, *supra*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry L. Stanley, Respondent,

v.

Atlantic Title Insurance Company, Appellant.

Appeal from Richland County
Joseph M. Strickland, Circuit Court Judge

Opinion No. 26470
Heard March 5, 2008 – Filed April 21, 2008

AFFIRMED

Louis H. Lang, of Callison Tighe & Robinson, of Columbia, for Appellant.

Tobias Gavin Ward, Jr., and James Derrick Jackson, both of Todd Holloway & Ward, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This is a direct appeal from a master's award in a claim brought on a title insurance policy. Appellant Atlantic Title Insurance Company argues that the master considered improper evidence and used an incorrect valuation method to determine the amount to award

Respondent Larry L. Stanley under his title insurance policy, and that Stanley's title insurance claim is barred by the statute of limitations. We hold that the master's decision as to the value of Stanley's property at the time of purchase is reasonably supported by the evidence in the record, that Atlantic Title's argument regarding valuation methods is not preserved for review, and that the master properly determined that Atlantic Title waived its ability to assert the statute of limitations as a defense to Stanley's claim. We therefore affirm the master's decision.

FACTUAL/PROCEDURAL BACKGROUND

In early 1998, Respondent Larry L. Stanley purchased a 2.49-acre tract of lakefront land along United States Highway 378 in Lexington County, South Carolina. The property is roughly rectangular in shape, with the northern and southern borders being the significantly longer dimensions of the property. Highway 378 crosses over Lake Murray and runs along the northern boundary of the property, and the east end of the property is waterfront. At the time Stanley purchased the property, the eastern end contained a building, a boat ramp, and a dock with several boat slips.

Sometime after purchasing the property, Stanley discovered a septic drainage field located on about a third of an acre at the southwest end of the property. The record reflects that the drainage field is an underground piping system which transports wastewater from a septic tank and diffuses the water into the ground. The drainage field on Stanley's property services a neighboring tract of land, and after discovering the field, Stanley initiated contact with the neighboring landowner. Stanley also contacted Appellant Atlantic Title Insurance Company, the company which insured his title.

The dispute regarding the drainage field was unfortunately not the only complication Stanley faced regarding this property, for shortly after Stanley purchased the property, the South Carolina Department of Transportation brought a condemnation action against him to acquire land on the property's northern border for the proposed widening of Highway 378. Accordingly, Stanley dealt for some time with disputes with his neighbor and with Atlantic Title over the drainage field, and with the D.O.T. regarding the proper

amount of compensation for the land taken for the proposed highway widening project. In 2004, after negotiations regarding the drainage field proved unsuccessful, Stanley brought an action for damages against Atlantic Title under his title insurance policy. Stanley and the D.O.T. settled the condemnation action while the title insurance claim awaited trial, and the settlement resulted in the D.O.T. acquiring a 1.4-acre strip of land along the property's northern border. The property taken by the D.O.T. contained the existing building on Stanley's property and the boat ramp, but the boat docks and about half of Stanley's shoreline were unaffected. The title insurance claim was tried a year later.

At trial, the parties approached the issue of damages from very different perspectives. Stanley testified that the area affected by the drainage field had no value, could be put to no use, and was unmarketable. Stanley offered that his land was worth approximately $100,000 per acre at the time of purchase, and that the proper measure of his damages was simply the per-acre value of his land at the time of purchase multiplied by the acres affected by the drainage field. In contrast, Atlantic Title offered the testimony of a real estate appraiser who valued the damage to Stanley's title by the difference between the value of a portion of Stanley's property without the drainage field and the value of the same portion including the drainage field – a difference of $4,000 by the appraiser's math. The master sided with Stanley, and en route to determining that the value of Stanley's property at the time of purchase was $100,000 per acre, the master made note of the amount of the prior condemnation action with the D.O.T. The master awarded $35,000 in damages, and Atlantic Title appealed.

This Court certified the appeal from the court of appeals pursuant to Rule 204(b), SCACR. Atlantic Title raises the following issues for review:

I. Did the master err in taking judicial notice of the settlement in the condemnation action between Stanley and the D.O.T. in the course of determining the per-acre value of Stanley's land at the time of purchase?

II. Did the master err in determining the value of Stanley's title insurance claim based on the complete loss of the affected portion of his property instead of measuring damages according to the reduction in the market value of Stanley's title?

III. Did the master err in concluding that Stanley's claim was not barred by the statute of limitations?

STANDARD OF REVIEW

In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. The Prior Condemnation Award

Atlantic Title argues that the master erred in taking judicial notice of the amount of the settlement in the condemnation action between Stanley and the D.O.T. Atlantic Title posits that the amount of the condemnation settlement is not probative of the value of the land at the time of purchase because the settlement occurred over five years after Stanley purchased the property and included compensation for the loss of the building and boat ramp as well as the land. Accordingly, Atlantic Title argues the master's ruling is based on improper evidence. We disagree.

We need not reach the questions raised as to the relevance of the condemnation award in this action, because an analysis of the order below demonstrates that this argument must fail. While Atlantic Title correctly points out that the master's order makes note of the condemnation award, the order additionally provides that "[b]ased on the testimony offered by [Stanley] and other evidence, this court concludes that the value of Mr. Stanley's remaining 1.093 acres was $100,000 at the time of purchase." The

master's order clearly ties the valuation of Stanley's land to Stanley's testimony at trial that his land was worth $100,000 per acre at the time of purchase, and for this reason, the master's notice of the condemnation award is inconsequential. Stated differently, to the extent Atlantic Title argues that the master's order bases its determination of the value of Stanley's land on the prior condemnation award, this contention is incorrect. The general rule in South Carolina is that a landowner is permitted to testify to the value of his land, *South Carolina State Hwy. Dep't v. Wilson*, 254 S.C. 360, 370, 175 S.E.2d 391, 397 (1970), and Atlantic Title does not dispute Stanley's testimony in this regard.

Because the master did not base his "time of purchase" valuation of Stanley's land on the amount of the prior condemnation settlement, the question of whether the master erred in taking judicial notice of the settlement is, in this case, purely academic. Accordingly, we hold that the master's conclusion that Stanley's land was worth $100,000 at the time of purchase is reasonably supported by the evidence in the record.

II. Measure of Damages

Atlantic Title argues that the master erred in determining the value of Stanley's title insurance claim based on the complete loss of the portion of his property affected by the drainage field. Atlantic Title argues that Stanley still owns the entire property and that his title is not impacted beyond a reduction in the overall value of the property. Although we agree with Atlantic Title's argument in principle, this is not an accurate characterization of the case it put forth at trial. For this reason, the argument is accordingly not preserved for review.

A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value. 46 C.J.S. *Insurance* § 1736 (2007); 43 Am. Jur. 2d *Insurance* § 528 (2003). Depending on the circumstances, the loss of a title's value can be measured in a variety of ways. For instance, an owner's loss can be the fair market value of a portion of property which has

proven completely unmarketable; the cost of removing the defect from the property; or the difference in the values of the property with and without the defect. 46 C.J.S. § 1739; 29A Am. Jur. *Insurance* § 1601 (1960). The terms of individual insurance agreements can control the method of valuation, but the purpose of title insurance has been stated as seeking to place the insured in the position that he thought he occupied when the policy was issued. 46 C.J.S. §1736.

The fact that property may be useless or may be put to only limited use does not mean that the property is not marketable. *See* 43 Am. Jur. 2d § 528. This has been recognized in South Carolina jurisprudence, most recently by the court of appeals in the case *McMaster v. Strickland*, 305 S.C. 527, 409 S.E.2d 440 (Ct. App. 1991). In that case, a purchaser bought property with the intention of developing it. When the property was designated as wetlands, the purchaser claimed his title was unmarketable. The court of appeals held that there was no evidence the title was unmarketable because "there is no evidence that the sellers do not own the property . . . [f]urther, there is no evidence it was unlawful to sell the property[.] [T]herefore it is legally, if not actually marketable." *Id*. at 531, 409 S.E.2d at 442.

This analysis reveals an error in the order below. Specifically, although a portion of Stanley's property is undoubtedly encumbered by the drainage field and may be functionally useless, it is still marketable, and the master was wrong to conclude otherwise. The argument accordingly goes that by being compensated for the full value of the affected portion of his land while he retains marketable title, Stanley is being overcompensated. Framed in terms of the guidepost that damages should be measured by the value of the title Stanley thought he was getting versus the value of the title he received, the suggestion is that because Stanley insured his title based on the expectation that he was purchasing a tract of lakefront land completely free from encumbrances, if a third of his tract is now encumbered, the measure of damages ought to be the difference in value of his whole property (including the useless portion), and the value of the property if the defect did not exist. For this reason, it appears that the master erred in awarding damages based on the total deprivation of the value of the third of an acre affected by the drain field. Such an award treats the third of an acre as if it has been taken.

Thus, at first blush, it would seem that this case should be reversed for an award of damages according to the appropriate standard.

But what was the method of valuing damages that Atlantic Title offered at trial? The record reflects that Atlantic Title focused its case on the testimony of an appraiser who testified that he divided Stanley's land for appraisal purposes into two portions: (1) enough land to support the building and the boat docks and (2) the remainder. Setting aside the land needed to support the building and the boat docks, the appraiser testified that comparisons with similar properties demonstrated an unencumbered land value of $24,000 and an encumbered value of $20,000. The appraiser accordingly estimated the damage to Stanley's property at $4,000, and Atlantic Title argues on appeal that this evidence is the only evidence in the record which properly values Stanley's loss.

Upon closer review, however, it is clear that the appraiser's report neither employs the proper valuation method for this type of title insurance claim nor does it properly value Stanley's loss. While the appraiser's report assumes that Stanley owns and operates the building and boat ramp, as a result of the D.O.T.'s condemnation, Stanley certainly does not. Similarly, the report does not value Stanley's property as land having lake access, and furthermore, the appraiser testified at trial that he determined the value of Stanley's property by examining comparable sales along Highway 378, and that none of these properties had lake access. This report does not accurately describe or value Stanley's land, and more importantly, the report does not analyze the land in the manner that Atlantic Title argues is proper. Stated differently, the report does not compare the encumbered value of the entire tract of Stanley's land with what the value of the entire tract of land would be without any encumbrances.

It is axiomatic that "[t]he losing party must first try to convince the lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). In this case, the argument on appeal differs, in our view markedly, from the theory of the case

presented at trial. Accordingly, we affirm the trial court's decision on the grounds that Atlantic Title's valuation argument is not preserved for review.

III. Statute of Limitations

Atlantic Title argues that Stanley's claim is barred by the three-year statute of limitations for contract actions found in S.C. Code Ann. § 15-3-530(a) (2005). To support this argument, Atlantic Title notes that Stanley filed his complaint in May of 2004 and relies on a letter it sent to Stanley in May of 2001 during negotiations regarding the drainage field. The letter provides:

> In order to induce the temporary forbearance of Larry Stanley from filing suit on the above-referenced claim for a period of thirty (30) days, Atlantic Title [] waives any defense of the statute of limitations or laches, unless the statute of limitations would apply to an action brought on May 21, 2001.

According to Atlantic Title, the letter operated to waive the statute of limitations defense for a limited period of thirty days. We disagree.

This argument is foreclosed by the terms of Atlantic Title's letter. Specifically, Atlantic Title misreads the waiver provision by interpreting "temporary," which describes the character of Stanley's delay in filing suit, as modifying the unequivocal language describing the waiver of the statute of limitations and laches defenses. Agreements, in general, are interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 110, 531 S.E.2d 287, 293 (2000). We find that Atlantic Title's reading of the letter as a thirty-day "temporary tolling agreement" is simply not supported by the letter's terms.

For this reason, we affirm the master's decision that Atlantic Title's letter waived its ability to assert the statute of limitations as a defense to Stanley's claim.

CONCLUSION

Based on the foregoing analysis, we affirm the master's decision. We specifically hold that there is evidence in the record which reasonably supports the master's ruling that the value of Stanley's land was $100,000 per acre at the time of purchase; that Atlantic Title's argument regarding valuation methods is not preserved for review; and that Atlantic Title's letter waived its ability to assert the statute of limitations as a defense in this case.

MOORE, WALLER, BEATTY, JJ., and Acting Justice E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Danielle Smith, Appellant,

v.

Joe Breedlove, Dryvit Systems, Inc., and H. Merrill Pasco,

of whom Joe Breedlove is Respondent.

Joe Breedlove, Defendant and Cross-Complainant,

v.

Dryvit Systems, Inc. and H. Merrill Pasco, Cross Defendants.

Joe Breedlove, Defendant and Third-Party Plaintiff,

v.

Solak Construction, Inc., JP Construction of South Carolina, Inc., Arcadio Torres, and Stanley C. Fronczak, Third-Party Defendants.

Arcadio Torres, Fourth-Party Plaintiff,

v.

Contractors Specialty Supply, Inc.,
d/b/a COTA Southeast and Pella
Window & Door, LLC, Fourth-Party Defendants.

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

Opinion No. 26471
Heard March 4, 2008 – Filed April 21, 2008

AFFIRMED

Glynn L. Capell, of Mullen Wylie & Seekings, of Hilton Head Island, for Appellant.

Joseph Ransom Barker, of McNair Law Firm, of Hilton Head Island, for Respondent.

JUSTICE PLEICONES: This is an appeal from a grant of summary judgment to respondent Joe Breedlove (Breedlove). The suit arose out of the appellant Danielle Smith's (Smith's) purchase of a home from Breedlove that was allegedly defectively constructed. We affirm.

FACTS

In 1993, Breedlove decided to build a single family residence on a vacant lot he owned in Hilton Head. He had retired from the United States Army in order to help provide care for his son, who suffered from juvenile diabetes. Breedlove taught at a private school for a period of five years, including the time the residence was constructed. Breedlove planned to build the home for himself and his family, and he did not have any agreement or intention to sell the residence.

Breedlove chose not to hire a general contractor, and he entered into a contract with Merrill Pasco (Pasco) for Pasco to provide services as an architect in designing and preparing the plans and specifications for Breedlove's home. Pasco further recommended the services of Stanley Fronczak (Fronczak), a cabinet installer, and Fronczak assisted Breedlove in choosing other residential specialty contractors (contractors) to provide additional services in completing the home.

Although Breedlove had never been employed in the construction industry nor done business as a general contractor, he entered into agreements with various contractors for their services in the construction of the home. Breedlove directly paid the contractors and the materials suppliers.

During the period of construction, Breedlove's name appeared as the owner and general contractor on various documents. These include the application for the building permit, the building permit itself, the application for water and sewer service, the elevator contract, the proposal for propane gas service, the application for approval and related documents from the neighborhood in which the house was to be located, credit applications, and other documents on which it was necessary for Breedlove to identify a contractor or builder in order to be able to move forward with the construction process.

A certificate of occupancy was issued on July 15, 1994, and it also listed Breedlove as the owner and general contractor. Breedlove and his

family moved into the residence, and the evidence showed that the Breedloves intended to stay in that home for the remainder of their lives.

In 1997, Breedlove's son graduated from high school and began college in Atlanta. Breedlove and his wife decided to rent an apartment near the university to provide his son a place where his medical needs would be better met, as opposed to a dormitory setting. Breedlove and his wife spent a large amount of time at the Atlanta apartment and only lived part-time at their Hilton Head residence. It became too expensive and inconvenient to maintain both the Atlanta apartment and their Hilton Head home, and the Breedloves decided to sell the Hilton Head home in 1998.

In July 1998, Breedlove entered into a contract of sale with Smith and her husband, Courtney Hill,[1] for the sale of the residence. The contract provided that the purchasers had inspected the property and were buying the home "as is." Smith stated that the only inspection done before delivery of the deed was performed by Hill, who had previously been involved in constructing homes.

Several years after moving into the home, Smith discovered the residence was partially clad with synthetic stucco known as exterior insulation and finish system (EIFS). She retained a forensic architect, and his investigations revealed numerous defects.

In 2002, Smith filed suit alleging causes of action for negligence and breach of implied warranty of workmanship against Breedlove and Pasco; she also alleged negligence, strict liability, and breach of warranty against the EIFS manufacturer Dryvit Systems (Dryvit). The complaint alleged Breedlove acted as the general contractor during construction of the home and that such construction was performed in a negligent and defective manner.[2]

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[1] Mr. Hill and Smith have since divorced, and Hill is not a party to this action.

[2] In response, Breedlove filed a third-party complaint against the contractors Solak, JP Construction, Torres, and Fronczak. Torres subsequently filed a

In 2003, Breedlove filed a motion for summary judgment. His motion was accompanied by his own affidavit in support of the motion, and Smith replied with affidavits and exhibits from Pasco, the forensic architect, and a general contractor she had retained as an expert. The Hon. Curtis Coltrane issued an Order denying Breedlove's motion. No depositions had been taken at the time this motion was argued in 2003.

In 2005, Breedlove again moved for summary judgment, and the circuit court postponed a hearing on the merits to enable the parties to complete discovery. The depositions of Breedlove, Smith, Smith's expert witnesses, Solak, Torres, and Jerry Parker of JP Construction all took place after Breedlove's first motion for summary judgment and before the hearing on his second motion. After a hearing, the Hon. Jackson Gregory granted Breedlove's second motion for summary judgment in 2006.

ISSUE

Did the circuit court err in granting summary judgment to Breedlove?

ANALYSIS

A trial court may properly grant a motion for summary judgment when "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 judgment as a matter of law." Rule 56(c), SCRCP. On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. David v. McLeod Regl. Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The appellate court, like the trial court, must view all ambiguities, conclusions, and all inferences arising in and from the evidence

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fourth-party complaint against an additional EIFS manufacturer Contractors Specialty Supply and against the window manufacturer Pella Window and Door.

in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Smith first argues that Breedlove's second motion for summary judgment is barred by Rule 43(l), SCRCP. We disagree.

Rule 43(l), SCRCP, provides, "If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action." The fact that a different trial judge previously denied a motion for summary judgment does not preclude the moving party from renewing its motion once new evidence is gathered. Dorrell v. S.C. Dept. of Transp., 361 S.C. 312, 325, 605 S.E.2d 12, 19 (2004).

In this case, although the legal basis of Breedlove's motions for summary judgment was the same in 2003 and 2005, considerable discovery had taken place and new evidence had been established. Contrary to Smith's contentions, it does not matter that Smith conducted the discovery or that some of the evidence was arguably favorable to Smith. The rule requires a different "set of facts," which were established due to the substantial amount of discovery that occurred after Breedlove's first summary judgment motion. Accordingly, the circuit court did not err in hearing Breedlove's second motion for summary judgment after discovery had taken place.

On the merits, Smith claims her first cause of action for breach of warranty of workmanlike service is dependent upon Breedlove's status as a general contractor. Specifically, Smith argues that because builders and general contractors impliedly warrant that the work will be done in a workmanlike manner, all she needs to prove to defeat Breedlove's summary judgment motion is that there is a genuine issue of material fact whether Breedlove was a general contractor. We disagree.

Although we agree with Smith that a genuine issue of fact exists in determining whether Breedlove acted as a general contractor, this fact is not "material" insofar as it impacts our analysis. The grant of summary judgment in favor of Breedlove did not solely result from the finding that Breedlove

was not a general contractor, but rather the circuit court determined that the implied warranty of workmanlike service only applies to builders in the business of building new dwellings for sale. Thus, the crucial issue is whether Breedlove, even if deemed a general contractor, can be held liable under an implied warranty of workmanlike service theory where he was not in the business of constructing houses and did not build the home to sell.

A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989). This is distinct from an implied warranty of habitability, which arises solely out of the sale of the home. Id. Although the warranty of workmanlike service arises out of the construction contract to which the builder is a party, a subsequent purchaser may sue a professional builder on the implied warranty of workmanlike service despite the lack of contractual privity. Id.

Starting with Rutledge v. Dodenoff, 254 S.C. 407, 175 S.E.2d 792 (1970), the doctrine of caveat emptor has been weakened so that a purchaser of a home may hold the "builder-vendor"[3] liable on the theory of breach of an implied warranty of workmanship. As stated in Rutledge, the rationale behind this implied warranty is based on the relative bargaining positions of the parties:

> The rationale of the decisions which hold the builder-vendor of a new house liable on the basis of an implied warranty is that the seller and buyer are not on an equal footing in such a transaction….[T]he primary purpose of the transaction is to provide the purchaser with a habitable dwelling and the transfer of the land is secondary. The seller holds himself out as an expert in such construction and the prospective purchaser, if he buys, is forced to a large extent to rely on the skill of the builder.

[3] A builder-vendor is a party who is engaged in the business of building and selling new dwellings. Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968).

> This is true because the ordinary purchaser is precluded from making a knowledgeable inspection of the completed house not only because of the expense and his unfamiliarity with building construction, but also because the defects are usually hidden rendering inspection practically impossible. Under such circumstances, the purchaser is at the mercy of the builder-vendor.

Rutledge, 254 S.C. at 413-414, 175 S.E.2d at 795.

The Court later extended the availability of implied warranties of "merchantability" and fitness for an intended purpose to subsequent purchasers. Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). Although the warranty at issue in Terlinde is distinguishable from the implied warranty of workmanlike service, the Terlinde Court's reasoning is instructive:

> The extension of implied warranties to subsequent purchasers is based upon sound legal and policy considerations. Respondents constructed the dwelling and, as the builder, held out their expertise to prospective buyers….Furthermore, the character of society has changed such that the ordinary buyer is not in a position to discover hidden defects in a structure, especially at a time when he is provided more elaborate furnishings which tend to obscure the structural integrity of the facility. The fact that the subsequent purchaser did not know the home builder, as did the original purchaser, does not negate the reality of the "holding out" of the builder's expertise and reliance which occurs in the market place.

Terlinde, 275 at 397-398 , 271 S.E.2d at 769. Thus, the rationale supporting the imposition of liability for breach of an implied warranty of workmanlike service is that the purchaser is forced to rely on the skill of the professional builder. *See* Kennedy, *supra* (extending reasoning of Terlinde to the implied warranty of workmanlike service). The considerations in favor of imposing liability on professional builders and professional general contractors do not

favor liability on Breedlove for the alleged breach of the implied warranty of workmanlike service.

Based on the record before us, we do not believe this is a case where an innocent and defenseless purchaser could not protect herself from an experienced and skilled construction professional. Breedlove never held himself out to Smith or anyone else to be a licensed general contractor with expertise in construction. In fact, Smith admitted that she knew around the time of the closing that Breedlove built the house for his family. Breedlove never made any misrepresentations as to his expertise or involvement with the construction of the home. Smith had every chance to have the residence inspected before delivery of the deed, but she relied on her husband's cursory inspection. Simply put, this was not a one-sided transaction where Smith had no choice but to rely on the construction skill and expertise of Breedlove.

Accordingly, we hold that the circuit court correctly granted summary judgment in favor of Breedlove on Smith's implied warranty claim because he was not in the business of constructing homes and because our policy of protecting purchasers, who must rely on the skill and expertise of professional builders, is not implicated by the facts of this case.

Smith next argues the circuit erred in granting summary judgment on her negligence claim due to its finding that Breedlove owed Smith no duty. We disagree.

The circuit court found that Breedlove did not owe Smith a duty of care in the construction of the home because he did not undertake and agree to construct the residence for Smith or for anyone else. The circuit court held that the undertaking or agreement to construct a dwelling for another is what creates the duty to exercise and use due care in the construction of that dwelling. Accordingly, because Breedlove never agreed to build the home for Smith or anyone else, then no duty arose for which he could be liable for an alleged breach.

We agree with the circuit court that the crucial undisputed fact is that Breedlove, when he constructed the residence, did not build or plan to build

the home for anyone but his family. He simply did not owe a duty to any future purchaser when no such sale was reasonably expected. As the Court stated in Terlinde:

> The key inquiry is foreseeability, not privity. In our mobile society, it is clearly foreseeable that more than the original purchaser will seek to enjoy the fruits of the builder's efforts. The plaintiffs, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards. In the light of the fact that the home was constructed as speculative, the home builder cannot reasonably argue he envisioned anything but a class of purchasers. By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.

Terlinde, 275 S.C. at 399, 271 S.E.2d at 770.

Because it was not reasonably foreseeable that Breedlove's home would be exposed to a known or speculative "class of purchasers," Breedlove was properly granted summary judgment on Smith's negligence claim. To hold that a duty arose because it was foreseeable that Breedlove would eventually sell the property, in light of the evidence in the record that the sole purpose for construction was as a permanent residence for Breedlove himself, would completely obviate the foreseeability requirement in determining the existence of a duty. In other words, while possible that Breedlove's home would eventually be purchased or occupied by another owner, this remote possibility, under the facts of this case, was not reasonably foreseeable so as to create a duty on behalf of Breedlove. Accordingly, summary judgment was appropriate.

CONCLUSION

We hold that summary judgment was properly granted in favor of Breedlove on Smith's actions for breach of the implied warranty of workmanlike service and for negligence. The order of the circuit court is

AFFIRMED.

TOAL, C.J., MOORE, WALLER and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James C. Sexton, Jr., Respondent.

Opinion No. 26472
Submitted March 25, 2008 – Filed April 21, 2008

DISBARRED

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

Desa Ballard of Law Offices of Desa Ballard, PA, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE.[1] Respondent requests that, if the Court imposes a period of suspension or disbarment, that the sanction be made retroactive to the date of his interim suspension, March 22, 2005. See

[1] Respondent's Motion for Requirement of Submission of Briefs and Motion for Oral Argument are denied.

In the Matter of Sexton, 363 S.C. 413, 611 S.E.2d 250 (2005). We accept the agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

On or about July 22, 2003, respondent was indicted on eleven (11) counts of mail fraud, two (2) counts of wire fraud, and one (1) count of conspiracy to commit money laundering in the United States District Court for the Central District of California.[2] After six weeks of jury trial, respondent pled guilty in March 2005 to four (4) counts of mail fraud and one (1) count of conspiracy to commit money laundering. The guilty plea was made pursuant to a plea agreement which provided for respondent's cooperation and contemplated that respondent would testify against his co-defendant father, James Carroll Sexton, Sr. Respondent's guilty plea immediately precipitated the open guilty plea to all counts by respondent's father.

Respondent was sentenced to imprisonment for twenty-one (21) months and, upon release, supervised release for a term of three (3) years. In addition, respondent was ordered to pay 15% of the ordered restitution in the total amount of $6,833,683.

Over the year following his guilty plea, respondent provided significant cooperation to the government with its continuing investigation and prosecution of other defendants. As a result, the United States moved for an order reducing respondent's sentence. On October 23, 2006, respondent's term of imprisonment was commuted to a term of five (5) years probation, one hundred (100) hours of community service, and payment of restitution.

[2] The acts giving rise to respondent's criminal conduct occurred prior to his admission to the practice of law on March 13, 2002.

Respondent represents that the United States has agreed in principal to apply the amount recovered in a subsequent forfeiture matter to the entire amount of restitution owed by respondent. Respondent anticipates his restitution being made and his probation terminated on this basis, but the forfeiture proceeding had not occurred at the time the parties' submitted the Agreement for Discipline by Consent.

Respondent has fully cooperated with the Office of Disciplinary Counsel's investigation into this matter.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it is a ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(4) (it is a ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime); and Rule 7(a)(5) (it is a ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent, retroactive to the date of his interim suspension. In the Matter of Sexton, supra. Within fifteen (15) days of the date of this

opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

In re: Amendments to South Carolina Bar Constitution

O R D E R

Pursuant to Rule 410(c), South Carolina Appellate Court Rules, we approve amendments to the South Carolina Bar Constitution submitted by the South Carolina Bar which: (1) allow notice of meetings to be served electronically; (2) eliminate the positions of Assistant Secretary and Assistant Treasurer; and (3) formally recognize the current practice of electing ABA State Bar Delegates in staggered terms.

These amendments shall be effective immediately. A copy of the amended portions of the South Carolina Bar Constitution is attached.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina
April 16, 2008

Article II. Definitions and General Provisions

. . .

Section 2.2 General Provisions. For the purpose of this Constitution and Bylaws

. . .

(3) Except as specifically provided otherwise in this Constitution or the Bylaws, any notice which is required or permitted to be given to the members generally or to any class or classes of members may be given by a special mailing or by electronic transmission or it may be contained in any official publication of the Bar. Notice is deemed to have been given when the communication is directed to the member at the mailing address or electronic address on the membership register for that member.

. . .

Article VIII. Officers and Other Personnel

Section 8.1 General. The officers of the Bar are the President, the President-Elect, the Chair of the House of Delegates, the Secretary, and the Treasurer. The Board of Governors may appoint, elect, or employ and prescribe the duties of an Executive Director and such other personnel as the Board deems necessary to carry on the work of the Bar, each of whom shall serve at the pleasure of the Board.

. . .

Article IX. Election of Officers, Governors and State Bar Delegates

. . .

Section 9.3 Nominating Procedure.
(a) On or before November 15 of each year, the Nominating Committee shall meet at a time and place designated by its Chair and shall promptly make nominations by majority vote for the offices of President-Elect, Secretary, and Treasurer, the members of the Board of Governors to be elected in that year, a State Bar Delegate to the American Bar Association and, in every alternate year, for the office of Chair of the House of Delegates. Only Circuit Delegates shall be eligible for nomination to the office of Chair of the House of Delegates. No one shall be eligible to be nominated or elected as State Bar Delegate who will at the time of election have served in such capacity for four years.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mr. T, Appellant,

v.

Ms. T and Michael Alston, Respondents.

In Re: S.N.T and D.T.T

Appeal From Sumter County
Jeffrey Young, Family Court Judge

Opinion No. 4369
Heard January 8, 2008 – Filed April 15, 2008

REVERSED AND REMANDED

Richard C. Jones and Patrick M. Killen, both of Sumter, for Appellant.

Michael Alston, of Washington, and Ryan Alexander McLeod, of Sumter, for Respondent.

PIEPER, J.: Mr. T appeals the family court's dismissal of his complaint to set aside a prior child support order and to determine paternity

of two children born during his marriage with Ms. T.[1] We reverse and remand for an evidentiary hearing and development of the record on the matter.

FACTS

The appellant, Mr. T, and the respondent, Ms. T, were married on May 9, 1986 in South Carolina. Subsequently Mr. T filed a complaint with the Sumter County Family Court seeking a divorce from Ms. T and seeking joint, legal custody of the parties' minor children. In paragraph five (5) of Mr. T's complaint, he alleged that "two children have been born of this marriage." In paragraph six (6) of his complaint, Mr. T alleged that he was entitled to joint, legal custody of the children. Ms. T then filed an answer and counterclaim admitting the allegations contained in paragraph five (5) of Mr. T's complaint and denying that he was entitled to joint, legal custody of their children.

The parties subsequently entered into an agreement which was placed in the record. The agreement specified that the parties agreed that Ms. T would have sole custody of the parties' two minor children. The agreement of the parties provided for reasonable and liberal visitation by Mr. T and it also provided for the payment of child support by Mr. T. He agreed to pay child support for the children in the amount of $1,219.69 each month.

The parties submitted their agreement to the Sumter County Family Court for approval and the court approved their agreement. The couple was divorced by Final Divorce Decree filed on October 18, 1999, which specifically set forth and incorporated the parties' agreement. Pursuant to that decree, the court specifically found that "[t]wo children have been born of this marriage." No appeal was taken from this order.

Mr. T filed the present lawsuit alleging that from the time of the birth of the children, through the time of the divorce and until recent months, he was under the false and mistaken belief that these children were his biological children. Mr. T also alleged that during a summer visit in 2005, he

[1] We have omitted the names of the parents and children from our opinion.

noticed that his son's physical appearance was similar to that of a man by the name of Michael Alston (Alston). Respondent Alston was named as a party to the present lawsuit. Mr. T also attached to his original complaint a DNA paternity test suggesting that he was not the biological parent of the children.

At the temporary hearing on March 10, 2006, counsel for Ms. T asked the court to continue the matter or to dismiss the complaint based on the court's lack of in personam jurisdiction over her and the court's lack of subject matter jurisdiction based on res judicata/collateral estoppel grounds. Alston also joined in the relief requested by Ms. T alleging he was a resident of Washington D.C. The Honorable W. Jeffery Young took Ms. T's motion to dismiss under advisement and allowed the parties thirty (30) days within which to prepare and submit briefs to the court regarding Ms. T's oral motion to dismiss.

On March 22, 2006, Mr. T amended his pleadings to allege fraud on the part of Ms. T. She then filed her answer and counterclaim to the amended complaint on April 19, 2006. In her answer and counterclaim, Ms. T objected to the court considering the paternity test which was attached to Mr. T's pleadings.

Thereafter, the court issued its order dismissing the complaint with prejudice based upon the prior divorce decree stating that there was "a clear finding of paternity" and the court lacked subject matter jurisdiction based on res judicata/collateral estoppel. The court's order of dismissal was filed on June 1, 2006. Pursuant to a motion for reconsideration, a hearing was held on September 6, 2006; that motion was denied.[2]

On September 28, 2006, Mr. T filed his Notice of Appeal. The appeal was dismissed on November 9, 2006 and was reinstated on December 21,

[2] The court never addressed the arguments that it lacked in personam jurisdiction over the parties.

2006. On or about March 1, 2006, Mr. T filed a Motion to Argue against Precedent with this court which was subsequently denied.[3]

STANDARD OF REVIEW

In appeals from the family court, the appellate court has the authority to correct errors of law and to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005); Miller v. Miller, 299 S.C. 307, 311, 384 S.E.2d 715, 717 (1989). However, this broad scope of review does not require this court to disregard the family court's findings. Lacke v. Lacke, 362 S.C. 302, 307, 608 S.E.2d 147, 149-50 (Ct. App. 2005). The issue presented on appeal is purely a question of law.

LAW/ANALYSIS

Mr. T claims that the family court erred in granting the respondents' motion to dismiss for lack of subject matter jurisdiction based on res judicata/collateral estoppel grounds. The procedural posture of this case is critical to this court's analysis. Mr. T has filed an independent action challenging the original decree on various grounds. The first cause of action in Mr. T's amended complaint brings the underlying paternity action pursuant to S.C. Code Ann. § 20-7-952 (1985). In his second cause of action, he seeks relief on the ground that prospective enforcement of the existing decree would be inequitable and it should therefore be set aside pursuant to Rule 60(b)(5), SCRCP. Finally, in his third cause of action, he seeks relief generally under Rule 60(b) which the court may liberally construe as either a

[3] This court denied Mr. T's motion to argue against published precedent for two reasons. First, this court, sitting as a three judge panel, lacks the authority to rule against prior published precedent without en banc review. Second, as discussed herein, the case at hand is distinguishable from the precedent set by Mr. G v. Mrs. G, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995), and the present case on appeal can be resolved without review of the precedent in Mr. G.

motion or an independent action.[4] Some of the causes of action suggest more than one ground of relief but throughout his pleading, he asserts various allegations of inequity and fraud or misrepresentation. In any event, where the interests of minors or incompetents are involved, "[p]rocedural rules are subservient to the court's duty to zealously guard the rights of minors. Where the rights and best interests of a minor child are concerned, the court may appropriately raise, ex mero motu, issues not raised by the parties." S.C. Dept. of Soc. Servs., v. Roe, 371 S.C. 450, 463, 639 S.E.2d 165, 172 (Ct. App. 2006) (citations omitted).

The family court judge found that the original divorce decree made a clear finding of paternity. The court cites to paragraph four of the divorce decree which states that "[t]wo children have been born to this marriage." The family court judge then concluded that the court "has no jurisdiction since the action is barred by res judicata/collateral estoppel."

However, the application of res judicata and collateral estoppel principles are not matters of subject matter jurisdiction. Subject matter jurisdiction refers to a court's power to hear and determine cases of the general class or category to which proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (citation omitted). Preclusive concepts such as res judicata and collateral estoppel are not jurisdictional matters. Weston v. Margaret J. Weston Med. Ctr., 2007 WL 2750216 at *4 n.6 (D.S.C. Sept. 20, 2007) (citing Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S.Ct. 1517 (2005)). While the family court order referenced jurisdiction, we believe the further reference to preclusion principles suggests the court dismissed the case under Rule 12(b)(6), SCRCP.

In doing so, the family court judge relied on the factual similarities between the case at hand and this court's decision in Mr. G v. Mrs. G, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). However, the case at hand is procedurally distinguishable from Mr. G. Here, Mr. T not only filed an

[4] See Banker's Mortg. Co. v. U.S., 423 F.2d 73, 77 (5th Cir. 1970); U.S. v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002).

independent action challenging the original decree, but also specifically seeks relief under Rule 60(b)(5); in Mr. G, the court specifically noted that the family court never ruled on the Rule 60(b)(5) issue and declined to consider it on appeal. Accordingly, sitting as a panel, we do not need to reconsider the precedent set by Mr. G in order to determine this appeal.[5]

Notwithstanding the intrinsic/extrinsic fraud analysis of Mr. G, the presence of extrinsic fraud is not the only mechanism by which a prior judgment can be set aside. Rule 60(b), SCRCP states, in part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

[5] Further, we note the South Carolina Supreme Court has adopted the intrinsic/extrinsic fraud distinction in an independent action context. However, that case dealt with the issue of fraud and not the other aspects of Rule 60 or an independent action based on special circumstances outside the context of fraud. See Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003). Moreover, in Arnold v. Arnold, 285 S.C. 296, 328 S.E.2d 924 (Ct. App. 1985), the court reversed an order of summary judgment as to a subsequent attack on paternity because the question of fraud had not been adequately addressed. However, Judge Goolsby, in dissent, opined that Arnold failed to demonstrate any facts, which if proved, would establish extrinsic fraud. We only read Arnold as being procedural in nature although recognizing on remand in that case the need to demonstrate the requisite fraud necessary for relief since fraud was the issue presented.

> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, "or" to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(emphasis added). The language of Rule 60 specifically excludes motions under Rule 60(b)(4) and (5) from the one year limitation within which prior judgments may be attacked and indicates these motions must be brought within a reasonable time. Furthermore, Rule 60(b)(5) allows the court to entertain motions to relieve a party from a prior judgment based on the competing equities of the circumstances that establish the judgment's prospective application is no longer equitable.

Finally, aside from the five subsections mentioned above, Rule 60 explicitly indicates that it in no way limits the court's power to entertain an independent action "to relieve a party from a judgment . . . 'or' to set aside a judgment for fraud upon the court." (emphasis added). While the most

common ground for an independent action is for fraud, the rule is not restricted to only that ground. The structure of this rule and its use of the word "or" indicate to this court two potential independent action attacks on a judgment, order or proceeding: 1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court. See, 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE. & PROCEDURE § 2868 (2d ed. 1995).

The Eighth Circuit characterized the independent action as follows:

> The indispensable elements of such a cause of action are 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law.

Nat'l Sur. Co. of N.Y. v. State Bank of Humboldt, 120 Fed. 593 (8th Cir. 1903). In essence, the rule merely reflects many of the considerations attendant to an equitable analysis. Further, since the independent action referenced in the rule is one in equity, the court may consider equitable defenses such as laches, unclean hands, and whether an adequate legal remedy exists. The court may also consider other policy doctrines such as parens patriae; we do not suggest this list is exclusive. However, what we do suggest is that equity only intervenes when the circumstances so require, but to do so, a court must be aware of all of the circumstances before it acts. Thus, the parties must be allowed to develop the record accordingly.

We find it necessary to review some of the cases prior to this date to test how they reflect these equitable principles. In Eichman v. Eichman, 285 S.C. 378, 329 S.E.2d 764 (1985), the husband was barred from asserting that he was not the father of the child. There were no allegations of fraud;

however, based on the elements cited above, it can be argued that the husband was at fault since there was an indication the child was born before husband was married and he arguably could have explored the matter fully based on that knowledge but intentionally chose not do so in hopes of reconciliation. Thus, his own voluntary decisions could reasonably preclude his request for relief. In Evans v. Gunter, 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988), the former husband sought to collaterally attack a child support decree and filed a Rule 60 motion based on evidence that he could not father a child throughout his life. The case was dismissed for failure to state a claim but that order was reversed because acts of the wife inducing him to sign a document denied husband the opportunity to be heard. Similarly, in Arnold, discussed herein, the trial court determined that the husband was estopped to contest paternity. However, the husband alleged fraud and the court reversed finding that the trial court made no determination whether there existed a genuine issue of fact regarding fraud since res judicata would not preclude vacation of the order if the requisite type of fraud was present. The court also indicated that for collateral estoppel purposes, there was no contention that the parties actually litigated the question of paternity.

Therefore, even if we were to assume based on precedent that any fraud alleged is intrinsic in nature, the judgment and concurrent finding of paternity is nonetheless vulnerable to attack outside of the fraud context under Rule 60(b)(5) and through an independent action if the appropriate circumstances are present.[6] If the family court had reached this stage of the analysis, it would have been necessary for it to consider "whether" res judicata or collateral estoppel should apply based on the circumstances presented. However, the parties were never given an opportunity to develop the record on these issues because the court merely determined it lacked jurisdiction

[6] We note that in Ray v. Ray, 374 S.C. 79, 82, 647 S.E.2d 237, 242 (2007), Justice Pleicones, in his dissent, recognized the possibility of some exceptional circumstance involving intrinsic fraud which would justify equitable relief. He did not provide an example but such a statement safeguards the broad inherent power of a court to effectuate equity under the proper circumstances. However, that dissent is not controlling as to our ruling herein.

based on those same preclusion principles without giving consideration to any possible exceptions to these rules. We understand the family court's concern, as well as hesitation, since there is little guidance in our case law on the various exceptions to preclusion principles.

As indicated, these preclusion concepts have been subjected to exceptions to their application. This court, in Pye v. Aycock, 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (Ct. App. 1997), adopted the Restatement (Second) of Judgments § 28 (1982), which states in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

The mere presence of the various exceptions, many of which are founded in equity principles, warrants affording the parties the opportunity to develop the record. As noted in the Restatement provision adopted in Pye, the adverse impact upon the interests of persons not parties to the original litigation may also be considered. Here, neither the alleged biological father, nor the children, were parties to the original litigation.

As articulately stated in People v. Plevy, 52 N.Y.2d 58, 64, 417 N.E.2d 518, 521 (1980) (citation omitted), preclusive doctrines are "not to be rigidly or mechanically applied and must on occasion, yield to more fundamental

concerns."[7] More precisely, the application of res judicata and collateral estoppel "may be precluded where unfairness or injustice results, or public policy requires it." Nelson v. OHG, 354 S.C. 290, 315, 580 S.E.2d 171, 184 (Ct. App. 2003) rev'd in part, 362 S.C. 421, 608 S.E.2d 855 (2005) (citing State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998); Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001).

Public policy suggests that "South Carolina, as *parens patriae*, protects and safeguards the welfare of its children. Family Court is vested with the exclusive jurisdiction to ensure that, in all matters concerning a child, the best interest of the child is the paramount consideration." Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992) (citation omitted). "This principle is founded upon the state's duty to protect those of its citizens who are unable because of infancy to take care of themselves, and on the right of the child, as citizen and ward, to the state's protection." Cook v. Cobb, 271 S.C. 136, 145, 245 S.E.2d 612, 617 (1978) (citation omitted). Nothing in the record herein suggests that the interests of the children were ever considered.[8]

An accurate determination of paternity not only significantly affects the interests of the parents or alleged parents of the children, but also significantly affects the interests of the children both now and in the future. A conclusion that parentage was adjudicated in the first proceeding based on principles of finality is indeed troubling, especially when considering the fundamental interests involved herein. Significant changes in testing procedures, including DNA analysis, have been developed since many of these principles were adopted and these tests allow more certainty in the

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[7] Although this concept originated in the context of collateral estoppel, South Carolina courts have applied the concept equally to res judicata. See State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998); Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001); Nelson v. OHG, 354 S.C. 290, 315, 580 S.E.2d 171, 184 (Ct. App. 2003) rev'd in part, 362 S.C. 421, 608 S.E.2d 855 (2005).

[8] Mr. T requested the appointment of a GAL in his complaint; however, the record does not indicate that a GAL was ever appointed to represent the interests of the children.

determination of parentage. Moreover, knowledge of a biological parent is important for purposes of medical history, genetic defects, inheritance rights and other matters; all of these considerations are best left to the family court.

Nothing herein should be construed as a finding by this court as to a bright line test in which to consider the issues presented. We specifically decline to do so in the absence of a well-developed record. We state only that these decisions cannot be made in a vacuum based on strict notions of finality or upon assumption and speculation about the best interests of the children. That decision is properly one for the learned judges of the family court after balancing the interests of all parties involved, including the children, as well as any equitable circumstances presented that would warrant equitable relief if the court determines, after development of the record, that equitable relief is appropriate.

CONCLUSION

Having considered the record on appeal, we hereby reverse the order of dismissal for lack of jurisdiction and remand the matter so that the family court may allow the parties to fully develop the record on the issues presented consistent with our decision. Once developed, the court must adequately balance the competing interests of all those involved as well as any equitable circumstances presented in the case and evaluate the applicability of the various exceptions to res judicata and collateral estoppel.[9] While this court acknowledges the policy consideration which thrives for finality of judgments, the equities of a case may be just as significant in overriding such finality. This especially rings true when the issue before the court is a determination of something so fundamental as the identity of a biological parent. Further, because the children have an identifiable interest in a determination of parentage and the proceedings herein, the court on remand

[9] Because the family court did not address any issues as to in personam jurisdiction, these issues are not properly preserved for our review but the family court may address these matters on remand if raised by the parties.

should consider whether the appointment of a guardian ad litem is appropriate.[10]

REVERSED AND REMANDED.

HUFF, J., and GOOLSBY, A.J., concur.

[10] See also S.C. Code Ann. §20-7-952(E) (1985).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Deborah W. Spence,
Individually, and on behalf of the
Estate of Floyd W. Spence, Appellant,

v.

Kenneth B. Wingate, Sweeny
Wingate & Barrow, P.A., Respondents,

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4370
Heard September 11, 2007 – Filed April 17, 2008

AFFIRMED

A. Camden Lewis and Brady R. Thomas, both of Columbia, for Appellant.

Pope D. Johnson, III, of Columbia, for Respondents.

THOMAS, J.: This is a legal malpractice action. The trial judge granted partial summary judgment to Respondents Kenneth B. Wingate and his law firm, Sweeney Wingate & Barrow, finding they did not owe a

fiduciary duty to Deborah Spence (Wife) concerning her late husband's life insurance policy. Wife appeals. We affirm.

FACTS

Viewing the record in the light most favorable to Wife, we find the following: On August 13, 2001, Wingate commenced legal representation of Wife. The purpose of the representation was to negotiate an agreement on Wife's behalf with the four sons of her husband, Congressman Floyd W. Spence, concerning the division of Spence's probate estate. Wife and Spence's sons entered into such an agreement on August 15, 2001. During the course of Wingate's representation of Wife, Wife also consulted with him about her husband's Federal Group Life Insurance Policy and informed him Spence had named her as beneficiary. On August 16, 2001, Spence died. Either in mid-August or early September, Wingate became the attorney for Spence's estate.

In 1988, Spence had named each of his four sons and Wife as equal beneficiaries under the life insurance policy. Shortly before his death, however, Spence attempted to make Wife the sole beneficiary of the policy. After Spence died, the Members Services Office of the United States House of Representatives determined the proceeds of the policy should be divided equally among Wife and the four sons and made payment accordingly.

Wife brought this action against Respondents, alleging negligence, professional negligence, breach of fiduciary duty, and civil conspiracy. After Respondents answered, they moved for partial summary judgment, claiming they were not liable to Wife or Spence's estate in connection with Spence's congressional life insurance policy. Following a hearing, the trial judge granted partial summary judgment to Respondents, holding that "[b]y statute, [Respondent] owed no duty or obligation to [Wife] with respect to the congressional life insurance police or the manner in which it was paid." This appeal followed.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, the appellate court uses the same standard that governs the trial court under Rule 56(c), SCRCP. Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). Summary judgment should be granted when "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. Nevertheless, "[a]n issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005); see also Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) ("Generally, an issue must be raised to and ruled upon by the circuit court to be preserved.").

LAW/ANALYSIS

On appeal, Wife argues a genuine issue of material fact exists as to whether Respondents breached a fiduciary duty owed to her arising from Wingate's earlier representation of her in a related matter. Respondents contend this argument is not preserved for review because the trial judge did not explicitly rule on this argument and Wife did not move to alter or amend the appealed order on that ground. In her reply brief, Wife maintains no motion to alter or amend was necessary because the sole argument she advanced as the basis for the existence of a fiduciary duty was Respondents' prior legal representation of her.

We agree with Respondents that it was incumbent on Wife to move under Rule 59(e), SCRCP, for a ruling on the issue of whether Respondents owed her a fiduciary duty based on her status as their former client in order to preserve this argument for appeal. In granting partial summary judgment to Respondents, the trial judge relied on South Carolina Code section 62-1-109. That section provides as follows:

> Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

S.C. Code Ann. § 62-1-109 (Supp. 2007).[1] This statute provides only that a lawyer's representation of a fiduciary in a probate matter does not, without more, impose on the lawyer responsibilities to other parties with interests in the fiduciary property. It does not address whether attorneys representing fiduciaries could be accountable to such claimants for other reasons.

Even if, as Wife asserts, the only argument she offered in opposition to the summary judgment motion was that Respondents owed her a fiduciary duty regarding Spence's life insurance policy because she had consulted with Wingate in the past about the matter, the trial judge apparently overlooked the prior attorney-client relationship. A careful examination of the appealed order indicates the trial judge considered only (1) Wingate's later role as the attorney for Spence's estate, and (2) the fact that Wingate did not represent Wife individually at the time of Spence's death. The trial judge did not mention Wife's alternative theory of liability that, as a former client of Respondents, she had a continuing fiduciary relationship with them that would not be affected by section 62-1-109. There is nothing in the appealed order suggesting the trial judge determined this statute absolved Wingate of

[1] The trial court cited the version appearing in the 2005 supplement of the South Carolina Code, which is identical to that appearing in the 2007 supplement.

all responsibilities to Wife regardless of when or how they arose. Absent an explicit ruling on the argument Wife advances in her appeal, we cannot disturb the trial judge's decision. See Shealy v. Aiken County, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding a general ruling by the trial court is insufficient to preserve a specific issue for appellate review); Van Blarcum v. City of N. Myrtle Beach, 337 S.C. 446, 453, 523 S.E.2d 486, 490 (Ct. App. 1999) (stating a reviewing court cannot address an issue on which there is an implicit rather than explicit ruling).

Under these circumstances, we cannot in good conscience address the issue of whether Wingate's prior representation of Wife in a related matter creates genuine issues of material fact as to whether Respondents owed and breached a fiduciary duty to Wife. The trial judge did not rule on this argument and was never requested to correct this omission.

AFFIRMED.

ANDERSON, J., concurs. HEARN, C.J., dissents in a separate opinion.

HEARN, C.J. (dissenting):

I respectfully dissent. I would hold the issue is preserved for our review, and that the circuit court judge erred in granting summary judgment on Wife's breach of fiduciary duty claim.

Wife's allegation that Wingate breached his fiduciary duty to her with regard to Spence's congressional life insurance policy was based upon their prior attorney-client relationship. As the majority opinion notes, and as Wingate's counsel conceded during oral argument, Wife's only argument in opposition to Wingate's motion for summary judgment on the breach of fiduciary claim was this prior attorney-client relationship. Inexplicably, and erroneously, the circuit court judge ruled that S.C. Code Ann. § 62-1-109 (Supp. 2005) precluded Wife's claim for breach of fiduciary duty, apparently believing that statute completely resolved Wife's argument concerning the parties' prior attorney-client relationship. In its order, the circuit court stated: "By statute, [Wingate] owed no duty or obligation to [Wife] with

respect to the congressional life insurance policy or the manner in which it was paid." Because the issue of Wingate's prior representation of Wife was the only argument made by Wife in support of her claim for breach of fiduciary duty, and because the circuit court ruled on this issue, a Rule 59(e) motion was unnecessary. See Elam v. South Carolina Department of Transportation, 361 S.C. 9. 25, 602 S.E.2d 772, 780 (2004) ("Civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party); Hardaway Concrete Co. Inc. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 493 (Ct. App. 2007) (holding a Rule 59(e) motion unnecessary to preserve an argument for appeal where the issue was raised to, and ruled upon by the circuit court).

On the merits, I would hold that a genuine issue of material fact existed as to whether Wingate breached a fiduciary duty when he failed to advise or assist Wife with the life insurance policy. Accordingly, I believe the circuit court erred in ruling that, as a matter of law, no duty was owed.

"A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." Moore v. Moore, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). "An attorney/client relationship is by nature a fiduciary one." Hotz v. Minyard, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (1991). "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Smith v. Hastie, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005).

Here, it is undisputed that Wingate represented Wife while negotiating an agreement between her and Spence's sons regarding Spence's probate estate. During that representation, Wife alleges she informed Wingate of her status as sole beneficiary under her husband's life insurance policy. Soon thereafter, Wife was told Wingate had become the attorney for her husband's estate. However, Wife alleges that Wingate never severed their attorney-client relationship. Wife claims that when Wingate informed her he was going to be the attorney for her husband's estate, he told her that she no longer needed a lawyer. At a subsequent family meeting, Wife claims Wingate suggested she give the sons the entire life insurance policy, despite his knowledge that Spence had designated her as the sole beneficiary. Upon

hearing this suggestion, Wife alleges she asked Wingate "to put his hat back on as [her] attorney and help [her]." According to Wife, Wingate refused to assist her.

Based on these allegations, there is evidence to support Wife's claim that a fiduciary relationship existed between her and Wingate, and that Wingate breached this fiduciary duty. Wingate had been her attorney, and in that capacity, she discussed with him her claim to Spence's life insurance. Thereafter, Wife alleges Wingate began representing the estate without severing their attorney-client relationship, advised her not to obtain a new attorney, refused to counsel her on how to claim her benefits, and even suggested she give up all of her rights under the policy. While a jury may ultimately find Wingate committed no wrongdoing, I would hold the circuit court erred in making that determination as a matter of law.

Accepting Wife's allegations as true, as we must when reviewing an order granting summary judgment, Wingate, as Wife's attorney, owed her certain fiduciary duties. Hotz, 304 S.C. at 230, 403 S.E.2d at 637. These duties are distinct from any duties arising from Wingate's representation of the estate. Therefore, I would hold the allegations by Wife are sufficient to present a genuine issue of material fact for the jury to determine whether Wingate's conduct amounted to a breach of a fiduciary duty. See Id. (concluding summary judgment was improperly granted where evidence indicated a factual issue existed as to whether a fiduciary duty had been breached). [2]

Accordingly, I would **REVERSE.**

[2] I note that Wife's allegations also support damages caused by Wingate's breach of fiduciary duty. Specifically, Wife claims that as a result of Wingate's breach, the insurance benefits were divided five ways among Wife and her husband's four sons instead of being paid solely to her. Moreover, Wife claims that had Wingate not breached this fiduciary duty, and either helped her file a declaratory judgment or advised her to hire another lawyer, she would not have suffered these damages.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Keith Anthony Sims, **Appellant.**

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4371
Heard April 8, 2008 – Filed April 17, 2008

AFFIRMED

Joseph L. Savitz, III, Chief Appellate Defender, of Columbia, for Appellant.

Henry Dargan McMaster, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Donald J. Zelenka, Assistant Deputy Attorney General, Melody J. Brown, Assistant Attorney General, and Solicitor Warren B. Giese, all of Columbia, for Respondent.

ANDERSON, J.: Keith Anthony Sims appeals his murder conviction, arguing the trial judge allowed the State's witness to relate a non-testifying third party's statement, violating Rule 802, SCRE. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Sims shot and killed Brian Anderson, and with the help of Natalie English, Derrick Ruff and Nikki Davis, hid the body and attempted to hide or destroy all other evidence. On December 30, 2003, the night of the shooting, Anderson and Sims attended a birthday party, and Anderson gave Sims a ride home. The two men engaged in a conversation about their past disagreements, and Anderson spoke of taking care of his "beefs" before the New Year. Previously, the men were in a dispute over whether Sims owed Anderson money. Sims testified, during their ride home, he believed Anderson was reaching under his seat to obtain a firearm and Sims fatally wounded Anderson with a weapon he had on his person. Sims recounted the events:

> We was talking about past arguments that we had. He was telling me that he had all these – all these different guns. He started telling me about how – he started telling me about how he could have then have brought harm to me and my family, how he could have then have brought harm to me and my family.
>
> So . . . when we was pulling up my driveway, he was telling me that I was taking – I was taking food out – out his unborn baby, out his unborn baby's mouth. He said that I was taking food out his unborn baby's mouth.
>
> And when he stopped the car he was telling me that – he was telling me that he was going to take care of all his beefs before the New Year. He was telling me that he was going to – that he was going to end all his beefs before the New Year, that he was going to end all his beefs before the New Year.

> And he was reaching underneath his seat. So I thought he was fixing to – he was fixing to grab him a gun to shoot me. So I pulled out my gun. Out of fear I shot.
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> . . .
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> . . . I thought he was reaching for his gun. So I thought he was reaching for his gun to shoot me and kill me. So out of fear I pulled my gun out and shot.

When asked by his counsel whether he intended to kill Anderson, Sims replied:

> No. I didn't mean to kill him. I was pulling my gun out because I thought he was fixing to kill me. I guess just out of – out of fear I shot.

Sims enlisted his girlfriend, Natalie English; his friend, Derrick Ruff; and Ruff's girlfriend, Nikki Davis, to hide the body and dispose of the remaining evidence. During her direct examination by the State, Davis proffered:

> Well, it was like around 3 something in the morning and I heard a knock at the door. And I wasn't going to answer the door. I was like, Derrick's mom just kept, you know, telling me to open the door. So I went and I opened the door. And Keith came in with Natalie with his arm folded.
>
> . . .
>
> He told me to wake up "Black", which is Derrick, and I told him I can't get him up. You just – you get him up yourself, basically. So he started hitting on Derrick, you know, to get him up. And Derrick got up. . . .
>
> . . .

So he started hitting him to get him up. And Derrick finally got up and told him, you know, to go in the back. And they went to the back and they started talking. Which Natalie, you know, she was already in. She came. She sat –

. . .

So I just started rubbing her back and telling her that everything was going to be all right and stuff. And she wouldn't tell me. I kept asking her what was going on. She wouldn't tell me what was going on. And so she asked me if I wanted to go to Charleston. And I told her, yeah, I needed to go to Charleston because at the time I was two months pregnant with my daughter and I needed to get my Medicaid card and my social security card and stuff like that. So I told her, yeah, I was going to go. So I started getting dressed and stuff like that. And then at that time Keith came out first, and Derrick he was still in the kitchen or whatever. And Keith asked me whether or not I was going or not. I told him, yeah, I was going. And he asked me if they had – if we had any bricks or anything like that. So I told him, I don't know. Just go look in the backyard.

. . .

. . . And we went to a Shell station afterwards. And Derrick got out to get gas. And at the time it was just – and Natalie got out and she went in the store. And at the time it was just me and Keith inside the car. And, you know, I was joking with him and stuff, just like, why didn't you get me anything for my birthday and stuff like that. You know, he gave me $10 for my birthday or whatever. And he told me to go inside the store to make sure Natalie was getting everything that he told them to get.

So I got out of the car and I went and I just peeked my head inside the store. And at that time she had, you know, like the

gloves and stuff like on top of the counter. So I figured that's what he told her to get. And I came back out into the car. And everybody came and they got inside the car. And then we headed to –

. . .

And we parked right in front of the lady's house. And I just figured that they were going to go. And so we all were going to go inside the house. But me and Natalie stayed inside the car and Keith and Derrick got out. And they started toting like this long thing I guess to a car, and a chain, you know, some bricks, just toting it to the back of the house right behind me.

. . .

The next thing I knew he [Sims] sped from behind the house inside of another car. And that's when I, you know, started pushing Natalie. I'm asking her what's going on? Did he steal a car or what's going on? Where did he that from and stuff like that. And then she told me, you know, Keith had murdered somebody. . . .

. . .

Keith dragged him out and he started to drag him by himself but I guess he couldn't do it. And Derrick started to help. And they got like just a little bit with the – he had just got a little bit with the guy and then Derrick came back and got Natalie. And Natalie told me to come on. And – and while we were – or when I got out of the car Keith was – he told me to put my socks on my hands, which I just did what he said. I put my socks on my hands. And Natalie grabbed one leg and I grabbed the other. . . .

. . .

> We just started dragging him. And we just dragged him 'til we – we got like to this little balcony thing. And then the guy was just laying like flat on the ground. And Keith was just saying things to him. And we were just trying to get him – we were just trying to get him through.
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> . . .
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> . . . So he said that our next best thing was to just try to lift him up. So we lifted him up and it took a while. And we just finally got him over. And everybody just ran or walked off and never looked back. But before – while we was walking off, Keith stayed and I heard a splash. And I just walked back to the car. And they got back into the car. And Keith brought some things to the car inside a paper bag. And I looked inside the bag and there was a cellphone and a chain and the guy's wallet.
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> . . .
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> And we left there and just kept on going. And somewhere during that time we – he [Sims] told me to get rid of it [the contents of the paper bag]. Actually he told me to get ride of it. . . .

Sims objected to Davis being permitted to testify English said "Keith had murdered somebody," arguing it was hearsay. The trial court overruled the objection without comment.

ISSUE

Did the trial judge err in allowing one co-conspirator to testify to another co-conspirator's statement relating Sims' own statement of guilt, characterizing it as non-hearsay, and finding it was calculated to induce participation in disposing of the victim's body and other evidence?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)); State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005). The Appellate Courts are "bound by the trial court's factual findings unless they are clearly erroneous." Baccus, 367 S.C. at 48, 625 S.E.2d at 220 (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)); Preslar, 364 S.C. at 472, 613 S.E.2d at 384.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) (citing State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974)); State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006); Preslar, 364 S.C. at 472, 613 S.E.2d at 384 ("On review, we are limited to determining whether the trial judge abused his discretion."). We will "not re-evaluate the facts based on [our] own view of the preponderance of the evidence but simply [determine] whether the trial judge's ruling is supported by any evidence." Wilson, 345 S.C. at 6, 545 S.E.2d at 829; Preslar, 364 S.C. at 472, 613 S.E.2d at 384. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Pagan, 369 S.C. at 208, 631 S.E.2d at 265 (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)); Douglas, 369 S.C. at 429-430, 632 S.E.2d at 848 (citing State v. Manning, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997)); Funderburk, 367 S.C. at 239, 625 S.E.2d at 249-50; Preslar, 364 S.C. at 473, 613 S.E.2d at 384-385. "In order for an error to warrant reversal, the error must result in prejudice to the appellant." Id. at 473, 625 S.E.2d at 385; Key, 256 S.C. at 94, 180 S.E.2d at 890 ("It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial."); State v. LaCoste, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001) ("Rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that

discretion resulting in prejudice to the complaining party.") (citing State v. Hughey, 339 S.C. 439, 453, 529 S.E.2d 721, 728-729 (2000); State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000)).

LAW/ANALYSIS

Sims contends the trial court erred in allowing Davis to testify regarding statements allegedly made to her by Natalie English, asserting this testimony constitutes impermissible hearsay. We disagree.

1. Hearsay

Rule 801(c) of the South Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules." State v. LaCoste, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001) (citing Rule 802, SCRE). "Hearsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examine the declarant." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150 (1985). "[R]eversal is not required unless appellant was prejudiced by the error." Mitchell, 286 S.C. at 573, 336 S.E.2d at 150.

> Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial." State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

Mitchell, 286 S.C. at 573, 336 S.E.2d at 150.

2. Conspiracy

Section 16-17-410 of the South Carolina Code of Laws provides:

> The common law crime known as "conspiracy" is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means.

"A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or of achieving by criminal or unlawful means an object that is neither criminal nor unlawful." State v. Gunn, 313 S.C. 124, 133-134, 437 S.E.2d 75, 80 (1993); State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001); Pinion ex rel. Montague v. Pinion, 363 S.C. 564, 566, 611 S.E.2d 271, 272 (Ct. App. 2005); State v. Crocker, 366 S.C. 394, 404, 621 S.E.2d 890, 895-896 (Ct. App. 2005) (citing S.C. Code Ann. § 16-17-410 (2003)); State v. Crawford, 362 S.C. 627, 638, 608 S.E.2d 886, 892 (Ct. App. 2005); State v. Condrey, 349 S.C. 184, 191-192, 562 S.E.2d 320, 323 (Ct. App. 2002); State v. Stuckey, 347 S.C. 484, 502, 556 S.E.2d 403, 412 (Ct. App. 2001); State v. Gosnell, 341 S.C. 627, 636, 535 S.E.2d 453, 458 (Ct. App. 2000); State v. Hammitt, 341 S.C. 638, 644, 535 S.E.2d 459, 462 (Ct. App. 2000); State v. Horne, 324 S.C. 372, 381, 478 S.E.2d 289, 294 (Ct. App. 1996) (noting the crime of conspiracy consists of an agreement or mutual understanding).

"The gravamen of the offense of conspiracy is the agreement or combination." Gunn, 313 S.C. at 133-134, 437 S.E.2d at 80; Crocker, 366 S.C. at 404, 621 S.E.2d at 896; Stuckey, 347 S.C. at 502, 556 S.E.2d at 412; Gosnell, 341 S.C. at 636, 535 S.E.2d at 458; Hammitt, 341 S.C. at 644, 535 S.E.2d at 462 ("The gravamen of conspiracy is the agreement or mutual understanding.").

"An overt act in furtherance of the conspiracy is not necessary to prove the crime." Crocker, 366 S.C. at 404, 621 S.E.2d at 896. "What is needed to establish criminal conspiracy is proof [the defendants] intended to act together for their shared mutual benefit within the scope of the conspiracy charged." Stuckey, 347 S.C. at 503, 556 S.E.2d at 412-413; Buckmon, 347 S.C. at 323, 555 S.E.2d at 405; State v. Greuling, 257 S.C. 515, 523, 186 S.E.2d 706, 709 (1972) ("In criminal conspiracy it is not necessary to prove an overt act. The gist of the crime is the unlawful combination. The crime is

then complete, even though nothing further is done."); State v. Crawford, 362 S.C. 627, 639, 608 S.E.2d 886, 892 (Ct. App. 2005).

Discussing the necessity of an agreement between co-conspirators, the South Carolina Court of Appeals elucidated:

> "To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties." Id. (quoting State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001)). Evidence of direct contact or an explicit agreement between the defendants need not be shown. State v. Barroso, 320 S.C. 1, 8, 462 S.E.2d 862, 868 (Ct.App.1995), rev'd on other grounds, 328 S.C. 268, 493 S.E.2d 854 (1997). "It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe his own benefits were dependent upon the success of the entire venture." Id. at 8-9, 462 S.E.2d at 868.

Crocker, 366 S.C. at 404-405, 621 S.E.2d at 896; Crawford, 362 S.C. at 639, 608 S.E.2d at 892 ("Once an agreement has been reached, the crime of conspiracy has been committed; no further act need take place."); Condrey, 349 S.C. at 192, 562 S.E.2d at 323; Stuckey, 347 S.C. 502-503, 556 S.E.2d at 412 ("However, a formal agreement is not necessary to establish a conspiracy, as the conspiracy may be proven by 'circumstantial evidence and the conduct of the parties.'") (quoting State v. Bultron, 318 S.C. 323, 334, 457 S.E.2d 616, 622 (Ct. App. 1995)); Gosnell, 341 S.C. at 636, 535 S.E.2d at 458 (South Carolina conspiracy law does not require proof of overt acts; circumstantial evidence may prove conspiracy.)

'"To establish sufficiently the existence of the conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties."' State v. Fleming, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963) (quoting 15 C.J.C. Conspiracy § 93a); State v. Follin, 352 S.C. 235, 267, 573 S.E.2d 812, 828 (Ct. App. 2002).

"Once a conspiracy has been established, evidence establishing beyond a reasonable doubt the connection of a defendant to the conspiracy, even though the connection is slight, is sufficient to convict him of knowing participation in the conspiracy." State v. Vasquez, 341 S.C. 648, 654, 535 S.E.2d 465, 468 (Ct. App. 2000); Crawford, 362 S.C. at 636, 608 S.E.2d at 891 ("[T]he willful and intentional adoption of a common design by two or more persons is sufficient for criminal conspiracy, provided the common purpose is to do an unlawful act either as a means or an end.").

3. Co-Conspirator Exception to the Rule Against Hearsay

Rule 801(d)(2)(E) of the South Carolina Rules of Evidence defines a co-conspirator's statements, offered against another co-conspirator as non-hearsay: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

State v. Sullivan, 277 S.C. 35, 42-43, 282 S.E.2d 838, 842-843 (1981), sets forth the well-recognized exception to the rule against hearsay associated with co-conspirator's statements:

> In the law of conspiracy, there is a well-recognized exception to the rule against hearsay which permits the statements of one conspirator made during the pendency of the conspiracy, admissible against a co-conspirator, once prima facie evidence of a conspiracy is proved. Thereafter, the acts and declarations of any conspirator made during the conspiracy and in furtherance thereof are deemed to be the acts and declarations of every other conspirator and are admissible against all. State v. Ferguson, et al., 221 S.C. 300, 70 S.E.2d 355 (1952).
>
> In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the declarations of one conspirator made in furtherance of the objects of the conspiracy to a third party are admissible against all of the members, but only after proof that each defendant was a member of the conspiracy.

> Under Glasser there was a preferred order of proof; nonhearsay which established membership in the conspiracy must precede the hearsay declarations. However, order of proof is discretionary with the trial judge and declarations made by a conspirator to a third party may be admitted in advance of evidence which would prima facie establish the existence of the conspiracy. State v. Rutledge, 261 S.C. 44, 198 S.E.2d 250 (1973); In accord: United States v. Vaught, supra.
>
> . . . Moreover, once a conspiracy has been established,
>
> "[E]vidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977)."
>
> United States v. Jabara, 618 F.2d 1319, 1328 (9th Cir. 1980).

State v. Gilchrist, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000), superseded Sullivan in a footnote:

> Rule 801(d)(2)(E) provides that a statement by a co-conspirator during the course and in furtherance of the conspiracy is not hearsay. Under the Federal Rules of Evidence, this same rule has been interpreted to allow admission of a co-conspirator's statement only where there is evidence of the conspiracy independent of the statement sought to be admitted. See, e.g., United States v. Asibor, 109 F.3d 1023 (5th Cir. 1997); United States v. Clark, 18 F.3d 1337 (6th Cir. 1994); United States v. Smith, 893 F.2d 1573 (9th Cir. 1990); United States v. Urbanik, 801 F.2d 692 (4th Cir. 1986).[FN1] Here, there is no independent evidence of a conspiracy between Robertson and appellant. The fact that Robertson was indicted for criminal conspiracy is not sufficient in itself to establish a conspiracy since an indictment is not evidence of the crime charged. 41 Am.Jur.2d INDICTMENTS AND INFORMATIONS § 1.

> FN1. Before enactment of the SCRE, precedent of this Court indicates that prima facia evidence of a conspiracy was required to support the admission of a co-conspirator's statement. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981).

> Further, a statement by a co-conspirator must advance the conspiracy to be admissible under Rule 801(d)(2)(E). State v. Anders, 331 S.C. 474, 503 S.E.2d 443 (1998) (admission to crime does not qualify as statement in furtherance of conspiracy).[FN2]

> FN2. As explained in United States v. Arias-Villanueva, 998 F.2d 1491, 1502 (9th Cir. 1993):

> While mere conversation or narrative declarations are not admissible under this rule, statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities are admissible.

An example of a statement by a co-conspirator being inadmissible as hearsay is found in State v. Anders, 331 S.C. 474, 476, 503 S.E.2d 443, 444 (1998). In Anders, a witness overheard one of the conspirators (Simmons) say '"Robert [Anders] was going to pay him big for blowing up the building."' Id. Additionally, the witness heard Simmons explain how he set the fire. Id. "The trial court ruled the statements were admissible against Anders on the basis they were made by Simmons in the furtherance of a conspiracy, so as to be admissible against both Anders and Simmons." Id. The Court of Appeals ultimately affirmed in result, but "held Simmons' statement was not admissible under the co-conspirator exception since, even if made **during** the conspiracy, the statement in no way **advanced** the conspiracy." Id. at 476-477, 503 S.E.2d at 444 (emphasis in original). The Supreme Court reversed the Court of Appeals, but agreed with the characterization of the statement as not falling under the co-conspirator exception to the rule against hearsay:

> We agree with the Court of Appeals' holding that Simmons' admission to the crime in no way furthered the conspiracy. Accord United States v. Posner, 764 F.2d 1535 (11th Cir.1985), cert. denied (although statements made to "allay suspicions" may be "in furtherance" of conspiracy, "spilling the beans" does not further conspiracy); United States v. Pallais, 921 F.2d 684 (7th Cir.1990), cert. denied, 502 U.S. 842, 112 S.Ct. 134, 116 L.Ed.2d 101 (1991) (casual admissions of culpability are not "in furtherance" of conspiracy and are insufficiently reliable to be considered by the jury). Accordingly, the Court of Appeals correctly ruled the statement was not admissible under the co-conspirator exception. See State v. Sullivan, 277 S.C. 35, 42, 282 S.E.2d 838, 842 (1981) (exception to rule against hearsay permits statements of one conspirator made during the pendency of the conspiracy, and in furtherance thereof, to be admitted against a co-conspirator once prima facie evidence of a conspiracy is proved); see also South Carolina Rules of Evidence, Rule 801(d)(2)(E).

Id. at 477, 503 S.E.2d at 444.

More recently, a case involving hearsay and co-conspirator's statements is State v. Anderson, 357 S.C. 514, 517, 593 S.E.2d 820, 821 (Ct. App. 2004). The State alleged Anderson conspired with Jamal Manick and Fred Moss to rob the victim. Id. at 515, 593 S.E.2d at 820. Bobby Lukie rode with Moss and Manick to the restaurant where Manick shot and killed Lamont Rappley. Id. at 516, 593 S.E.2d at 821. Similarly to the case at hand, Anderson presents a situation where a co-conspirator testified for the State[1]:

> At trial, Lukie testified that around 11:00 p.m. on the night of the murder, he drove by a convenience store and noticed Ross and Manick standing outside the store. Lukie stated that when

[1] Moss testified the phrase "having a lick" meant they could rob the victim. Id. at 516, 593 S.E.2d at 821.

> he asked Ross and Manick what they were doing, Ross told him "they had a lick or something like that." Defense counsel objected, arguing this testimony was hearsay. The State argued the testimony was admissible as non-hearsay because the statement was made in furtherance of the conspiracy. The trial court agreed and overruled the defense's objection.

Id. at 517, 593 S.E.2d at 821. Discussing hearsay and the co-conspirator exception, the Court of Appeals inculcated:

> Rule 801(d)(2)(E), SCRE, provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. See also State v. Gilchrist, 342 S.C. 369, 371, 536 S.E.2d 868, 869 (2000) (noting that Rule 801(d)(2)(E) allows for the admission of a coconspirator's statement where there is evidence of the conspiracy independent of the statement sought to be admitted). Here, there was evidence presented at trial that Ross and Manick conspired with [Anderson] to rob and murder the victim. The statements allegedly made to Lukie by Ross were sufficient to allow the jury to reasonably infer that the statements were made in furtherance of the conspiracy, especially in light of the fact that Lukie agreed to accompany Ross and Manick in their robbery of the victim. Accordingly, we find no error in the trial court's ruling that the statement was not hearsay.

Id.

In the case sub judice, there was evidence presented, in the form of Davis' own testimony, indicating Davis, Sims, English and Ruff had a mutual understanding and conspired to hide Anderson's body and dispose of all remaining evidence of the shooting. While Davis' testimony implies she knew nothing of Anderson's death until the statement by English, her testimony directly prior to the statement is sufficient to show she knew or should have known the scope of the conspiracy. Additionally, her conduct subsequent to English's statement proves her involvement in the conspiracy. Thus, English's statements are admissible as non-hearsay against all four

individuals, including Sims. The statement was sufficient to allow a jury to reasonably infer it was made to induce enlistment, advance participation, or prompt additional action on Davis' part in furtherance of the conspiracy to hide the details of Anderson's death, especially in light of the fact Davis was already acting in collusion with English, Sims and Ruff. Consequently, we find no error in the admission of Davis' testimony.

CONCLUSION

We rule the trial judge properly allowed one co-conspirator to testify to another co-conspirator's statement relating to appellant's own statement of guilt because the statement was calculated to induce participation in the combined and joint effort to dispose of the victim's body, the gun, and other evidence of murder. We hold the statement was **NOT** hearsay, but constituted relevant and admissible probative evidence in this murder. ACCORDINGLY, the conviction and sentence of the appellant are

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Fussell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett and Lawrence Redmond, Appellants,

v.

The Estate of Eloise Pinckney Harris, Jerome C. Harris, a Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan,

Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Martine A. Hutton, The Converse Company, LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe, and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as of Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney, Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney ,Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod and all other persons unknown claiming any right title, estate, interest, or lien upon the real estate tracts described in the Complaint therein, Defendants, Of whom Daniel Duggan is Respondent.

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

Opinion No. 4372
Submitted February 1, 2008 – Filed April 18, 2008

AFFIRMED

George J. Morris and Walter Bilbro, Jr., both of Charleston, for Appellants.

Louis H. Lang, of Columbia, for Respondent.

THOMAS, J.: In this action to quiet title, Kathleen Brown, along with the other named appellants, appeals an order granting summary judgment to Daniel Duggan. We affirm.[1]

FACTS

Appellants filed a complaint and lis pendens on February 1, 2005, to quiet title to approximately 28.6 acres of heirs' property. On January 24, 2006, both the complaint and lis pendens were amended to list numerous other parties with potential claims to the property.

Identified as part of the 28.6 acres was a 0.540-acre parcel (the Duggan Property) conveyed by Robert L. Tuttle to Duggan in 2003. Tuttle and

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Christl Gehring acquired the Duggan Property in 2002 pursuant to a judgment of foreclosure and sale in 2000. Shortly after the judicial sale, Gehring conveyed her interest in the property to Tuttle.

In their amended complaint, Appellants requested the 2000 foreclosure be set aside because of ineffective service of process on Kathleen and Bobbie L. Brown, the mortgagors of Duggan Property when it went into foreclosure. On April 27, 2005, Duggan filed an answer in which he asserted various affirmative defenses, including the doctrines of res judicata and collateral estoppel and his status as a bona fide purchaser for value without notice. On February 28, 2006, Duggan filed a return and joinder to a summary judgment motion filed by two other defendants in the case.[2] In his return and joinder, Duggan again asserted as affirmative defenses section 15-39-870, his status as a bona fide purchaser for value without notice, and the doctrines of res judicata and collateral estoppel.

In response to Duggan's summary judgment motion, Appellants submitted an affidavit from Keith Brown, Kathleen Brown's son, challenging statements in the affidavits of service filed in the 2000 foreclosure action that he was served on behalf of Kathleen and Bobbie Brown. Specifically, Keith stated that he was not the person served and that both Kathleen and Bobbie, respectively his mother and sister, were incompetent at the time of the foreclosure action and subsequent sale. Appellants also submitted affidavits from two relatives who supported Keith's assertion that Kathleen and Bobbie were incompetent.

The trial judge found Appellants' complaint about "irregularities in the proceedings" could not overcome the "clear statutory imperative" of section 15-39-870, under which the doctrine of res judicata would protect a bona fide purchaser for value without notice. Accordingly, summary judgment was granted to Duggan. This appeal followed.

[2] Defendants Lisa M. Shogry-Savage and David Savage moved for summary judgment, and Duggan joined in their motion.

STANDARD OF REVIEW

"Summary judgment is appropriate 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 judgment as a matter of law." Moore v. Weinberg, 373 S.C. 209, 215-16, 644 S.E.2d 740 743 (Ct. App. 2007). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

LAW/ANALYSIS

Appellants argue the grant of summary judgment to Duggan was error because evidence of ineffective service of process on Kathleen and Bobbie in the foreclosure proceeding warranted reopening the 2000 foreclosure action and setting aside the subsequent sale of the Duggan Property. We disagree.

South Carolina Code section 15-39-870 provides as follows:

> Upon the execution and delivery by the proper officer of the court of a deed for any property sold at a judicial sale under a decree of a court of competent jurisdiction that proceedings under which such sale is made shall be deemed res judicata as to any and all bona fide purchasers for value without notice, notwithstanding such sale may not subsequently be confirmed by the court.

S.C. Code Ann. § 15-39-870 (2005). The rationale for the statute is the well established public policy of protecting good faith purchasers and upholding the finality of a judicial sale. See Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968) (stating "a sound public policy requires the validity of judicial sales be upheld, if in reason and justice it can be done"); Wooten v.

Seanch, 187 S.C. 219, 222, 196 S.E 877, 878 (1937) (upholding a foreclosure sale in which the mortgagee purchased the property sold and further stating that, to set aside a sale, "there must be such irregularity in the proceedings as to show that the sale was not fairly made, or that appellant was defrauded or misled to his injury and loss").

In Cumbie v. Newberry, the defaulting mortgagor received notice that his foreclosed land was to be sold at public auction. When the first bidder did not complete the sale, the land was sold at a subsequent auction. Notice of the second auction was published, but the defaulting mortgagor did not receive personal notice. The defaulting mortgagor sought to rescind the sale, arguing lack of personal jurisdiction. The supreme court stated:

> In furtherance of [public policy] . . . a purchaser in good faith at a judicial sale is not affected by irregularities in the proceedings or even error in the judgment under which the sale is made; but is required at his peril only to make inquiry as to the jurisdiction of the court which ordered the sale, and whether all proper parties were before the court when the order was made.

Cumbie, 251 S.C. at 37, 159 S.E.2d at 917 (citations omitted); see also 27 S.C. Jur. Mortgages § 125 (1996) ("Foreclosure proceedings are res judicata as to any bona fide purchaser for value without notice, even though the sale is not later confirmed by the court.").

We hold the requirements of section 15-39-870 were satisfied in this case. First, the Master had competent jurisdiction to execute and deliver the deed to the Duggan Property pursuant to the judgment of foreclosure and sale by a "court of competent jurisdiction." In support of his motion for summary judgment, Duggan submitted a series of documents, all of which were matters of public record, indicating the judgment of foreclosure and sale and subsequent exchanges of title to the Duggan property were properly executed. Included in the documents was the judgment of foreclosure and sale. The judgment stated (1) service was made upon defendants, Kathleen and Bobbie;

(2) both Kathleen and Bobbie were in default; (3) the attorneys of record were notified of the hearing; and (4) neither Kathleen nor Bobbie was in the United States military service. The judgment further indicated the property was to be sold by the Charleston County Master-in-Equity and listed the terms of the sale. Duggan also provided a deed from the Master conveying the property to Tuttle and Gehring and indicating the property was sold pursuant to the judgment of foreclosure and sale.

Second, Duggan was a bona fide purchaser without notice. To claim the status of a bona fide purchaser, a party must show (1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, "*i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect." Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). In addition, "[t]he bona fide purchaser must show all three conditions—actual payment, acquiring of legal title, and bona fide purchase—occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property." Id., 628 S.E.2d at 875.

There appears to be no dispute that Duggan satisfied the first two conditions. Appellants, however, claim the Master lacked jurisdiction to sell the Duggan Property because of defects in service, as evidenced by the affidavit of Keith Brown, in which he denied receiving service copies of the foreclosure papers that were to be served on Kathleen and Bobbie, and the affidavits from Brown and other relatives stating Kathleen and Bobbie were incompetent. Based on these affidavits, Appellants assert Kathleen and Bobbie were never properly notified of the underlying foreclosure proceeding as required by Rule 4(d)(2) of the South Carolina Rules of Civil Procedure. None of these affidavits, however, were matters of record at the time of the foreclosure sale.

Appellants also argue Duggan presented no evidence that proper newspaper publication of the foreclosure sale occurred or that John Doe or Jane Doe was named in the foreclosure action to represent unknown parties, minors, incompetents, or persons who could possibly be in the military, apparently suggesting these omissions should have alerted Duggan that

lawful service of process on all necessary parties was lacking. We, however, have found no specific rulings in the appealed order on Appellants' arguments concerning lack of newspaper publication or the failure to name all necessary defendants in the foreclosure, and there is no indication that Appellants moved to alter or amend on either of these grounds; therefore, these issues are not preserved for appeal. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that, when the trial court does not explicitly rule on an issue at trial and the appellant fails to move to alter or amend the judgment on that ground, the issue is not properly before the appellate court and should not be addressed). Moreover, there is no evidence that either Duggan or his predecessors-in-title had notice, constructive or otherwise, of Appellants' claims that Kathleen and Bobbie were incompetent and were not properly served in the foreclosure action. Pursuant to section 15-39-870, then, we hold Duggan's title is not affected by Appellants' claims of defective service of process in the foreclosure action.

In light of our disposition, we need not address Duggan's arguments concerning laches and abandonment as additional reasons to uphold the grant of summary judgment. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (explaining the appellate court need not address a remaining issue when resolution of a prior issue is dispositive).

AFFIRMED.

HEARN, C.J., and ANDERSON, J., concur.