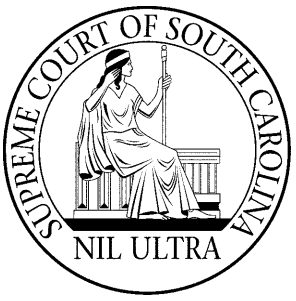

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 10, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Wilton Darnell Newton, Respondent

Appellate Case No. 2013-000408

Opinion No. 27239
Submitted March 12, 2013 – Filed April 10, 2013

DISBARRED

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

Wilton Darnell Newton, of Clemson, *Pro Se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. In addition, respondent agrees to, within thirty days of the date of this opinion, enter into a restitution plan with the Commission on Lawyer Conduct pursuant to which he will pay restitution over a two year period for losses resulting from his misconduct and to reimburse the Commission and ODC for costs incurred in the investigation and prosecution of this matter. Respondent requests that the disbarment be made retroactive to the date of his interim suspension. We accept the agreement and disbar respondent from the practice of law in this state, but decline to make the disbarment retroactive. Respondent shall pay restitution and costs as outlined in the Agreement. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

In connection with his representation of the personal representative of an estate, respondent received $41,000, which he deposited into his trust account. Respondent improperly removed funds from the trust account, resulting in a balance that was below the amount that should have remained in trust for the estate. Respondent subsequently wrote two checks from the trust account for a beneficiary of the estate, which could not be honored due to insufficient funds. Respondent reissued the checks and they cleared the account because respondent had deposited money into the account that he had received from family members and others to cover the shortage.

Matter II

Respondent was hired by the mother of a client to represent the client in two legal matters. The client's mother made payments to respondent of $1,200 and $1,700. Respondent deposited the funds directly into his operating account instead of depositing them in his trust account until earned.[1] The client and her mother later began having problems obtaining information from respondent regarding the status of the client's pending legal matters, which resulted from respondent having closed his practice and obtained non-legal employment out of state. The client and her mother had to pay another attorney to finalize one of the legal matters. Respondent has not refunded any portion of the fees paid to him to represent the client.

Matter III

The same client retained respondent, on a contingency fee basis, to represent her in a civil action. Respondent referred the client's case to another attorney who obtained a settlement on the client's behalf. Respondent received a portion of the

[1] This conduct occurred prior to this Court's amendment of Rule 1.5 of the Rules of Professional Conduct, to allow a lawyer, under certain circumstances, to deposit a fee in the lawyer's operating account rather than hold the fee in trust. *See* Rule 1.5(f), RPC. Regardless, there is no indication respondent met the requirements of Rule 1.5(f), which would allow him to deposit the funds directly into his operating account.

settlement as attorney's fees. The client's portion of the settlement was given to her mother to hold in trust until the client was released from in-patient medical treatment.

When respondent needed funds to deposit into his trust account to cover the estate checks referenced in Matter I, he sought assistance from the client's mother. She issued a check to respondent in the amount of $10,000 from the settlement funds with the understanding that respondent would pay the money back before the client was released from treatment. She wrote "pers loan" on the memo line of the check. However, respondent marked through the word "loan" and wrote "atty fees" on the memo line. The check was deposited into respondent's trust account and the money was used to cover the replacement checks issued in the estate matter. Respondent failed to put terms for repayment of the loan in writing and failed to advise the client's mother to consult an attorney before making the loan. Although respondent did not agree to pay interest on the loan or to make payments or repay the loan by a certain date, he did promise to give the client's mother approximately $7,500 in "several weeks" after liquidating a retirement account. However, respondent did not repay any of the loan, and as a result, the client's mother was forced to borrow $10,000 from a bank in order to have funds to give the client when she was released from treatment. Respondent was informed of the terms of the bank loan and agreed to give the client's mother money to make payments, but as of the date of the Agreement in this matter, respondent had only contributed $500 towards repayment of the loan.

Matter IV

Respondent failed to comply with the recordkeeping requirements of Rule 417, SCACR, by failing to maintain copies of bank statements, substitute checks, records of deposit, or records related to electronic funds transfers related to his trust account or his operating account. Respondent also failed to prepare or maintain an accounting journal, client ledgers, or reconciliation reports. As a result, it is impossible to determine exactly what happened to the money that respondent should have been holding in trust in the estate matter. However, an audit of respondent's trust and operating accounts performed by ODC revealed that over a three to four year period, respondent removed approximately $48,377.98 from his trust account by electronically transferring it to his law firm operating account. Respondent has no document to show that the removal of the funds from his trust account was for any legitimate purpose. Instead, respondent used the

funds to pay for office and personal expenses, including food, clothing, sunglasses, flowers, dry cleaning, gas, online shopping, cell phone services, iTunes, ebook and video game downloads, movie rentals, tanning, and a ski vacation. Respondent also wrote 37 checks totaling approximately $21,647.88 on behalf of clients who did not have funds on deposit in the trust account. Those checks were made payable to various entities, including clerks of court and register of deed offices and to clients for refunds. During this period of time, respondent deposited client fees directly into his operating account instead of holding them in trust until earned. He overdrew the account more than 125 times, incurring more than $4,000 in bank fees.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.2 (scope of representation and allocation of authority between client and lawyer); Rule 1.15 (safekeeping property); Rule 1.16 (declining or terminating representation); Rule 8.4(b)(criminal conduct); Rule 8.4(d)(conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e)(conduct prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(violated Rules of Professional Conduct); Rule 7(a)(5)(engaged in conduct tending to pollute the administration of justice, tending to bring the courts and the legal profession into disrepute, and demonstrating unfitness to practice law); and Rule 7(a)(6)(violation of the Oath of Office taken upon admission to the practice of law).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. The disbarment shall not be made retroactive to the date of respondent's interim suspension. 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.

Within thirty days of the date of this opinion, respondent shall pay the costs

incurred by ODC and the Commission in the investigation and prosecution of this matter. Also within thirty days of this opinion, respondent shall enter into a plan with the Commission to pay, over a two year period, the following restitution: $1,200 to the mother of the client in Matter II as a refund of legal fees paid on behalf of the client in the criminal matter; $9,500 plus interest to the mother of the same client as repayment of the loan referenced in Matter III; $3,150 to the Lawyers' Fund for Client Protection to hold in trust pending identification of the client to whom the funds withdrawn from the trust account on behalf of the estate in Matter I belong; and full reimbursement to the Lawyers' Fund for any payments made on respondent's behalf. Finally, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to readmission.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kana Rahman Johnson, Respondent

Appellate Case No. 2013-000406

Opinion No. 27240
Submitted March 12, 2013 – Filed April 10, 2013

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Bogan Law Firm, of Columbia, for Respondent.

PER CURIAM: Respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Therein, respondent admits misconduct and agrees to the issuance of a confidential admonition or a public reprimand. We accept the agreement and issue a public reprimand.

In the agreement, respondent admits having engaged in a sexual relationship with a client who she was representing in a divorce action. The client and his wife eventually reconciled and the action was dismissed.

Respondent admits that her conduct constitutes a violation of the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.8(m)(A lawyer shall not have sexual relations with a client when the client is in a

vulnerable condition or is otherwise subject to the control or undue influence of the lawyer, when such relations could have a harmful or prejudicial effect on the interests of the client, or when sexual relations might adversely affect the lawyer's representation of the client.); 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 also admits her conduct constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (It shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct.).

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for her misconduct. Within thirty days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct. In addition, within one year of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Thomas S., Petitioner.

Appellate Case No. 2011-194610

ON WRIT OF CERTIORARI FROM THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27241
Heard March 5, 2013 – Filed April 10, 2013

REVERSED AND REMANDED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review an unpublished decision by the Court of Appeals which held that trial court did not err in permitting witness Shellenberg to give an opinion. *In re S.*, Op. No. 2011-UP-121 (S.C. Ct. App. filed March 24, 2011). We agree with petitioner and find that Shellenberg, a lay witness, was improperly allowed to offer expert opinion

testimony and that this error was not harmless. We therefore reverse and remand for further proceedings.

FACTS

In 2004, petitioner was adjudicated delinquent on charges of first degree criminal sexual conduct with a minor and disturbing the schools,[1] and committed to the Department of Juvenile Justice (DJJ) for an indeterminate period not to exceed his twenty-first birthday. It appears from the record that petitioner engaged in oral and anal sex, and some fondling, approximately five times over the course of three years, with his step-nephew. Petitioner was aged ten when the first act occurred, and the victim six.

In February 2008, the South Carolina Juvenile Parole Board determined that petitioner was eligible for release. This decision triggered review pursuant to the Sexually Violent Predator Act (SVP Act).[2] S.C. Code Ann. § 44-48-30(5) and § 44-48-40(B) (Supp. 2012). Both the multidisciplinary team and the prosecutor's review committee found reason to believe petitioner met the definition of a sexually violent predator (SVP),[3] and a court determined that probable cause existed to believe he was an SVP. §§ 44-48-50 to -80. Dr. Neller was appointed by the court as the qualified expert following the court's probable cause determination. § 44-48-80(D).

Following a trial, a jury determined, beyond a reasonable doubt, that petitioner was an SVP. He appealed, the Court of Appeals affirmed, and this certiorari follows.

ISSUE

> Did the Court of Appeals err in affirming the trial court's decision to allow witness Shellenberg to express an expert opinion?

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[1] Although the dispositional order states the disturbing the schools charge was a probation violation, the charging petition itself does not allege probation was at issue. Compare ROA p. 124 with p. 125.

[2] South Carolina Code Ann. §§ 44-48-10 *et seq.* (Supp. 2012).

[3] See § 44-48-30(1) discussed *infra*.

ANALYSIS

The State called three witnesses to testify that petitioner was an SVP, that is, that he (1) had been convicted of or adjudicated delinquent for a sexually violent offense and (2) suffers from a mental abnormality or personality disorder that (3) makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. §§ 44-48-30(1); 6(b). A person is "likely to engage in acts of sexual violence" within the definition of an SVP if his "propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." § 44-48-30(9). The purpose of the SVPA is to involuntarily commit only a "limited subclass of dangerous persons" and not to broadly subject any dangerous person to what may be an indefinite term of confinement. *In re Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002) citing *Kansas v. Crane*, 534 U.S. 407, 413 (2002); *In re Harvey*, 355 S.C. 53, 584 S.E.2d 893 (2003).

Here, there is no question that petitioner satisfied two of the three requirements for being deemed an SVP: he has been adjudicated delinquent for a sexually violent offense and he has been diagnosed as suffering from a mental abnormality.[4] Therefore, the only contested issue at trial was whether that mental abnormality means his "propensity to commit acts of sexual violence is of such a degree" as to place him in the "limited subclass of dangerous persons" who should be "confined in a secure facility for long-term control, care, and treatment."

The State's first witness was Dr. Neller, a board certified clinical psychologist with an emphasis in forensic psychology. Dr. Neller is the Chief Psychologist with the South Carolina Sexually Violent Predator Program, and was the court-appointed expert in this case. Although Dr. Neller diagnosed petitioner as suffering from a mental abnormality, his professional opinion was that petitioner did not meet the SVP criteria. Dr. Neller testified that the purpose of the SVPA was "to identify, essentially, an extremely dangerous group of sexual offenders" and that he did not see how "most any expert" would place petitioner in that group. When questioned about petitioner's conduct that would appear to demonstrate to a layperson that he was a danger, e.g., deviant fantasies, downloading a pornographic cartoon

[4] Dr. Neller testified that petitioner was a sexual sadist, that is, "a person who . . . . enjoys humiliating, a person who enjoys harming, a person who becomes sexually aroused by the harm he's inflicting on a person."

depicting violent rape, and repeated disciplinary violations, Dr. Neller testified that none were probative of a likelihood that petitioner would reoffend.

Following Dr. Neller's testimony, the State called Linda Price, an employee of the South Carolina Board of Juvenile Parole. Price's testimony concerned petitioner "acting out" when she went to inform him that the Board had approved his release. He was calm until she told him that the Board had ordered he pay restitution to the State for expenses it had incurred when it paid for his victim's counseling and medical bills.[5] Price testified that petitioner became loud and red-faced, questioned why he should pay restitution, and blamed the victim for his confinement. Price testified she repeatedly told petitioner to hush and sit down, and that before he sat down he "appeared to make a lunge in my direction with his body" and that after sitting he refused to say anything more. She went on to testify to the difficulties in having petitioner's North Carolina relatives agree to take him, and that if he went to North Carolina he would be supervised while on parole but would not be on a public sex offender registry. While there was no objection to Price's testimony on the ground of relevance, it is difficult to understand how this evidence assisted the jury in determining whether petitioner has the required propensity to reoffend such that he is in the small subclass of dangerous offenders who should be involuntarily committed.

The State's final witness was a licensed social worker (Shellenberg) who had worked with petitioner while he was confined in DJJ. She "impeached" Dr. Neller's written report, which stated that petitioner's biological mother had visited monthly, by testifying she only visited twice, by stating Dr. Neller's report failed to include two school disciplinary reports made after the report was prepared, and by testifying that petitioner's medications had been changed after the report was prepared. Finally, Shellenberg testified that eleven "level drops" for disciplinary infractions were omitted from Dr. Neller's report. Shellenberg admitted, however, there was no sexual component to any of petitioner's disciplinary infractions other than the downloading of the pornographic cartoon.

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[5] We question the Juvenile Parole Board's authority to order restitution as a condition of parole. While S.C. Code Ann. § 16-3-1260(3) (2003) permits this type of restitution as a condition of parole or community supervision for persons convicted in General Sessions court, under subsection (4), in juvenile proceedings only the family court is authorized to order it as a condition of probation in juvenile proceedings.

Shellenberg testified that while she was a certified sex offender treatment specialist, she was not qualified to diagnose petitioner, but that Dr. Neller was. Shellenberg testified she was familiar with Dr. Neller's report, and was asked about the report's conclusion that petitioner's responses on certain assessments were consistent with anti-social narcissistic and paranoid features. The State questioned Shellenberg whether she was testifying as an expert witness, and she acknowledged that she was not.

Shellenberg was then asked if she was familiar with petitioner and whether he "seems to display . . . ." Petitioner's attorney immediately objected on the ground the witness was "not an expert in this." The judge overruled the objection, stating:

> THE COURT: Well, no - - in her area of involvement, I'll let her answer. The jury understands she's not an expert but she has certain competence in her field, and she's entitled to give her opinion.
>
> Go ahead.

Shellenberg's direct examination continued:

> Q. Have you seen Thomas display those very features you referred to a minute ago in Dr. Neller's report: Anti-social narcissistic and paranoid features?
>
> A. Yes, and his triggers are entitlement and power and control.
>
> Q. What do you mean by triggers?
>
> A. Um, with sexual offenders there is an offense cycle, and triggers are the things that could send them into their offense cycle and cause them to possibly re-offend.
>
> Q. Well, what would Thomas' triggers be?
>
> A. Um, entitlement and power and control.
>
> Q. And by entitlement, what do you mean?

A. The sense of grandiosity and - - basically, ah, having more knowledge than, probably, another person, more superior traits.

Q. So, when Dr. Neller refers to Thomas having a grandiose sense of self-importance and expects to be recognized as a superior, is that what you're talking about - -

A. Yes, I am.

Q. - - by entitlement?

A. Yes.

Q. And what was the second thing?

A. Um, power and control.

Q. Power and control, and how would you describe that?

A. That would be associated with his offense in which the other - - the child that he victimized was getting more attention, and Thomas felt powerless, and that is the trigger that caused him to offend.

Q. Would Thomas' reaction to [Price's] discussion with him about planned restitution and the statements he made that [Price] has testified about earlier which you heard?[sic]

A. Yes.

Q. Is that consistent with this control feature that you're describing now?

A. Yes, it is.

Petitioner contends, and we agree, that Shellenberg's testimony crossed the line from lay to expert in several particulars. As this Court recently explained:

> Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. *See* Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. *See* Rules 602 and 701, SCRE.
>
> *Watson v. Ford Motor Co.*, 389 S.C. 434, 445 -6, 699, S.E.2d 169, 175 (2010).

Here, the question whether sex offenders enter an offense cycle and therefore reoffend if exposed to certain triggers is not a matter within the purview of a lay witness. Nor was Shellenberg qualified to identify petitioner's purported triggers or define them. She did not observe petitioner when he abused his victim, and did not have personal knowledge of the reasons he committed that abuse, nor did she personally observe the interaction between petitioner and Price. Shellenberg was both testifying to matters beyond her firsthand knowledge, and offering her opinion that the interaction with Price was the type of event that could trigger his offense cycle, therefore increasing his likelihood to reoffend. Shellenberg was improperly permitted to offer expert opinion testimony after the State explicitly presented her as a lay witness and after petitioner lodged a timely objection. *Watson*, *supra*.

The sole issue before the jury was whether petitioner was likely to reoffend, and Dr. Neller, the sole expert in the case testified he was not. The only evidence in the record of petitioner's "propensity to commit [future] acts of sexual violence" was that of witness Shellenberg, who was improperly allowed to "give her opinion" despite the fact the State explicitly called her as a non-expert. In fact, Shellenberg herself admitted on cross-examination that she was not qualified to diagnose petitioner as an SVP. The erroneous admission of her extensive opinion testimony mandates reversal here. *Compare e.g. State v. Ellis*, 345 S.C. 175, 547

S.E.2d 490 (2001) (improper non-expert opinion testimony which goes to the heart of the case is not harmless).

CONCLUSION

The Court of Appeals erred in affirming the jury verdict here. We therefore reverse and remand for further proceedings.

REVERSED AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of P. Michael Dupree, Petitioner.

Appellate Case No. 2013-000382

ORDER

On February 13, 2013, the Court suspended petitioner from the practice of law for nine (9) months, retroactive to April 18, 2012, the date of his interim suspension, with conditions. In the Matter of DuPree, 2013 WL 518625 (February 13, 2013).[1] Petitioner now seeks reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR.

Since the Court heard argument on the parties' Agreement for Discipline by Consent shortly before issuing the order of suspension[2] and petitioner's misconduct did not involve harm to clients, the Court decides this matter without referral to the Committee on Character and Fitness.[3] See Rule 33(d), RLDE. Based on the petition and recent hearing, the Court finds petitioner has satisfied the conditions imposed by the order of suspension and the requirements for reinstatement, and hereby reinstates petitioner to the practice of law.

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[1] In the Matter of Dupree, 398 S.C. 111, 727 S.E.2d 739 (2012) (order placing petitioner on interim suspension).

[2] The oral argument included sworn testimony from petitioner and other individuals.

[3] Petitioner and the Office of Disciplinary Counsel were given the opportunity to express objections to this procedure. Both parties filed returns stating no objection to the procedure.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Pleicones, J., not participating

Columbia, South Carolina

April 4, 2013

The Supreme Court of South Carolina

In the Matter of William G. Yarborough, III, Petitioner.

Appellate Case No. 2011-205454
Appellate Case No. 2011-200046

ORDER

On September 1, 2000, the Court transferred petitioner to incapacity inactive status. In the Matter of Yarborough, 342 S.C. 387, 536 S.E.2d 870 (2000). On December 18, 2000, the Court disbarred petitioner from the practice of law. In the Matter of Yarborough, 343 S.C. 316, 540 S.E.2d 462 (2000).

Pursuant to Rule 33, RLDE, and Rule 28, RLDE, of Rule 413, SCACR, petitioner petitions the Court for reinstatement to the practice of law and to be transferred to active status. After hearings addressing both petitions, the Committee on Character and Fitness issued Reports and Recommendations recommending the Court grant both petitions. [1]

The petitions are granted subject to the following conditions:

1. before he shall be reinstated, petitioner shall execute a contract with Lawyers Helping Lawyers on such terms as required by Lawyers Helping Lawyers to provide for petitioner's continued sobriety; [2]

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[1] Based on recent amendments to Rule 410, SCACR, petitioner will be reinstated as a "regular," rather than "active" member of the Bar.

[2] The contract shall be filed with the Office of Bar Admissions with a copy provided to the Commission on Lawyer Conduct. The contract must be received by the Office of Bar Admissions no later than ten (10) days prior to the May 2013 swearing-in ceremony.

2. for the two years immediately following his reinstatement, petitioner shall comply with his proposed "plan" to facilitate his return to the practice of law;[3]

3. for a period of two years following his reinstatement, petitioner shall be mentored by James H. Price, III, Esquire, on terms required by the "plan;" Mr. Price shall file quarterly reports with the Commission on Lawyer Conduct which assess petitioner's compliance with the "plan;" and

4. completion of the Legal Ethics and Practice Program Ethics School and Trust Account School and the Advertising and Trust Account School within one (1) year of his reinstatement; within ten (10) days of completion of the programs, petitioner shall provide proof of completion to the Commission on Lawyer Conduct.

Petitioner shall be sworn-in and reinstated to the South Carolina Bar during the next regularly-scheduled swearing-in ceremony to be held in May 2013.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 8, 2013

[3] The specifics of the plan are provided in the Report and Recommendation addressing the Petition for Reinstatement.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger Wendell Walker, as the Personal Representative of the Estate of Kenneth Ray Walker and individually as a surviving child and Devisee of the Decedent, Kenneth Ray Walker (d/o/d 09/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 09/20/2008, Respondents,

v.

Catherine W. Brooks, Appellant.

Appellate Case No. 2011-199991

Appeal From Colleton County
R. Thayer Rivers, Jr., Special Referee

Opinion No. 5112
Heard January 15, 2013 – Filed April 10, 2013

REVERSED

Everett H. Garner and Benjamin A. Dunn, II, both of Holler, Garner, Corbett, Ormond, Plante & Dunn, of Columbia, for Appellant.

Gregory S. Forman, of Charleston, and Everett W. Bennett, Jr., of Walterboro, for Respondents.

LOCKEMY, J.: Catherine W. Brooks appeals the Special Referee's (Referee) ruling that she held only an equitable mortgage on the subject property. We reverse.

FACTS

This case revolves around the characterization of two deeds given to Brooks by her brother, Kenneth Ray Walker (Decedent), which purportedly conveyed properties on Cooks Hill Road in Colleton County (Cooks Hill properties). Decedent owned and lived on two hundred acres of his family's farm in Colleton County, including the Cooks Hill properties. In the years prior to Decedent deeding the Cooks Hill properties to Brooks, Decedent's other sister, Jane Ballagh, helped him financially. At one point, Ballagh mortgaged some of Decedent's property in an effort to save his homestead. The mortgage was eventually placed in her name[1] and was satisfied at a later point by Brooks, on behalf of Decedent.

Brooks financially supported Decedent during the 1990s and into the beginning of the early 2000s. Her financial support included but was not limited to providing Decedent with a telephone line, paying his power and cable bill, buying him groceries, and giving him cash on at least a weekly basis. Brooks claimed she spent "everything in this world" on Decedent. During this time, she also helped him receive Social Security Disability (SSD) benefits and was made his trustee by the federal government for purposes of those SSD benefits. All parties testified she had a close familial relationship with Decedent.

In 1996, Decedent executed the first deed of the Cooks Hill properties to Brooks for $13,250.00. The property was assessed in the amount of $36,000.00. Brooks testified Decedent conveyed the land to her because she did more for him than anybody in his life, and he told her not to allow anyone to "fool her out of it" after he passed away. She stated Decedent requested only $13,250.00 for the property because she had already spent so much of her money supporting him; however, she admitted never writing him a check or giving a lump sum to him in consideration to Decedent for the deed. She then explained the sum was placed on the deed simply because the attorney required it. Decedent made a second conveyance of

[1] The mortgage was originally recorded in Patsy Walker's name, but was then assigned to Ballagh.

the Cooks Hill properties, approximately fifteen acres, to Brooks in 2003 for a nominal sum. That property was assessed at $85,000.00.

After the execution of each deed, Decedent continued negotiating leases with businesses operating on the Cooks Hill properties, collecting rent from those businesses for his own personal use, and maintaining the Cooks Hill properties. Roger Wendell Walker, one of Decedent's sons, would often pick up rent checks and cash them for his father. At times, Decedent would direct Roger to cash the check and deposit a certain amount into Brooks's bank account. Two witnesses working for companies leasing land within the Cooks Hill properties testified to the direct involvement they had with Roger and Decedent, even after the deeds were executed. Brooks admitted she never exercised any dominion or control over the Cooks Hill properties.

Several writings presented were alleged to be related to the execution of the two deeds. First, on July 16, 2004, Brooks handwrote an agreement on behalf of Decedent that provided Decedent

> would like for all the money from Larry Herndon [with Lowcountry Sand and Gravel (Lowcountry)] to be paid to Catherine W. Brooks until she is paid sixty thousand dollars at that time she is to release to Kenneth Walker all the property off Cooks Hill Road . . . Any money Kenneth pays Catherine W. Brooks will be toward the sixty thousand dollars.

(Repurchase Memorandum).

Roger explained he leased his own property, which was separate from the Cooks Hill properties, to Lowcountry for sand dredging and received all monies from that lease. There was a second lease between Lowcountry and Brooks, because the water runoff from the sand dredging ran across the Cooks Hill properties. Brooks stated Decedent had proposed sand dredging from a pond on the Cooks Hill property, which they would offer to Herndon for purchase, and the profits from that potential venture are what are referenced in the Repurchase Memorandum. She stated the venture never came to fruition. However, Brooks further conceded the Repurchase Memorandum stated she would release the land to Decedent after

any payment of $60,000.00 from Decedent, even if it did not come from Lowcountry's sand dredging.

A second document consisting of Brooks's and Decedent's handwriting reflected Decedent's starting balance owed to Brooks in the amount of $60,000.00 (Ledger). Roger testified the Ledger was to account for the balance Decedent owed Brooks. After the initial $60,000.00 figure, the Ledger detailed numerous payments, of which many were initialed by Brooks to show her receipt of those payments.[2] The Repurchase Memorandum established that any monies paid to Brooks from the sand dredging were to be subtracted from the balance in the Ledger in exchange for the return of the Cooks Hill properties. Roger claimed that once the balance in the Ledger was paid, it was understood the Cooks Hill properties would be re-conveyed to Decedent. Roy Walker, Decedent's brother, confirmed that Brooks agreed to sign the property back to Decedent. Brooks asserted Decedent's payments in her ledger appearing to pay down the $60,000.00 consisted of rent that was ultimately hers, because the Cooks Hill properties were in her name. Thus, she essentially "was being paid with her own money." Brooks conceded that had Decedent paid her the $60,000.00 from profit off of Lowcountry's sand dredging business, she would have deeded the Cooks Hill properties back to Decedent.

A third document in Brooks's handwriting contained a list of costs, including but not limited to Brooks's payments to satisfy Ballagh's previous mortgage on Decedent's property, the costs of preparing the deeds for the Cooks Hill properties, a motor transmission, and light bills (Cost List). At the top of the Cost List, the document has a header stating "Money For Dredge." Roger asserted the Cost List showed how Brooks totaled the $60,000.00 debt shown on the Ledger. Brooks testified it was simply a coincidence that the figures on the Cost List with interest totaled close to $60,000.00. She claimed the $60,000.00 balance on the Ledger originated when Decedent told her Lowcountry's sand dredging was going to begin, and the profit from the sand dredging would be split between her and Decedent. She testified Decedent randomly chose a sum of $60,000.00 to pay Brooks from his profit from the sand dredging.

After Decedent's death, Brooks claimed the deeds were intended to place title of the Cooks Hill properties in her name and were absolute on their face; thus, she

[2] She indicated she documented some of the payments because Decedent asked her to do so, and she did anything he asked because of his intimidating nature.

was the rightful owner of the properties. Brooks testified she did not have anything to leave her children without the Cooks Hill properties because she had given all her money to Decedent, and her children wanted an inheritance. She admitted attempts were made prior to and after Decedent's death to pay off the balance shown on the Ledger in return for the Cooks Hill property, but she refused them. She stated because she had held the property for quite a while, its value had increased, and she would not sell it for less than it was worth.

Decedent's sons and heirs, Roger, Jimmy Ray Walker, and Wilson Whitney Walker (collectively referred to as Respondents) brought this action claiming they were the rightful owners of the Cooks Hill properties, as heirs of Decedent, and Brooks's deeds were intended to create an equitable mortgage in the properties in return for the financial assistance Brooks provided to Decedent during his lifetime.

The Referee found a longstanding fiduciary relationship existed between Brooks and Decedent, and Brooks helped to financially support Decedent several times. Further, he found Decedent deeded properties to Brooks that were valued at much greater amounts than any debt Decedent ever owed her. He also found Brooks knowingly allowed Decedent and one of his sons to totally control the premises during the time the properties were in her name, and the tenants of the properties for the most part dealt exclusively with Decedent or one of his sons. Finally, he noted Brooks admitted she wrote the note that stated Decedent owed her $60,000.00, and upon payment of that debt, she would deed the properties back to him.

The Referee stated these facts were controlled by *Gregorie & Son v. Hamlin*, 273 S.C 412, 257 S.E.2d 699 (1979), and the evidence supported a finding of an equitable mortgage. Thus, the Referee determined that upon payment of the debt found to be owed by Respondents to Brooks, Respondents were entitled to a deed conveying the properties to them. This appeal followed.

STANDARD OF REVIEW

On appeal from an action sounding in equity, "this court may view the facts in accordance with our preponderance of the evidence." *Anderson v. Buonforte*, 365 S.C. 482, 488, 617 S.E.2d 750, 753 (Ct. App. 2005). "However, we should not disregard the findings of the special referee, who was in a better position to weigh

the credibility of witnesses." *Id.* (citing *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)).

LAW/ANALYSIS

Equitable Mortgage

Brooks argues the Referee erred in determining the deeds conveying the Cooks Hill properties did not pass fee title, but rather constituted an equitable mortgage against the land. Specifically, she contends the present facts are distinguishable from *Gregorie*, and thus, the Referee erred in his application of that case. We agree.

In *Gregorie*, the subject property (Oakland Plantation) was owned by an oil distributorship, Gregorie & Son, that was experiencing financial difficulty. 273 S.C at 415, 257 S.E.2d at 700. Gregorie & Son was having particular difficulty with two of its suppliers, Arkansas Fuel Oil Corporation (Arkansas Fuel) and Carolina Fleets, Inc. (Carolina Fleets). *Id.* Hamlin was a neighbor and longtime friend of the family that owned Gregorie & Son, and he began loaning money to the business in the 1950s at the request of one of the Gregories. *Id.* Additionally, Hamlin co-signed a promissory note held by Arkansas Fuel in the principal amount of $30,000.00 and was the one financially responsible promisor. *Id.*

During that time, Gregorie & Son's operation was turned over from father, Gregorie, Sr., to son, Gregorie, Jr. *Id.* In 1960, Arkansas Fuel and Carolina Fleets began pressing for collections upon their respective debts. *Id.* The amount of money needed to pay the debts to both Arkansas Fuel and Carolina Fleet was $39,791.68. *Id.* at 416, 257 S.E.2d at 701. Attempts to sell Gregorie & Son in 1961 because of its continuing debt were unsuccessful, and Hamlin and Gregorie, Jr., approached First National Bank of South Carolina (First National) about the possibility of a loan to pay off Gregorie & Son's debts. *Id.* The loan was secured by Oakland Plantation. *Id.* As a result of discussions, First National and Gregorie, Sr. executed a note and mortgage on January 26, 1961, in the amount of $35,000.00. *Id.* The note, but not the mortgage, was guaranteed by Hamlin. *Id.* On the same date, Gregorie, Sr., executed a deed purporting to convey Oakland Plantation to Hamlin, the consideration being the assumption of the balance due on the note to First National and five dollars. *Id.* In addition to the deed, Gregorie,

Jr., on behalf of Gregorie, Sr., and Hamlin executed a repurchase agreement on January 31, 1961. *Id.*

A second mortgage was executed on behalf of Gregorie & Son, Gregorie, Sr., and Gregorie, Jr., in favor of Hamlin in the amount of $35,000.00. *Id.* at 417, 257 S.E.2d at 701. Security for this mortgage was real estate and rolling stock of Gregorie & Son. *Id.* The question before the court was whether the deed conveying Oakland Plantation and the accompanying agreement was intended as a deed absolute or as security for a debt and hence a mortgage. *Id.* at 414, 257 S.E.2d at 700.

The court found an equitable mortgage did exist, and outlined eight factors it considered in its determination: (1) the existence and survival of a debt; (2) a deed plus a separate agreement; (3) previous negotiations of parties; (4) inadequacy of consideration/price; (5) dealings between parties; (6) terms of the contract for conveyance; (7) burden of proof; and (8) defenses.[3] *Id.* at 419, 257 S.E.2d at 702.

We will now examine the relevant *Gregorie* factors in the context of the present facts.

Outstanding Debt

Brooks contends the Respondents presented no evidence of an outstanding debt between her and Decedent to indicate the deeds to the Cooks Hill properties were absolute in nature. We disagree.

> A strong indicia of whether the purported conveyance was intended as security for a debt or was a sale or deed is reflected by the existence or lack thereof of a debt or liability between the parties either existing prior to the contract or rising from a loan made at the time of the contract whereby the debt is still left subsisting after the transaction in question.

Id. (citing *Hamilton v. Hamer*, 99 S.C. 31, 57-58, 82 S.E. 997, 1004 (1914)).

[3] All parties admit the eighth factor of defenses is irrelevant under the present facts.

> The effect of [the] existing debt usually turns out to be "that the payment[] stipulated for [in] the agreement to reconvey is in reality the payment of this existing debt, [then] the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instrument[. . .]."

Id. at 420, 257 S.E.2d at 702 (quoting *Hamilton*, 99 S.C. at 35, 82 S.E. at 999). The *Gregorie* court noted an uncontested memorandum of agreement accurately outlined the history of the relationship between Gregorie, the debtor, and Hamlin, the creditor, and the existence of a debt between them. *Id.* at 420, 257 S.E.2d at 702-03. The court also found it compelling that the payment stipulated in the agreement to re-convey was approximately the same amount as the amount of the existing debt. *Id.* at 421, 257 S.E.2d at 703.

Here, the evidence established an existing debt between Decedent and Brooks. Brooks testified she spent all her personal money helping Decedent. She purchased groceries, gave him cash, and helped with utilities. The Cost List enumerated debts accrued from 2003 until 2008, providing an even clearer example of the amount Decedent owed Brooks. The debt was close to $60,000.00 with interest included, which was the amount enumerated in the Repurchase Memorandum for re-purchase of the Cooks Hill properties. Accordingly, Brooks presented evidence of an existing and surviving debt between the two parties.

Deed In Addition to a Separate Agreement

Brooks claims the Repurchase Memorandum was not contemporaneous with the deeds, which she argues was necessary to find an equitable mortgage. Under these facts, we agree the documents were not executed within a reasonable time frame to be construed together, but we decline to adopt the proposition that the documents must be executed contemporaneously to find an equitable mortgage.

"Where a separate instrument is executed as a part of the same transaction as the conveyance, the two instruments are construed together if the writing is in the nature of a conditional sale or a re-purchase agreement." *Id.* (citing 54a Am. Jur. 2d *Mortgages* § 86 (2009)). The *Gregorie* court found "a conveyance accompanied by a re-purchase agreement is a strong circumstance to be considered

in the determination between a deed absolute and equitable mortgage." *Id.* at 422, 257 S.E.2d 703.

Here, the first deed was executed on March 19, 1996. The second deed was executed on February 5, 2002. The Repurchase Memorandum was executed on July 16, 2004. Unlike the repurchase agreement in *Gregorie*, the Repurchase Memorandum here did not accompany the deeds because it was written more than a year after the execution of the second conveyance. *See* 59 C.J.S. *Mortgages* § 71 (2009) (stating "the character of the transaction is fixed at its inception, and as a general rule, the only facts and circumstances that may be considered in determining whether a mortgage was intended are those which existed at the time the instrument was executed"). The Ledger has costs beginning in 2003, but the actual origin date of the Ledger is unknown. These documents are insufficient to support a finding of an equitable mortgage. We believe it would undermine public policy to allow such vague documentation to support a change in the nature of a document, which on its face is an absolute deed, to an equitable mortgage, particularly in this instance, in which the Repurchase Memorandum was written nearly a year after the execution of the final deed. This factor is a strong indicator the conveyances were not intended to be an equitable mortgage.

Previous Negotiations of Parties

Brooks argues Respondents presented no evidence of prior negotiations between the parties because their interactions were the result of being siblings and were not business related. Thus, no hallmarks of a lender and borrower relationship existed as they did in *Gregorie*. We agree.

Addressing this factor, the *Gregorie* court stated "'[o]n the question whether a deed absolute in form was intended as a mortgage, it is proper to consider the previous negotiations of the parties, their agreements and conversations[, conduct,] and the course of dealings between them prior to and leading up to the deed in question.'" *Id.* (quoting 59 C.J.S. *Mortgages* § 76 (2009)). The *Gregorie* court listed five indicators used to determine whether or not a sale was in fact intended:

> 1. That there was no evidence that the owner desired to sell or that the lender desired to purchase.
> 2. That during the negotiations nothing was said about a sale of that property.

> 3. That no price was fixed as a selling value of the property and no discussion along that line was had.
> 4. That no attempt was made to ascertain the real value of the property upon which a sale would reasonably be based, greater liberality being exercised when a loan was intended.
> 5. That the grantees made no inquiry as to the value of the land.

Id. at 422, 257 S.E.2d at 703-04.

In *Gregorie*, the "circumstances . . . indicate[d] overwhelmingly that no outright sale was ever contemplated by either party." *Id.* at 422, 257 S.E.2d at 704. The court found there was neither an agreement to sell nor a contract of sale. *Id.* at 423, 257 S.E.2d at 704. Further, it found significant the party claiming title established absolutely no evidence he took any of the normal and customary steps that would indicate he was buying the property. *Id.*

The circumstances in *Gregorie* that overwhelmingly established a sale was not contemplated by either party are not present here. The Repurchase Memorandum was written nearly a year after the final conveyance, and thus, it was not evidence of any prior negotiations between the parties. The close relationships and familial transactions resulted in informal and inadequately documented transactions, unlike in *Gregorie*, in which a business entity was involved. The price of Decedent's first conveyance was discussed, and Decedent indicated he was selling the land at a lower price due to the financial support Brooks had given him. The second conveyance was for a nominal amount of money, but it was conveyed approximately eight years later, and during that time, Brooks had continued to help Decedent financially. We note Decedent was familiar with the process of mortgaging his property, because he previously mortgaged his property to Ballagh, yet he chose to deed the land in question to Brooks. Accordingly, we do not find the previous negotiations of the party support the argument that a mortgage was intended instead of the absolute deed that was executed.

Inadequacy of Consideration/Price

Brooks maintains the vastly different relationship of the parties in this case negates this factor of any real probative value. We agree.

> "[I]f the consideration passing between the parties, or the amount to be paid by the grantor on exercising his right to repurchase, would be fairly proportioned to the value of the property, if considered as a debt or loan secured by a mortgage thereon, but grossly inadequate if regarded as the price of the land on an absolute sale, this will tend strongly to show that a sale could not have been intended, but that the transaction should rather be treated as a mortgage."

Id. at 424-25, 257 S.E.2d at 705 (quoting 59 C.J.S. *Mortgages* § 77 (2009)).

This factor weighs in favor of Decedent. A review of the record establishes the deeds reflect a lower price than the assessed value of the land. The first conveyance was given for a relatively more reasonable price than the second, which was simply a nominal value. However, Brooks admitted never paying a lump sum amount for consideration of the first conveyance.

Dealings Between the Parties

Brooks argues that as with prior negotiations between her and Decedent, her dealings with Decedent were not business related, and as such, no evidence substantiated the existence of an equitable mortgage. We agree.

The *Gregorie* court noted that "another indicia of customary and normal course of dealings which gives aid in determining the intention of the parties is how the contact between the parties to the transaction originated, and if the grantor attempted to borrow money at the inception of the transaction." *Id.* at 426, 257 S.E.2d at 706.

Here, Brooks helped Decedent financially throughout the last years of his life. The record does not contain evidence the conveyances arose out of Decedent's specific need for any further money, other than his continuing and ongoing need for

financial help to live. In *Gregorie*, the transaction in question "was a direct result of Gregorie[, Sr.,] making application for a loan to both First National Bank and to Hamlin," whereas here, no specific transaction occurred for which Decedent would intend to mortgage the property. Again, Decedent and Brooks had an ongoing relationship in which she provided financial aid to him, and it appears Decedent deeded these properties on his own accord. This factor weighs in favor of Brooks.

Terms of Contract for Conveyance

Brooks contends neither the terms of the deeds nor the Repurchase Memorandum contained any evidence to show Decedent retained an interest in the property. We agree.

The terms of the contract must be examined, and significantly, the court must find whether the repurchase agreement sets a deadline whereby if the money owed is not paid by that time, then the creditor claims to have an absolute fee simple title. *Id.* at 428-29, 257 S.E.2d at 706-07. In *Gregorie*, the court noted two cases where the repurchase agreements set a deadline whereby if the money owed was not paid by that time, the creditor claimed to have an absolute fee-simple title. *Id.* at 429, 257 S.E.2d at 707. The court found no reason for such a stipulation if one already had title under the absolute deed received from the grantee. *Id.* We also find noteworthy the *Gregorie* court found Hamlin's own testimony, the party attempting to establish an absolute deed, convincingly showed a sale was not contemplated. *Id.* at 429-30, 257 S.E.2d at 707.

In the present case, Brooks's testimony did not produce such convincing evidence in favor of an equitable mortgage. Further, the Repurchase Memorandum did not have a stipulation granting Brooks a fee absolute should Decedent fail to meet a deadline for payment of $60,000.00. The Repurchase Memorandum simply stated that after Decedent paid $60,000.00 to Brooks, she would deed the Cooks Hill property back to him. Brooks was adamant the property was sold or given to her in fee absolute because of her financial support to Decedent. The record contains no evidence of any language in the Repurchase Memorandum that would give rise to an inference of a mortgage. Accordingly, we find this factor weighs in favor of Brooks.

Burden of Proof

Finally, an allegation that a deed, absolute on its face, is in fact a mortgage "must be sustained by testimony prima facie showing that [the allegation] is true." *Id.* at 431, 257 S.E.2d at 707. "When this is done, it removes the presumption arising from the fact that a paper is presumed to be what its face imports." *Id.* at 431, 257 S.E.2d at 707-08. "When this is done, it is incumbent on the mortgagee to remove the inferences that may be drawn from such prima facie showing. This is sometimes spoken of as the burden of proof, but it is simply making it incumbent on the mortgagee to disprove the case as then made." *Id.* at 431, 257 S.E.2d at 708.

While the Repurchase Memorandum and Decedent's Cost List may have created a prima facie showing the deeds created equitable mortgage, we find Brooks has disproved that showing. *See* 54a Am. Jur. 2d *Mortgages* § 93 (stating for a court to find an instrument absolute on its face was intended by the parties as a mortgage, "[t]he evidence must be, according to various statements, clear and convincing, plain, credible, satisfactory, unequivocal, unambiguous, and conclusive and [i]t will not suffice if composed of loose and random statements, or facts and circumstances of doubtful import"). As we stated above, many of the factors that must be shown to establish an equitable mortgage did not fall in Respondents' favor.

CONCLUSION

The writings and testimony presented in this case were vague and inadequate and simply did not come close to the amount of evidence put forth in *Gregorie* to establish an equitable mortgage. Moreover, the Repurchase Memorandum in the present case was written long after the second conveyance, which we find is a strong indicator that at the time of execution, the conveyances were not intended to be an equitable mortgage. Brooks successfully disproved Respondents' prima facie showing. Accordingly, the Referee's order is

REVERSED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Regions Bank, Plaintiff,

v.

William S. Owens, David S. Hostetler, Roland G. Paddy and Greer State Bank, Defendants,

of whom, William S. Owens is the Appellant,

and Regions Bank, Roland G. Paddy and Greer State Bank are the Respondents.

Appellate Case No. 2011-193586

Appeal From Lexington County
James O. Spence, Master-in-Equity

Opinion No. 5113
Heard October 1, 2012 – Filed April 10, 2013

AFFIRMED

Gene McCain Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach; and Cheevin T. Lex Gardner, of Gardner Law Office, of Myrtle Beach, for Appellant.

Stephen Peterson Groves, Sr. and Robert Bruce Wallace, both of Nexsen Pruet, LLC, of Charleston; William Wesley Johnson, Jr., of Barfield & Johnson, LLC, of Lexington; and Sherman Brook Fowler, of Carter Smith

Merriam Rogers & Traxler, PA, of Greenville, for Respondents.

LOCKEMY, J.: In this appeal from a mortgage foreclosure action, William Owens argues the master-in-equity erred in denying his motion to set aside entry of default. Owens contends the master erred in finding he failed to demonstrate good cause for failing to answer Regions Bank's (the Bank) summons and complaint as required by Rule 55(c), SCRCP. We affirm.

FACTS/PROCEDURAL BACKGROUND

On June 24, 2005, the Bank's records indicate it loaned Owens, Roland G. Paddy, and David S. Hostetler (collectively, Defendants) $700,000 to purchase approximately one hundred acres of land (the property) in Lexington County. In consideration for the loan, Defendants executed and delivered a promissory note and mortgage to the Bank. On March 31, 2009, following the maturity of the promissory note and in consideration for an extension of the maturity date to July 1, 2009, a second promissory note and assignment of rents was executed in the amount of $642,564 to the Bank. Defendants failed to pay the loan by July 1, 2009, thereby defaulting under the note.

On December 1, 2009, the Bank filed a mortgage foreclosure action seeking to recover the outstanding debt of $683,154.75 as well as attorney's fees and costs. Paddy filed and served his answer on January 15, 2010. Paddy admitted participating in the loan transaction but denied the outstanding loan amount and the Bank's entitlement to attorney's fees and costs. Owens and Hostetler failed to answer. Owens was personally served with the foreclosure pleadings at his business address on January 26, 2010. After Owens failed to file an answer, the case was referred to the master, and a final hearing was set for July 19, 2010. Counsel for the Bank filed an affidavit of default against Owens on March 19, 2010. The Bank notified Owens of the final foreclosure hearing by letter on June 22, 2010.

On July 16, 2010, Owens filed a motion to set aside entry of default, for leave to file an answer, and for a continuance. Owens asserted Paddy misrepresented he would answer on behalf of himself and Owens. In his proposed answer, Owens denied he participated in the loan transaction, denied he signed the loan documents, and alleged the Bank was negligent in processing the loan without his

consent. Owens also asserted a counterclaim alleging the Bank violated the South Carolina Unfair Trade Practices Act.

The Bank deposed Owens, Paddy, and the loan closing attorney, Michele Paddy Refosco.[1] According to Owens, Paddy approached him about investing $100,000 in a "deal." Although Owens denied he knew the deal was to purchase the property, Owens stated Paddy had discussed the property with him and he understood Paddy intended to "turn around and sell" the property to a bottling company. Owens testified Paddy told him he could expect a significant return on his investment. Owens recalled he discussed the deal with Paddy for several months before he gave Paddy the $100,000 to invest. Owens and Paddy did not sign a contract or partnership agreement.

Owens denied purchasing the property, owning the property, or agreeing to participate in any financing for the property. According to Owens, he did not attend the loan closing at Refosco's office, and the signature on the 2005 promissory note is not his. Owens admitted he signed "a bunch of papers" Paddy brought to his office without reading them, but he could not recall what type of documents he signed. Owens testified he contacted Paddy after receiving the foreclosure summons and complaint, and Paddy represented to him he had retained an attorney and was "taking care of it." According to Paddy, he had discussions with Owens regarding the need to finance the property with the Bank. Paddy testified he attended the loan closing at Refosco's office along with Owens and Hostetler. Paddy testified Refosco explained the terms of the loan documents and all three Defendants signed the documents. Refosco also testified the Defendants signed the 2005 loan transaction documents in her presence at her law office on June 24, 2005.[2]

Owens admitted signing a limited power of attorney in favor of Paddy on May 24, 2007. Pursuant to the power of attorney, Owens authorized Paddy to execute in Owens's name the "HUD-1 Statement, Deed, Disbursement Authorizations, and any and all other closing documents in connection with the sale of [the property]." Owens, however, stated the power of attorney was solely for the purpose of allowing Paddy to pick up Owens's share of the property's sale proceeds in Columbia.[3] Paddy did not disagree with Owens's characterization, but stated that

[1] Refosco is Paddy's daughter.

[2] Refosco testified she would not have witnessed and notarized the documents unless Owens had signed them in her presence.

[3] Owens did not read the power of attorney agreement before signing it.

the power of attorney was also for the purpose of allowing Paddy to make decisions related to the property and sign documents associated with the property and its financing. Paddy signed the 2009 promissory note on behalf of Owens as attorney-in-fact. According to Paddy, he explained to Owens, prior to signing on his behalf, the terms of the transaction. Owens revoked the power of attorney on June 30, 2010.

After the Bank filed its mortgage foreclosure action, Paddy testified he hired an attorney to represent only himself and not Owens and Hostetler. Paddy stated he told Owens he had "hired a lawyer in that county to take care of whatever we had to do on this foreclosure and to keep me abreast of what was going on." According to Paddy, while the attorney was only representing Paddy, Paddy was "looking out for [Owens]." Paddy testified he did not tell Owens an attorney would appear on Owens's behalf.

In a November 30, 2010 order, the master denied Owens's motion to set aside entry of default, finding Owens's mistaken belief that Paddy would answer the complaint on his behalf did not meet the "good cause" standard set forth in Rule 55(c), SCRCP. The master noted the record was void of any evidence Paddy agreed or suggested he would hire an attorney for Owens. The master found Owens failed to take steps to protect himself and should not be rewarded for his "own negligence and intentional ignorance." Subsequently, Owens filed a motion to reconsider, which the master denied on March 9, 2011. The appeal followed.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 163, 375 S.E.2d 321, 322 (Ct. App. 1988). An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

LAW/ANALYSIS

I. Entry of Default

Owens argues the master erred in denying his motion to set aside entry of default because the Lexington County Clerk of Court failed to formally enter the default into the court records. Because Owens failed to raise this argument to the master, it is not preserved for our review. *See Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) ("To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court.").

II. Good Cause

Owens argues the master erred in finding Owens failed to demonstrate good cause for failing to answer the complaint. We disagree.

Rule 55(a), SCRCP, provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c), SCRCP, permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08, 681 S.E.2d at 888 (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)). "The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause." *Id.* "A motion under Rule 55(c) is addressed to the sound discretion of the trial court." *Id.*

Owens contends he has shown good cause for failing to answer the complaint. First, Owens argues Paddy misled him into believing Paddy had hired an attorney to answer the complaint on Owens's behalf. Owens asserts he reasonably relied on Paddy's representations because Paddy had his power of attorney, which allowed him to act on Owens's behalf regarding the property. Owens argues he immediately hired an attorney when he learned Paddy did not file an answer on his

behalf. Owens maintains that, as a 79-year-old with a limited education, he was unaware he was signing loan documents and had complete trust in Paddy.

We find evidence in the record supports the master's finding Owens did not show good cause for failing to answer the complaint. While Owens testified he contacted Paddy after receiving the complaint and Paddy told him he had hired an attorney and would "take care of it," Paddy disputed this characterization. Paddy testified he never told Owens he had hired an attorney to represent him and file an answer on his behalf. Furthermore, Owens presented no evidence he took any steps to protect himself by contacting either Paddy or Paddy's attorney to confirm an answer would be filed on his behalf. *See Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (holding "a party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney.").

Owens argues he is entitled to relief pursuant to the factors outlined in *Wham*. *See Wham*, 298 S.C. at 465, 381 S.E.2d at 502-03 (holding the master shall consider the following factors in deciding whether to grant relief from an entry of default: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted). Owens contends his motion for relief was timely, he had a meritorious defense, and the Bank would not be prejudiced. Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors. *See Sundown*, 383 S.C. at 607-08, 681 S.E.2d at 888 (holding a court need only consider the *Wham* factors "[o]nce a party has put forth a satisfactory explanation for the default"); *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995) (holding the trial court is not required to make specific findings of fact on the record for each *Wham* factor if the record contains sufficient evidentiary support for the finding of lack of good cause).

Owens also asserts the master erred in applying an excusable neglect standard in determining Owens was not entitled to any relief. Although the master discussed this standard during the hearing on Owens's motion to reconsider, the master also discussed good cause during the hearing on Owens's motion to set aside entry of default, and he properly applied the good cause standard in his final order.

Finally, Owens argues the master erred in citing *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002), in his order. The master cited *Pilgrim* for the

proposition that a defendant's mistaken belief that a fellow defendant would file an answer on his behalf does not meet the good cause standard. In *Pilgrim*, this court noted that "[t]he courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant." 350 S.C. at 642, 567 S.E.2d at 529. Here, the master concluded that "[i]f reliance on one's own attorney is insufficient to show 'good cause,' then reliance on another defendant and *his* attorney is equally insufficient." Owens contends the master's reliance on *Pilgrim* was an error of law because *Pilgrim* was vacated by our supreme court. We agree with Owens that *Pilgrim* was vacated on April 25, 2003. *See Bage, LLC v. Se. Roofing Co. of Spartanburg, Inc.*, 383 S.C. 489, 490, 681 S.E.2d 867 (2009) (noting the parties in *Pilgrim* settled while the petition for certiorari was pending before our supreme court; therefore, the decision was vacated). However, the master's reliance on *Pilgrim* was not an error justifying reversal because the proposition for which *Pilgrim* stands was not overturned by the court and remains the law of this state. *See Sundown*, 383 S.C. at 609, 681 S.E.2d at 889 (holding "the law is clear that an attorney or insurance company's misconduct is imputable to the client").

CONCLUSION

Based on the foregoing, we the master did not abuse his discretion in refusing to grant Owens relief under Rule 55(c), SCRCP. Accordingly, the master's order is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Teresa Blakely, Appellant.

Appellate Case No. 2011-196627

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

Opinion No. 5114
Heard March 12, 2013 – Filed April 10, 2013

AFFIRMED

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch Jr., both of Columbia, for Respondent.

PIEPER, J.: This appeal arises out of Appellant Teresa Blakely's[1] conviction for accessory after the fact to a felony. Blakely was initially acquitted of murder. She was subsequently tried for accessory after the fact to a felony. On appeal, Blakely

[1] Blakely's name is listed as Teresa Blakely on the indictment for accessory after the fact to a felony but is listed as Teresa Fuller on the indictment for murder. We refer to her as Blakely throughout this opinion.

raises multiple claims arising under the due process clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, § 3 of the South Carolina Constitution, including: (1) the vindictive prosecution in this matter is barred; (2) the indictment for accessory after the fact to a felony following Blakely's acquittal of murder violates due process; and (3) the State's inconsistent positions in two separate criminal proceedings against the same defendant is prohibited. We affirm.

FACTS

Blakely and Kim Alexander were involved in a relationship before and during Blakely's marriage to Houston Fuller, the victim herein. Paul Morris, Alexander's brother, claimed he became aware of derogatory statements Fuller made in reference to Alexander. As a result, Morris vowed to avenge those statements by physically accosting Fuller. Morris arrived at the residence of Fuller and Blakely, began a physical altercation with Fuller, and ultimately killed Fuller during the course of the altercation. Blakely's fourteen-year-old daughter and her daughter's fourteen-year-old boyfriend were in the house during the altercation. Blakely pretended to call 911, told the teenagers to stay down, and further told the teenagers Morris' fight with Fuller involved the "Mexican Mafia." After checking Fuller and finding no pulse, Blakely helped Morris load Fuller's body into Fuller's truck. Morris drove Fuller's truck to a steep bank and rolled the truck with the body down the embankment. Morris got into the vehicle driven by Blakely and Blakely dropped Morris off at a convenience store.

The State indicted Blakely for murder based on the theory that she aided and abetted Morris in killing Fuller. After a four-day trial, the jury rendered a not guilty verdict. After Blakely's acquittal, Morris pled guilty to voluntary manslaughter. Subsequently, Blakely was indicted for accessory after the fact to a felony and tried without a jury. Blakely moved the trial court to quash the indictment due to multiple violations of due process.[2] The trial court denied Blakely's motion to quash the indictment. The trial court convicted Blakely and sentenced her to eight years, suspended upon the service of four years with three years' probation. This appeal followed.

[2] In her motion to quash the indictment, Blakely advanced the same arguments that she now argues to this court on appeal.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012). This Court simply determines whether the trial judge's ruling is supported by any evidence. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

LAW/ANALYSIS

First, Blakely argues the prosecution for accessory after the fact to a felony is the result of vindictive prosecution when the State could have originally indicted Blakely for both murder and accessory after the fact. We disagree.

Murder is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10 (2003). In a murder case, the corpus delicti consists of two elements: (1) the death of a human being; and (2) the criminal act of another in causing that death. *State v. Weston*, 367 S.C. 279, 293, 625 S.E.2d 641, 648 (2006). Before an accused may be found guilty of being an accessory after the fact to a felony, the following elements must exist: (1) the felony has been completed; (2) the accused must have knowledge that the principal committed the felony; and (3) the accused must harbor or assist the principal felon. *State v. Legette*, 285 S.C. 465, 466, 330 S.E.2d 293, 294 (1985). "The assistance or harboring rendered must be for the purpose of enabling the principal felon to escape detection or arrest." *Id.* at 467, 330 S.E.2d at 294.

"The common law traditionally categorized the participants in a felony as accessory before the fact, principal first, principal second, and accessory after the fact." WILLIAM SHEPARD MCANINCH, W. GASTON FAIREY, AND LESLEY M. COGGIOLA, THE CRIMINAL LAW OF SOUTH CAROLINA 410 (5th ed. 2007). Generally, under the common law, liability as an accessory essentially "shadowed" that of the principal. *See State v. Massey*, 267 S.C. 432, 443, 229 S.E.2d 332, 338 (1976) ("At common law an accessory could not be convicted unless his principal had been convicted."). In modern jurisprudence, principals and accessories have generally merged, except for an accomplice who is an accessory after the fact. *See* S.C. Code Ann. § 16-1-40 (2003) ("A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony . . . is guilty of a felony and, upon conviction, must be punished in the manner prescribed for

the punishment of the principal felon."). This means that an accessory who provides any assistance may be sentenced the same as if he was the principal of the crime, but the accessory cannot be convicted as both. *See State v. Sheriff*, 118 S.C. 327, 328, 110 S.E. 807, 807 (1922) (noting the common law and the criminal code recognize the "distinction between principals and accessories before the fact and, while the punishment is the same for each, that does not change the essential distinction or relieve the necessity of the appropriate allegations in an indictment"). Today, the accessory's culpability no longer shadows that of the principal. Accordingly, an accessory may be convicted even if the principal is not charged, is acquitted, or is not yet prosecuted. *See Massey*, 267 S.C. at 444, 229 S.E.2d at 338 (noting "the conviction of the principal is no longer a condition precedent to the conviction of an accessory").

The exception to these modern notions of accomplice liability is that of an accessory after the fact. *See* S.C. Code Ann. § 16-1-55 (2003) (outlining lower classifications of punishment for persons convicted of the offense of accessory after the fact to a felony as compared to punishment for the principal felon). Unlike the crime of accessory before the fact to a felony, an accessory after the fact crime does not merge with the principal offense. Moreover, accessory after the fact to a felony is not a lesser-included offense of murder. *State v. Fuller*, 346 S.C. 477, 481, 552 S.E.2d 282, 284 (2001); *see State v. Good*, 315 S.C. 135, 138-39, 432 S.E.2d 463, 465-66 (1993) (noting accessory after the fact is not a lesser-included offense of any of the offenses with which the defendant was charged, including murder, armed robbery, grand larceny of a motor vehicle, and criminal conspiracy). In addition, double jeopardy does not attach under these facts.[3] *See State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) ("Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." (internal quotation marks omitted)).

Next, we review the claim of vindictive prosecution. In *State v. Fletcher*, 322 S.C. 256, 258-59, 471 S.E.2d 702, 704 (Ct. App. 1996), this court was presented with a question regarding whether prosecutorial vindictiveness was indicated by the actions of a solicitor in a case. "It is a due process violation to punish a person for exercising a protected statutory or constitutional right." *Id.* at 259, 471 S.E.2d at 704 (citations omitted). However, "punishment of the offender is recognized as a

[3] On appeal, Blakely does not assert a double jeopardy claim.

proper motivation for a sentencing trial judge or a prosecutor." *Id.* at 260, 471 S.E.2d at 704. The presence of a punitive motivation "does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity." *Id.* "[A]n initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *State v. Dawkins*, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989). A prosecutor "has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." *State v. Langford*, 400 S.C. 421, 435 n.6, 735 S.E.2d 471, 479 n.6 (2012).

Our court in *Fletcher* noted that "the United States Supreme Court has fashioned certain rules as a protection against vindictive action in response to a criminal defendant's exercise of a statutory or constitutional right." *Fletcher*, 322 S.C. at 260, 471 S.E.2d at 704. Only "certain limited circumstances pose a realistic likelihood of vindictiveness by a prosecutor" and, therefore, warrant the application of a presumption of vindictiveness. *Id.* (internal quotation marks omitted). "The inquiry . . . is not focused solely on the presence or absence of actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses such a reasonable likelihood of vindictiveness as to require a presumption of vindictiveness." *Id.* at 260-61, 471 S.E.2d at 704 (internal quotation marks omitted).

South Carolina courts have not answered the exact question regarding whether prosecution on a new indictment after a defendant obtained an acquittal on a separate charge gives rise to a presumption of vindictiveness. In *Fletcher*, we considered prosecutorial vindictiveness alleged by a defendant who had successfully asserted her right to appeal. Fletcher was arrested and charged with assault and battery and discharging a firearm, both municipal charges. *Id.* at 259, 471 S.E.2d at 704. At the same time, Fletcher was also charged with pointing a firearm, a general sessions charge. *Id.* at 261 n.3, 471 S.E.2d at 705 n.3. After she was convicted in her absence on both of the municipal charges, she successfully appealed her convictions and the general sessions court reversed the municipal court for failure to provide proper notice of the trial. *Id.* at 259, 471 S.E.2d at 704. While the new trial on the municipal charges was pending, the solicitor directly indicted Fletcher for assault with intent to kill. *Id.* Fletcher requested the circuit

court force the solicitor to elect between assault with intent to kill and pointing a firearm, arguing the two charges covered the same offense. *Id.* The circuit court ultimately dismissed the charge of assault with intent to kill. *Id.* The circuit court refused to dismiss the pointing a firearm charge despite Fletcher's motion to do so on the grounds of prosecutorial vindictiveness. *Id.* Fletcher was convicted of pointing a firearm. *Id.*

In its analysis regarding Fletcher's claim that the circuit court erred by not dismissing the pointing a firearm charge based on prosecutorial vindictiveness, this court determined the actions of the solicitor did not warrant the application of the presumption of prosecutorial vindictiveness even though "Fletcher exercised a procedural right to appeal the conviction arguably emanating from the same conduct which provided the basis for the greater charges." *Id.* at 261, 471 S.E.2d at 705. We emphasized the fact that "the decision to charge Fletcher with the offense of pointing a firearm was initiated at the same time the municipal charges were brought" and, therefore, it was not an action the solicitor took against Fletcher "after the exercise of a legal right." *Id.* (internal quotations omitted).

After determining insufficient evidence of a reasonable likelihood of prosecutorial vindictiveness existed to warrant application of the presumption, this court noted that in order to succeed on her claim of prosecutorial vindictiveness, Fletcher was "required to prove actual prosecutorial vindictiveness." *Id.* at 262, 471 S.E.2d at 705. "The only evidence presented to the trial court in support of the allegation of actual vindictiveness [was] the timing of the direct indictment." *Id.* In response to Fletcher's allegations of prosecutorial vindictiveness, "the solicitor represented to the court that he was unaware of the pending municipal charges until the week prior to trial" and "argued the direct indictment was precipitated by a review of the file, revealing to him that the situation was more violent than just pointing a firearm because Fletcher actually fired the weapon at the alleged victim." *Id.* at 262, 471 S.E.2d at 705-06. We concluded that any inference of vindictiveness derived from the timing of the direct indictment was insufficient to prove an improper motivation because the evidence established probable cause to believe the crime had occurred; accordingly, we held Fletcher did not prove actual prosecutorial vindictiveness. *Id.* at 262-63, 471 S.E.2d at 706.

Blakely asserts our supreme court's holding in *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002), is applicable to the instant case. Patrick was originally indicted for burglary, two counts of armed robbery, assault and battery with intent to kill,

and the use of a motor vehicle without the owner's consent. *Id.* at 205, 562 S.E.2d at 610. "All the indictments, except the burglary indictment, were *nol prossed* prior to trial." *Id.* Patrick was ultimately convicted of burglary and sentenced to life in prison. *Id.* Seventeen years after his conviction, Patrick was successful in obtaining a reversal through post-conviction relief (PCR). *Id.* at 205-06, 562 S.E.2d at 610. The State then re-indicted Patrick for all five original charges, and the jury convicted Patrick on all counts. *Id.* at 206, 562 S.E.2d at 610. Patrick's application for PCR was denied. *Id.* However, our supreme court granted Patrick's petition for certiorari. *Id.* at 205, 562 S.E.2d at 610.

In its analysis regarding Patrick's claim of prosecutorial vindictiveness, the Supreme Court of South Carolina cited *North Carolina v. Pearce*, 395 U.S. 711 (1969), for the proposition that "the Due Process Clause of the Fourteenth Amendment prevent[s] a trial court from penalizing a defendant for choosing to exercise his right to appeal." *Patrick*, 349 S.C. at 209, 562 S.E.2d at 612. The supreme court found that in order for a presumption of prosecutorial retaliation to apply, Patrick would need to show a reasonable likelihood that retaliation was a motive behind bringing the additional charges. *Id.* If no such reasonable likelihood existed, the court determined Patrick would have the burden to prove actual retaliation. *Id.* The court found a presumption of prosecutorial vindictiveness applied because the facts presented a reasonable likelihood that the solicitor brought the additional charges in retaliation for Patrick's exercise of his right to appeal. *Id.* at 210, 562 S.E.2d at 612. The court specifically noted that seventeen years passed between the trials, but no new evidence was discovered and none of the facts or witnesses available to the prosecution had changed. *Id.* at 209-10, 562 S.E.2d at 612. In analyzing whether the State rebutted the presumption, the court noted that the solicitor's reasons for prosecuting the previously *nol prossed* charges included: (1) it was in the interest of the State of South Carolina; and (2) it was common practice not to prosecute additional charges once a solicitor had a life sentence on one charge. *Id.* at 210, 562 S.E.2d at 612. The supreme court held the State had not rebutted the presumption of prosecutorial vindictiveness with these "fairly weak reasons for bringing the charges, especially considering the length of time between the original trial and the retrial." *Id.*

Though informative, *Fletcher* and *Patrick* are not directly applicable to the instant matter because Blakely did not exercise a protected statutory or constitutional right such as PCR or appeal; instead, Blakely was acquitted on one charge and then indicted on another. We find persuasive the decisions of several federal circuit

courts of appeals that have considered the exact issue at bar and have held a new prosecution following an acquittal on separate charges does not, without more, give rise to a presumption of vindictiveness. Most recently, the Eleventh Circuit decided no presumption of prosecutorial vindictiveness existed when "the second indictment did not follow a successful appeal . . . nor did it seek heightened charges." *United States v. Kendrick*, 682 F.3d 974, 983 (11th Cir. 2012). The Second Circuit found the prosecution of a defendant on federal weapons charges after an acquittal on Racketeer Influenced and Corrupt Organizations Act (RICO) charges was entirely legitimate "and certainly cannot be considered vindictive." *United States v. Johnson*, 171 F.3d 139, 141 (2d Cir. 1999). The Eighth Circuit held the filing of additional charges after an acquittal did not evoke the presumption of vindictive prosecution because the "exercise of one's choice to proceed with a jury trial rather than a bench trial does not compel a special presumption of prosecutorial vindictiveness whenever additional charges are brought after a jury trial is demanded." *United States v. Rodgers*, 18 F.3d 1425, 1430-31 (8th Cir. 1994) (internal quotation marks omitted). Additionally, the Third Circuit found:

> We will not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case is justified by the evidence and does not put the defendant twice in jeopardy. Such a presumption is tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution. It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace. . . . We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality.

United States v. Esposito, 968 F.2d 300, 306 (3d Cir. 1992).

Blakely argues a presumption of vindictiveness exists here because the State could have originally indicted her for both murder and accessory after the fact but, instead, the State elected to indict her for accessory after the fact only after she was acquitted for murder. Blakely asserts the State failed to provide an explanation regarding why the charges were not tried together and argues the indictment for accessory after the fact was retaliatory because the State was unsuccessful in

securing a conviction for murder. However, Blakely admitted to the trial court that if the State originally had a two-count indictment, the State would have been required to take somewhat inconsistent positions because if the jury had found Blakely guilty of murder, the jury would have been forced to acquit her of accessory after the fact. Evidence in the record shows the second indictment was issued after Blakely was acquitted of murder and not after Blakely had asserted some protected statutory or constitutional right. Furthermore, Blakely makes no allegations of vindictiveness other than the fact that the State issued a second indictment after an acquittal. Therefore, based upon our review of applicable jurisprudence, we find the record supports the trial court's denial of Blakely's motion to quash the indictment as there is no presumption or sufficient evidence of prosecutorial vindictiveness.

Second, Blakely argues the indictment for accessory after the fact to a felony after she had been acquitted of murder violates due process where the American Bar Association's (ABA) standards for prosecutors involving joinder and severance of cases prohibit prosecution in the instant matter. We disagree.

Though the ABA standards for criminal justice are a useful point of reference, these standards are only guides and do not establish the constitutional baseline. *Rompilla v. Beard*, 545 U.S. 374, 400 (2005). The U.S. Constitution does not codify the ABA's model rules. *Montejo v. Louisiana*, 556 U.S. 778, 790 (2009). South Carolina does not require mandatory joinder of indictments in one trial but instead, leaves the decision of whether to join charges to the discretion of the trial court after motion by one party. *See State v. Hinson*, 253 S.C. 607, 613, 172 S.E.2d 548, 551 (1970); *State v. Evans*, 112 S.C. 43, 45, 99 S.E. 751, 751 (1919). Federal courts have rejected the argument that the initial choice to withhold certain charges and then later proceed on those charges after an acquittal amounts to a constitutional violation. *See Paradise v. CCI Warden*, 136 F.3d 331, 336 (2d Cir. 1998) ("Accepting this contention would encourage prosecutors to overcharge defendants, by charging both a greater number of crimes and the most severe crimes supported by the evidence. This is a result we do not wish to promote. Instead, the validity of a pretrial charging decision must be measured against the broad discretion held by the prosecutor to select the charges against the accused." (internal quotations omitted)); *Johnson*, 171 F.3d at 141 (finding no error in the prosecution of new charges after an acquittal even when knowledge of the new charges existed prior to the first trial).

Although Blakely argues the ABA standards involving joinder and severance of cases preclude prosecution, we believe these standards are not controlling or dispositive. While our supreme court and this court have, on occasion, referred to ABA standards,[4] our jurisprudence has not adopted the standards as a rule of court. Furthermore, we find Chief Justice Toal's cautionary dissent in *Ard v. Catoe* instructive as to the weight of the reliance South Carolina courts should place on the ABA standards:

> Additionally, I note that in support of their conclusion that trial counsel were deficient, the majority cites extensively to American Bar Association (ABA) guidelines on the prevailing norms of practice. The majority justifies their reliance on ABA guidelines by pointing to an endorsement of ABA standards in *Strickland v. Washington.* In my opinion, however, the *Strickland* court makes it clear that the ABA standards, although helpful, are "only guides" for assessing reasonableness. . . . This Court has never adopted the

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[4] *See Council v. State*, 380 S.C. 159, 172-73, 670 S.E.2d 356, 363 (2009) (noting that trial counsel's conduct fell below the standards set by the ABA for the appointment and performance of counsel in death penalty cases); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007) (citing the ABA's standards for defense counsel's performance regarding investigation of a capital case in support of its decision to affirm the PCR court's finding of ineffective assistance of counsel); *Matter of Goodwin*, 279 S.C. 274, 277, 305 S.E.2d 578, 580 (1983) (noting the ABA standards' suggested procedure for a trial court's handling of a conflict between counsel and a criminal defendant client intending to commit perjury); *Harden v. State*, 276 S.C. 249, 253-56, 277 S.E.2d 692, 694-95 (1981) (finding the rationale in ABA standard 14-3.3 regarding whether to accept guilty pleas and plea agreements persuasive); *State v. Way*, 264 S.C. 280, 285, 214 S.E.2d 640, 642 (1975) (Bussey, J., dissenting) (referencing the ABA standards' provision regarding the function of the trial judge); *State v. Stanley*, 365 S.C. 24, 39, 615 S.E.2d 455, 463 (Ct. App. 2005) (citing, among other authorities, the ABA Standards for Criminal Justice, § 6-1.1 (2d ed. 1980), for the premise that a judge has a responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of criminal justice).

> ABA guidelines as the standard for prevailing professional norms in South Carolina.

372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal, C.J., dissenting, and Burnett, J., concurring with the dissent); *see also Medlin v. State*, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981) (Littlejohn and Gregory, JJ., concurring in part and dissenting in part) (noting "no other state and no other jurisdiction has adopted the ABA Standards as a rule of court"). Accordingly, while the ABA standards may be useful or may offer assistance in the analysis of an issue, these standards are not controlling or dispositive. Moreover, with respect to Blakely's specific claim, we note the ABA standards do not create a due process right; instead, due process rights emanate from the U.S. Constitution and the South Carolina Constitution. Therefore, we find Blakely's second argument is without merit.

Third, Blakely argues the State took inconsistent positions in the two separate criminal proceedings against Blakely and, therefore, violated due process. We disagree.

In support of her argument, Blakely cites to *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). However, the *Groose* court held the state violated the defendant's due process rights when it used one of a codefendant's two factually contradictory versions of events surrounding the murders to convict the defendant, and then relied on another version at a later trial to convict someone else of the same murders. *Id.* at 1051-52. In the instant matter, the State merely pursued two different legal theories. Blakely cites no other authority prohibiting the State from asserting two different legal theories based on the facts presented. Accordingly, we affirm as to this issue.

CONCLUSION

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

AFFIRMED.

SHORT and THOMAS, JJ., concur.