OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29

July 24, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

None Page

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

4043-Simmons v. Simmons	Pending
4104-Hambrick v. GMAC	Pending
4106-Kelley v. Kelley	Pending
4107-State v. R. Rice	Pending
4108-Middleton v. Johnson	Pending
4109-Thompson v. SC Steel	Pending
4111-LandBank VII v. Dickerson	Pending
4112-Douan v. Charleston Cty.	Denied 07/05/06
4114-Martin v. Rapid Plumbing	Denied 07/06/06
4118-Richardson v. Donald Hawkins Const.	Pending
4120-Hancock v. Mid-South Mgmt.	Pending
4122-Grant v. Mount Vernon Mills	Pending
4126-Wright v. Dickey	Pending
4127-State v. Santiago	Pending
4128-Shealy v. Doe	Pending
2006-UP-158-State v. R. Edmonds	Pending
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-218-Luther Smith v. State	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-238-SCDSS v. Hutson	Pending

2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-245-Gobbi v. Peoples' Fed. Bank	Pending
2006-UP-256-Fulmer v. Cain	Denied 07/05/06
2006-UP-262-Norton v. Wellman	Pending
2006-UP-265-Brown v. Harris	Pending
2006-UP-267-Barnum v. Sto Corp.	Denied 07/05/06
2006-UP-270-Elgin v. Kelly	Pending
2006-UP-276-Hopkins v. Brown	Pending
2006-UP-277-State v. Hunsucker	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-280-Ingram v. SCPPPS	Pending
2006-UP-281-Johnson v. Sonoco Products et al.	Pending
2006-UP-285-State v. B. Scott	Pending
2006-UP-286-SCDSS v. McKinley	Pending
2006-UP-287-Geiger v. Funderburk	Pending
2006-UP-289-Waterford Place HOA v. Barner	Pending
2006-UP-290-Taylor v. Bank of Amercia	Pending
2006-UP-292-Polson v. Johnson	Pending
2006-UP-297-Employers v. Moran	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3787-State v. Horton	Pending

3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Granted 07/07/06
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3967-State v. A. Zeigler	Pending

3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3982-LoPresti v. Burry	Pending
3983-State v. D. Young	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4006-State v. B. Pinkard	Pending

4011-State v. W. Nicholson	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4028-Armstrong v. Collins	Pending
4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending

4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4060-State v. Compton	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4065-Levine v. Spartanburg Regional	Pending
4068-McDill v. Mark’s Auto Sales	Pending
4069-State v. Patterson	Pending
4070-Tomlinson v. Mixon	Pending
4071-State v. K. Covert	Pending
4074-Schnellmann v. Roettger	Pending
4078-Stokes v. Spartanburg Regional	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4082-State v. Elmore	Pending
4085-Sloan Construction Co. v. Southco	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4091-West v. Alliance Capital	Pending

4092-Cedar Cove v. DiPietro	Pending
4093-State v. J. Rogers	Pending
4095-Garnett v. WRP Enterprises	Pending
4096-Auto-Owners v. Hamin	Pending
4100-Menne v. Keowee Key	Pending
4102-Cody Discount Inc. v. Merritt	Pending
4113-Pirri v. Pirri	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-487-State v. Burnett	Denied 7/07/06
2004-UP-605-Moring v. Moring	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Denied 07/07/06

2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm'n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-165-Long v. Long	Granted 07/07/06
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-197-State v. L. Cowan	Pending

2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-222-State v. E. Rieb	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending

2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-556-Russell Corp. v. Gregg	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending
2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-590-Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-592-Biser v. MUSC	Pending

2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-025-State v. K. Blackwell	Pending
2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-038-Baldwin v. Peoples	Pending
2006-UP-043-State v. Hagood	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-065-SCDSS v. Ferguson	Denied 07/07/06

2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v,. Ffrench	Pending
2006-UP-084-McKee v. Brown	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-115-Brunson v. Brunson	Pending
2006-UP-122-Young v. Greene	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Tyree Alphonso Roberts, a/k/a
Abdiyyah Ben Alkebulanyahh, Appellant.

Appeal From Beaufort County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26185
Heard May 24, 2006 – Filed July 24, 2006

AFFIRMED

Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Beaufort, for Respondent.

JUSTICE WALLER: This is a capital case. Roberts was convicted of the murder of two Beaufort County Sheriff's Deputies and was sentenced to death. The sole issue he raises on appeal is whether the trial court erred in

requiring him to remain present during the sentencing phase of his trial. We affirm the convictions and sentence.

FACTS

In January 2002, Roberts lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Roberts' wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Roberts had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Roberts had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Roberts hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Roberts coming through the woods with a gun in his hands. Roberts stated, "I just killed those two white bitches and I'm going to say it was self-defense." Blake left Roberts and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Roberts was subsequently found hiding in the mud under a bridge with a shoulder and hip wound. Roberts was arrested. At the time, he had a black fanny pack carrying ammunition for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Roberts had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

Roberts was charged with capital murder. At the guilt or innocence phase of trial, he chose to represent himself. However, two attorneys remained as stand-by counsel to assist him at trial. While the jury was deliberating, Roberts indicated to the trial court that if the jury returned a

guilty verdict, he did not intend to participate at sentencing. He also indicated he did not want his stand-by attorneys to present a defense. Roberts indicated that if the trial court required him to be present at the sentencing hearing, he would be unruly and would have to be restrained.

The jury convicted Roberts of two counts of murder. Roberts advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the sentencing; he indicated he would probably be unruly if required to be present. Stand-by counsel conferred with Roberts and then advised the court as follows:

> He says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change, they'll have to do it on their own motion. . . and that if the judge - if the attorneys on stand-by are to perform in any capacity, the judge will have to order that on his own motion. . . He says that he doesn't want to be present in this courtroom in order to hear the evidence in the second phase. And that if the judge - but he does not intend to disrupt the proceedings. . . but if the judge determines that he should be in one of the side rooms . . . that's a decision that his honor will have to make himself. He says that he is withdrawing from any further discussion with the court. . . . he does not intend to cooperate with stand-by counsel, to bring any witnesses. . . .

The trial court was concerned with Roberts' decision, but was also disturbed that to appoint counsel to represent Roberts at sentencing might compromise his right to proceed pro se. Roberts continued to maintain that he did not intend to confront any witnesses, and did not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Roberts present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Roberts indicated his desire that counsel not represent him in any way, but ultimately decided counsel could remain as stand-by counsel to object to the introduction of improper evidence.

The sentencing proceeded with Roberts seated at counsel table. As soon as the first witness was sworn, Roberts stood and began to chant aloud, "Blessed be Yahweh, El Shaddai, Jehova, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." He was told by the court to be seated, and when he continued chanting, he was removed and a brief hearing was held in the hearing room at the back of the courtroom. Roberts was brought back into the courtroom and once again began chanting when the witness began to testify. The jury was removed, and Roberts was placed in a conference room at the back of the courtroom which had a glass partition to allow him to hear and see into the courtroom. He was initially restrained, but the restraints were removed before the jury was returned to the courtroom.

Throughout sentencing, the court offered to allow Roberts to come back into the courtroom if he could do so without being disruptive; however, Roberts indicated he would rather remain in the back room. Roberts ultimately returned to the courtroom to make a closing statement to the jury. After deliberations, the jury found the existence of the two aggravating circumstances and recommended a sentence of death. Roberts appeals.

ISSUE

Did the trial court commit reversible error in refusing Roberts' request to be completely absent from sentencing?

DISCUSSION

It is well-established that an accused may waive the right to counsel and proceed pro se. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998), *citing* Faretta v. California, 422 U.S. 806 (1975). Although a defendant's decision to proceed pro se may be to his own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id.

Citing State v. Bell, 293 S.C. 391, 360 S.E.2d 706, 711 (1987), Roberts asserts a defendant need not be present at all times during a capital trial. We find Bell inapplicable to the facts of this case. There, the defendant twice

disrupted the guilt-phase closing argument of his defense counsel, objecting to the trial proceeding on the Sabbath. After being warned against such conduct, Bell again disrupted the proceedings, and was removed to a holding cell without the benefit of any audio hookup. This Court held that the right to be present at trial could be waived, and that Bell's disruptive conduct amounted to a waiver of the right to be present at trial, such that he could not be heard to complain.

Although it may, under certain circumstances, be *permissible* to allow a capital defendant to be absent from trial, this does not mean there is a constitutional right to be absent. On the contrary, this Court has specifically held there is no constitutional right of a defendant not to be present at trial. State v. Moore, 308 S.C. 349. 417 S.E.2d 869 (1992).[1] Accordingly, no constitutional right of Roberts was violated by his continued presence at trial.[2]

Moreover, Roberts has demonstrated no prejudice from his continued attendance at trial; there is simply no basis to conclude that his death sentence resulted from his presence in a holding cell at the back of the courtroom. Accord State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), *cert. denied*, 525 U.S. 1077, 119 S.Ct. 816, 142 L.Ed.2d 675 (1999) (death penalty defendant failed to show prejudice from presence in jury room of religious pamphlet

---

[1] The defendant in Moore asserted he had a right not to be present at trial in order to preclude an in-court identification of him by the State's witnesses. However, our holding in Moore unequivocally held there is *no* constitutional right not to be present at trial. Moore applies not only where the defendant wishes to prevent an identification, but applies with equal force in *any* case in which the defendant desires to absent himself from trial.

[2] Moreover, Rule 16, SCRCrimP, states that, "except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence. . . " In a similar situation, the California Supreme Court recently held a "capital defendant may not voluntarily waive his right to be present during . . . those portions of the trial in which evidence is taken, and . . . may not be removed from the courtroom unless he has been disruptive or threatens to be disruptive." People v. Huggins, 41 Cal. Rptr. 3d 593 (2006). Similarly, the Alabama Court of Criminal Appeals has recognized that until 1997 (when Alabama Rules Crim. Proc., Rule 9.1(a), (b)(2) was amended), a defendant charged with a capital offense could not waive his right to be present at any phase of the capital trial. Robitaille v. State, ___So.2d ___, 2005 WL 3118795 (Ala. Crim. App. 2005).

concerning God's view of death penalty, where misconduct did not affect jury's verdict).

CONCLUSION

Roberts' convictions and sentence are affirmed. We have conducted the mandatory review required by S.C. Code Ann. § 16-3-25 (1985). The evidence indicates the sentence was not the result of passion, prejudice, or any other arbitrary factor, the evidence supports the finding of the aggravating circumstances, and the sentence is not disproportionate to that imposed in similar cases. State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005), *cert. denied*, ___ U.S.___ 2006 WL 565552 (May 15, 2006); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied*, 529 U.S. 1025 (2000); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), *cert. denied*, 503 U.S. 993 (1992); State v. South, 285 S.C. 529, 331 S.E.2d 775, *cert. denied* 474 U.S. 888 (1985).

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Deena S. Buckley, Respondent/Appellant,

v.

E. Wade Shealy, Jr., Appellant/Respondent.

Appeal from Charleston County
Jocelyn B. Cate, Family Court Judge

Opinion No. 26186
Heard May 4, 2006 – Filed July 24, 2006

AFFIRMED IN PART; REVERSED IN PART

Donald Bruce Clark, of Charleston, for Appellant-Respondent.

Stephen L. Brown, Matthew K. Mahoney, and Jeffrey J. Wiseman, all of Young Clement Rivers, of Charleston, for Respondent-Appellant.

CHIEF JUSTICE TOAL: This is an appeal from the family court's decision in a rule to show cause hearing regarding the compliance with a divorce settlement agreement. We affirm the trial court's decision declining to enforce the 1997 agreement, converting the note into a money award to Deena Buckley (Wife), and awarding $2,400 per month in child support.

However, we reverse the trial court's decision to award Wade Shealy (Husband) an equitable set-off.

PROCEDURAL / FACTUAL BACKGROUND

Wife and Husband have been involved in marital litigation since 1993. In October of 1993, the family court entered an order approving a separate support and maintenance agreement between the parties. Among other things, the family court ordered Husband to assign $30,000 of his interest in a note owed to him by his real estate firm, the Pinnacle Group (Pinnacle), to Wife. However, several issues between the parties were not able to be resolved in the 1993 agreement because Husband failed to assign the note to Wife and Husband's failure to make other payments to Wife. Husband also failed to comply with other requirements of the 1993 order. For example, Husband was ordered to obtain a life insurance policy in the amount of $1,000,000 for the benefit of his children. Husband let the policy lapse and later obtained policies totaling $600,000 in value but naming his father and sister as beneficiaries of the policies.

As a result, in 1995, Wife filed a rule to show cause to enforce the family court's order. Consequently, a second order was entered in this litigation requiring Husband to pay $44,340.70 to Wife. The family court again ordered that the Pinnacle note be assigned to Wife. The terms of the 1995 order were to be completed within thirty days. However, Husband never complied with the order.

Because of Husband's failure to comply, Wife again filed a rule to show cause. In 1997, the family court ordered the parties to engage in mediation, and the result of the mediation lies at the heart of the appeal before this Court. The parties agree that, at sometime in 1997, Husband and Wife signed an agreement. Husband gave Wife a check for $5,000. In addition, Husband paid Wife $1,500 per month from 1997 to 2003. The signed agreement was last seen at the mediator's office, and it is unclear what happened to the signed agreement. However, it is clear that the family court never entered a signed copy of the agreement as a result of the 1997 rule to show cause and subsequent mediation. As a result, the agreement is not available for the Court to review.

The parties disagree as to the exact terms of the 1997 agreement. Husband contends that he agreed to pay a sum of $25,000 as full settlement for all unpaid judgments. He testified that $5,000 was a down payment on the sum. Further, he contends he agreed to pay the sum of $1,000 per month for twenty months to satisfy the unpaid debt. In addition, Husband said he was to pay $500 a month in child support. In sum, he contends he was to pay $1,500 a month for twenty months and $500 per month thereafter.

On the other hand, Wife contends that Husband was to pay $5,000 in delinquent child support and $1,500 a month in child support in futuro. To support her claim Wife points out that despite Husband's contention that he would pay $1,500 for only twenty months, he continued to pay that sum for almost five years and noted on the checks the amount was for child support.

In 2003, Wife filed yet another rule to show cause against Husband. Wife sought to hold Husband in contempt for his failure to comply with the 1995 family court order. In addition, Wife filed an action for declaratory judgment seeking a determination that the terms of the 1995 order were not complied with and that judgment continued to be outstanding. Husband counterclaimed seeking a set-off for alleged overpayments of child support.

Following a trial, the court ruled that Wife was entitled to the amounts of the judgments entered by the two previous family court orders plus statutory interest. In 2004, the court ordered that Wife receive $162,806.13 from Husband resulting from the prior family court orders that went ignored. The court went further to provide Husband with a set-off toward the amounts of "overpayment" related to child support. The Court gave Husband credit for the amount of support paid over and above the original family court ordered support. Thus Husband received a set-off for any amount of payment made over $200.78.[1] No documentation was provided as to how many payments were made but the court determined that Husband was entitled to a set-off totaling $97, 629.62.

[1] In 1995, the family court temporarily reduced Husband's child support payments to $200.78 and the amount was never increased after the temporary reduction until the 2004 family court order increasing the amount to $2,400 a month.

Husband appealed the court's ruling and Wife cross appealed as to the set-off. This Court certified this case from the court of appeals pursuant to Rule 204(b), SCACR. As a result, the following issues are before this Court:

I. Did the family court err in determining that the 1997 agreement between the parties was unenforceable pursuant to Rule 43(k), SCRCP?

II. Did the family court err in determining that Wife was not barred by equitable estoppel because Wife benefited under the 1997 agreement?

III. Did the family court err in determining that there was no full accord and satisfaction under the 1997 agreement?

IV. Did the family court err in converting the assignment of a note in a 1993 family court order into a money judgment?

V. Did the family court err in awarding attorney's fees to Wife?

VI. Did the family court err in awarding Husband an equitable set-off?

LEGAL ANALYSIS

I. Rule 43(k)

Husband argues that the family court erred in determining that the 1997 agreement between the parties was unenforceable pursuant to Rule 43(k), SCRCP. We disagree.

"Like former Circuit Rule 14 on which it is based, Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). The rule is intended to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity

of determining such disputes. *Id*. When the terms of the settlement are not agreed upon, it is not settled and therefore is not removed from the requirements of Rule 43(k). *Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 154, 528 S.E.2d 94, 97 (Ct. App. 2000). However, the rule is not applicable where the agreement is admitted or carried into effect. *Ashfort*, 318 S.C. at 493-94, 458 S.E.2d at 534.

In *Ashfort*, parties to the litigation purportedly settled their case and advised the court of the settlement. *Ashfort*, 318 S.C. at 493, 458 S.E.2d at 534. A dispute arose as to the terms of the settlement, and this Court affirmed the trial court's refusal to compel settlement because no meeting of the minds took place. *Id*. The Court reasoned that purpose of the rule [43(k)] was to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements. *Id*.

In the present case, the parties did not enter an agreement on the record before the court. Additionally, the parties in this case seemingly cannot agree to the terms of the agreement or at the very least the terms of the agreement are unable to be ascertained. The *Ashfort* opinion directly addresses the type of scenario presented in the case at bar. In *Ashfort*, this Court declined to enforce an agreement on parties when the terms of the agreement were not known. Accordingly, we uphold the family court's decision not to enforce the agreement.

II. Equitable Estoppel

If the Court determines an agreement existed, Husband argues that the family court erred in determining that Wife's suit was not barred by equitable estoppel because Wife benefited from the agreement.

Because we find that no enforceable agreement existed, we decline to address this issue.

III. Accord and Satisfaction

Husband argues the family court erred in determining that there was no full accord and satisfaction of the 1997 agreement. We disagree.

Because, we find that no enforceable agreement existed, we decline to address this issue

IV. Conversion of Note

Husband argues that the family court erred in converting the Pinnacle group note into a money judgment. We disagree.

In the family court's 1995 order, the family court provided that Husband should assign $30,000 of a $600,000 note to Husband from his real estate company, Pinnacle, to Wife. The family court further provided that Wife could proceed directly against Pinnacle as holder of the note to collect the principal and any accrued interest due. In a subsequent proceeding before another family court the family court converted the note into a money judgment award to Wife.

In support of his argument, Husband cites authority that one circuit judge cannot overrule a standing order of another circuit court judge. *See Charleston County Dept. of Social Services v. Father*, 317 S.C. 283, 288, 454 S.E. 2d 307, 310 (1995) (holding that a trial judge cannot over rule an order from another trial judge). Husband argues that the family court cannot "overrule" the standing order of another family court. In addition, Husband argues that Wife did not properly proceed to collect on the note as directed by the family court.

We find that the family court correctly converted Wife's share in the note into a money judgment. First, Husband never obeyed the 1995 family court directive to assign the note to Wife. As a result, Wife could not proceed against Pinnacle to collect on the note. Husband should not be permitted to gain for his failure to assign the note to Wife by now claiming she has not properly sought collection on the note. Second, the family court exercised its power in equity to ensure a just result. *See Ex Parte Dibble*, 279 S.C 592, 595-96, 310 S.E.2d 440, 442 (Ct. App. 1983) (stating the time honored equitable maxim that all courts have the inherent power to all things reasonable necessary to ensure that just results are reached to the fullest extent possible).

Because Husband did not obey the family court's 1995 order, the subsequent family court decided, in equity and fairness to Wife, to carry the first court's order into effect by converting the note into a money judgment. *See Dinkins v. Robbins*, 203 S.C. 199, __, 26 S.E.2d 689, 690 (1943) (stating that judge may act when the subsequent order does not alter or substantially affect the ruling of the previous order). Accordingly, we affirm the family court's decision.

V. Attorney's Fees

Husband argues the family court erred in awarding attorney's fees to Wife. We disagree.

The decision to award attorney's fees in a divorce case is a matter within the sound discretion of the trial judge and the award will not be reversed on appeal absent an abuse of discretion. *Reid v. Reid*, 280 S.C. 367, 377, 312 S.E.2d 724, 729 (Ct. App. 1984).

The family court correctly awarded attorney's fees to Wife. Husband consistently disobeyed the court's orders. The record reflects that Husband has been financially stable throughout these proceedings but has refused to obey the directives of the court. As a result, the family court correctly awarded attorney's fees to Wife.

VI. Equitable Set-off

Wife argues that the family court erred in giving Husband an equitable set-off for "overpayments" of child support. We agree.

Husband received a set-off for child support payments made over and above $200.78 for the periods around 1997-2003. While the "final" 2004 Order does not explicitly spell out how the number $97,629.62 was derived, at some point during this ongoing saga, Husband's child support payment was reduced to the amount of $200.78 per month.[2] The temporary amount

[2] During this time (1995) Wife and children were receiving food stamps. At the same time, Husband was earning at least $70,000 per year. In addition,

was never increased by court order. However, at sometime in 1997 Husband began to pay $1,500 a month in child support. Accordingly, in the 2004 order, the court awarded Husband a set-off for the payments made in excess of $200.78 for nearly six and a half years – thus the $97,000 figure.

We hold that the family court erred in awarding Husband a set-off. Husband failed to make timely child support payments for a time that, including appeal, amounts to almost 13 years. The record reflects a constant lack of effort on the part of Husband to cooperate with Wife. In fact, the record demonstrates a very good effort by Husband to be very difficult in his dealings with Wife. These actions pale in comparison to the ongoing disregard for the family court's directives. As a result, we do not believe that Husband should receive an *equitable* set-off. *See Norton v. Matthews*, 249 S.C.71, 79, 152 S.E.2d 680, 684 (1967); *See also First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568-69, 511 S.E.2d 372, 379 (Ct. App. 1998) (holding that the doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly to the detriment of the plaintiff).

Husband is not a party deserving of equitable treatment because of his own misdeeds in dealing with Wife and with the court. Accordingly, we reverse the family court's decision awarding Husband a set-off.

CONCLUSION

Based on the above reasoning, we affirm the decision of the family court declining to enforce the 1997 agreement between the parties. In addition, the family court correctly awarded Wife $162,806.13 and ordered Husband to pay $2,400 per month in child support.

Husband was building a financial empire – Husband owns 25% of an entity that bought a $15,000,000 island off the coast of Georgia, owns a home in Kennebunkport, Maine, and a lot in Florida. This is in addition to the over $250,000 in income Husband now makes.

However, the family court erred in giving Husband an equitable set-off. As a result, we reverse the decision of the family court related to the $97,629.62 set-off awarded Husband.

Accordingly, Husband is ordered to pay Wife $162,806.13. Husband is to pay child support in the amount of $2,400 per month from February 2004 going forward. Husband is to pay retroactive child support of $6,300 in monthly payments of $480 per month for the period dating from July 2003 until February 2004. In addition, Husband is to comply with all other provisions outlined in the family court's order of February 3, 2004.

MOORE, WALLER, JJ., and Acting Justice L. Casey Manning, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In 1997, the parties reached an agreement whereby the former husband began making monthly payments to his former wife in amounts far greater than the child support required of him by the 1995 modification of the 1993 order. While the terms of this 1997 agreement are unclear, and the agreement itself unenforceable, I find no abuse of discretion in the family court's decision to award the former husband a set-off for these greater-than-required payments against the monies due the former wife under the 1995 order. In my opinion, the family court's equitable resolution of this situation should be affirmed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harbor Island Owners' Association, Respondent,

v.

Preferred Island Properties, Inc., a North Carolina Corporation, Appellant.

Appeal From Beaufort County
Curtis L. Coltrane, Master-in-Equity

Opinion No. 26187
Heard May 24, 2006 – Filed July 24, 2006

AFFIRMED IN PART; REVERSED IN PART

Robert V. Mathison, Jr., of Mathison & Mathison, of Hilton Head Island, for Appellant.

James B. Richardson, Jr., of Law Office of James B. Richardson, Jr., of Columbia, for Respondent.

JUSTICE PLEICONES: This is a default-judgment case. Appellant appeals from an order of the master-in-equity that Appellant was in default, and from an order of default judgment. We certified the case from the Court

of Appeals pursuant to Rule 204(b), SCACR, and we now affirm the entry-of-default order, and affirm in part and reverse in part the default-judgment order.

FACTS

Appellant is a North Carolina corporation that owned two parcels of property in the Harbor Island subdivision in Beaufort County, South Carolina. On February 6, 2004, Respondent filed a notice and certificate of lien on the two parcels.[1] Respondent served the notice and certificate by mail on Robert Honeycutt (Honeycutt), Appellant's principal and manager, at Honeycutt's North Carolina address.

On March 4, 2004, Respondent filed a summons and complaint seeking foreclosure on the two parcels.[2] According to the complaint, Appellant had failed to pay membership fees owed on the two lots for assessment years 1991-1992 through 2003-2004. The fees were owed pursuant to the Harbor Island Owners' Association Covenants.

On March 19, 2004, a process server personally served the summons and complaint on Paul Barber (Barber), the person listed with the Secretary of State as Appellant's registered agent for service of process. Barber swore in his affidavit that he "threw the papers away" because he thought he had "no business affiliation" with Appellant. He swore that he had "had no knowledge of why or how [he] became named as the agent for service for" Appellant.

On April 22, 2004, Respondent filed an affidavit of default with the clerk of court for Beaufort County. Respondent served the affidavit by mail on both Barber and Honeycutt.

---

[1] Respondent later filed a *lis pendens*.

[2] Respondent also pleaded a cause of action for damages, which is not at issue on appeal.

Appellant's attorney became aware of the complaint and the affidavit of default on April 27. On April 28, Appellant filed an answer to the complaint.

On July 22, 2004, Appellant filed a document entitled Motion to Determine that Default Has Not Been Entered and in the Alternative to Set Aside Entry of Default. After a hearing, the master denied the motion. The master found that Appellant was in default and that Appellant had failed to show good cause to set aside the entry of default.

The master also granted Respondent's motion for default judgment in the amount of the unpaid membership dues. The master found that Respondent was entitled to pre- and post-judgment interest on each late fee at a rate of eighteen percent per annum, which the master found was a contractual rate established by the association covenants. The master then held that Respondent was entitled to recover its damages through foreclosure on the two parcels, and the master declared that he would hold a public auction.

ISSUES

I. Whether the master erred in finding that Appellant was in default.

II. Whether the master erred in finding that a contractual interest rate of eighteen percent applied.

ANALYSIS

We affirm the entry-of-default order and affirm in part and reverse in part the default-judgment order. The master did not abuse his discretion in finding Appellant in default, but the master did abuse his discretion in holding that a contractual interest rate of eighteen percent applied to the judgment.

I. ENTRY OF DEFAULT

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion ... occurs when ... the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Roberson v. S. Finance of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005) (citations and internal quotation omitted).

Appellant argues that Respondent's affidavit of default was a nullity because it was filed before the time for Appellant to answer had expired. Respondent filed the affidavit of default thirty-four days after serving the complaint on Barber, Appellant's registered agent. Appellant notes the rule that generally, "[a] defendant shall serve his answer within 30 days after the service of the complaint upon him." Rule 12(a), SCRCP. According to Appellant, however, under Rule 6(e), SCRCP, a defendant has thirty-five days to answer if service is made upon a registered agent.

Rule 6(e) provides:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon *a person designated by statute to accept service*, five days shall be added to the prescribed period.

Rule 6(e), SCRCP (emphasis added).

In Appellant's view, a "registered agent" is "a person designated by statute to accept service," because a registered agent is a creature of statute. Appellant also points to the South Carolina Reporters' Comments on various statutes, which seem to view registered agents as statutory agents. See S.C.

Code Ann. §§ 33-5-101 rptr. cmt. (referring to the registered agent for a domestic corporation as a "statutory agent"), 33-5-104 (same, and implicitly differentiating between the Secretary of State's status as a statutory agent and a registered agent's status as a statutory agent), and 33-15-107 (discussing the "appointment of a statutory agent" by a foreign corporation). Because Barber was a statutory agent, Appellant claims, Appellant had thirty-five days within which to file its answer. Because Respondent filed its affidavit of default prior to the expiration of Appellant's time to file an answer, the affidavit of default was a nullity, and default was never properly entered.

We agree with Respondent that a "registered agent" is not a "person designated by statute to accept service" and that Rule 6(e) therefore does not apply. While section 33-15-107 requires a foreign corporation to designate an agent, the statute itself makes no designation. Cf. S.C. Code Ann. § 15-9-245 (2005) (providing that service of process is made upon the Secretary of State for businesses that do business in the state without authorization); S.C. Code Ann. § 15-9-270 (2005) (providing for service of process upon the Director of the Department of Insurance for insurance companies).

Consequently, we affirm the master's holding that default was properly entered against Appellant.

II. INTEREST RATE

Concerning the judgment of default, Appellant argues that the master erred in finding that a contractual interest rate of eighteen percent applied to pre- and post-judgment interest on the unpaid membership fees. We agree.

The master's findings of fact must be upheld "unless wholly unsupported by the evidence or controlled by an error of law." Roberson, 365 S.C. at 11, 615 S.E.2d at 115. Here, the master's finding is not supported by the evidence in the record.

At the damages hearing, Respondent introduced a copy of the neighborhood covenants. Article V, section 6 of the covenants provides that unpaid dues carry "interest thereon at a rate set by the Board of Directors."

To show the rate set by the board, Respondent called its bookkeeper to testify. Respondent's attorney asked, "And what is the interest rate that accrues on those assessments?" The bookkeeper answered, "18% -- I think, 19%. It's in the computer, but I don't remember it."

The master found that the bookkeeper's testimony supported Respondent's claim for an eighteen-percent contractual interest rate. We agree with Appellant that the testimony did not constitute evidence supporting the master's finding. The bookkeeper did not remember the rate.

Respondent asserts that regardless of the evidence submitted at the hearing, the basis for the master's finding, the record reveals an additional sustaining ground. Respondent argues it is entitled to the eighteen-percent rate because the rate's application was alleged in the complaint.[3] We disagree.

The interest on the unpaid assessments is part of damages. By defaulting, Appellant admitted the allegations in the complaint concerning liability, not damages. Respondent had the burden of proving damages. See Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981) (discussing Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978)).

Regarding proof of damages, Rule 55(b)(1), SCRCP, provides:

> When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought, if that party has been defaulted for failure

[3] In its complaint, Respondent alleged it was entitled to interest "at a rate set by the Board (1 1/2% per month)."

> to appear and if such party is not a minor or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

Here, Respondent attached verified statements of accounts to the complaint. See Rule 9(i), SCRCP (providing that "[i]n an action on an account the pleader shall attach a verified copy of the account to the pleading, or if the items of the account are set forth in the pleading, it must be verified"). These accounts do not reference accrued or accruing interest, let alone a particular interest rate. The account statements, therefore, do not satisfy Rule 55 with respect to the claim for a contractual rate. Further, the complaint itself is not verified; thus, the allegation in the complaint does not satisfy Rule 55, either.

We therefore reverse the master's holding that Appellant owes interest on the judgment at a rate of eighteen percent, and we remand the case to the master with instruction to order payment at the judgment rate.

CONCLUSION

We affirm the order denying Appellant's motion to set aside entry of default. We reverse the finding in the default-judgment order that a contractual interest rate of eighteen percent applied, and remand the case to the master with instruction to apply the judgment rate.

AFFIRMED IN PART; REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

BB&T f/k/a Southern National Bank, Respondent,

v.

Carolyn M. Taylor a/k/a Carolyn Yvonne Murphy Taylor, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 26188
Submitted June 21, 2006 – Filed July 24, 2006

REVERSED AND REMANDED

Carolyn M. Taylor, of Columbia, Pro Se Petitioner.

John William Ray, of Greenville, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision in BB&T v. Taylor, Op. No. 2004-UP-513 (S.C. Ct. App. filed Oct. 14, 2004). Carolyn M. Taylor a/k/a Carolyn Yvonne Murphy Taylor (Petitioner) contends the Court of Appeals erred in affirming the lower court's denial of a motion to set aside a judgment against her and in favor of BB&T f/k/a Southern National Bank (Respondent). We find Petitioner was not properly served with process and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On May 29, 1998, Respondent filed an action against Petitioner for collection of a consumer debt. Respondent hired a private process server, Robert Jones, who verified Petitioner's residential address. Jones also obtained the make and model of Petitioner's vehicle and license tag number through public records.

Jones made nine visits to Petitioner's residence attempting to serve her, and he left a message on the residence's answering machine. On June 17, 1998, Jones arrived at Petitioner's residence about 4:30 p.m. and departed about 17 minutes later. There were two vehicles in the driveway including the one registered to Petitioner. Jones claimed someone was inside the residence but would not open the door or communicate with him. He called out his intent to leave the papers and then posted the summons and complaint on the front door of the residence.

Respondent filed an affidavit of default, and on August 3, 1998, a judgment in default was entered against Petitioner. On July 16, 2002, Petitioner filed a motion to set aside the judgment pursuant to Rule 60(b)(4), SCRCP. Petitioner alleged the default judgment should be set aside because the court lacked personal jurisdiction due to insufficient service of process. The lower court found Petitioner had been sufficiently served with process and denied Petitioner's motion. The Court of Appeals affirmed. BB&T v. Taylor, Op. No. 2004-UP-513 (S.C. Ct. App. filed Oct. 14, 2004).

ISSUE

Did the Court of Appeals err in affirming the lower court's denial of Petitioner's motion to set aside a judgment against her?

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). Our standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

LAW AND ANALYSIS

Petitioner alleges she did not personally receive the summons and complaint in this case as required by Rule 4, SCRCP. She contends the Court of Appeals therefore erred in affirming the lower court's denial of her motion to set aside a judgment against her. We agree.

Rule 60(b)(4), SCRCP, provides: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding [because] . . . the judgment is void." A judgment is void if a court acts without personal jurisdiction. Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. Ex parte S.C. Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002) (citing State v. Sanders, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920) ("The purpose of the summons is to acquire jurisdiction of the person of the defendant. . . .")).

Under Rule 4(d)(1), SCRCP, service shall be made as follows:

> Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

"Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995).

The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). Exacting compliance with the rules is not required to effect service of process. Roche, 318 S.C. at 209-10, 456 S.E.2d at 899. "Rather, [the Court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* at 210, 456 S.E.2d at 899. A presumption of proper service exists when the rules governing service are followed. Roche, 318 S.C. at 211, 456 S.E.2d at 900 (citation omitted).

The dispositive issue in this case is what constitutes delivery of a copy of the summons and complaint to the individual personally where the process server has repeatedly attempted to serve process and during the attempt at issue believed an individual was inside the residence but never saw or communicated with the individual.[1] Petitioner's residence and the manner

[1] Respondent contends we should apply the following factors to determine whether Petitioner's motion to set aside the judgment was properly granted: the promptness with which relief is sought, the reasons for the

of service of process are undisputed. In an affidavit of service, Jones stated he posted the documents on the front door "after person(s) inside refused to answer door." In a subsequent affidavit, Jones stated he posted the documents on the front door after determining a person was present inside the residence, knocking and calling out to the alleged occupant, determining the alleged occupant would not communicate with him, confirming one of the vehicles at the residence belonged to Petitioner, and calling out his intent to leave the papers.

Although there is no South Carolina case directly on point, we find Patel v. Southern Brokers, Ltd., 277 S.C. 490, 289 S.E.2d 642 (1982), instructive. In Patel, the plaintiff attempted service of process under the long arm statute because the defendant was a North Carolina corporation. The summons and complaint were sent to the defendant by certified mail, return receipt requested. The plaintiff could not enter proof of service because the postal service returned the unopened envelope as refused. Noting "technical objections to service of process" had been overruled "where the defendant had not been denied due process," the Court found a defendant could not avoid process by refusing to accept registered mail known to contain a summons and complaint. *Id.* at 494, 289 S.E.2d at 645. Once the documents were made available to the defendant, "the mailman was not required to ram them down the Defendant's throat." *Id.* at 495, 289 S.E.2d at 645. The Court concluded the defendant had been served with process and the lower court had jurisdiction over the defendant.

The Court of Appeals' opinion in this case cited foreign authority which dealt with situations in which the process server left the summons and

---

failure to act promptly, the existence of a meritorious defense, and the prejudice to the other parties are relevant. These factors do not apply to a motion made pursuant to Rule 60(b)(4), SCRCP. See New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (listing the factors); see, *e.g.*, Hill v. Dotts, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001) (applying the factors to a motion made under Rule 60(b)(1), SCRCP); Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) (same).

complaint on the door or doorstep of the defendant's residence after the process server talked to or had contact with an individual inside the residence who refused service. See Taylor, Op. No. 2004-UP-513 (citing Jacobson v. Garland, 487 S.E.2d 640 (Ga. Ct. App. 1997) (sufficient service of process found where process server told defendant's wife in a face-to-face encounter that he was serving process on her, defendant's wife closed the door without accepting the documents, and thereafter, process server left documents at the foot of the door and loudly announced he was leaving the documents); Bossuk v. Steinberg, 447 N.E.2d 56 (N.Y. 1983) (sufficient delivery found where the process server announced intention to leave the summons and complaint and left a copy of the documents outside the defendant's door after a person of suitable age and discretion refused to open the door to accept service); Wood v. Weenig, 736 P.2d 1053 (Utah Ct. App. 1987) (defendant was properly served when process server left summons and complaint on defendant's doorstep after an individual claiming to be defendant's daughter and over 14 years old refused to accept documents); CRB v. State, Dep't of Family Servs., 974 P.2d 931 (Wyo. 1999) (sufficient service of process found where after defendant refused to open the door, process server left the summons and complaint in defendant's mailbox and informed defendant he was being served)).

Unlike the foreign authority cited by the Court of Appeals, Jones merely speculated that an individual of suitable age and discretion was inside Petitioner's residence and was refusing to communicate with him during his attempts to serve process. Also, Petitioner did not refuse to accept a copy of the summons and complaint, unlike the defendant in Patel. Rather, there are no facts in the record to indicate Petitioner was even aware of the process server and his attempts to serve her. Petitioner was not properly served under these facts because Jones never saw or spoke to anyone who resided in Petitioner's residence nor did anyone refuse acceptance before Jones attached the summons and complaint to Petitioner's front door. See generally Willoughby v. Seese Realty Inc., 421 So.2d 691 (Fla. Dist. Ct. App. 1982) (statutory requirements for personal service were not met where the sheriff did not deliver the summons and complaint to the defendant but left a copy of the documents at the defendant's door); Thomas v. Johnson, 423 S.E.2d 306 (Ga. Ct. App. 1992) (statutory requirements for personal service were not met

where process server tacked the summons and complaint to the defendant's front door and process server never saw or talked to the defendant nor were there any facts to indicate the defendant was aware of the process server).

The process server is not required to ram the documents down a defendant's throat and personal service of process "should not become a game of wiles and tricks." 62B Am.Jur.2d Process § 190 (2005). However, there must be something more than a mere suspicion of a defendant's refusal to accept the summons and complaint before we are willing to find a defendant was sufficiently served with process by a means other than strict compliance with Rule 4(d)(1), SCRCP.[2]

CONCLUSION

We find the lower court abused its discretion in denying Petitioner's motion to set aside the judgment, and we reverse the Court of Appeals' decision. We remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

[2] We find it unnecessary to address Petitioner's argument regarding Rule 4(g), SCRCP. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issues is dispositive).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Susie Cornelius, individually,
and on behalf of all others
similarly situated, Respondent,

v.

Oconee County, Appellant.

Appeal from Oconee County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26189
Heard June 6, 2006 – Filed July 24, 2006

AFFIRMED

Bradley A. Norton and Julie Elisabeth Mahon, both of Norton, Ballenger and Mahon, of Walhalla, and Matlock Elliott and Joshua Howard, both of Haynsworth, Sinkler and Boyd, of Greenville, for Appellant.

James G. Carpenter and Jennifer J. Miller, both of Carpenter Law Firm, of Greenville, for Respondent.

ACTING JUSTICE HILL: In 1976, Oconee County electors approved a referendum authorizing the County to own and operate a wastewater treatment facility, but limiting funding for this service to three sources and limiting service to "portions of Oconee County." Oconee County appeals a circuit court order holding that these restrictions apply to any expansion of County's sewer system, and awarding respondent Cornelius attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 (2005). We affirm.

FACTS

The 1976 referendum (Referendum) authorized Oconee County "to acquire, purchase, construct and operate a wastewater treatment facility to serve portions of Oconee County, consisting of a treatment plant, trunk lines, connector lines and other necessary and appropriate apparatus. Provided and upon condition that the sole funds utilized for the acquisition, purchase, construction, maintenance and operation of such facilities shall be obtained and derived from: (1) Grants from Federal and State agencies; (2) Revenue earned and derived from the operation of the facilities to be constructed and paid only by the users thereof; and (3) Bonds payable from revenues produced and earned from the operation of such facilities." (emphasis added). Pursuant to the Referendum, County built and operates a sewer system serving parts of the County.

In December 2004, respondent Cornelius, a County citizen and taxpayer, brought this declaratory judgment action against County. Cornelius asserted County had adopted and intended to implement a Master Plan that, among other things, anticipated construction of new wastewater treatment facilities. She alleged that County had approved a contract with SCDOT to construct a treatment facility to serve an interstate highway "Welcome Center," and that the contract included a cap on sewage treatment charges. Cornelius claimed County intended to fund these projects and to offset any losses using *ad valorem* tax dollars, and contended that this funding scheme

violated the conditions set by the 1976 Referendum.[1] County acknowledged its plans to fund sewer expansion using tax monies.

The circuit court granted Cornelius summary judgment, holding that County may fund sewer projects only within its boundaries, and only using the three types of funding listed in the Referendum. The circuit court subsequently awarded Cornelius $9,450 in attorneys' fees pursuant to § 15-77-300. County appeals both orders.

ISSUES

1) Whether the circuit court erred in holding County was bound by the terms of the Referendum.

2) Whether the circuit court abused its discretion in awarding Cornelius attorneys' fees.

ANALYSIS

A. Referendum

The South Carolina Constitution of 1895 placed control of local government affairs largely with the General Assembly. Most notably, Article X, §6 of the 1895 Constitution allowed the General Assembly to grant counties the power to levy taxes only for specific listed purposes such as roads, prisons, education, courts, salaries of county officials, and other "ordinary county purposes." The intent of this provision was to "halt county and township taxing and spending except that which was unequivocally for traditional local government purposes." Underwood, The Constitution of South Carolina: Vol. II: The Journey Toward Local Self-Government at 83 (1989). As a result, this Court strictly interpreted what constituted an "ordinary county purpose" for which state government could lawfully permit

[1] Cornelius also contended that County intended to fund water projects. The circuit court held County lacked authority to build or operate a water system, a holding not challenged on appeal.

counties to levy taxes or issue bonds. See, e.g., Leonard v. Talbert, 225 S.C. 559, 83 S.E.2d 201 (1954) (act creating physical education commission and providing funding for sports fields for Richland County schools had neither educational nor "ordinary county purpose" within the meaning of Article X, §6). In the same vein, because modern waste treatment practices were not known in 1895 and could not therefore have been an "ordinary" county purpose, the Court construed Article X, §6 as prohibiting counties from expending tax revenues or bond funds to construct or operate sewerage systems. Doran v. Robertson, 203 S.C. 434, 27 S.E.2d 714 (1943). In 1973, the Constitution was amended and Article VIII, § 16 was added as part of the quest for Home Rule. This Constitutional provision permits a county, upon majority vote of its electors, "to acquire by initial construction or purchase" and to "operate…sewer systems…." As noted in Knight v. Salisbury, 262 S.C. 565, 574, 206 S.E.2d 875, 879 (1974), the provision removed the obstacles presented by Article X, §6 and Doran and "expressly empowers counties to act" in establishing sewer systems.

Oconee County maintains that the purpose of Article VIII, § 16 is to allow voters to decide whether a county should be permitted to initially engage in wastewater treatment functions. County argues that since the Constitution refers to "**initial** construction or purchase," and since the Referendum referred only to "**a** wastewater treatment facility," the Referendum only limits the funding sources County could use to construct the first facility and does not hinder County from using tax monies or other forms of financing to fund subsequent expansions of the facility or additional sewer system projects. According to County, once the 1976 Referendum passed, County was free to expand its sewer system and service, and to fund that expansion in any way it chose. We disagree.

As a general rule, once voters have approved a Referendum, a county may expand its sewerage system without further authorization from the electors. See Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982). The question remains, however, whether such an expansion is subject to the express terms and limitations of the Referendum.

We hold that a county seeking to expand a utility cannot ignore the express terms of the Article VIII, § 16 referendum that initially authorized the county to own and operate the utility. As Justice Littlejohn observed in Johnson:

> The people, speaking through a constitution, endeavor to protect their life, liberty and property by prescribing and limiting the powers of the government. This acts as a bulwark of liberty for the protection of private rights. The Constitution is the instrument of the people to protect themselves against the rule of man as contrasted with the rule of law.
>
> The power of government to demand money from its people by way of taxation, or otherwise, is equivalent to the power to destroy.
>
> 277 S.C. at 356, 287 S.E.2d at 482 (Littlejohn, A.J., dissenting).

The Constitution forbids a county from owning and operating a sewer system unless county electors have approved the county's assumption of this function by referendum. While nothing in Article VIII, §16 requires that the referendum be phrased to restrict the sources of funding a county may use for a sewer system, here Oconee County chose to include such a restriction in the referendum it presented to the voters. Accordingly, the voters of Oconee County approved the referendum, but only on the condition that specific, non-tax based financing be used to construct, operate, and maintain the sewer system. To now permit the County to use the fact of a favorable vote as a license to ignore the express terms of that referendum and deploy its general taxing power to finance expansion of the system would subvert the popular will and deprive "the people [of the right] to protect themselves against the rule of man…."

County alternatively contends that a constitutional referendum is merely one of several methods by which a county may be authorized to

provide sewer services. County claims S.C. Code Ann. § 44-55-1410(A) (2002) provides an independent basis upon which a county may opt to provide sewer services using *ad valorem* tax funds. We disagree. This statute was enacted in 1975 pursuant to the Constitution's directive to the General Assembly to implement Home Rule, see Hospitality Ass'n of South Carolina v. County of Charleston, 320 S.C. 219, 464 S.E.2d 113 (1995), and provides the governmental framework for a county to operate a sewer system that has been initially authorized by constitutional referendum. Cf. Murphree v. Mottel, 267 S.C. 80, 226 S.E.2d 36 (1976) (favorable Article VIII, § 16 referendum is prerequisite for county operation of water or sewer facilities). The statute does not permit a county to operate wastewater treatment facilities in the absence of a constitutional referendum.[2]

County next contends that it can enlarge its sewer system utilizing *ad valorem* tax monies, citing S.C. Const. art. VIII, § 7, which states, "The General Assembly shall provide by general law for…powers…of counties, including the power to tax…." This general taxing provision does not prevail over the specific requirement of the constitutional referendum mandated by Article VIII, § 16. See S.C. Const. art. I, § 23 ("The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory…").

Finally, County points to its general authority to expend tax revenues in aid of economic development, including sewer services, as a separate basis upon which it may expand sewer services independent of the Referendum. We disagree. A county's general taxing authority does not trump the constitutional requirement that electors approve the operation of sewer services by referendum. Cf. Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992) (general constitutional provision does not overrule specific constitutional clause).

[2] Indeed, the last sentence of section 44-55-1410(A) plainly provides that "[n]othing herein contained is intended to authorize the levy of taxes."

We therefore affirm the circuit court order holding that County is bound by the terms of the Referendum both geographically[3] and financially in expanding its wastewater treatment services and facilities.

B. Attorneys' Fees

Cornelius was awarded $9,450 attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 (2005). County argues it acted with "substantial justification" because there are no preexisting judicial precedents on these issues, merely attorney general opinions, and that Cornelius was not a "prevailing party" in that this was merely a declaratory judgment action to define rights, duties, and obligations, and that therefore the fee award was improper. We affirm the award.

In order to make an award under § 15-77-300, the trial court must find: 1) the party seeking the award was the prevailing party; 2) the state agency acted without substantial justification; and 3) that no special circumstances make an award unjust. Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498 (1990). The trial court's decision to award or deny fees under § 15-77-300 will not be disturbed on appeal absent an abuse of discretion. Id.

Taking County's arguments in reverse order, this Court has never held that § 15-77-300 is inapplicable to declaratory judgment actions. In fact, the Court has decided numerous declaratory judgment appeals where fees were sought pursuant to the statute. See, e.g., City of Charleston v. Masi, 362 S.C. 505, 609 S.E.2d 301 (2005) (no prevailing party under statute where declaratory judgment action dismissed as moot); Eargle v. Horry County, 344 S.C. 449, 545 S.E.2d 276 (2001) (remanding declaratory judgment action for determination of statutory award); S.C. Tax Comm'n v. United Oil Marketers, Inc., 306 S.C. 384, 412 S.E.2d 402 (1991) (no abuse of discretion in denying award to non-prevailing party in declaratory judgment action). While the statute specifically exempts certain types of suits, declaratory

[3] Nothing in the Referendum or the circuit court order, however, limits County's authority to contract with other public or private entities to provide sewer services. See S.C. Code Ann. §44-55-1410(D); § 6-15-20.

judgments are not among them. A party whose position prevails in a declaratory judgment dispute with a state agency may be awarded fees under § 15-77-300.

The trial court can award attorneys' fees under the statute only if it finds the State "agency acted without substantial justification in pressing its claim…." § 15-77-300(1). An agency acts with "substantial justification" within the meaning of the statute when its position has a "reasonable basis in law and fact." McDowell v. SCDSS, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Contrary to County's contention, the fact that novel issues were raised does not mean County was substantially justified in opposing Cornelius. Declaratory judgment actions by their very nature often present novel questions. See, e.g. Eargle, *supra* (authority of county administrator to suspend elected official's employees); United Oil Marketers, *supra* (constitutionality of license tax incentive statute for gas/ethanol blend); Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) (to define relationship between sheriff's office and county council). Moreover, County cited no viable authority supporting its position that it was no longer bound by the Referendum's terms. We agree with the circuit court that County acted without substantial justification, and no special circumstances render the attorneys' fee award unjust.

We find the circuit court properly exercised its discretion in awarding Cornelius fees under § 15-77-300. Jasper County, *supra*.

CONCLUSION

The circuit court orders holding County is bound by the terms of the Referendum and awarding Cornelius attorneys' fees are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Walker Scott Russell, Respondent,

v.

Wachovia Bank, N.A., as Putative Trustee of the Alleged Donald Stuart Russell Revocable Trust and as Putative Trustee of the Alleged Donald Stuart Russell Irrevocable Trust, Virginia U. Russell, Donald S. Russell, Jr., Mildred Russell Williams Nieman, John R. Russell, Thaddeus Russell Williams, Virginia Carol Williams, and Cecilia Frances Williams, Appellants.

AND

Mildred R. Neiman, Respondent-Appellant,

v.

Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell, Sr., Virginia C. Williams, T. Russell Williams, Cecilia F. Williams, Virginia U. Russell, Donald S. Russell, Jr., W. Scott Russell, and John R. Russell, Defendants,

of which Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell, Sr., Virginia C. Williams, T. Russell Williams, Cecilia F. Williams, Virginia U. Russell, Donald S. Russell, Jr., and John R. Russell are Respondents-Appellants

and W. Scott Russell is Respondent.

AND

Mildred R. Neiman, Respondent-Appellant,

v.

Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell, Sr., Virginia C. Williams, T. Russell Williams, Cecilia F. Williams, Virginia U. Russell, Donald S. Russell, Jr., W. Scott Russell, and John R. Russell, Defendants,

of which Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell, Sr., Virginia C. Williams, T. Russell Williams, Cecilia F. Williams, Virginia U. Russell, Donald S. Russell, Jr., and John R. Russell are Appellants-Respondents

and W. Scott Russell is Respondent.

AND

In the Matter of the Estate of Donald S. Russell, Deceased,---
Walker Scott Russell, Respondent,

v.

Virginia U. Russell, Donald S. Russell, Jr., Mildred Russell Williams Neiman, John R. Russell, and Wachovia Bank, N.A. as Personal Representative, Appellants.

AND

Wachovia Bank, N.A., as Personal Representative of the Estate of Donald S. Russell, deceased, Third-Party Appellant-Respondent,

v.

Virginia Williams, Russell Williams, Cecilia Williams, Walker Scott Russell, Jr., and Grace Johnson Russell, Third-Party Respondents,

Of which Virginia Williams, Russell Williams and Cecilia Williams are Third-Party Respondents-Appellants.

Appeal from Spartanburg County
Henry F. Floyd, Circuit Court Judge

Opinion No. 26190
Heard April 6, 2005 – Filed July 24, 2006

AFFIRMED IN PART; REVERSED IN PART

Stanley T. Case and Edward G. Smith, of Butler Means Evins & Browne, of Spartanburg, for Appellant-Respondent Wachovia Bank.

G. Dewey Oxner, Jr., and Moffatt G. McDonald, of Haynsworth Sinkler Boyd, of Greenville, for Appellant-Respondent Estate of Virginia U. Russell.

R. Ray Dennis, of Dennis Shaw & Drennan, of Spartanburg, for Appellants-Respondents John R. Russell and Donald S. Russell, Jr.

Thomas E. McCutchen and Hoover C. Blanton, of McCutchen Blanton Johnson & Barnette, of Columbia, for Appellants Virginia C. Williams, T. Russell Williams, and Cecelia F. Williams.

Desa A. Ballard and Jason B. Buffkin, of Law Offices of Desa Ballard, of West Columbia; and Joseph M. McCulloch, Jr., of Law Offices of Joe McCulloch, of Columbia, for Respondent-Appellant Mildred R. Neiman.

J. Neil Robinson, of Robinson Law Office, of Charlotte; and Leo A. Dryer, Jr., of Dryer Law Offices, of Columbia, for Respondent Walker Scott Russell.

CHIEF JUSTICE TOAL: The underlying litigation began when beneficiaries of an estate challenged the validity of a will and two trusts, alleging the documents were procured by undue influence. The trial court granted summary judgment in favor of the defendants. This Court affirmed as modified. *Russell v. Wachovia Bank*, 353 S.C. 208, 578 S.E.2d 329

(2003). After remittitur was issued, certain defendants moved for summary judgment, seeking to enforce no-contest clauses appearing in the will and revocable trust. The trial court denied summary judgment, ruling that the no-contest clauses were unenforceable because beneficiaries had probable cause to challenge the estate plan. The court also issued two orders regarding attorney's fees and costs. After certifying this case for review pursuant to Rule 204(b), SCACR, we affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Mildred Russell Neiman (Mim) and Walker Scott Russell (Scott) each filed actions to set aside the will, and revocable and irrevocable trusts of their father, Donald Stuart Russell (Testator).[1] In general, the complaints alleged that Testator was unduly influenced and coerced by Mim's children (the Williams Children), and perhaps others, to design his estate plan as he did. Named defendants included the following: the Williams Children; Mim's ex-husband (Thad Williams); Wachovia Bank (Wachovia), the executor of the estate and the trustee; Testator's wife, Virginia U. Russell (Mrs. Russell), who is now deceased; and Testator's two other children, John R. Russell (Johnny) and Donald R. Russell, Jr. (Donnie).

After extensive discovery was conducted, the trial court granted summary judgment in favor of the defendants. This Court affirmed as modified, holding that the will and trusts were not procured by undue influence. *Russell v. Wachovia Bank*, 353 S.C. 208, 578 S.E.2d 329 (2003). As to the will contest, we found that the record was "devoid of any evidence that the Williams Children or Thad influenced the execution or any modification of the will." *Id.* at 219, 578 S.E.2d at 335. Similarly, as to the trust contest, we found that there was "no evidence to make out a *prima facie* case of undue influence . . . ." *Id.* at 224, 578 S.E.2d at 337.

[1] Testator served as an active judge on the United States Court of Appeals for the Fourth Circuit until his death on February 22, 1998, at the age of 92. Prior to his appointment to the federal bench, Testator served as governor of South Carolina, United States senator from South Carolina, and President of the University of South Carolina.

Following remittitur, the Williams Children filed a motion for summary judgment seeking to enforce the no-contest clauses appearing in Testator's will and revocable trust. Wachovia intervened, making similar arguments. The no-contest clauses provided that beneficiaries who challenged the validity of the will and trust documents would be disinherited. Therefore, if enforced, these provisions would have the effect of disinheriting Mim and Scott for bringing the underlying actions.

Following a hearing, the trial court issued three orders that are the subject of the present appeal. In the first order, the trial court found that Scott and Mim had probable cause to believe that Testator had been unduly influenced by the Williams Children, and perhaps others, prior to his death. As a result, the court ruled that the no-contest clauses were invalid and unenforceable. Wachovia, Mrs. Russell's estate, Donnie, and Johnny appeal.

In the second order, the trial court ordered Mim to pay attorney's fees and costs incurred by Wachovia in the amount of $264,995.31, by her mother's estate in the amount of $147,110.25,[2] and by her brothers, Johnny and Donnie, in the amount of $97,412.83. Mim appeals.

Finally, in the third order, the trial court denied a motion for sanctions filed against Scott and his attorneys. The court also denied the Williams Children's request for attorney's fees and costs. The Williams Children appeal.

Accordingly, the issues presented on appeal are as follows:

I. Did the trial court properly grant summary judgment in favor of Mim and Scott, finding they had probable cause to contest the validity of the estate plan?

II. Did the trial court properly order Mim to pay certain attorney's fees and costs?

[2] This award was later increased to $165,060.68, after the court realized that the original award did not include costs.

III. Did the trial court properly deny the Williams Children's request for attorney's fees and costs?

LAW/ANALYSIS

I. No-Contest Clauses

Wachovia, Mrs. Russell's estate, Donnie, and Johnny contend that the trial court erred in granting summary judgment in favor of Mim and Scott, finding they had probable cause to contest the validity of the estate plan. We agree.

In general, clauses in a will designed to penalize beneficiaries for contesting a will or instituting other proceedings relating to the estate are valid and enforceable. *E.g.*, *Cox v. Fowler*, 614 S.E.2d 59 (Ga. 2005); *In re Estate of Mumby*, 982 P.2d 1219, 1224 (Wash. Ct. App. 1999). Commonly referred to as "no-contest" or "in terrorem"[3] clauses, such clauses may "protect estates from costly and time-consuming litigation" and "minimize the bickering over the competence and capacity of testators, and the various amounts bequeathed." *In re Estate of Seymour*, 600 P.2d 274, 278 (N.M. 1979). No-contest clauses may have the desirable effect of ensuring that the details of a testator's private life are not made public. *Cf. Smithsonian Instit. v. Meach*, 169 U.S. 398, 402-03 (1898) (stating that will contests frequently bring "to light matters of private life that ought never to be made public").

[3] "Technically, a no-contest clause is only one type of *in terrorem* clause, the latter term including any clause seeking to coerce a person into taking or refusing to take some action." Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 Ariz. St. L.J. 629, n. 2 (1994). The terms are typically used interchangeably, but we use the term "no-contest" throughout this opinion because the clauses in the present case specifically address the consequences of contesting the estate plan.

But courts in South Carolina and North Carolina,[4] along with a majority of jurisdictions, have recognized an exception to the general rule that no-contest clauses are valid and enforceable. Under South Carolina law, a no-contest clause is unenforceable if the challenger has probable cause for instituting proceedings. S.C. Code Ann. § 62-3-905 (1986). Similarly, North Carolina law provides that a no-contest clause is unenforceable against a person who in good faith and with probable cause challenges the validity of a will. *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 856 (N.C. 1952).

In the South Carolina case of *Rouse v. Branch*, the Court held that beneficiaries contesting a will on the ground that the will was a forgery did not forfeit their right to inherit. 91 S.C. at 118, 74 S.E. at 135. In so holding, the Court explained:

> The right of a contestant to institute judicial proceedings upon probable cause, to ascertain whether the will was ever executed by the apparent testator, is founded upon justice and morality. If a devisee should accept the fruits of the crime of forgery, under the belief, and upon probable cause, that it was a forgery he would thereby become morally a *particeps criminis*; and yet if he is unwilling to commit this moral crime, he is confronted with the alternative of doing so, or of taking the risk of losing all, under the will, in case it should be found not to be a forgery.
>
> Public policy forbids that he should be tempted in such a manner.

Id. Accordingly, if a beneficiary has a belief, based on probable cause, that a will constitutes a forgery, the beneficiary may (and should) contest the validity of the will, without fear of being disinherited under the terms of a no-contest clause.

---

[4] In our prior opinion, we held that issues surrounding the *will* were governed by South Carolina law, and issues surrounding the *trust* were governed by North Carolina law. Because the no-contest clauses appear in both the will and trust, we analyze this issue under the law of each state. In the end, however, we find that the legal standard is the same under both South and North Carolina law.

Likewise, beneficiaries are permitted to make bona fide inquiries into whether a will was procured through undue influence or duress. In the North Carolina case of *Ryan v. Wachovia Bank & Trust Co.*, six of testator's ten children contested the will, alleging that testator's signature was obtained through undue influence and duress, and that testator was not even capable of executing the document. 70 S.E.2d at 853. Testator was ninety-years old when he died; he was worn out and feeble; was unable to work for several years prior to his death; and, at times, did not recognize his children. *Id.* at 854. Evidence was also submitted that for several years prior to testator's death, two of his daughters—who were among the chief beneficiaries under the will—were always present when testator's other children visited him. Based on this evidence, the court held that a subsequent action challenging the validity of the will was brought in good faith and based on probable cause. Accordingly, the no-contest clause was unenforceable against the challenger. *Id.*

In so holding, the court explained:

> In our opinion, a bona fide inquiry whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself.
> . . .
>
> There is a very great difference between vexatious litigation instituted by a disappointed heir, next of kin, legatee or devisee, without probable cause, and litigation instituted in good faith and with probable cause, which leads the contestant to believe that a purported will is not in fact the will of the purported testator.

Id. at 856-57.

In the present case, Testator amended both his will and revocable trust approximately fifteen months before he died to include provisions disinheriting beneficiaries who contested the validity of his estate plan. Accordingly, the second codicil to the will provides:

> Should any beneficiary of this Will or of the trust agreement . . . contest the validity of this Will or any provision thereof or attempt to prevent any provision from being carried out in accordance with its terms in legal proceedings or otherwise, then any interest provided for such beneficiary and his or her descendents is revoked and such beneficiary shall be deemed to have predeceased me for all purposes under this Will.

Similarly, the revocable trust was amended to provide:

> Should any beneficiary of this trust contest the validity of this trust or any provision thereof or attempt to prevent any provision thereof from being carried out in accordance with its terms in legal proceedings or otherwise, then any interest provided herein for such beneficiary and his or her descendents in this trust is revoked and such beneficiary and his or her descendents shall be deemed to have predeceased me for all purposes under this trust.

Despite the existence of these provisions, two of Testator's children, Mim and Scott, each filed lawsuits alleging that the will and trust documents were procured by undue influence. After extensive discovery was conducted, the trial court granted summary judgment in favor of the defendants. This Court affirmed.

After remittitur was issued, defendants moved for summary judgment seeking to enforce the no-contest clauses. After a hearing, the trial judge found that Mim and Scott "had sufficient evidence to support their reasonable belief" that Testator had been unduly influenced. In support of this ruling, the court cited the strife and discord in the family, particularly between Mim and her children, the Williams Children. The court also noted that Mim and Scott were treated less advantageously under the estate plan than they believed Testator had intended.[5] Accordingly, the judge granted summary

[5] Testator's estate totaled approximately $33,000,000. Upon Mrs. Russell's death, Scott was to receive $750,000 in trust for life. Testator's other sons, Donnie and Johnny, were each to receive a one-third share of the remaining balance. Mim, however, was to *share* the remaining one-third of the balance

judgment in favor of Mim and Scott, finding that they had probable cause to challenge the estate plan. As a result, the judge ruled that the no-contest clauses were invalid and unenforceable.

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.* at 493-94, 567 S.E.2d at 860.

Viewing the evidence in the light most favorable to Mim and Scott, we hold that summary judgment was improperly granted. Mim and Scott did not have probable cause to bring the underlying actions. Family discord and strife, coupled with a less-than-favorable inheritance, do not constitute probable cause. Moreover, the fact that Testator did not announce that the Williams Children would share in the estate is not reason to believe he was unduly influenced to favor them.

Any suspicions Mim and Scott may have had about the influence of others over Testator should have been dispelled by the overwhelming evidence of Testator's abilities. Unlike the testator in *Ryan*, Testator maintained his physical and mental health up until his death. He continued to serve as a federal judge, driving himself to and from work. He was fully capable of executing testamentary documents. He maintained his independence, was freely permitted to come and go from his home and office as he desired, having opportunities to visit relatives, friends, and business associates without supervision.

Therefore, because we find that Mim and Scott lacked probable cause to contest the estate plan, we reverse the trial court's order granting summary judgment. Consequently, we find that the no-contest clauses in both the will

---

equally with her children, the Williams Children, in trust for life. The estate plan also directed that upon Mim's death, funds remaining in her trust would pass to the Williams Children.

and trust are valid and enforceable. To hold otherwise would undermine Testator's intent. *See Matter of Clark*, 308 S.C. 328, 417 S.E.2d 856 (1992) (explaining that the cardinal rule for interpreting and construing a will is the determination of the testator's intent).

There is evidence throughout the record that Testator anticipated that certain beneficiaries would contest the validity of his estate plan. He told his attorney and his son, Donnie, that he anticipated a challenge. He asked one of his former law clerks to represent the Williams Children in the event a challenge was brought. He even went so far as to have himself examined by a psychiatrist to create a record of his testamentary capacity. And most importantly, he amended his will and revocable trust to include language explicitly providing that beneficiaries who contested the validity of the estate plan would have their interest revoked and "shall be deemed to have predeceased [him]."[6] In sum, he did all that he could have to ensure that his wishes would be respected. If a no-contest clause cannot be upheld under these facts, such a clause would not ever be enforceable.

Therefore, by giving the no-contest clauses their full, intended effect, we honor Testator's wishes.

II. Sanctions Against Mim

The trial court found that Mim improperly continued the litigation of this case, even after she realized that the facts did not support her claims. Consequently, the court ordered Mim to pay certain attorney's fees and costs

[6] Because the no-contest clauses at issue in this case provided that, in the event of a dispute, one's interest would be given over to another, the clauses were not merely *in terrorem* but were also intended to effect a forfeiture. *See Mallet v. Smith*, 27 S.C. Eq. (3 Rich. Eq.) 12 (1853) (explaining that when a clause merely states that beneficiaries shall not dispute the terms of a will, the clause is considered *in terrorem*, and forfeiture will *not* result; but when a clause also provides for the giving over of one's interest in the event of a dispute, then a forfeiture *will* result).

incurred from the point in the litigation that she should have realized the lawsuit was frivolous. We agree with the imposition of sanctions.[7]

Sanctions were imposed pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA)[8] and Rule 11 of the South Carolina Rules of Civil Procedure (SCRCP).

The FCPSA provides:

> Any person who takes part in the procurement, initiation, *continuation,* or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:
>
> (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and
>
> (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (Supp. 2002) (emphasis added). A party continues litigation with a proper purpose if he "reasonably believes in the facts upon which his claim is based and . . . relies upon the advice of counsel, sought in good faith and given after full disclosure of all facts within his knowledge . . . ." S.C. Code Ann. § 15-36-20 (Supp. 2002). When reviewing a trial court's decision to impose sanctions under the FCPSA, this Court takes its own view of the evidence. *Father v. S.C. Dep't of Soc. Services,* 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003).

---

[7] We have held that the litigation was initiated without probable cause. However, we award attorneys' fees and costs only for the period requested.

[8] We recognize that the General Assembly recently amended or repealed various sections of this Act. S.C. Code Ann. § 15-36-10 (Supp. 2005). Nonetheless, we apply the law as it existed at the time judgment was entered.

After the complaints in the present case were filed, defendants submitted the following information to the plaintiffs and to the court: (1) an affidavit from Testator's attorney, who drafted the will and trust documents; (2) affidavits from Testator's colleagues on the Fourth Circuit; (3) an affidavit from one of Testator's personal friends, a former Chief Justice of the South Carolina Supreme Court; (4) an affidavit from Testator's personal physician; and (5) copies of all of Testator's estate documents, dating back until the late 1950s.

The affidavit of Testator's attorney established that Testator's final will and trust documents reflected Testator's desires. The attorney described Testator as "competent, alert, and capable of making independent decisions." The attorney also stated that Testator "was aware of the extent and nature of his property, maintained control over his property and understood in detail his business affairs . . . ." Affidavits from Testator's colleagues and friends confirmed that Testator maintained both his independence and intellect up until his death. Testator's physician, who observed Testator six weeks before his death, described Testator as "independent and clear thinking, showing no signs of mental incapacity." Moreover, he stated that Testator "never complained . . . that he was mistreated by any person" and never showed signs of physical abuse. Finally, documents produced from Wachovia's files revealed that over the course of four decades, Testator had never treated his children equally in his estate plans.

The trial court ruled that, based on this information, Mim should not have continued the litigation. We agree. The affidavit from Testator's attorney made it clear that the estate plan represented Testator's wishes. Other affidavits confirmed that Testator was fully capable of thinking for himself and executing his testamentary documents as he desired. Mim's argument that she continued the litigation on the advice of counsel is without merit because subsequent discovery revealed that she was not entirely honest with her attorneys. Therefore, we hold that the trial court properly imposed sanctions pursuant to the FCPSA.

Mim was also sanctioned pursuant to Rule 11, SCRCP, for submitting an affidavit that the trial court later described as "false." We agree with the trial court's assessment of the affidavit and therefore hold that the court

properly imposed sanctions pursuant to Rule 11, SCRCP. Rule 11(a) provides, in part, as follows:

> The signature of an attorney or party [on a pleading, motion, or other paper] constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
>
> . . .
>
> If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

On appeal, the imposition of sanctions pursuant to this rule will not be disturbed absent an abuse of discretion. *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). "An abuse of discretion may be found if the conclusions reached by the court are without reasonable factual support." *Id.*

We hold that the trial court properly awarded sanctions pursuant to Rule 11. Mim's own deposition testimony directly contradicts statements made in her affidavit. In the affidavit, Mim stated that Testator "always promised and intended to treat his children equally with regards [sic] to his estate." She also stated that the Williams Children prevented her from seeing Testator. Finally, she attested that the Williams Children had been violent and abusive toward Testator.

Each of these statements was later contradicted in Mim's deposition testimony, demonstrating that the affidavit she signed and submitted to the court was not based on knowledge, information, or belief that there were grounds to support it. Accordingly, we hold that the trial court did not abuse its discretion in ordering Mim to pay reasonable attorney's fees and costs

from the time defendants' summary judgment motion was first argued, until the time when summary judgment was granted.[9]

Therefore, we affirm the trial court's imposition of sanctions against Mim.

III. The Williams Children

Like the other defendants, the Williams Children moved for sanctions pursuant to the FCPSA and Rule 11. But the court ruled that the Williams Children's motion was filed too late. We disagree.

Generally, a trial judge loses jurisdiction[10] over a case when the time to file post-trial motions has elapsed. *Ex parte Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004). An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of court, the judge retains control of the case. *Upchurch v. Upchurch*, 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006). As a result, a motion for sanctions must be filed within ten days of the notice of entry of judgment. *Pitman v.*

[9] Because we hold that Mim (and Scott) lacked probable cause *from the outset* to bring the underlying actions, we would support an award of reasonable attorney's fees and costs spanning the entire litigation of this case. But since we have been asked only whether the trial court properly awarded fees and costs measured from the time summary judgment was first argued until the time it was granted, we affirm the amount awarded, limited as it may be.

[10] Jurisdiction refers to the trial court's authority to retain jurisdiction over the case, not the court's subject matter jurisdiction. *See Ex parte Beard*, 359 S.C. at 358. (explaining that the ten day rule is a time limitation on the court's ability to retain the case not the power of the trial court to hear cases of that nature).

Republic Leasing Co., Inc., 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002).[11]

In the present case, the trial judge signed the order granting summary judgment on April 27, 2001. That same day, the trial judge faxed a letter to all attorneys, including the Williams Children's attorneys, notifying them that the order was being filed that day. In addition, the clerk of court file-stamped the judgment sheet on April 27, indicating that the order was filed that day. However, judgment was not entered by the clerk until May 8, 2001.

The Williams Children filed their motion for sanctions on May 14, 2001, which is within the ten day time limit. Therefore, the trial court erred in finding that it lacked jurisdiction to consider the motion. Accordingly, the issue of sanctions pursuant to the FCPSA and Rule 11 should be remanded to the trial court.

CONCLUSION

Because Mim and Scott did not have probable cause to contest the estate plan, we reverse the trial court's decision granting summary judgment in their favor. We also hold that the trial court properly imposed sanctions against Mim. However, we hold that the trial court erred in declining to address the issue of sanctions sought by the Williams Children. Therefore,

[11] We do distinguish between the FCPSA and the Rule 11 sanctions. There is no requirement that a motion for sanctions made pursuant to Rule 11 be made within ten days from notice of entry of judgment. *See Ex parte Beard*, 359 S.C. at 359-60, 597 S.E.2d at 839 (holding that a motion for sanctions pursuant to the FCPSA must be filed within ten days of notice of entry of judgment but not a motion under Rule 11). As a result, we decline to address what time limit is proper with regard to the Rule 11 sanctions because the issue is not before us. However, since the motion made pursuant the FCPSA is proper it is only logical that the Rule 11 motion was timely according to *Ex parte Beard*. *See The Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (stating that criteria for Rule 11 sanctions are essentially the same as those for sanctions under the FCPSA).

the issue of sanctions is remanded to the trial court for a decision on its merits.

MOORE, WALLER, PLEICONES, JJ., and Acting Justice Perry M. Buckner, concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth Ray Martin, Respondent.

Opinion No. 26191
Submitted June 26, 2006 – Filed July 24, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Jason B. Buffkin, of West Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to reinstatement of the Deferred Disciplinary Agreement under a renewed schedule, an admonition, or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Since his admission to the practice of law in 1999, respondent has been a sole practitioner. In January 2002, Client A retained respondent to represent her in a claim to recover money and property from a former boyfriend. During the representation, respondent failed to ensure that his office had a system for accurate recordation and retention of incoming telephone messages and he lost documents related to Client A's case.

Respondent admits that, from January through June 2002, his only action on behalf of Client A was the preparation of one demand letter; he concedes, however, that he has no proof that he actually prepared the letter. Respondent further admits he knowingly failed to respond to Client A's inquires regarding the status of her case.

In July 2002, respondent sent a letter to Client A informing her that he did not have time to handle her case. He returned all fees paid by Client A and advised her regarding the statute of limitations.

During its investigation of this matter, respondent knowingly failed to respond to two separate telephone messages from ODC, but otherwise fully cooperated with ODC's investigation into this matter.

Matter II

On August 27, 2004, respondent entered into a Deferred Disciplinary Agreement in resolution of the grievance discussed above. Respondent agreed as follows: 1) to retain the services of a law office management advisor approved by ODC within fifteen days; 2) to file with ODC an initial report by the advisor within sixty days; and 3) that failure to comply with the terms of the agreement would constitute misconduct. An Investigative Panel of the Commission on Lawyer

Conduct accepted the Deferred Disciplinary Agreement and, by letter dated September 30, 2004, ODC notified respondent that the deadlines in the agreement would be measured from September 30, 2004.

Respondent did not meet the deadlines for hiring a law office management advisor and filing a report with ODC. Respondent states he had spoken with an advisor and that his failure to hire the advisor was due to his inability to pay the fee. Respondent made no attempt to contact ODC to request an extension of time or otherwise discuss the matter until contacted by ODC several months later.

The deferment contained in the Deferred Disciplinary Agreement was subsequently revoked and the grievance reopened. Nevertheless, respondent represents that, on his own initiative, he hired a law office management advisor who completed a review of his office procedures and that he has implemented the advisor's recommendations.

Matter III

In May 2004, respondent was retained by Client B for purposes of a warranty matter. At the time, respondent told Client B he hoped the matter would be resolved in six months. Respondent sent a letter to the defendant in May 2004.

Client B alleges he contacted respondent in October 2004, at which time respondent assured him he would call the following Monday and brief him on the status of the warranty matter. Despite the promise, respondent failed to contact Client B during the remainder of 2004.

On April 12, 2005, Client B contacted respondent. Respondent informed him that his warranty had expired in January 2005 but that respondent had preserved his claim prior to that date. Respondent failed to provide Client B with any documents or other evidence of claim preservation.

Respondent represents Client B's claim is preserved and he continues to represent Client B in this matter.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.1 (lawyer shall provide competent representation), Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(9) (it shall be ground for discipline for lawyer to willfully fail to comply with the terms of a finally accepted deferred disciplinary agreement).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David G. Ingalls, Respondent.

Opinion No. 26192
Submitted June 26, 2006 – Filed July 24, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to issuance of either an admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent practices law primarily in the area of real estate transactions. He also owns a title insurance agency known as Hanover Title Agency, Inc., (Hanover) which is located on the premises of his law office.

During 2001 and 2002, Hanover was owned by respondent and his then-employee Margaret McNelis. McNelis is not a lawyer.

Since the late 1990s and at respondent's direction, McNelis regularly closed real estate transactions on respondent's behalf when he was not present. On at least 49 such occasions between April 2001 and July 2002, respondent was on vacation and not in the office when McNelis closed transactions and signed closing documents on respondent's behalf. On other occasions, McNelis closed real estate transactions at respondent's direction because respondent was delayed in returning to the office from other business or the closing occurred at a time other than originally scheduled and when respondent was unavailable.

Respondent represents, and ODC does not dispute, that his standard procedure was to personally attend real estate closings and, if he could not, to arrange for another attorney to conduct the closing on his behalf. Respondent represents that most of his closings occurred in his presence or that of another lawyer; however, when neither he nor another lawyer were available, it was standard procedure to have McNelis conduct the closing.

Respondent now recognizes that a lawyer must personally conduct the closing of every real estate transaction and that, by knowingly allowing a non-lawyer to close real estate transactions, he assisted in the unauthorized practice of law. Respondent represents that it is now his standard procedure to conduct real estate closings in the presence of a lawyer.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.1 (lawyer shall provide competent representation), Rule 5.3(b) (lawyer having direct supervisory authority over non-lawyer shall make reasonable efforts to ensure the person's conduct is compatible with the professional obligations of the lawyer), Rule 5.3(c) (lawyer shall be

responsible for conduct of non-lawyer that would be a violation of Rules of Professional Conduct if engaged in by a lawyer), Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law), and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate the Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Russ and Lee Pye, Justin Enterprises, a South Carolina General Partnership, **Appellants,**

v.

Estate of Dorothy T. Fox, John Richard Fox, III, A Personal Representative, Estate of John C. Fox, and G. Thomas Hill (Tommy Hill), **Respondents.**

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

Opinion No. 26193
Heard January 5, 2006 – Filed July 24, 2006

AFFIRMED

Chalmers C. Johnson, of Chalmers Johnson Law Firm, of Charleston, for Appellants.

Coming B. Gibbs, Jr., of Gibbs & Holmes, of Charleston, for Respondents Estate of Dorothy T.

Fox, John Richard Fox, III, as Personal Representative, and Estate of John C. Fox.
David W. Overstreet and David J. Harmon, both of Carlock Copeland Semier & Stair, LLP, of Charleston, for Respondent G. Thomas Hill.

ACTING JUSTICE ANDERSON: Russ and Lee Pye, along with their partnership, Justin Enterprises (the Pyes), initiated this action against the Estate of Dorothy T. Fox, the Estate of John C. Fox, John Richard Fox, III (the Foxes), and attorney G. Thomas Hill, alleging (1) abuse of process, (2) civil conspiracy, and (3) a violation of the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. section 15-36-10. The circuit court dismissed Hill from the action at the summary judgment stage, and directed a verdict in favor of the Foxes at the close of the Pyes' case. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The Pyes own two adjacent parcels of land, known as Encampment Plantation and Encampment Plantation Drive, located on Highway 17 in Charleston County. The Foxes have an easement for ingress and egress over Encampment Plantation Drive which allows them access from their land to Highway 17. At least one additional parcel separates the Pyes' land from the Foxes'.

Dr. Southard owns property adjacent to the Pyes and has an easement over Encampment Plantation Drive. Soon after Southard purchased his tract he began requesting that the Pyes alter the travel lane over Encampment Plantation Drive. Due to the layout of the lane, Southard was forced to make a ninety-degree turn in order to access his property. Southard engaged in logging on the land, and the cumbersome ninety-degree turn inhibited access for the logging trucks.

Initially, the Pyes resisted Southard's request to realign the travel lane. According to Mrs. Pye's testimony at trial, Southard's proposal would have required the removal of one of several "Grand Trees" which were protected by a county ordinance. However, an Act of God intervened when lightening struck one of the Grand Trees. As a result, the Pyes realigned the lane on Encampment Plantation Drive to turn at a forty-five-degree angle and pass over where the fallen Grand Tree once stood. The Pyes planted shrubbery to cover the former path. Despite the Pyes' rearrangement of the travel lane, several lawsuits ensued.

On February 27, 2002, attorney Hill filed suit 02-CP-10-903, which was captioned Estate of John Carlton Fox v. Justin Enterprises, A South Carolina General Partnership, Russ Pye and Lee Pye (Suit 903). However, John Carlton Fox's estate was already closed. Therefore, Suit 903 was eventually dismissed. On May 16, 2002, civil action number 02-CP-10-2131 (Suit 2131) was filed. Suit 2131 alleged the same causes of action as Suit 903, but was captioned Estate of Dorothy T. Fox, John Richard Fox, III, as Personal Representative, John Richard Fox, III, and Developments Unlimited, LLC. The Foxes were dismissed as plaintiffs from Suit 2131 on December 19, 2002, but the action continued with Dr. Southard's company, Developments Unlimited, LLC, as the sole plaintiff.

Thus, the Foxes filed two lawsuits against the Pyes, but they were eventually dismissed from both suits. Hill represented the Foxes in each action. Based on these lawsuits, the Pyes initiated the case sub judice against the Foxes for abuse of process, civil conspiracy, and violation of S.C. Code Ann. section 15-36-10, the South Carolina Frivolous Civil Proceedings Sanctions Act, and against Hill on the civil conspiracy and frivolous proceedings act claims.

Hill moved for summary judgment on the civil conspiracy cause of action. The circuit judge granted the motion reasoning the Pyes stated the same claim under the frivolous proceedings act.

Subsequently, Hill filed a motion for summary judgment on the frivolous proceedings act claim. The court scheduled the summary judgment

motion in conjunction with the Pyes' Rule 59 motion to alter or amend. The Pyes agreed to withdraw the frivolous proceedings act claim based on In re Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004). The court of appeals, in In re Beard, held that the Frivolous Proceedings Sanctions Act was subject to the general ten-day limitation for post-trial motions. Thus, the Pyes' claim under the act was time barred.

The court then heard the Pyes' Rule 59(e) motion. The judge previously had granted summary judgment finding the civil conspiracy claim was adequately addressed by the frivolous proceedings cause of action. According to the Pyes, because the frivolous proceedings claim was not viable, the basis for the court's decision did not apply. The following colloquy occurred at the hearing:

> **The Court:** What are you suggesting that he did outside of his duty as a lawyer? That's the problem. I didn't hear anything that he did, or didn't do, that wasn't really tied to what his responsibilities were to his client.
>
> **Ms. Hunt:** Essentially, Your Honor, the evidence sets forth in my memoranda, that Mr. Hill had conversations with Mr. Fox prior to filing the lawsuit that Mr. Fox—Mr. Fox testified in his deposition that he actually took it upon himself to file the lawsuit and that he didn't inform him that the estate was closed. He acted outside that realm when he takes it upon himself to give people permission to enter upon the plaintiffs' property to measure trees—he ventured—he's outside that attorney-client relationship by—
>
> . . . .
>
> **The Court:** [D]o you have any proof that he gave them permission to go anywhere outside the easement?
>
> **Ms. Hunt:** No, Your Honor.

The Court: Okay. Then as long as it is confined to the easement, then he had a duty to do what he did. Okay. Thank you.

Ms. Hunt: Thank you, Your Honor.

The Court: I deny the Motion to Reconsider.

The case was tried before a jury with two causes of action surviving against the Foxes—abuse of process and civil conspiracy. At the close of the Pyes' case, the Foxes moved for a directed verdict. The court found no evidence of an ulterior purpose or willful abuse of process in the proceedings the Foxes initiated. Therefore, the judge directed a verdict on the abuse of process claim. The Pyes do not appeal this ruling. Next, the circuit court addressed the civil conspiracy claim:

> As to the conspiracy, I understand the dilemma here, Ms. Hunt, and I understand you're contemplating appealing that. I realize that situation. There is no evidence, because Mr. Hill had been dismissed prior to this lawsuit. So there was no—you couldn't have really had any testimony concerning that. So, there's no evidence concerning a conspiracy on the part of Mr. Fox. He can't conspire with himself. That being the case, the Court would also grant the directed verdict as to the conspiracy action and, therefore, directs a verdict for the Defendant in this matter.

The Pyes present two issues on appeal: (1) whether the circuit court erred in granting summary judgment to dismiss the civil conspiracy cause of action against Hill; and (2) whether the circuit court erred in directing a verdict in favor of the Foxes.

STANDARD OF REVIEW

Summary Judgment

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).

Directed Verdict

In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003); Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002).

This Court will reverse only where there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law. Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); Abu-Shawareb v. S.C. State Univ., 364 S.C. 358, 613 S.E.2d 757 (Ct. App. 2005); Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). Essentially, this Court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor. Harvey v. Strickland, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002); Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997).

LAW/ANALYSIS

I. Summary Judgment

A. Issue Preservation

The Pyes contend the circuit court erred in granting summary judgment in favor of Hill.

Generally, "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986). In Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995), this Court held "an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client."

For the first time on appeal, the Pyes allege that Hill breached an independent duty owed to them. According to the Pyes, Hill owed the Pyes a duty based on Rule 11, SCRCP and S.C. Code Ann. section 16-17-10, the

barratry statute. This issue was not presented to or ruled upon by the trial judge and is not preserved for our review.

It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. See generally Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000).

The Pyes raise for the first time on appeal the theory that Hill should be held liable for civil conspiracy on the basis of a duty he owed to them. They did not present this issue at the initial summary judgment hearing or at the Rule 59(e) hearing. Therefore, this issue is not properly before us, and we will not consider it now for the first time on appeal.

The theory the Pyes did raise to the trial judge at the Rule 59(e) hearing was that Hill should be held liable for acting outside the scope of his professional duties and in his own interest. In support of this argument the Pyes presented two factual incidents: (1) Hill allegedly asked Fox to join in litigation against the Pyes and then filed a lawsuit in the name of the Estate of John Carlton Fox without Richard Fox's permission; and (2) Hill granted a third party permission to enter Encampment Plantation Drive to take some measurements. The circuit court specifically addressed the granting permission to enter the land and declared that act was not outside the scope of Hill's representation of his client. The Pyes do not appeal this aspect of the judge's ruling.

The court did not address Hill's alleged solicitation of Fox or his filing of the lawsuit without the client's knowledge. Hill contends that because the circuit court did not rule on this issue at the Rule 59(e) hearing, it is not preserved. We disagree.

Generally, an issue must be raised to and ruled upon by the circuit court to be preserved. Elam v. S. Carolina Dep't of Trans., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it

for appellate review"). However, an exception to this rule exists where an issue is raised but not ruled upon at a Rule 59(e) hearing. In Coward Hund, the court of appeals explained:

> "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988)). As one authority has noted, "**Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.**" James F. Flanagan South Carolina Civil Procedure 475 (2d ed. 1996).

Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999 (emphasis added); see also Collins Music Co., Inc. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) (quoting Coward Hund). In Pressley v. Lancaster County, 343 S.C. 696, 542 S.E.2d 366 (Ct. App. 2001), the court of appeals, citing Coward Hund, applied this principle when the court addressed the merits of an argument which Pressley raised at trial and in a Rule 59(e) motion, but which the trial court "summarily denied." See Pressley, 343 S.C. at 706 n.4, 542 S.E.2d at 371 n.4.

Professor Flanagan further edifies:

> One commentator noted: "Lawyers cannot force a trial judge to address a disputed issue." Moreover, the Supreme Court identifies two ways to preserve the issue: "a ruling by the trial judge or a post-trial motion." The language implies that a properly requested ruling under Rule 59 is sufficient without a specific judicial decision on the matter.

South Carolina Civil Procedure 475-76 (2nd ed. 1996) (footnotes omitted) (quoting Charles E. Carpenter, Jr. Preserving Error for Appeal, South

Carolina Lawyer, 15, 18 (Mar./Apr. 1995) and Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993)).

In the instant case, the Pyes raised the issue whether Hill acted outside the scope of his professional responsibilities by allegedly soliciting Fox to join in litigation against the Pyes and by filing the suit without Fox's knowledge. The Pyes asserted this theory both at the summary judgment hearing and the Rule 59(e) hearing. Consequently, this issue is preserved for our review, even though the circuit judge did not rule on the theory.

B. Civil Conspiracy

The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); see also Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp., 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) ("A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage.") (citation omitted). It is essential that the plaintiff prove all of these elements in order to recover. Lyon v. Sinclair Refining Co., 189 S.C. 136, 200 S.E. 78 (1938). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

"[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); accord Cowburn, 366 S.C. at 49, 619 S.E.2d at 453. This Court has observed:

> Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987). "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . ." Id. at 601, 358 S.E.2d at 153. An action for civil conspiracy is an action at law; the trial judge's findings will be upheld on appeal unless they are without evidentiary support. Gynecology Clinic v. Cloer, 334 S.C. 555, 514 S.E.2d 592 (1999).

Peoples Federal, 358 S.C. at 470, 596 S.E.2d at 57.

The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. Lee, 289 S.C. 6, 344 S.E.2d 379. "[A]n unlawful act is not a necessary element of the tort." Id. at 11, 344 S.E.2d at 382. Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989).

Although the theory of Hill's scope of representation is properly preserved, we do not need to reach this issue. Instead, we affirm the circuit court's grant of summary judgment under Rule 220(c), SCACR and I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). The Pyes failed to establish the elements of civil conspiracy. There was absolutely no evidence submitted at the summary judgment stage supporting an agreement between Hill and Richard Fox to injure the Pyes. The only evidence the Pyes proffered to establish that Hill's actions were outside the scope of his representation is the following statement from Richard Fox's deposition testimony: "I stopped by Mr. Hill's office and he asked me if we wanted to get involved in opening the road and I said yes. And at the time—I should have probably given him more information but he took it on his own and that's when he filed it under my father's estate which had already been

closed." Yet, even in a light most favorable to the Pyes, Richard Fox's statement does not establish any wrongful intent by the Foxes to injure the Pyes. Accordingly, we affirm the circuit court's summary judgment on the basis that the Pyes failed to offer proof of an agreement between Hill and the Foxes to injure the Pyes.

II. Directed Verdict

At the conclusion of the Pyes' case, the circuit court directed a verdict for the Foxes on civil conspiracy, finding that since Hill had been dismissed from the case, there could be no testimony about a conspiracy. The Pyes maintain that Hill's immunity from liability does not eviscerate their case against the Foxes for conspiracy. They claim the court should have considered the evidence of conspiracy against the Foxes rather than directing a verdict. We affirm pursuant to Rule 220(c), SCACR and I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

After reviewing the evidence presented at trial, we conclude the Pyes failed to satisfy the elements of civil conspiracy. The Pyes did not proffer any evidence of an agreement by Hill and the Foxes to injure the Pyes. A directed verdict is proper where the evidence raises no issues for the jury as to liability. See Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). Therefore, we affirm the court's directed verdict in favor of the Foxes based on the Pyes' failure to present evidence of a necessary element of civil conspiracy.

CONCLUSION

Hill's liability based on a duty owed to the Pyes was never raised to the circuit court and is not preserved for our review. Although the court did not rule on the issue of whether Hill ambulated outside the scope of his professional duties, the argument was raised at the summary judgment hearing and at the Rule 59(e) hearing. Consequently, the issue is adequately preserved. However, because the Pyes failed to offer evidence on all of the elements of civil conspiracy, we affirm summary judgment. Similarly, we

affirm the directed verdict in favor of the Foxes for failure to submit any evidence establishing a necessary element of civil conspiracy. Accordingly, the order of the circuit court is

AFFIRMED.

TOAL, C.J., MOORE, BURNETT, and PLEICONES, JJ., concur.