Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

July 12, 2011

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629.

The Commission will not accept applications after <u>Noon on Thursday, August 11, 2011.</u>

The term of office currently held by the Honorable Kaye G. Hearn, Justice of the Supreme Court, Seat 4, will expire July 31, 2012.

The term of office currently held by the Honorable Thomas E. Huff, Judge of the Court of Appeals, Seat 8, will expire June 30, 2012.

The term of office currently held by the Honorable George C. "Buck" James, Jr., Judge of the Circuit Court for the Third Judicial Circuit, Seat 2, will expire June 30, 2012.

The term of office currently held by the Honorable J. Michael Baxley, Judge of the Circuit Court for the Fourth Judicial Circuit, Seat 2, will expire June 30, 2012.

The term of office currently held by the Honorable L. Casey Manning, Judge of the Circuit Court for the Fifth Judicial Circuit, Seat 2, will expire June 30, 2012.

A vacancy will exist in the office currently held by the Honorable G. Thomas Cooper, Judge of the Circuit Court for the Fifth Judicial Circuit, Seat 3, upon Judge Cooper's retirement on or before December 31, 2012. The successor will fill the unexpired term of that office which will expire June 30, 2015.

The term of office currently held by the Honorable Roger L. Couch, Judge of the Circuit Court for the Seventh Judicial Circuit, Seat 2, will expire June 30, 2012.

The term of office currently held by the Honorable Eugene C. Griffith, Jr., Judge of the Circuit Court for the Eighth Judicial Circuit, Seat 2, will expire June 30, 2012.

The term of office currently held by the Honorable Kristi Lea Harrington, Judge of the Circuit Court for the Ninth Judicial Circuit, Seat 2, will expire June 30, 2012.

The term of office currently held by the Honorable Alexander S. Macaulay, Judge of the Circuit Court for the Tenth Judicial Circuit, Seat 2, will expire June 30, 2012.

The term of office currently held by the Honorable William Paul Keesley, Judge of the Circuit Court for the Eleventh Judicial Circuit, Seat 1, will expire June 30, 2012.

The term of office currently held by the Honorable R. Knox McMahon, Judge of the Circuit Court for the Eleventh Judicial Circuit, Seat 2, will expire June 30, 2012.

The term of office currently held by the Honorable Michael G. Nettles, Judge of the Circuit Court for the Twelfth Judicial Circuit, Seat 1, will expire June 30, 2012.

The term of office currently held by the Honorable Perry M. Buckner, III, Judge of Circuit Court for the Fourteenth Judicial Circuit, Seat 1, will expire June 30, 2012.

The term of office currently held by the Honorable John D. McLeod, Judge of the Administrative Law Court, Seat 2, will expire June 30, 2012.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/html-pages/judmerit.html. If you wish to pick up an application package, first please contact Senate Judiciary Administrative Assistant, Laurie Traywick at (803) 212-6623.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF J. M. LONG, III, PETITIONER

On April 25, 2011, Petitioner was definitely suspended from the practice of law for nine (9) months, retroactive to March 1, 2010. In the Matter of Long, ___S.C.___, 709 S.E.2d 632 (2011). He has now filed a petition to be reinstated.

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

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

These comments should be received no later than September 12, 2011.

Columbia, South Carolina
July 14, 2011

The Supreme Court of South Carolina

In the Matter of James Gerald Longtin, Respondent.

ORDER

On July 18, 2011, respondent was definitely suspended from the practice of law for nine (9) months. In the Matter of Longtin, Op. No. 27009 (S.C. Sup. Ct. filed July 18, 2011) (Shearouse Adv. Sh. No. 23 at 33). Accordingly, we hereby appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

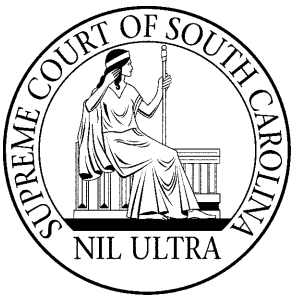
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution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

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

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
July 18, 2011



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
July 18, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, Petitioner,

v.

M.R.C.L., R.L., and G.L., Defendants,

of whom M.R.C.L. is Respondent,

and G.L., by and through Guardian ad Litem, Maria Royle, is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
W. Thomas Sprott, Jr., Family Court Judge

Opinion No. 27007
Heard June 7, 2011 – Filed July 18, 2011

REVERSED

Paul C. White, of Moncks Corner, for Petitioner.

Phillip S. Ferderigos and Jeremy E. Bowers, both of Barnwell Whaley Patterson & Helms, of Charleston, for Respondent.

Virginia Cravens Ravenel, of Columbia, for Guardian Ad Litem.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in South Carolina Dept. of Social Services v. M.R.C.L., 390 S.C. 329, 701 S.E.2d 757 (Ct. App. 2010). We reverse.

FACTS

The Department of Social Services (DSS) initiated termination of parental rights (TPR) proceedings against M.R.C.L. (mother) and R.L. (father). Child was removed from mother and father's home in May 2007 due to allegations of physical neglect, after both parents tested positive for crack cocaine. Child, who was one year old at the time, was placed in a pre-adoptive foster home with two of her siblings.[1] Mother and father have a history with DSS dating back to 1991, and their drug abuse is a recurring issue.

After a merits hearing, the family court ordered mother and father to complete a treatment plan, including a drug and alcohol assessment and a parental assessment, and to maintain safe and appropriate housing. Mother and father did not complete the treatment plan.

Mother was offered job counseling services through South Carolina Vocational Rehabilitation (SCVR), including diagnosis and treatment, GED prep classes, and job readiness training. Although mother attended a few

[1] Mother and father have a total of seven children. Excluding the child that is the subject of this action, TPR has been granted as to five of the other children, and one child has been emancipated.

days of classes, she did not successfully complete the program. Mother claimed she had transportation issues, despite having been offered transportation to the job training center and the GED center.

The family court also ordered mother and father to pay child support. Father paid some child support, using disability benefits, but mother paid none. Father and mother both considered mother to be a "housewife," and both testified father provided for the family financially. Father testified his income consisted of disability benefits of approximately $689 per month and occasional income he earned by performing odd jobs and lawn care. Because mother did not earn any income, father paid all of the bills, and the family purchased groceries using mother's food stamps.

At the time child was removed from the home, mother and father owned five dogs. At the time of the TPR hearing, mother and father owned ten dogs, which mother estimated cost fifty dollars per month to feed. Mother and father also purchased cell phones for approximately two hundred dollars. Over the course of the time child was in foster care, these expenditures totaled over one thousand dollars.

Mother last worked in 2004 when she held three jobs in different fast food establishments. Mother suffered from diabetes during her pregnancy with child and later developed a degenerative disc disease in her shoulders and lower back. According to mother, the disease left her unable to lift heavy objects as required by many jobs in the fast food industry. At the time of the TPR hearing mother claimed to have unsuccessfully applied for approximately thirty jobs. On cross-examination, mother admitted this testimony differed from testimony she had given one month earlier in a different TPR action. Mother testified she applied for jobs not only in the fast food industry, but also different types of jobs "to try and better [herself]." Mother claimed to have applied for a job answering phones but believed she was not offered the position because of her lack of computer skills.

After child was first placed in foster care, mother provided medications and lotion for child's eczema. Mother also testified she provided child with food, drinks, toys, diapers, and wipes. The DSS case manager acknowledged mother provided the lotion when child was first placed into foster care, but

testified mother provided child only snacks, drinks, and toys during her last two or three visits.

The GAL testified that, in her opinion, it was in child's best interest to terminate mother and father's parental rights and allow the foster parents to adopt child. The GAL stated child was reluctant to spend time with mother and father and that they had to "bribe" child with snacks and toys. The GAL also testified child had bonded with her foster parents and called her foster mother "mommy." The GAL stated her biggest concern with returning child to mother and father was that they had failed to rehabilitate themselves from their drug use.

The family court terminated mother and father's parental rights, generally finding (1) mother and father willfully failed to visit the child; (2) mother and father willfully failed to support the child; and (3) TPR was in the best interest of the child.

Mother appealed the grant of TPR, and the Court of Appeals reversed, holding DSS failed to prove by clear and convincing evidence that mother willfully failed to support or visit the child. Because the Court of Appeals found DSS failed to prove any statutory ground for TPR, it did not reach the issue whether TPR was in the best interest of the child. We granted both DSS and the GAL's petitions for a writ of certiorari.

ISSUE

Did the Court of Appeals err in reversing the family court's order terminating mother's parental rights?

STANDARD OF REVIEW

Grounds for termination of parental rights must be proven by clear and convincing evidence. Doe v. Roe, 386 S.C. 624, 630, 690 S.E.2d 573, 577 (2010). Upon review, this Court may make its own conclusion from the record as to whether clear and convincing evidence supports the termination. Id. This Court, however, is not required to ignore the fact that the family

court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id.

LAW/ANALYSIS

DSS argues the Court of Appeals erred in reversing the family court's TPR order. We agree.

The family court may order TPR upon a finding of one or more of the following grounds, and that termination is in the best interest of the child:

> . . . .
>
> (3) The child has lived outside the home of either parent for a period of six months, and during that time the parent has willfully failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.
>
> (4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has willfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

S.C. Code Ann. § 63-7-2570 (2010).[2]

Whether a parent's failure to visit or support a child is "willful" within the meaning of the statute is a question of intent to be determined from all the facts and circumstances in each case, and the trial judge is given wide discretion in making this determination. S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992). "While the trial judge is given wide discretion in making this determination, the element of willfulness must be established by clear and convincing evidence." S.C. Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 137, 538 S.E.2d 285, 289 (2000). "Conduct of a parent which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." S.C. Dep't of Soc. Servs. v. Seegars, 367 S.C. 623, 630, 627 S.E.2d 718, 721 (2006).

A. Willful Failure to Visit

DSS does not challenge the Court of Appeals' holding that DSS did not prove by clear and convincing evidence that mother willfully failed to visit child. In finding DSS failed to show mother willfully failed to visit the child, the Court of Appeals noted there was no evidence of how many visits were scheduled, how many visits mother missed, how long the visits lasted, what activities took place during the visits, how much time elapsed between each visit, or whether mother was invited to participate in the GAL's visits. The court further noted the record contained no evidence of the distance between the foster home and mother's home, which the TPR statute requires to be a consideration in determining the parent's ability to visit.

The GAL's sole argument regarding visitation is that the Court of Appeals erred in considering whether mother was invited to participate in the GAL's visits. The GAL does not otherwise challenge the Court of Appeals' holding that DSS failed to show by clear and convincing evidence that mother willfully failed to visit child.

[2] Formerly S.C. Code Ann. § 20-7-1572.

Disregarding the Court of Appeals' consideration whether mother was invited to participate in the GAL's visits, its holding was based on numerous other reasons why DSS did not show mother willfully failed to visit child. Because these rulings have not been challenged, they are the law of the case. See Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006) (as a general rule, an unchallenged ruling, right or wrong, is the law of the case). We therefore decline to address whether the Court of Appeals erred in holding DSS did not meet its burden of proving mother willfully failed to visit child. The only issues before this Court are whether mother willfully failed to support child and, if so, whether TPR was in the child's best interest.

B. Willful Failure to Support

DSS argues the Court of Appeals erred in holding DSS failed to show by clear and convincing evidence that mother willfully failed to support the child. We agree.

The Court of Appeals found that, considering mother's "extremely limited means," her efforts did not appear to evince a settled purpose to forego parental duties. The Court of Appeals also noted mother failed to take advantage of the vocational rehabilitation services offered by SCVR, but found the programs would not have guaranteed her income, even had she completed them.

We find the Court of Appeals erred in reversing the family court's finding that mother willfully failed to support the child. Specifically, considering all the facts and circumstances of this case, DSS showed by clear and convincing evidence that mother willfully failed to support child. The TPR statute requires the parent make a material contribution, either financial or consisting of other necessities "according to the parent's means." Although mother had no independent source of income, occasionally providing child with food, drinks, medicine, diapers, wipes, and toys would not be considered a material contribution.

The most significant issue for our consideration, therefore, is whether mother's failure to support child was willful. We find the Court of Appeals erred in holding DSS failed to show by clear and convincing evidence that

mother willfully failed to support child. Specifically, we disagree with the Court of Appeals' holding that mother's failure to support child was not willful because her actions did not evince a settled purpose to forego parental duties. Seegars, supra. We disagree with the Court of Appeals' conclusion that mother's failure to complete the SCVR program does not serve as evidence that her failure to support child was willful. The Court of Appeals correctly notes mother's completion of the program would not have guaranteed mother an income, but would have only served to make her a more desirable candidate for employment. However, mother's failure to increase her chances of finding employment by taking advantage of the SCVR program or undertaking an effort to earn her GED manifests her indifference to child and her intention to forego parental responsibilities. Over the course of fifteen months mother had to complete the program, she only attended a few classes. Mother's only excuse for not completing the program was that she had transportation issues, but she could have been provided with transportation.

Further, there is evidence mother had the means to provide child with some financial support, but chose to spend that money on other items. Namely, mother continued to pay an estimated fifty dollars per month to care for her dogs during the seventeen-month span child was in foster care. This monthly expense constituted a large sum of money mother could have instead provided child.

In sum, we believe mother's failure to pay court-ordered child support or give a reasonable excuse for her failure to pay manifests a conscious indifference to the rights of child to receive support. Seegars, supra.

C. Best Interest of the Child

DSS argues TPR is in child's best interest. We agree.

The GAL testified that, in her opinion, it was in child's best interest to terminate mother and father's parental rights. Further, mother has an extensive seventeen year history with DSS stemming from her recurring drug abuse. Judging from mother's past history with drug and alcohol abuse, her apparent indifference to obtaining gainful employment, and her lack of bond

with child, we find the family court properly found TPR was in child's best interest.

CONCLUSION

The Court of Appeals erred in holding DSS failed to show by clear and convincing evidence that mother willfully failed to support child. We further hold the family court properly found TPR was in child's best interest. Accordingly, the decision of the Court of Appeals is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gilbert S. Bagnell, Respondent.

Opinion No. 27008
Heard June 9, 2011 – Filed July 18, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Gilbert S. Bagnell, *pro se*, of Columbia.

PER CURIAM: In this attorney discipline matter, Respondent Gilbert S. Bagnell has been accused of misconduct, including failure to work on a client's case, failure to communicate with a client, failure to properly terminate representation by protecting a client's interests, and failure to cooperate with the Office of Disciplinary Counsel (ODC). We concur in the Panel's recommendation, and therefore, disbar Respondent.

I.

Respondent Gilbert S. Bagnell was admitted to the Bar in 1991. In 2006, Client hired Respondent to work on a matter against a

financial institution over a disputed debt.[1] At the time, Respondent told Client that he had hired an additional firm to assist Respondent in the matter.[2] Shortly thereafter, Respondent became very difficult to contact. Client called Respondent multiple times, sent multiple certified letters, used intermediaries to attempt to contact Respondent, and tracked Respondent down to speak to him personally. Whenever Client was able to get in touch with Respondent, Respondent was always dismissive. Respondent failed to do any work on the case or file an action. Respondent further failed to return Client's files, as requested.

Client filed a complaint with ODC in 2009. ODC informed Respondent of the allegations of misconduct and the initiation of a full investigation by way of multiple letters. Respondent failed to respond to these allegations or to a subpoena for documents. In early 2010, ODC filed formal charges—again, Respondent failed to acknowledge or answer. As a result, an order of default was issued. In July 2010, ODC notified Respondent of a hearing on the formal charges.[3]

The matter came before a hearing panel of the Commission on Lawyer Conduct (Panel) in August 2010, and Respondent did not appear. At the hearing, Client testified that he suffered about $28,800 in damages as a result of Respondent's actions. He testified that he believed the statute of limitations had run on his cause of action.

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[1] Client hired Respondent to pursue a suit against the financial institution for allegedly wrongly damaging Client's credit rating, which led to substantial economic loss.

[2] In fact, the law firm contacted by Respondent had declined to assist in the matter. Respondent never notified Client of that fact.

[3] Respondent abandoned the practice of law and ignored all ODC inquiries. It appears that Respondent moved and informed neither ODC nor the South Carolina Bar of a new mailing address. As a result, it may be that Respondent did not receive actual notice of the panel hearing. ODC sent notice to Respondent's last known address. Respondent was well aware of the grievance proceedings and so acknowledged in a letter he provided the Court shortly before oral argument. In the letter, Respondent consented to the sanction of disbarment and waived any objections to service. Although notified of oral argument, Respondent failed to appear.

The Panel found Respondent violated the following Rules of Professional Conduct under Rule 407, SCACR: Rule 1.2 (scope of representation); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.16 (declining or terminating representation); Rule 8.1(b) (cooperating with disciplinary authority); Rule 8.4(a) (misconduct); Rule 8.4(e) (conduct prejudicial to the administration of justice). The Panel also found Respondent committed misconduct under the Rules for Lawyer Disciplinary Enforcement under Rule 413, SCACR: Rule 7(a)(1) (violated Rules of Professional Conduct); Rule 7(a)(3) (willfully failed to comply with subpoena issued under Rules of Professional Conduct and failed to respond to a lawful demand from disciplinary authority); 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). The Panel ultimately recommended Respondent be disbarred and ordered to pay the cost of the disciplinary proceeding.

II.

This Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission." Rule 27(e)(2), RLDE, Rule 413, SCACR.

An attorney's failure to answer formal charges is an admission of the factual allegations set forth in those charges. Rule 24(a), RLDE, Rule 413, SCACR. Similarly, an attorney's failure to appear before the Panel when ordered to do so is an admission of the factual allegations that were the subject of the hearing. Rule 24(b), RLDE, Rule 413, SCACR.

III.

We find Respondent has committed misconduct in the respects identified by the Panel. Thus, we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (scope of representation); Rule 1.3 (diligence); Rule 1.4

(communication); Rule 1.16 (declining or terminating representation); Rule 8.1(b) (cooperating with disciplinary authority); Rule 8.4(a) (misconduct); Rule 8.4(e) (conduct prejudicial to the administration of justice). We further find Respondent violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violated Rules of Professional Conduct); Rule 7(a)(3) (willfully failed to comply with subpoena issued under Rules of Professional Conduct and failed to respond to a lawful demand from disciplinary authority); 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).

We find disbarment is warranted in Respondent's case. As the Court has stated on numerous occasions, an attorney who "fail[s] to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law." In re Hall, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998). Attorneys who engage in such conduct face severe sanctions "because a central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers." Id.; see In re Murph, 350 S.C. 1, 4–5, 564 S.E.2d 673, 675 (2002) (an attorney's bad acts, combined with his failure to respond, warranted disbarment); see also In re Sifly, 279 S.C. 113, 115, 302 S.E.2d 858, 859 (1983) (disbarring an attorney who failed to timely file an appeal on behalf of a client, failed to adequately represent a client in a trust fund matter resulting in significant monetary losses by the client, drew checks on his personal account that were not sufficiently funded, had a civil default judgment entered against him, and failed to cooperate with disciplinary authorities or appear to contest the charges against him).

Respondent abandoned the practice of law, prejudicing Client and the administration of justice. Respondent is clearly not fit to practice law. We disbar Respondent. Within fifteen days of the date of this opinion, Respondent shall surrender his certificate of admission to practice law and shall file an affidavit with the Clerk of Court showing

he has complied with Rule 30, RLDE, Rule 413, SCACR. Further, Respondent is ordered to pay the costs of the Panel proceedings within 60 days, in the amount of $910.55.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Gerald Longtin, Respondent.

Opinion No. 27009
Heard April 19, 2011 – Filed July 18, 2011

DEFINITE SUSPENSION
WITH ADDITIONAL CONDITIONS

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

Jeffrey M. Butler, of Walterboro, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) filed formal charges on allegations of misconduct against James Gerald Longtin (Respondent) stemming from six separate complaints. Following a hearing, the Hearing Panel of the Commission on Lawyer Conduct (Panel) recommended Respondent be suspended from the practice of law for a period of six months, along with certain other requirements. ODC took exception to the Panel Report on several grounds. We agree with the exceptions taken by ODC, and order Respondent's suspension from the practice of law for a period of nine months

from the date of this opinion. Further, we adopt all other sanctions recommended by the Panel with the additional requirement that Respondent appear before the Committee on Character and Fitness prior to reinstatement.

I. FACTUAL/ PROCEDURAL HISTORY

Matter A

Respondent was the attorney of record for approximately five cases before the Honorable J. Michael Baxley in the circuit court. On October 31, 2005, Respondent arrived late to a roster meeting, where he informed the court that the five cases were all default cases. Therefore, the court advised Respondent to provide default motions and proposed orders for each case within ten days of the roster meeting. Respondent did not provide the requested motions and orders within that timeframe, nor thirty days after the original deadline when the court reminded Respondent to file the motions and proposed orders. Consequently, the court dismissed each case with prejudice for lack of prosecution.

In November 2005, the Honorable Doyet A. Early III issued an Order and Rule to Show Cause for Respondent to appear and show cause why several cases should not be dismissed for failure to prosecute. At the hearing on November 30, 2005, Respondent was unable to provide the court with a satisfactory reason for failing to file the necessary motions and orders to conclude the cases. Therefore, the court ordered Respondent to provide a full report on all of the cases within one week of the hearing. Respondent did not comply with the court's directive until January 6, 2006.

Matter B

An out-of-state client retained Respondent to handle various collection matters. By letter dated October 28, 2005, the client requested Respondent return all case files and provide a detailed status report of the work he

performed. Respondent did not reply, and the client mailed a follow-up letter in December 2005. By letter dated January 10, 2006, Respondent confirmed he was in the process of closing all of the files; however, he did not communicate with the client regarding the status of the cases. Despite several telephone calls and another follow-up letter, as of May 1, 2006, when the client filed a grievance with ODC, Respondent had not yet provided the requested information.

ODC notified Respondent by letter dated May 11, 2006, that the client filed a complaint. Respondent replied in a letter dated May 26, 2006, that his failure to provide the requested information was the result of a "misinterpretation." By letter dated February 15, 2007, ODC provided Respondent with a copy of another letter from the client, dated October 26, 2006, indicating Respondent had still not provided the requested information, so ODC requested a written response within fifteen days, stating why Respondent still failed to provide the requested information. Respondent did not respond or otherwise communicate with ODC in response to the letter. Therefore, on March 28, 2007, ODC sent a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting a written response. Respondent failed to reply or otherwise communicate with ODC. Consequently, the Commission authorized a full investigation into the matter on June 15, 2007, and served Respondent with a Notice of Full Investigation. Respondent failed to provide a written response to the Notice of Full Investigation.

Matter C

On March 4, 2003, the United States District Court for the District of South Carolina suspended Respondent from the practice of law, as a consequence of Respondent's previous suspension by this Court on October 28, 2002.[1] In 2004, after Respondent applied to file a complaint in the

[1] The Court previously suspended Respondent for thirty days for failing to communicate and respond to numerous requests for information concerning the status of a client's case; failing to adequately communicate with another client, appear in court on that client's behalf, or timely return phone calls; and

district court on behalf of a client during his suspension, Chief Judge Joseph F. Anderson Jr. ordered Respondent to begin the process of reinstatement immediately. However, Respondent failed to commence this process, and continued to practice law in the district court and to accept fees from parties seeking relief in the United States Bankruptcy Court, where he represented debtors in ongoing cases. While suspended, Respondent filed thirty-six new cases in federal court.

At a Rule to Show Cause Hearing in 2006, the district court admonished Respondent and suspended him from practicing in the district court for at least one year following his readmission and placed certain other conditions upon Respondent for gaining readmission.[2] However, Respondent subsequently assisted a litigant in filing a motion in the district court while suspended.

Matter D

In October 2004, Respondent retained the complainant law firm to conduct research and draft an appellate brief in a criminal appeal and paid an initial retainer of $1,500.00. The law firm completed this work in December 2004 and notified Respondent he owed a balance of $803.16, after which the law firm sent numerous letters to Respondent attempting to collect the fee.[3] The law firm made several offers for Respondent to pay half of the amount due in a lump sum or to make smaller monthly installments. Respondent did not avail himself of either option and insisted on paying the full amount due, never contesting the balance. After the law firm filed the grievance in

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failing to cooperate with ODC. *In the Matter of James G. Longtin*, 352 S.C. 21, 22, 572 S.E.2d 282, 282 (2002).

[2] Respondent remains suspended from practicing law in the district court.

[3] All in all, it appears the law firm sent twelve letters between February 28, 2005, and August 28, 2007, and the parties had numerous telephone conversations during this timeframe concerning the bill.

October 2007, and nearly three years after Respondent received the law firm's services, Respondent finally paid the balance. The law firm subsequently abandoned its grievance.

Matter E

In June 2005, the complainant client retained Respondent to prepare and record a deed, paying Respondent $160.00 in attorney's fees and recording costs. Respondent reluctantly provided the client with the necessary paperwork to execute the deed at home. Within several days, the client returned a signed deed to Respondent's secretary for recording. Respondent did not record the deed. After several attempts to contact Respondent, the client reached Respondent on the telephone, and he informed her that she had incorrectly executed the deed. The client returned to Respondent's office the next day to execute a proper deed.[4] After executing the second deed, Respondent told the client he would record the deed. For several months, Respondent did not record the deed as promised and the client attempted to contact Respondent. Respondent never replied. Ultimately, the client hired another lawyer to record the deed.

In December 2005, the client filed a complaint in magistrate's court to recoup attorney's fees and filing fees from Respondent. Respondent did not answer.[5] On January 26, 2006, the magistrate court entered a judgment against Respondent. The client contacted the South Carolina Bar's Client Assistance Program (CAP) for assistance. CAP attempted to contact Respondent, but he did not respond. Therefore, CAP contacted ODC in April 2008. By letter to Respondent dated April 8, 2008, ODC requested a written explanation within fifteen days. Respondent failed to respond or otherwise communicate with ODC. On May 5, 2008, ODC sent Respondent a *Treacy*

[4] At the hearing, Respondent testified he did not remember executing a second deed.

[5] At the hearing, Respondent testified he was never served with the complaint. However, when he became aware of the judgment in 2008, Respondent did not attempt to have it vacated.

letter again requesting a written response. Respondent finally replied on May 6, 2008. To date, Respondent retains the $10.00 recording fee in his trust account.

Matter F

In August 2007, the defendant in another collections matter forwarded a check to Respondent to satisfy a debt owed to his client. Respondent told the defendant he would file a Stipulation of Dismissal with Prejudice with the clerk of court, even though the case had already been dismissed. However, Respondent never filed a Stipulation of Dismissal, even after repeatedly telling the defendant he would do so. Respondent's delay in filing the dismissal prevented the defendant from resolving the matter until July 2008.

Mitigation

Dr. Charlotte Murrow Taylor, who holds a Ph.D. in counseling, testified before the Panel on Respondent's behalf. Dr. Taylor has performed extensive testing on Respondent and currently treats him. She opined that Respondent suffers from Asperger's disorder, adult variety,[6] Attention Deficit Disorder, and anxiety disorder. According to Dr. Taylor, stress from receiving a *Treacy* letter, from a court demanding information, or from an angry client would likely trigger Respondent's avoidant tendencies, causing him to close himself off from subsequent communications. Dr. Taylor testified Asperger's patients are treatable through cognitive behavioral intervention therapy, comprising rote practice of behavioral and social skills. With the aid of medication, Dr. Taylor testified, patients have been known to make great progress under this form of therapy. She testified Respondent is

[6] Dr. Taylor testified Asperger's disorder is a genetic developmental syndrome, which impairs behavioral development but not intellectual development. She stated Asperger's patients are generally highly intellectual, but adult Asperger's patients commonly have problems interacting with people and functioning under stress. She testified stress tends to exacerbate the common symptoms of withdrawal, avoidant behavior, and confusion.

currently taking medication, has been cooperative in his counseling, has reacted positively to treatment, and has made considerable progress since she began treating him.

Panel's Recommendation

The Panel found Respondent committed misconduct with respect to Matters A, B, and C. However, the Panel found Respondent did not commit misconduct as to Matters D and F, and as to Matter E, the Panel made a partial finding of misconduct.

Therefore, the Panel found Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 3.2 (Expediting Litigation); Rule 5.5 (Unauthorized Practice of Law); Rule 8.1(b) (Bar Admission and Disciplinary Matters); and Rule 8.4(a) (Violation of RPC). Additionally, the Panel found that Respondent violated Rules 7(a)(1), 7(a)(5), and 7(a)(7) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

Based on these findings, the Panel recommends this Court: (1) suspend Respondent from the practice of law for a definite period of six months and appoint an attorney to protect clients' interests; (2) order Respondent to pay the cost of the disciplinary proceedings; (3) require Respondent to complete the Legal Ethics and Practice Program Ethics School and Trust Account School as a condition of discipline; (4) require Respondent to continue to follow the recommendations of his treating physicians, including counseling and medication, and to file quarterly treatment compliance and progress reports with the Commission for a period of two years following his return to the practice of law; (5) require Respondent to meet regularly with a Mentor approved by ODC for a period of two years following his return to the practice of law and to file quarterly reports by the Mentor during that time period; and (6) require Respondent to return the $10.00 recording fee which he continues to hold in his trust account to the complainant client.

The Panel considered as aggravating circumstances Respondent's prior disciplinary offense and his obstruction of disciplinary proceedings by intentionally failing to comply with the directives of ODC. The Panel concluded Respondent's diagnosis of Asperger's syndrome did not excuse Respondent's omissions, but did operate to mitigate the severity of any sanctions imposed.

II. DISCUSSION

The sole authority to discipline attorneys and decide appropriate sanctions after a thorough review of the record rests with this Court. *In re Thompson*, 343 S.C. 1, 10–11, 539 S.E.2d 396, 401 (2000). In such matters, this Court may draw its own conclusions and make its own findings of fact. *Id.*; Rule 27(e)(2), RLDE, Rule 413, SCACR (We "may accept, reject or modify in whole or in part the findings, conclusions and recommendations of the [Panel]."). Nevertheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Id*. Moreover, "[a] disciplinary violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); *see also* Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

Matters A, B, C, and F

We agree with the Panel that Respondent committed misconduct under the facts of Matters A, B, and C, but not under the facts of Matter F. Neither party takes exception to these findings. Accordingly, "the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations" as to these matters. *In Re Prendergast*, 390 S.C. 395, 396 n.2, 702 S.E.2d 364, 365 n.2 (2010) (citing Rule 27(a), RLDE, Rule 413, SCACR, which states, "The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

Therefore we agree with the Panel that Respondent committed misconduct as to Matter A by failing to prosecute cases adequately on behalf of his clients and to follow orders of the court; as to Matter B by willfully failing to respond to his client and the ODC; and as to Matter C by continuing to practice law in the federal court while suspended. We further agree with the Panel as to Matter F that Respondent's conduct did not evidence any intent to mislead or take advantage of the complainant, nor did his conduct cause her any harm, so Respondent did not violate the Rules of Professional Conduct in that Matter.

Matter D

The Panel did not find Respondent committed misconduct as to Matter D, and ODC takes exception to this finding. We agree with ODC that the Panel erred in finding Respondent did not commit misconduct after failing to pay the case-related expenses to the complainant law firm.

The Panel "was satisfied that Respondent was simply unable to financially pay the [law] firm and did not willfully ignore the bill or refuse to pay it." In addition, the Panel was inclined to dismiss the allegations against Respondent because the complainant law firm instituted the disciplinary action solely to collect the debt and abandoned its grievance immediately after Respondent paid. However, the Panel was split regarding whether the Rules allow for a finding of misconduct where an attorney fails to pay another attorney case-related expenses. Therefore, the Panel found ODC had not met its burden of proof that Respondent committed misconduct by failing to pay the law firm the case-related expenses until after the grievance was filed.

Rule 8.4(a) of the Rules of Professional Conduct provides "[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Moreover, Rule 7(a)(5) of the Rules for Lawyer Disciplinary Enforcement states "[i]t shall be a ground for discipline

for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law." The Court has relied on these provisions in past disciplinary proceedings to find misconduct where a lawyer has failed to pay case-related expenses to a third-party. *See In re Johnson*, 385 S.C. 501, 685 S.E.2d 610 (2009) (disciplining an attorney for failing to pay an expert witness); *In re Okpalaeke*, 374 S.C. 186, 648 S.E.2d 593 (2007) (disciplining an attorney for failing to pay a copy bill to a court reporter); *In re Fulton*, 343 S.C. 506, 541 S.E.2d 531 (2001) (disciplining an attorney for failing to pay a physician's court appearance fee).

Similarly, the appellate work performed by the complainant law firm was a case-related expense, and Respondent's failure to timely pay the balance amounts to misconduct under the Rules. In our view, Respondent did not provide satisfactory reasons for not timely paying the law firm. Respondent maintains, and the Panel concluded, that he was not aware he would owe additional fees when he retained the firm to handle the appellate work and did not have adequate funds to pay the law firm the remainder of the fee charged. However, this does not excuse Respondent's failure to pay the law firm a relatively nominal sum for nearly three years, especially after the law firm made several offers and attempts to negotiate a payment plan. Therefore, we believe such failure warrants a finding of misconduct under the Rules.[7]

Matter E

As to Matter E, the Panel found Respondent committed misconduct by failing to timely respond to inquiries from ODC. However, because it found Respondent to be the more credible witness concerning the factual dispute over whether the client returned to Respondent's office to execute the second deed, the Panel found ODC failed to meet its burden of proving Respondent committed misconduct. Nevertheless, the Panel recommended we require

[7] We note that the law firm abandoned its grievance after Respondent paid the invoice, and remind the bar that the disciplinary process should not be used as a mechanism to collect debts.

Respondent to return the $10.00 recording fee Respondent continues to hold in his trust account. The ODC objected to the portion of the Panel's finding concerning the credibility determination. We agree with ODC that the Panel erred in not finding misconduct under the facts of Matter E because Respondent failed to perform the task for which he was retained.

The Court remains the ultimate fact-finder in disciplinary matters. *See Johnson*, 385 S.C. at 504, 685 S.E.2d at 611 ("We may 'accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the [Panel].'") (quoting Rule 27(e), RLDE, Rule 413, SCACR)). Regardless of the factual dispute surrounding the circumstances, it is undisputed that the complainant client hired Respondent to record a deed, and Respondent never completed this task. This fact is evidenced by Respondent's retention of the recording fee in his trust account and the complainant's testimony she was forced through Respondent's inaction to hire another attorney to record the deed and eventually sue Respondent for a refund of these costs and fees. Regardless of whose version of events we believe concerning the preparation of the deed documents for recording, Respondent undoubtedly failed to perform the task for which he was retained. Therefore, we find Respondent committed misconduct with respect to Matter E.

Character and Fitness

Finally, we agree with ODC that Respondent should be required to appear before the Committee on Character and Fitness if he chooses to seek reinstatement.

The Panel concluded that Dr. Taylor's testimony "raise[d] serious questions about Respondent's capacity to practice law unless he continues to make substantial progress in his treatment" for Asperger's Syndrome and suggested Respondent receive "close treatment and observation if [he] seeks to return to the active practice of law," but did not recommend screening by the Committee on Character and Fitness prior to reinstatement.

As an initial observation, the instant case presents several egregious acts of misconduct. We are very concerned about Respondent's failure to heed directives from state and federal judges, and to communicate with his clients and ODC. While we find Respondent's actions reprehensible, we are also sympathetic to Respondent's recent diagnosis. However, we must weigh this sympathy against our duty to protect the public from lawyers who may lack the present ability to adequately represent their clients in the courts of this State. Dr. Taylor testified Asperger's patients have the ability to learn to control the kinds of behaviors that led to these proceedings. It is our hope that Respondent will continue to thrive in his treatment plan. However, as an added protection to the public, we find it prudent to require Respondent to appear before the Committee on Character and Fitness if he chooses to petition for reinstatement. The Committee on Character and Fitness is in the best position to ensure Respondent's continued compliance with his treatment plan and will make an informed recommendation concerning Respondent's ability to practice law.[8]

CONCLUSION

Based on the foregoing reasons, we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 3.2 (Expediting Litigation); Rule 5.5 (Unauthorized Practice of Law); Rule 8.1(b) (Bar Admission and Disciplinary Matters); and Rule 8.4(a) (Violation of RPC). Additionally, we find Respondent violated Rules 7(a)(1), 7(a)(5), and 7(a)(7) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. We adopt the Panel's conclusion that Respondent's diagnosis does not preclude findings of misconduct in this case, but does serve to mitigate the sanctions imposed below.

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[8] Of course, we recognize that because we have decided to impose a nine month suspension, instead of the six month suspension recommended by the Panel, the Rules require that any petition for reinstatement be transferred to the Committee on Character and Fitness, unless this Court provides other instructions. Rule 33(d), RLDE, Rule 413, SCACR. The above-stated concerns justify our decision to order Respondent, upon petitioning for reinstatement, to appear before the Committee on Character and Fitness.

Therefore, we conclude Respondent's misconduct warrants suspension from the practice of law for a period of nine months from the date of this opinion, and during the suspension, we direct the appointment of an attorney to protect clients' interests. Prior to filing any petition for reinstatement, we order Respondent: (1) to pay the cost of these disciplinary proceedings; (2) to complete the Legal Ethics and Practice Program Ethics School and Trust Account School as a condition of discipline; (3) to continue to follow the recommendations of his treating physicians, including counseling and medication; and (4) to return to the complainant client the $10.00 recording fee which Respondent continues to hold in his trust account. Further, any petition for reinstatement shall be referred to the Committee on Character and Fitness. If reinstated, Respondent shall (1) file quarterly treatment compliance and progress reports with the Commission for a period of two years following his return to the practice of law; and (2) meet regularly with a Mentor approved by ODC for a period of two years following his return to the practice of law, and file quarterly reports by the Mentor during that time period.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of William
Ashley Boyd, Respondent.

ORDER

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The petition is granted.

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

IT IS FURTHER ORDERED that respondent is hereby enjoined from access to any trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

July 14, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lonnie J. Davis Respondent,

v.

KB Home of South Carolina, Inc. and Jeff Meyer, Appellants.

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

Opinion No. 4851
Heard April 6, 2011 – Filed July 13, 2011

AFFIRMED

D. Michael Henthorne and William K. Brumbach, III, both of Columbia and Stephen D. Dellinger, of Charlotte, for Appellants.

Allan R. Holmes, Sr., and A. Riley Holmes, Jr., both of Charleston, for Respondent.

GEATHERS, J: In this wrongful termination case, KB Home of South Carolina, Inc. and Jeff Meyer[1] (collectively Appellants) appeal a circuit court judgment denying their motion to compel arbitration. On appeal, Appellants contend the circuit court erred in: (1) determining the validity of an arbitration clause contained in Lonnie Davis's employment application when that threshold determination was arguably for the arbitrator, (2) finding Appellants waived their right to enforce the arbitration clause by actively participating in litigation for eighteen months before seeking to compel arbitration, and (3) finding the alleged arbitration clause to be an unconscionable and unenforceable contract of adhesion. We affirm.

FACTS / PROCEDURAL HISTORY

Davis applied for employment with KB Home on January 12, 2006. Davis's employment application contained an arbitration clause, stating as follows:

> I understand and agree that <u>if employed, I will be required to arbitrate any disputes arising out of or related to my employment</u> with or termination from the Company, including any claims for discrimination, harassment, retaliation and/or wrongful termination. I understand that only an arbitrator, not a judge or a jury, will hear such disputes. I further understand that this term and condition of my employment may not be changed except by written agreement specifically for such purpose entered into between myself and the Company and signed by the President of the division or the Company's Sr. Vice President of Human Resources, and that such term and condition of my employment shall not be affected by any other employment policies or programs, in writing or otherwise, relating to other terms and conditions of

[1] Jeff Meyer was the immediate supervisor of Lonnie Davis, the plaintiff in this action.

> my employment and that such policies and programs are subject to change at any time for any reason by the Company at its discretion and that I have no vested rights in any Company policy or program now or hereafter in effect.

(emphasis added). The employment application also stated "I understand that this application remains current for only 30 days." Davis signed the employment application underneath the following statement: "I certify that I have read, fully understand and accept all of the above terms."

On March 13, 2006, sixty days later, Davis was offered a position as the Vice President of Finance with KB Home. Davis signed an employment agreement containing a merger clause. The merger clause provided:

> Entire Agreement: This letter together with the documents referenced herein contain all of the agreements and understandings regarding your employment and the obligations of KB Home in connection with employment. KB Home has not made, nor are you relying upon any oral or written promises or statements made by KB Home or any agent of KB Home except as expressly set forth herein. This letter supersedes any and all prior agreements and understandings between you and KB Home and alone expresses the agreement of the parties. This letter containing all of the agreements and understandings regarding your employment can only be amended in writing by the Senior Vice President, Human Resources of KB Home.

(emphasis added).

KB Home terminated Davis on July 20, 2007. Davis subsequently brought a lawsuit against Appellants on March 3, 2008, for breach of contract, breach of contract accompanied by a fraudulent act, violation of the South Carolina Payment of Wages Act, wrongful termination/retaliation, and

defamation. Davis claimed he was fired for reporting numerous infractions by KB Home employees, including various managers' demeaning and harassing conduct toward female employees as well as numerous fraudulent and unethical financial transactions in violation of the civil and criminal laws of South Carolina.

The parties engaged in discovery, filing multiple sets of interrogatories and requests for production of documents. Both Davis and Appellants produced documents and filed responses to the opposing parties' interrogatories. In addition, Appellants noticed and rescheduled Davis's deposition on five separate occasions. Appellants filed a motion to dismiss, which the circuit court heard and denied on January 9, 2009. A scheduling order was signed by the circuit court on April 30, 2009.

Davis filed a motion to compel discovery on July 13, 2009. Specifically, Davis suggested Appellants' responses to Davis's first set of interrogatories and requests for production were inadequate. On July 28, 2009, Appellants filed a motion for entry of a confidentiality order with respect to Davis's discovery requests. On August 5, 2009, Appellants filed a memorandum in response to Davis's motion to compel discovery. The parties consented to an amended scheduling order, which was signed on August 7, 2009.

In September of 2009, eighteen months after Davis filed his complaint, Appellants filed a motion to compel arbitration and to stay the proceedings. Davis filed a response to the motion to compel arbitration. Davis argued the merger clause in his subsequent employment agreement superseded the prior employment application containing an arbitration clause. Davis further argued Appellants waived their right to seek arbitration by waiting eighteen months to file a motion to compel arbitration. Davis suggested the parties had engaged in extensive discovery, thereby giving Appellants an unfair advantage should the case go to arbitration. Finally, Davis argued the arbitration clause was an unconscionable contract of adhesion, and therefore unenforceable by an arbitrator.

The circuit court held a hearing on the motion to compel and denied the motion. The circuit court noted "[t]he reason for the denial is as set forth in

[Davis's] memorandum, all of the reasons stated."[2] The circuit court issued a Form 4 judgment denying Appellants' motion to compel arbitration on October 30, 2009. Appellants did not file a motion to alter or amend pursuant to Rule 59(e), SCRCP. This appeal followed.

ISSUES ON APPEAL

1. Is it for a court or an arbitrator to determine the threshold validity of an arbitration clause contained in Davis's employment application when a merger clause in the resulting employment agreement arguably superseded the application thereby rendering the arbitration clause invalid, and when the employment application stated it would expire after 30 days?

2. Did KB Home and Meyer waive their right to enforce the arbitration clause in Davis's employment application by actively participating in litigation for eighteen months before seeking to compel arbitration?

3. Is the arbitration clause an unconscionable and unenforceable contract of adhesion?

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (emphasis added). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. "The denial of a motion to compel arbitration, based on a finding of waiver, is reviewed on appeal de novo." Rich v. Walsh, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003).

[2] Davis's Memorandum in Opposition to the Motion to Stay and Refer to Arbitration was included as part of the Record on Appeal.

LAW / ANALYSIS

I. Court versus Arbitrator

We first address the issue of whether it was proper for the circuit court, as opposed to an arbitrator, to address the threshold validity of the arbitration clause contained in Davis's employment application.

"Unless the parties have contracted to the contrary, the FAA [Federal Arbitration Act] applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Neither party challenges the circuit court's application of the FAA to the employment agreement in the instant case. Therefore, this court need not address whether this contract qualifies as a transaction involving interstate commerce. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (stating that an unchallenged ruling, right or wrong, is the law of the case).

"[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." Simpson, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1; see also Munoz, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA."). Therefore, our analysis under South Carolina law is "ultimately the same" as the analysis under federal law. Simpson, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1. Appellants contend Simpson is inapplicable to the present matter because it was governed by the South Carolina Uniform Arbitration Act (UAA), whereas the instant case is governed by the FAA. We disagree.

As the supreme court noted in Simpson, this distinction is insignificant as the UAA and FAA provisions at issue are nearly identical. Compare 9 U.S.C.A. §§ 2, 4 (West 2009), with S.C. Code Ann. §§ 15-48-10(a), -20(a) (2005). The FAA provides: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the

parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C.A. § 4 (West 2009) (emphasis added); accord S.C. Code Ann. § 15-48-20(a) (2005) (noting "if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied") (emphasis added).

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); see also 9 U.S.C.A. § 2 (West 2009) (noting arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); 7 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 15:11 (4th ed. 1997) ("The usual principles and standards of interpretation applicable to other contracts are said to govern arbitration agreements.").

Arbitration clauses are severable from the contracts in which they are embedded. S.C. Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993); The Hous. Auth. of City of Columbia v. Cornerstone Housing, L.L.C., 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003). Therefore, "the issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." Munoz, 343 S.C. at 540, 542 S.E.2d at 364. "[A] party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." Great W. Coal, 312 S.C. at 562-63, 437 S.E.2d at 24.

Appellants contend Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 445-46 (2006), governs the outcome of the present case because Davis is challenging the existence of the entire agreement and not just the arbitration provision. See id. at 444 (noting challenges to the validity of arbitration agreements can be divided into two distinct types: (1) specific challenges to the validity of the agreement to arbitrate, and (2) challenges to the contract as a whole). We disagree.

Davis does not suggest his entire employment agreement was invalid. Rather, Davis contests only the validity of the arbitration clause contained in his employment application in light of the subsequent employment offer letter, which contained a merger clause. Therefore, Davis's challenge is to the validity of the arbitration clause contained in his employment application. The employment application cannot be considered the entire employment agreement. We conclude Davis is making a specific challenge to the existence of the arbitration clause, and not a challenge to the entire employment agreement.[3] Cf. Buckeye Check Cashing, 546 U.S. at 445-46 (noting that arbitration provisions are severable from the remainder of the contract, and when a party challenges the contract as a whole as opposed to specifically challenging the arbitration provision, the contract's validity is considered by the arbitrator in the first instance).

In addition, the arbitration clause in the instant matter did not expressly provide that any issues relating to the validity, existence, and scope of the arbitration agreement would be submitted to an arbitrator. Therefore, we hold the determination regarding whether a valid arbitration agreement existed was a "gateway matter" that the circuit court could properly consider. Simpson, 373 S.C. at 23, 644 S.E.2d at 668 (noting that certain "gateway matters" relating to the existence of an arbitration agreement are for the court to decide absent "clear and unmistakable" evidence to the contrary) (emphasis added).

[3] During oral argument, Appellants contended this court is bound to reviewing the terms of the arbitration clause itself in determining its validity. We disagree. The South Carolina Supreme Court has looked outside the language of the arbitration clause to determine its enforceability. See Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (noting the arbitration clause was unconscionable partly because Simpson did not possess the business judgment necessary to understand the implications of the arbitration agreement, and Simpson did not have a lawyer present when she signed the agreement).

A. Merger Clause

Having concluded the circuit court properly considered Appellants' arguments, as opposed to submitting them to an arbitrator, we proceed to address the arguments on the merits. Appellants contend the circuit court erred in concluding that the provisions of Davis's employment application were superseded and rendered invalid by the presence of a merger clause in his subsequent employment agreement. We disagree.

To evaluate this argument, we look to South Carolina case law addressing merger clauses and contract interpretation. Munoz, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA."). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009).

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." Gilliland v. Elmwood Props., 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990); see also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:1 (4th ed. 1999) (explaining the parol evidence rule "prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing") (emphasis added). The parol evidence rule is particularly applicable where the written instrument contains a merger or integration clause. U.S. Leasing

Corp. v. Janicare, Inc., 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App. 1988).

"A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement." Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984); see also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:21 (4th ed. 1999) (same); Black's Law Dictionary 880 (9th ed. 2009) (defining an integration clause, also termed a merger clause, as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract").

"The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing." Wilson, 281 S.C. at 266, 315 S.E.2d at 134. Furthermore, when the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to the agreement, even when the writing is silent as to the particular term sought to be established. U.S. Leasing Corp., 294 S.C. at 318, 364 S.E.2d at 205; see also Blackwell v. Faucett, 117 S.C. 60, 65, 108 S.E. 295, 296 (1921) (noting if the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term thereto).

By virtue of its express terms, the employment agreement at issue superseded any prior agreements. The employment agreement provided: "This letter together with the documents referenced herein contain all of the agreements and understandings regarding your employment and the obligations of KB Home in connection with employment." Neither the employment application nor the arbitration clause contained therein was referenced in the subsequent offer letter agreement. The agreement further provided: "This letter supersedes any and all prior agreements and understandings between you and KB Home and alone expresses the agreement of the parties."

We conclude the merger clause was clear and unambiguous on its face.[4] In addition, the employment application at issue was executed two months prior to the employment agreement. Therefore, the arbitration clause in the application is not admissible to modify or add to the terms of the subsequent employment agreement containing a merger clause. See Wilson, 281 S.C. at 266, 315 S.E.2d at 134; Blackwell, 117 S.C. at 65, 108 S.E. at 296. KB Home could easily have referenced the arbitration clause contained in the employment application in its offer letter agreement, or reproduced identical arbitration-clause language in its employment offer agreement. KB Home chose not to do so, and this court must enforce the employment agreement according to its terms, regardless of its wisdom or folly. See Ellis, 316 S.C. at 248, 449 S.E.2d at 488 (noting a court must enforce an unambiguous contract according to its terms "regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully").

Appellants cite Ramirez-Baker v. Beazer Homes, Inc., 636 F.Supp.2d 1008 (E.D. Cal. 2008), to support their argument that a subsequent employment agreement does not operate to invalidate a prior arbitration clause. Under California law, parol evidence was properly admissible to prove the existence of an arbitration clause contained in an employment application when the subsequent employment agreement (signed five days later) was silent on the issue of dispute resolution. Id. at 1014, 1016-17. This evidence was admissible to modify the employment agreement even though the subsequent agreement contained a merger clause. Id.

We do not believe South Carolina law supports this conclusion. See Blackwell, 117 S.C. at 65, 108 S.E. at 296 (observing that if the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term, even when the agreement contains no language regarding that term); U.S. Leasing Corp., 294 S.C. at 318, 364 S.E.2d at 205

[4] Even if this court were to view the merger clause as ambiguous, any ambiguity must be construed against the drafter of the contract, in this case KB Home. See Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").

(noting when a writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to the agreement, even when the writing is silent as to the particular term sought to be established); Wilson, 281 S.C. at 266, 315 S.E.2d at 134 (noting that a merger clause expresses the parties' intention that the writing be treated as a complete integration of their agreement and that a completely integrated agreement cannot be varied or contradicted by parol evidence of either a prior or a contemporaneous agreement omitted from the writing).

While we recognize South Carolina law supports a policy favoring arbitration when a valid arbitration agreement exists, there is currently no exception to the merger clause rule in South Carolina for arbitration clauses in employment applications that are superseded by express language in a subsequent employment agreement. See Munoz, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA."); see also Zabinski, 346 S.C. at 596, 553 S.E.2d at 118 ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

We affirm the circuit court's finding that the merger clause contained in the employment offer letter operated to supersede the arbitration clause contained in the employment application. Accordingly, there was no arbitration clause to enforce, and the circuit court properly denied the motion to compel arbitration.

B. 30-day Expiration Clause

Appellants next argue that the arbitration clause was separate and distinct from the employment application, and therefore the 30-day expiration of the employment application did not apply to the arbitration clause contained therein. We need not address Appellants' argument regarding the 30-day expiration of the employment application because we hold the merger clause was valid and binding. Therefore, the merger clause served to negate any prior or contemporaneous agreements not included in the final document. See U.S. Leasing Corp., 294 S.C. at 318, 364 S.E.2d at 205 (noting when a writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to the agreement, even when the

writing is silent as to the particular term sought to be established); see also Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues on appeal when the resolution of a prior issue is dispositive).

II. Waiver

Appellants further argue the circuit court erred in finding they waived their right to enforce the arbitration clause by engaging in litigation for an eighteen-month period prior to filing a motion to compel arbitration. Specifically, Appellants argue Davis cannot demonstrate any prejudice from the delay, and mere inconvenience is insufficient to demonstrate prejudice. We disagree, and we affirm the circuit court's ruling on this alternative basis.

The right to enforce an arbitration clause may be waived. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Id. "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Id. (internal quotation marks and citation omitted).

In Rhodes v. Benson Chrysler-Plymouth, Inc., this court set out three factors a court generally considers when determining whether a party has waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "To establish prejudice, the non-moving party must show something more than mere inconvenience." Id. at 127, 647 S.E.2d at 251 (internal citations and quotation marks omitted).

We first address whether a substantial length of time has passed between commencement of the action and the motion to compel arbitration. South Carolina case law varies with respect to what constitutes a "substantial

length of time." Compare Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003) (finding a nineteen-month period in which the parties exchanged written interrogatories and requests to produce and the party requesting arbitration took two depositions demonstrated waiver), and Rhodes, 374 S.C. at 125, 128, 647 S.E.2d at 250, 252 (finding a ten-month period in which parties exchanged written interrogatories and requests to produce and took five depositions was sufficient to demonstrate waiver), with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was limited in nature, the parties had not availed themselves of the court's assistance, and respondent had not held any depositions did not demonstrate waiver), and Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc., 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period where the "litigation consisted of routine administrative matters and limited discovery [that] did not involve the taking of depositions or extensive interrogatories" did not establish waiver).

We conclude a substantial length of time has passed in the instant matter. Appellants waited eighteen months after Davis filed his complaint to file their motion to compel arbitration and stay proceedings. No other South Carolina case has found that a party did not waive their rights to compel arbitration after a year and a half of litigation.

Regarding the second factor, we further conclude the parties have engaged in extensive discovery. Both Davis and Appellants produced documents and filed responses to the opposing parties' interrogatories. Appellants noticed and rescheduled Davis's deposition on five separate occasions. Davis filed a motion to compel discovery on July 13, 2009. Appellants filed a memorandum in response to Davis's motion to compel discovery on August 5, 2009. All of the foregoing actions forced Davis to incur attorney's fees that would not have been expended in arbitration. Under the facts of this case, we hold Davis was prejudiced by the costs he incurred in discovery. See Evans, 352 S.C. at 551, 575 S.E.2d at 77 (holding defendant's continuation of discovery, rather than seeking arbitration in a timely manner, prejudiced plaintiff by forcing her to incur discovery costs that would not have been expended in arbitration).

Lastly, we note the parties have availed themselves of the circuit court's assistance on several occasions. Appellants filed a motion to dismiss, which the circuit court heard and denied via a Form 4 judgment on January 9, 2009. Appellants filed a motion for entry of a confidentiality order with respect to Davis's discovery requests on July 28, 2009. An initial scheduling order was signed by the circuit court on April 30, 2009. Finally, the parties consented to an amended scheduling order, which was signed by the Chief Administrative Circuit Court Judge on August 7, 2009. Pursuant to the terms of the amended scheduling order, this case was subject to being called for trial on or after February 15, 2010.

Even if the arbitration clause in Davis's employment application had been valid and binding, we affirm the circuit court's denial of Appellants' motion to compel arbitration on the alternative basis that Appellants waived their right to enforce the arbitration agreement. Although the parties have not taken any depositions, a substantial length of time has passed, the parties have engaged in extensive discovery, and the parties have availed themselves of the circuit court's assistance on several occasions.

III. Unconscionable Contract of Adhesion

Finally, Appellants argue the circuit court erred in finding the arbitration agreement was an unconscionable contract of adhesion. Because we hold the merger clause in the employment agreement nullified the existence of the arbitration clause contained in the employment application, we need not reach the merits of this issue. Futch, 335 S.C. at 613, 518 S.E.2d at 598 (stating an appellate court need not address remaining issues on appeal when the resolution of a prior issue is dispositive).

CONCLUSION

For all of the foregoing reasons, the decision of the circuit court is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Douglas Earl Stiltner and
Christine Rene Stiltner, Appellants,

v.

USAA Casualty Insurance
Company, Respondent.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 4852
Heard May 5, 2011 – Filed July 13, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Blake Alexander Hewitt and John S. Nichols, both of Columbia, and Bryan D. Ramey, of Piedmont, for Appellants.

J. R. Murphy, of Columbia, for Respondent.

THOMAS, J.: Douglas Earl Stiltner (Mr. Stiltner) and Christine Rene Stiltner (Mrs. Stiltner) sued USAA Casualty Insurance Company seeking reformation of an automobile insurance policy to include underinsured motorist coverage (UIM coverage) in the same limits as the liability coverage in the policy. On cross-motions for summary judgment, the trial court issued an order finding as a matter of law that (1) USAA made a meaningful offer of UIM coverage to its insured, Mr. Stiltner, and (2) Mrs. Stiltner's rejection of the offer was binding on both Mr. and Mrs. Stiltner. The Stiltners appeal. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Since 1990 or 1991, Mr. Stiltner has had his vehicles insured by USAA. After Mr. and Mrs. Stiltner married in 1998, Mr. Stiltner added Mrs. Stiltner to his policy as an operator. At some point, he raised his limits to 100,000/300,000/50,000. At no time before the Stiltners sued USAA has Mr. Stiltner ever had UIM coverage on his policy.

In 2000, USAA mailed Mr. Stiltner offer forms for uninsured motorist coverage (UM coverage) and UIM coverage. On October 17, 2000, both forms were faxed to USAA from Mrs. Stiltner's place of employment. The form offering UM coverage had handwritten "x's" indicating various selected limits of UM coverage, but also had a handwritten checkmark indicating a rejection of the offer to purchase UM coverage. Similarly, the form for UIM coverage had "x" marks indicating selected limits of UIM coverage, but also a checkmark indicating a rejection of the offer to purchase UIM coverage. Both forms bore what appeared to be the signature of Mrs. Stiltner.

According to Richard Kennedy, a senior underwriter at USAA, the completed forms the Stiltners returned to USAA were internally inconsistent and a USAA member service representative who handled South Carolina insureds would have contacted them to discuss the discrepancy. Two days later, a form for UM coverage was faxed to USAA from Mrs. Stiltner's place of employment. This form bore the same "x" marks selecting limits for UM coverage, but also had a checkmark in the space indicating acceptance of UM

coverage. On the same day, a form for UIM coverage—in fact, the same form faxed to USAA two days ago—was faxed to USAA from Mrs. Stiltner's place of employment. This form, however, was altered to remove the "x" marks indicating selected limits for UIM coverage, but retained the checkmark indicating purchase of UIM coverage was rejected. Although neither Mr. nor Mrs. Stiltner specifically recalled receiving the UIM offer form, neither disputed that it was Mrs. Stiltner's signature on the form indicating both a rejection of UIM coverage and an acknowledgement of the offer.

Mr. Stiltner generally handled the couple's insurance matters; however, Mrs. Stiltner was authorized to handle such matters provided she made no unilateral changes in the policy and communicated with Mr. Stiltner before taking any action. In her deposition, Mrs. Stiltner testified that, if she had handled a matter concerning Mr. Stiltner's insurance policy, she "would have just kept things the way they were, the way he had it before" and would not have signed a document for the policy without Mr. Stiltner's permission. Mr. Stiltner, however, maintained he never asked Mrs. Stiltner to sign any USAA forms or discussed with her the various types of coverage on his USAA automobile insurance policy.

In March 2007, the Stiltners were both seriously injured when another driver failed to yield the right of way and drove into the path of their motorcycle. Their combined medical expenses approached $500,000, and neither had completed treatment at the time of the hearing in the present matter. The at-fault driver was covered by an insurance policy with liability limits of only $25,000 per person and $50,000 per occurrence. The Stiltners accepted the at-fault driver's liability limits in exchange for a covenant not to execute judgment, allowing them to pursue other available insurance coverage.

The Stiltners then brought the present action against USAA, seeking a declaratory judgment that (1) USAA did not make a meaningful offer of UIM coverage, (2) Mr. Stiltner's policy should be reformed to include UIM coverage with limits equal to his liability limits of 100,000/300,000/50,000,

(3) the Stiltners were both Class I insureds, and (4) the Stiltners could stack UIM coverage to fully compensate them for their injuries.

USAA filed a general denial and moved for summary judgment after the parties completed discovery. In support of its motion, USAA asserted (1) Mrs. Stiltner had signed a form rejecting UIM coverage, (2) USAA had made a meaningful offer of UIM coverage, (3) Mrs. Stiltner acted as Mr. Stiltner's agent when she signed the form rejecting UIM coverage, and (4) it would be inequitable for Mrs. Stiltner to escape the effect of her own selection.

The Stiltners then filed a cross-motion for summary judgment, arguing among other things, the rejection form allegedly signed by Mrs. Stiltner was not a valid rejection of UIM coverage. The trial court conducted a hearing on the cross-motions and later issued an order granting summary judgment to USAA and denying summary judgment to the Stiltners. The Stiltners then filed their notice of appeal.

ISSUES

I. Did the trial court err in finding Mrs. Stiltner had the authority to act as Mr. Stiltner's agent when she signed the form rejecting UIM coverage on his policy?

II. If Mrs. Stiltner had the authority to take action on Mr. Stiltner's insurance policy, is there a reasonable dispute as to whether she was acting within the scope of that authority?

III. Should this court uphold the grant of summary judgment on the ground that Mr. Stiltner, in failing to take any corrective action after receiving policy declarations and renewal notices for a period of over six years, ratified Mrs. Stiltner's rejection of UIM coverage?

IV. Should this court uphold summary judgment as to Mrs. Stiltner on the ground that she should be estopped from denying her own rejection of coverage?

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP." Boyd v. Bellsouth Tel. & Tel. Co., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). "Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Id. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Id. "[I]n cases applying a preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Whether Mrs. Stiltner had authority to reject UIM coverage on behalf of Mr. Stiltner

The Stiltners first argue the trial court erred in concluding that Mrs. Stitlner had authority to transact matters under Mrs. Stiltner's automobile policy as long as she discussed them with Mr. Stiltner in advance and did not make any changes to the policy. We disagree.

"The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the mere fact of the marital relationship." Bankers Trust of S.C. v. Bruce, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984). Under such rules, "the relationship of agency need not depend upon express appointment and acceptance thereof. Rather, the agency relationship may be, and frequently is, implied or inferred from the words and conduct of the

parties and the circumstances of the particular case." Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004).

The trial court noted Mr. Stiltner, during his deposition, "confirmed [Mrs. Stiltner] had authority to transact matters under his automobile insurance policy as long as she did not make any changes or left things as they were"; however, the court further noted Mr. Stiltner "also indicated that she was to discuss any matters with him before she handled it." According to this testimony and the trial court's ruling, Mrs. Stiltner could have rejected UIM coverage on Mr. Stiltner's behalf if she had discussed it with him before doing so. The Stiltners do not dispute that Mrs. Stiltner had authority to sign insurance documents for Mr. Stiltner, provided these prerequisites were met. In her deposition, Mrs. Stiltner testified she would not have signed a document for Mr. Stiltner's automobile policy without discussing it with him first or without him knowing anything about it. Viewing the evidence in the light most favorable to the Stiltners, then, we agree with the trial court that Mrs. Stiltner had the implied authority to act on Mr. Stiltner's behalf regarding his automobile insurance coverage provided her actions did not change his existing coverage and she consulted Mr. Stiltner before she acted.

II. Whether Mrs. Stiltner was acting within the scope of her authority

The Stiltners argue that if Mrs. Stiltner had any authority to take action on Mr. Stiltner's automobile insurance policy, when the evidence is viewed in the light most favorable to them, there remains a reasonable factual dispute as to whether Mrs. Stiltner was acting within the scope of her authority. We agree.

In finding that Mrs. Stiltner was acting within her authority when she signed the form rejecting UIM coverage, the trial court relied on (1) Mr. Stiltner's statement that Mrs. Stiltner had authority to transact matters under his automobile insurance policy as long as she did not make any changes and discussed them with him in advance and (2) Mrs. Stiltner's statements during her deposition that she would not have signed a document for the insurance policy without Mr. Stiltner's permission or contrary to his instructions. Based

on these statements, the court reasoned that Mrs. Stiltner's signature indicating a rejection of UIM coverage was conclusive proof that she discussed the matter with Mr. Stiltner before signing the form. What the court overlooked, however, was Mr. Stiltner's testimony that he did not discuss any such form with his wife. Such testimony, if believed by a jury, would support a finding that, notwithstanding the Stiltners' usual practice of discussing insurance matters before signing the corresponding forms, Mrs. Stiltner was not acting within the scope of her authority when she signed the form rejecting UIM coverage. This evidence, then, would be at least a scintilla of evidence precluding summary judgment. See Hancock, 381 S.C. at 330-31, 673 S.E.2d at 803 (clarifying that "more than a scintilla of evidence" is necessary "to withstand a motion for summary judgment" only "in cases requiring a heightened burden of proof or in cases applying federal law").

III. Ratification

USAA argues that even if Mrs. Stiltner was not acting within her authority as Mr. Stiltner's agent when she rejected UIM coverage, Mr. Stiltner ratified her actions when he failed to take corrective action after receiving policy declarations and renewal notices for a period of over six years that showed he did not have UIM coverage. We hold it would be premature for this court to affirm the grant of summary judgment based on this ground.

The possibility that an insured can ratify another's rejection of UIM coverage on behalf of the insured has been recognized in at least one reported decision. Nationwide Mut. Ins. Co. v. Powell, 292 F.3d 201, 205 (4th Cir. 2002). One asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangements. Lincoln v. Aetna Cas. & Sur. Co., 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). Absent an admission by the insured that he or she has ratified a rejection of UIM coverage, "[w]hether or

not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court." Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 86, 124 S.E.2d 602, 608 (1962). Moreover, "mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless the silence or acquiescence in question cannot be explained on any other theory than that of ratification." 2A C.J.S. Agency § 71 (2003).

Here, Mr. Stiltner presented evidence that he did not understand the difference between UM coverage and UIM coverage until he and Mrs. Stiltner were involved in the accident that led to this lawsuit and, until that time, assumed he had what he needed to be "well-covered." Furthermore, there was evidence that he was unaware that Mrs. Stiltner had purported to reject UIM coverage on his behalf. We therefore hold that factual issues remain as to whether USAA can assert ratification as a defense to the Stiltner's request for reformation of their policy. See Restatement (Third) of Agency, § 4.06 cmt. b (2006) (stating ratification requires that the principal have actual knowledge of the relevant material facts).

IV. Estoppel as to Mrs. Stiltner

USAA further maintains that even if the policy is reformed, Mrs. Stiltner should have been estopped from denying her own rejection of UIM coverage. USAA contends that agency principles support this reasoning. We disagree.

In support of its argument for estoppel, USAA cites Bonnette v. Robles, 740 So. 2d 261, 263 (La. Ct. App. 1999), in which a wife who had signed a form opting for a lower level of UM coverage than what she could have selected was held to "be estopped to deny the validity of her legal representative capacity for purposes of increasing her own UM benefits limits when she plainly would have represented to the insurer, by signing the documents, that she had the legal authority to sign as [her husband's] representative." That decision, however, was based on a statutory provision allowing for such action by either "the named insured or his legal

representative." La. Rev. Stat. Ann. § 22:1295 (2009) (formerly La. Rev. Stat. Ann. § 22:1406). In contrast, the South Carolina provision on "knowing selection of coverage," does not reference the possibility of a legal representative acting on behalf of an insured in rejecting UIM coverage. S.C. Code Ann. § 38-77-350(B) (2002).

A party claiming estoppel must show, among other things, reasonable reliance on the conduct of the party to be estopped. Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994). This is consistent with the following comments from the Restatement (Third) of Agency:

> Whether a person makes an implied representation of authority is a question of fact to be determined by inferences to be drawn from the person's conduct. . . . It is a question of fact whether the manner in which the purported agent made the statement was effective as a manifestation made to the third party.

Restatement (Third) of Agency § 6.10 cmt. c (2006). Thus far, we have determined that the question of whether Mrs. Stiltner was acting within the scope of her authority when she signed the form rejecting UIM coverage on behalf of her husband could not be decided as a matter of law based on the evidence presented at the summary judgment hearing. Furthermore, USAA has not presented any evidence—such as a prior course of dealing between the parties—that would establish reasonable reliance on its part as a matter of law. We therefore hold USAA was not entitled to summary judgment on the issue of whether Mrs. Stiltner's rejection of UIM coverage should be binding on her.

CONCLUSION

We agree with the trial court that Mrs. Stiltner had the implied authority to transact matters concerning Mr. Stiltner's automobile insurance coverage provided her actions did not change Mr. Stiltner's existing coverage and she consulted with Mr. Stiltner before acting. We further hold, however,

that there is a genuine issue of material fact as to whether Mrs. Stiltner acted within her scope of authority when she rejected UIM coverage on Mr. Stiltner's insurance policy and remand this matter for a trial on the merits. We reject USAA's arguments that it is entitled to summary judgment on the ground of ratification and that Mrs. Stiltner should be estopped from denying rejection of UIM coverage on her own behalf.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and WILLIAMS, JJ., concur.