The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF JOSEPH W. GINN, III, PETITIONER

On August 9, 2010, Petitioner was definitely suspended from the practice of law for nine (9) months, retroactive to October 1, 2009. In the Matter of Ginn, Op. No. 26848 (S.C. Sup. Ct. filed August 9, 2010) (Shearouse Adv. Sh. No. 31 at 19). He has now filed a petition to be reinstated.

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

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

These comments should be received no later than October 22, 2010.

Columbia, South Carolina
August 23, 2010

The Supreme Court of South Carolina

In the Matter of
James S. Chandler, Jr., Deceased.

ORDER

The Commission on Lawyer Conduct has filed a petition advising the Court that James S. Chandler, Jr., Esquire, passed away on August 7, 2010, and requesting the appointment of an attorney to protect the interests of Mr. Chandler's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

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

Mr. Chandler maintained that are necessary to effectuate this appointment.

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

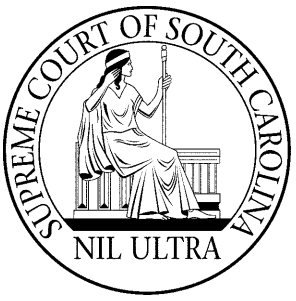
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Amy E. Armstrong, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Chandler's mail and the authority to direct that Mr. Chandler's mail be delivered to Ms.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

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

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

Columbia, South Carolina

August 26, 2010



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OF

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AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
August 30, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles T. Timmons, Jr., as personal representative of the Estate of Elizabeth N. Timmons — Petitioner,

v.

Jane T. Starkey and UBS Financial Services Inc., — Defendants,

of whom

UBS Financial Services Inc. is the — Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26874
Heard May 12, 2010 – Filed August 30, 2010

AFFIRMED

Mitchell C. Payne and Charles M. Black, Jr., both of Warner, Payne and Black, of Columbia, and S. Brook Fowler, of Carter Smith Merriam Rogers and Traxler, of Greenville, for Petitioner.

Cory Hohnbaum, of King and Spalding, of Charlotte, North Carolina, and James N. Gorsline, King and Spalding, of Atlanta, Georgia, for Respondent.

Ronald F. Barbare, of Lathan & Barbare, of Taylors, for Defendant.

JUSTICE PLEICONES: We granted certiorari to review a Court of Appeals decision reversing a circuit court order which had denied respondent's (UBS) request for arbitration of petitioner's claims. Timmons v. Starkey, 380 S.C. 590, 671 S.E.2d 101 (Ct. App. 2008). We affirm.

FACTS

In 1995, petitioner executed a durable power of attorney naming her daughter, defendant Starkey, as her attorney-in-fact. In 1996, petitioner opened an investment account with J.C. Bradford & Co. (Bradford). In June 2004, the power of attorney was properly recorded. UBS became the successor-in-interest to Bradford, and in September 2004, petitioner executed an investment service contract with UBS, which included this arbitration clause:

> BY SIGNING BELOW, I UNDERSTAND, ACKNOWLEDGE AND AGREE…that in accordance with the last paragraph of the Master Account Agreement entitled 'Arbitration[,]' I am agreeing in advance to arbitrate any controversies which may arise with…UBS Financial Services in accordance with the terms outlined therein[.]
>
> (Emphasis in original).

The arbitration clause of the Master Account Agreement provides, in part,

> Client agrees…that any and all controversies which may arise between UBS Financial Services, any of UBS Financial Services' employees or agents and Client concerning any account, transaction, dispute or the construction, performance or breach of this Agreement or any other agreement…shall be determined by arbitration.

Petitioner's daughter, defendant Starkey, was an employee of UBS. Starkey removed over $129,000 from petitioner's account, and used this money for her own benefit. Petitioner brought this suit against Starkey and UBS, and both defendants sought to compel arbitration. The trial court denied both requests, but only UBS appealed. On appeal, the Court of Appeals reversed, and held UBS was entitled to arbitration.

ISSUE

> Did the Court of Appeals err in finding that petitioner's claims against UBS should be arbitrated?

ANALYSIS

Petitioner concedes that the transaction at issue here, that is, Starkey's removal of funds from petitioner's UBS account is within the scope of the parties' arbitration agreement. She contends, however, that UBS's failure to prevent Starkey from removing the funds was outrageous and thus she should not be required to arbitrate her dispute. We disagree.

Arbitration clauses are not applicable to "'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Partain v. Upstate Auto. Group, ____ S.C. ____, 689 S.E.2d 602, 605 (2010). We agree that, in the abstract, it is probable that where an employee of an investment company steals money from an investor's account, that illegal act would not be found to be foreseeable from the investor's

standpoint, and thus the transaction would not be subject to arbitration. Compare Aiken v. World Fin. Corp., 373 S.C. 144, 644 S.E.2d 705 (2007) (not foreseeable that company's employees would steal client's identity).

Here, however, we do not have a theft of funds from petitioner's account. Instead, petitioner's complaint alleges that "Starkey utilized the authority granted to her under [petitioner's] power of attorney…[by] removing [petitioner's]funds and assets from accounts at UBS and transferring the same to Starkey's own accounts…." That Starkey was also a UBS employee does not make the transaction carried out by Starkey in her capacity as her mother's attorney-in-fact "illegal" or "outrageous." There is nothing in this complaint that would support a finding that UBS did anything illegal or outrageous in permitting Starkey, an individual acting pursuant to a durable power of attorney, access to the funds and assets in petitioner's account.

Starkey's actions may well be found to be outrageous and/or illegal at her trial, but her alleged misconduct in removing the funds and assets was not the result of her professional relationship with UBS, but rather was the result of her mother's decision to make Starkey her attorney in fact. Under the facts of this case, there is no allegation susceptible of a construction that UBS acted either illegally or outrageously. Accordingly, UBS's arbitration request should be honored. The decision of the Court of Appeals is

AFFIRMED.

KITTREDGE, J., and Acting Justices James E. Moore and E. C. Burnett, III, concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. Petitioner argues that the court of appeals erred in reversing the trial court's order denying UBS's request for arbitration of her claims. I agree, and would reverse the court of appeals' decision.

In my view, this case is on all fours with this Court's decision in *Aiken v. World Fin. Corp.*. 373 S.C. 144, 644 S.E.2d 705 (2007). In *Aiken*, we held that an employee's theft of a client's identity was not a foreseeable risk contemplated by the contract. An arbitration clause does not cover every potential suit between the signing parties; instead, it only applies to those claims foreseeably arising from the contractual relationship. Because the harm to the client was not foreseeable, we held the claim was not subject to the agreed upon arbitration clause. *Id.*, 373 S.C. at 151, 644 S.E.2d at 709.

The facts of this case are analogous to those in *Aiken*. In her complaint, Petitioner claims UBS breached its fiduciary duty by allowing its employee, Petitioner's daughter, to steal Petitioner's money and by failing to adopt, implement, and enforce policies and procedures to prevent employees from stealing and misappropriating clients' funds. In my view, even though Petitioner's daughter was her attorney-in-fact, her theft of the funds at issue was allegedly made possible because of her access to the accounts as an employee of UBS. The fact that Petitioner would be injured by UBS's failure to enforce or implement policies and procedures to prevent the misappropriation of funds by its employees was not foreseeable to Petitioner at the time she entered into the contract with UBS. Therefore, in my view, Petitioner's claims against UBS are not subject to the arbitration clause.

For this reason, I would reverse the court of appeals decision.

The Supreme Court of South Carolina

In the Matter of Jonathan L.B. Davis, Respondent.

ORDER

On January 5, 2010, respondent was arrested and charged with driving under the influence, driving with an expired license tag, and violation of the open container law. On April 9, 2010, respondent was arrested and charged with driving under the influence. The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a) and (b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has filed a return opposing the petition.

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

IT IS FURTHER ORDERED that J. Calhoun Watson, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s),

and any other law office account(s) respondent may maintain. Mr. Watson shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Watson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina

August 25, 2010

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Patricia H. Pitts and Robert G. Pitts, Respondents,

v.

Chad Fink, Appellant.

Appeal from Darlington County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4706
Submitted May 3, 2010 – Filed June 30, 2010
Withdrawn, Substituted and Refiled August 24, 2010

AFFIRMED

J. René Josey and Jeffrey L. Payne, of Florence, for Appellant.

Charles J. Hupfer, Jr. and Van Whitehead, of Florence, for Respondents.

PIEPER, J.: In this appeal challenging the enforcement of an Alabama default judgment in South Carolina, Chad Fink asserts the circuit court erred in denying his motion for relief from judgment, arguing the judgment was void for lack of personal jurisdiction. We affirm.[1]

FACTS/PROCEDURAL HISTORY

This action to domesticate an Alabama default judgment stems from a dispute over funds loaned by Patricia and Robert Pitts (Mr. and Mrs. Pitts) to Fink, Charles Hobbs, and Barton Pitts pursuant to a loan agreement. The $455,000 loan was in furtherance of the business interests of Roundabout Plantation, an Alabama L.L.C., which was operated by Fink, Hobbs, and Pitts for the purpose of developing a golf course and subdivision in Houston County, Alabama. Hobbs and Pitts were also named as defendants in the action on the loan.

The loan agreement, which was prepared by the borrowers, bore the caption, "State of Alabama, Houston County," and contained a choice of law provision stating, "[t]he parties hereto agree that this agreement shall be construed and enforced according to the laws of the State of Alabama." The agreement further provided that each of the members of Roundabout Plantation agreed and acknowledged they would be jointly and severally liable for the payment of all sums advanced and all sums which may become due under the terms and conditions of the agreement. A provision for the payment of attorney's fees, in the event the lender would have to employ the services of an attorney to collect any sums due under the agreement, was also included.

When Mr. and Mrs. Pitts were not repaid under the terms of the loan agreement, they initiated the underlying action in Houston County, Alabama. Despite signing the return of service, Fink did not file a response, and a judgment by default was entered against him for the sum of $795,940.78, plus interest and costs.

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

Thereafter, in an effort to enforce the Alabama default judgment in South Carolina, Mr. and Mrs. Pitts filed the judgment in Darlington County, South Carolina. Fink responded by filing a motion for relief from judgment pursuant to Rule 60(b)(4), SCRCP, and section 15-35-940 of the South Carolina Code (2005), asserting the Alabama judgment was void for lack of personal jurisdiction.

During the discovery that ensued, Mr. and Mrs. Pitts learned that Fink went to Alabama approximately a dozen times to monitor the progress of the golf course. Fink testified in his deposition that the loan proceeds were used for the construction and development of the golf course. Fink further testified that although he did not remember executing the loan agreement, his signature appeared on the document. He also conceded that the signature on the return of service to the summons and complaint appeared to be his own.

Following a hearing on the matter, the circuit court issued an order denying the motion for relief from judgment. The order further directed that the Alabama default judgment be entered in South Carolina in accordance with the notice of filing of foreign judgment by Mr. and Mrs. Pitts. Fink did not file a motion to alter or amend. This appeal followed.

STANDARD OF REVIEW

"An action to enforce a foreign judgment is an action at law." Minorplanet Sys. USA Ltd. v. Am. Aire, Inc., 368 S.C. 146, 149, 628 S.E.2d 43, 44 (2006). In an action at law, tried by a judge without a jury, we accept the findings of the trial court if there is any evidence to support the findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

This case involves a challenge to the domestication of an Alabama default judgment due to lack of personal jurisdiction; thus, we are not called upon to review the merits of the underlying claim. Pursuant to South

Carolina's version of the Uniform Enforcement of Foreign Judgments Act (UEFJA), a judgment debtor is permitted to file a motion for relief from judgment or a notice of defense to a foreign judgment on any ground for which relief from a judgment of this state is allowed. S.C. Code Ann. § 15-35-940(A) (2005); cf. Law Firm of Paul L. Erickson, P.A. v. Boykin, 383 S.C. 497, 505, 681 S.E.2d 575, 579-80 (2009) (striking a portion of section 15-35-940(b) as unconstitutional but severable from the remainder of the statute). Applying the appropriate constitutional and due process considerations, we find the motion for relief from judgment was properly denied.

Under Article IV, Section 1 of the United States Constitution, "Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other State." U.S. Const. art. IV, § 1. In accordance with this provision, every state is required to give to a judgment at least the res judicata effect which the judgment would be accorded in the state where rendered. Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co., 356 S.C. 644, 653, 591 S.E.2d 611, 616 (2004) (citing Durfee v. Duke, 375 U.S. 106, 109 (1963)). However, "[a] judgment of a court without jurisdiction of the person or of the subject matter is not entitled to recognition or enforcement in another state, or to the full faith and credit provided for in the federal Constitution." Fin. Fed. Credit Inc. v. Brown, 384 S.C. 555, 562-63, 683 S.E.2d 486, 490 (2009) (quoting 50 C.J.S. Judgments § 986 (1997)). Where the court of the issuing state has fully and fairly litigated and finally decided the question of jurisdiction, further inquiry into the jurisdiction of the issuing court is precluded. Durfee, 375 U.S. at 111. Otherwise, "before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree." Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 705 (1982). Similarly, under the UEFJA, a judgment debtor may seek relief from a judgment due to a lack of personal jurisdiction. PYA/Monarch, Inc. v. Sowell's Meats & Servs., Inc., 327 S.C. 469, 473, 486 S.E.2d 766, 768 (Ct. App. 1997).

Turning to the instant case, since the issue of personal jurisdiction in Alabama was neither fully litigated nor finally decided, we undertake the

jurisdictional inquiry suggested in Underwriters Nat'l Assurance Co. When determining the validity and effect of a foreign judgment based on lack of personal jurisdiction, courts look to the law of the state that rendered the judgment. Fin. Fed. Credit Inc., 384 S.C. at 566-67, 683 S.E.2d at 492. Thus, to ascertain whether the Alabama court properly exercised jurisdiction over Fink, we must consult Alabama law regarding personal jurisdiction.

Alabama's long-arm rule authorizes the assertion of personal jurisdiction to the limits of due process under the federal and state constitutions. Leithead v. Banyan Corp., 926 So.2d 1025, 1030 (Ala. 2005) (noting "Alabama's long-arm 'statute,' which is actually Rule 4.2, Ala. R. Civ. P., extends to the limits of due process.").[2] Alabama courts have interpreted the due process rights guaranteed under the Alabama Constitution to be coextensive with the due process rights guaranteed by the United States Constitution. Elliott v. Van Kleef, 830 So.2d 726, 730 (Ala. 2002). Courts employ a two-pronged test for due process. First, the defendant must have certain minimum contacts with the forum state. Id. at 730-31 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Second, the exercise of jurisdiction over the defendant must not offend "traditional notions of fair play and substantial justice." Int'l Shoe Co., 326 U.S. at 316. Under the minimum contacts prong, the defendant's conduct and connection with the forum state must be "such that [the defendant] should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). Further, "the minimum contacts test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to

[2] Effective August 1, 2004, Rule 4.2 was amended and rewritten. Rule 4.2, Ala. R. Civ. P. (committee comments). The former Rule 4.2 included a "laundry list" of types of conduct that would subject an out-of-state defendant to personal jurisdiction in Alabama, as well as containing the "catchall" clause now contained in the new 4.2(b). Id. According to the committee comments to the amendment, "[b]ecause the 'catchall' clause has consistently been interpreted to go to the full extent of federal due process . . . it is no longer necessary to retain the 'laundry list' in the text of the Rule." Id. Likewise, whether we apply the former Rule 4.2 or the new Rule 4.2, our analysis of Alabama's long-arm "rule" in the matter at hand remains the same.

determine whether the requisite affiliating circumstances are present." Kulko v. Sup. Ct. of Cal., 436 U.S. 84, 92 (1978) (internal quotation omitted).

The level and character of a party's minimum contacts is assessed based on whether the contacts are general or specific. Ex Parte Full Circle Distribution, L.L.C., 883 So.2d 638, 644 (Ala. 2003). "General contacts, which give rise to general personal jurisdiction, consist of the defendant's contacts with the forum state that are unrelated to the cause of action and that are both 'continuous and systematic.'" Ex Parte Phase III Constr., Inc., 723 So.2d 1263, 1266 (Ala. 1998) (Lyons, J., concurring) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984)). "Specific contacts, which give rise to specific personal jurisdiction, consist of the defendant's contacts with the forum state that are related to the cause of action." Id. (citing Burger King Corp., 471 U.S. at 472-75). "Although the related contacts [for specific jurisdiction] need not be continuous and systematic, they must rise to such a level as to cause the defendant to anticipate being haled into court in the forum state." Id.

Because Fink had no "continuous and systematic" contacts with Alabama, principles of general jurisdiction are not controlling. See Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 416. Thus, we confine our analysis to the nature and extent of Fink's contacts in the context of specific jurisdiction. In this situation, the jurisdictional inquiry must focus on "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Additionally, there must exist a clear, firm nexus between the acts of the defendant and the allegations forming the basis of the complaint. Duke v. Young, 496 So.2d 37, 39 (Ala. 1986). Pursuant to that analysis, "[t]he substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." Asahi Metal Indus. Co. v. Sup. Ct. of Cal., 480 U.S. 102, 112 (1987) (internal quotation omitted). "This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." Burger King Corp., 471 U.S. at 475 (internal quotations omitted) (internal citations omitted).

In regard to contractual relationships, the United States Supreme Court has emphasized "the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.'" Id. at 479 (quoting Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316-17 (1943)). "It is these factors- prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing- that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." Id.

Applying these principles to the present case, we find Fink's contacts suffice to meet the requirements of personal jurisdiction in Alabama. Fink executed the loan agreement as a part-owner of Roundabout Plantation, an Alabama L.L.C., and the proceeds of the loan were to be used to construct a golf course and subdivision owned and operated by Roundabout Plantation in Alabama. The loan payments were also to be made from the proceeds of Roundabout Plantation's Alabama operations. By constructing the golf course and subdivision in Alabama from the loan proceeds and by traveling to Alabama periodically to oversee its operation and to monitor the use of the loan proceeds, Fink established a continuing relationship with Alabama in connection with the loan.

Furthermore, the loan agreement was captioned "Houston County, Alabama," and contained an Alabama choice of law provision. In Corporate Waste Alternatives, Inc. v. McLane Cumberland, Inc., 896 So.2d 410 (Ala. 2004), the Supreme Court of Alabama was presented with the issue of personal jurisdiction in a dispute concerning a contract that contained an Alabama choice of law provision. There, in contemplation of the ramifications of the choice of law provision, the court noted, "the provision in the contract stating that the contract would be governed by Alabama law should have further alerted [the nonresident defendant] that it might reasonably anticipate being haled into court in [Alabama]." Corporate Waste Alternatives, Inc., 896 So.2d at 414 (citing Elliott, 830 So.2d at 730) (internal quotations omitted). While we recognize that a choice of law provision

standing alone would be insufficient to confer jurisdiction, it is certainly relevant under the facts of this case. See Burger King Corp., 471 U.S. at 482 (stating that a choice of law provision is relevant but "such a provision standing alone would be insufficient to confer jurisdiction").

Notwithstanding the caption and choice of law provision, the terms of the agreement itself reveal the loan was inextricably linked with Fink's Alabama business. As established by the agreement's identification of the "Borrower" as "all members of Roundabout Plantation, L.L.C.," this direct connection to the Alabama business resonates throughout the agreement. From the subsequent clause indicating "Roundabout Plantation, L.L.C. is developing a subdivision and golf course in Houston County, Alabama" to the express statement that the loan is "for use in the construction and development of the subdivision and golf course described hereinabove," the plain language of the agreement established a direct link to Alabama. This link is further reinforced by the terms of the agreement governing the use of proceeds and payment. In particular, the agreement designated the proceeds of the loan to be used "only for the purposes set forth herein and for the payment of accrued interest during the term of this loan" and established the term of the loan based on the progress of Roundabout Plantation's Alabama development, stating the term of the loan shall be for a period of five years "or until such time as fifty (50%) percent of the residential lots contained within the Roundabout Plantation, L.L.C. development in Houston County, Alabama shall have been sold."

With specific regard to minimum contacts, Fink's deposition testimony is also instructive. In particular, Fink's testimony confirmed that the loan proceeds were used for the construction and development of Roundabout Plantation. He further testified that he traveled to Alabama on at least twelve occasions over the course of two years to monitor the progress of the development. For instance, Fink testified he visited the golf course on one occasion to check up on the profit and loss statements for the canteen. On that visit, Fink spoke with the individual who ran the golf course canteen to verify whether the canteen's sales were consistent with those in the profit and loss statements. Fink's actions in traveling to Alabama for the purpose of monitoring the progress of the Alabama development demonstrate a nexus

between his undertaking as a part-owner of Roundabout Plantation and his responsibilities under the loan agreement. Moreover, Fink's actions in furtherance of his obligations as part-owner of Roundabout Plantation under the loan agreement were purposely directed toward the forum state so as to establish a substantial connection to Alabama. Most notably, Fink's conduct with the forum was not the result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.

In asserting Fink's contacts lacked a firm nexus to the allegations of the complaint, Fink relies on Duke v. Young, 496 So.2d 37 (Ala. 1986), and its application of the "effects test" outlined in Calder v. Jones, 465 U.S. 783 (1984). These cases are distinguishable. In Calder, the United States Supreme Court approved a test employed by the California courts for determining personal jurisdiction over nonresident defendants who allegedly committed an intentional tort outside the forum. Id. at 787. Rather than focusing only on the defendant's conduct within or contacts with the forum, the "effects test" set forth in Calder allows long-arm jurisdiction to be based on the effects within the forum of tortious conduct outside the forum. Id. Subsequently, in Duke v. Young, the Supreme Court of Alabama applied the "effects test" articulated in Calder. Duke, 496 So.2d at 39. There, in finding personal jurisdiction was proper, the Duke court, citing Calder, noted "[t]he defendants' 'intentional, and allegedly tortious, actions were expressly aimed at' Alabama." Duke, 496 So.2d at 40. While courts are split in their interpretation of the breadth of the Calder "effects test," courts unanimously agree the test requires that the defendant commit an intentional tort aimed at the forum state.[3] See Walker v. Biogistics, Inc., 2009 WL 856998, 1 (S.D. Ala. 2009) (noting "the 'Calder effects test' for personal jurisdiction requires

[3] See also Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 398 n. 7 (4th Cir. 2003) (stating the "'effects test' of specific jurisdiction is typically construed to require that the plaintiff establish that: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.").

'the commission of an intentional tort [ ] expressly aimed at a specific individual in the forum whose effects were suffered in the forum.'" (quoting Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008)). As the allegations in the complaint in the present action remain purely contractual, we find consideration of the "effects test" unwarranted.

In sum, based on the language of the loan agreement and Fink's corresponding actions purposely directed toward Alabama, we conclude Fink had fair warning of the link between the loan and Alabama. Furthermore, as in Burger King and Corporate Waste Alternatives, Fink's direct contacts with Alabama in monitoring the use of the loan proceeds and the progress of the Alabama development in conjunction with the choice of law provision designating the law of Alabama as the governing law bolster his deliberate affiliation with Alabama and the reasonable forseeability of possible litigation there. See Burger King Corp., 471 U.S. at 482 (holding the defendant "'purposely availed himself of the benefits and protections of Florida's laws' by entering into contracts expressly providing that those laws would govern franchise disputes."); Corporate Waste Alternatives, Inc., 896 So.2d at 414 (noting "the provision in the contract stating that the contract would be governed by Alabama law should have further alerted [the nonresident defendant] that it might reasonably anticipate being haled into court in [Alabama]."). Thus, based on these actions, we conclude Fink's contacts with the state of Alabama reasonably suggest Fink should have anticipated being haled into court in Alabama.

Having determined the requisite minimum contacts have been established, we now turn to whether the assertion of personal jurisdiction comports with "traditional notions of fair play and substantial justice." See Int'l Shoe Co., 326 U.S. at 316. In addressing this prong, we must consider the contacts in light of other factors, such as the burden on the defendant of litigating in the forum state, as well as the forum state's interest in adjudicating the dispute. Elliott, 830 So.2d at 731. Initially, we note Fink has not argued on appeal that litigation in Alabama would be unfair or burdensome; thus, consideration of this argument is not preserved for review. See Hiller Invs. Inc. v. Insultech Group, Inc., 957 So.2d 1111, 1119 (Ala. 2006) (holding the court need not analyze whether subjecting the nonresident

defendant to Alabama's jurisdiction would violate the traditional notions of fair play and substantial justice where the nonresident defendant has not argued those issues on appeal).

Nonetheless, were we to reach this issue, we note that Fink submitted to the jurisdiction of Alabama in two other foreclosure suits pertaining to Roundabout Plantation. Specifically, Fink was involved in litigation against Frizzell Construction Company concerning the breach of a promissory note; he also was involved in a similar action by Peoples Community Bank in 2002. Both actions were maintained in Alabama, and Fink did not plead lack of personal jurisdiction in either case. Notwithstanding, Fink's numerous contacts with Alabama relative to Roundabout Plantation in conjunction with his visits to monitor the progress of the development indicate the burden of defending an action in Alabama does not rise to the level of being inconsistent with traditional notions of fair play and substantial justice. See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (noting that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957))).

CONCLUSION

Viewing the totality of the facts in the instant case, we find, for purposes of personal jurisdiction, Fink maintained sufficient minimum contacts to satisfy Alabama's long-arm rule and federal due process. Consequently, the enforcement of the Alabama default judgment against Fink in South Carolina was proper.[4] Accordingly, the order of the circuit court is

[4] Fink also appeals the amount of attorney's fees awarded in the judgment. Although raised at the hearing, we find this issue is not preserved as it was neither ruled upon by the circuit court nor raised by way of a post-trial motion to alter or amend. See Elam v. S.C. Dep't. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("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.") (emphasis in original). In fact, attorney's fees were

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

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not even mentioned in the order; thus, even if we were to find the amount of fees awarded troubling, the matter is not properly before us for review.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William P. Melton and Ann Frazier Melton, Appellants,

v.

Medtronic, Inc., Dr. Jennifer Feldman, and Columbia Heart Clinic P.A., d/b/a Columbia Heart and/or Columbia Heart Cardiologists, Defendants,

Of Whom Dr. Jennifer Feldman, and Columbia Heart Clinic P.A., d/b/a Columbia Heart and/or Columbia Heart Cardiologists are Respondents.

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

Opinion No. 4729
Heard April 14, 2010 – Filed August 25, 2010

AFFIRMED

Glenn E. Bowens, of Winnsboro, for Appellants.

Martin S. Driggers, Jr., of Hartsville, for Respondents.

WILLIAMS, J.: In this civil case, we must determine whether the circuit court erred in granting summary judgment in favor of Dr. Jennifer Feldman (Dr. Feldman) and Columbia Heart Clinic (collectively Respondents) on William and Ann Melton's (collectively Appellants) causes of action for medical malpractice, negligent misrepresentation, abandonment, and intentional infliction of emotional distress.[1] We affirm.

FACTS

William Melton (Melton) is a seventy-four-year-old male who resides in Winnsboro, South Carolina. In 2002, Melton had what he described as a "flicker of a blackout," which caused him to become unsteady when he stood up. Following this episode, Melton visited his family physician, Dr. Manuel Venegas (Dr. Venegas), in Chapin, South Carolina. After putting Melton through a series of tests, Dr. Venegas concluded Melton did not have a serious heart problem. However, as a safety precaution, Dr. Venegas referred Melton to Dr. Feldman, a cardiologist in Columbia, for further assessment.

Dr. Feldman arranged for Melton to have a catheterization performed on June 24, 2002. Before the catheterization, Melton was given a form to sign that would authorize Dr. Feldman to implant a cardioverter defibrillator (ICD) into Melton's heart if necessary. Although Melton does not recall being told exactly what an ICD would do or whether he actually needed one, he signed the form.

[1] The trial court also granted summary judgment on Melton's causes of action against Dr. Feldman for breach of warranty of fitness for a particular purpose and express breach of warranty and on Melton's wife's claim for loss of consortium. Melton does not challenge these rulings in this appeal.

After the catheterization, Dr. Feldman informed Melton he needed to have an ICD implanted. Dr. Feldman recommended an ICD made by Medtronic, Inc. (Medtronic). On June 25, 2002, Melton signed a consent form authorizing Dr. Feldman to implant a Medtronic Marquis ICD (the ICD) into his chest. Melton understood the purpose of the ICD was to deliver a shock to his heart if it needed regulating. However, Melton does not recall Dr. Feldman ever offering any advice on which type of ICD she would be implanting, which ones were better than others, or what the risks of implanting an ICD were. Further, according to Melton, when he asked Dr. Feldman how she chooses one company's ICD over another, she responded, "I choose according to which company's representative I like the best."

The summer after Dr. Feldman implanted the ICD, the ICD delivered an unexpected shock to Melton's heart. During his next visit, Dr. Feldman told Melton the ICD was "set at the wrong speed," and so she had a nurse adjust it accordingly. Thereafter, on the morning of June 10, 2005, Melton experienced yet another unexpected shock from the ICD as he was getting dressed. Melton's wife called for an ambulance, which took Melton to Providence Memorial Hospital.

At some point after the June 2005 incident, during a "normal defibrillator visit," a nurse informed Melton that up to 1.5 percent of the type of Medtronic ICDs that Melton had implanted in his chest "may suffer sudden and premature battery failure."[2] According to Melton, the nurse also stated Dr. Feldman "had known about the defect for about a year but [was not] allowed to tell patients that the battery might go dead at any moment . . . ." Neither the nurse nor Dr. Feldman gave Melton any advice as to whether to replace the ICD. Melton was, however, given a copy of a "Device Alert," which discussed the potential defect, how to monitor the battery of an

[2] The record is inconsistent as to the timing of the visit during which Melton found out about this potential defect in his ICD. Melton testified he found out about the defect after the June 10, 2005 incident that forced him to visit the hospital. However, the "Device Alert" form that informs patients about the defect was signed by Melton on May 10, 2005.

implanted ICD, and that the patient had the option of having a different ICD implanted. At one point, the Device Alert reads, "My signature below indicates that all of the information above has been explained to me including the risks and benefits of each course of action, and that I had a chance to ask questions about this information." Melton signed his name at the bottom of the Device Alert.

Melton and Dr. Feldman decided to replace the ICD with one made by Guidant. The surgery to replace the ICD was scheduled for July 6, 2005. Before that time, however, Melton read in the Wall Street Journal and other publications that Guidant, like Medtronic, was experiencing technical problems with their ICDs. When Melton called Dr. Feldman's office to discuss the surgery and the other kinds of ICDs that were available, a nurse told him Dr. Feldman was on vacation in Australia, and "if [he] wanted any information, to go to the website of the company." Upon returning from her vacation, Dr. Feldman called Melton. Melton claims Dr. Feldman was upset that Melton "didn't trust her choice of putting in a Guidant," and that she said he "shouldn't have any questions about it[.]" Ultimately, Dr. Feldman told Melton, "You don't trust me, you need to get another doctor, . . . and don't even come back to my group." Dr. Feldman did provide Melton the name of another doctor with the University of South Carolina; however, Melton never called that doctor.

Appellants commenced this action against Medtronic, Dr. Feldman, and Columbia Heart Clinic on April 17, 2006.[3] Appellants settled their claims against Medtronic. As part of discovery, the Respondents took depositions from Melton and his wife. Respondents also took depositions from three of

[3] Melton alleged ten causes of action: (1) products liability, negligence (against Medtronic); (2) products liability, strict liability (against Medtronic); (3) breach of warranty, merchantability (against Medtronic); (4) breach of warranty, fitness for a particular purpose (against all defendants); (5) breach of warranty, express (against all defendants); (6) medical malpractice and negligence (against all defendants); (7) negligent misrepresentation (against all defendants); (8) outrage (against Dr. Feldman); (9) abandonment (against Dr. Feldman); and (10) loss of consortium (against all defendants).

Melton's treating physicians: his current family physician, Dr. Venegas; his former family physician, Dr. Roger Gaddy (Dr. Gaddy); and his current cardiologist, Dr. John Beard (Dr. Beard). Neither Dr. Feldman nor the nurse with whom Melton spoke at Columbia Heart Clinic were deposed. Dr. Feldman and Columbia Heart Clinic moved for summary judgment on December 27, 2006.

The circuit court granted summary judgment as to all claims against the Respondents. As to Melton's causes of action for medical malpractice, negligent misrepresentation, and abandonment, the circuit court held those claims were "all de facto claims for medical malpractice" and, therefore, Melton was required to provide expert testimony. The circuit court found Melton failed to produce expert testimony establishing the standard of care, breach, and proximate causation. As to Melton's cause of action for outrage or intentional infliction of emotional distress, the circuit court found Melton presented "insufficient evidence that the conduct of [Respondents] was outrageous in any respect." As to Melton's two causes of action for breach of warranty, the circuit court held those were products liability claims. Accordingly, because neither of the Respondents was the "seller" of the ICD, summary judgment was appropriate. Finally, as to Melton's wife's action for loss of consortium, the circuit court held because her claim was dependent on Melton's claims, summary judgment was appropriate. This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law.'" Id. (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

LAW/ANALYSIS

A. Outrage/Intentional Infliction of Emotional Distress

Melton argues the circuit court erred in granting summary judgment in favor of the Respondents on his claim for outrage. We disagree.

To establish intentional infliction of emotional distress or outrage, a plaintiff must establish: (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it. Shupe v. Settle, 315 S.C. 510, 517, 445 S.E.2d 651, 655 (Ct. App. 1994). "Facts which may show extreme insensitivity on the part of the defendant do not necessarily establish the tort of outrage." Hawkins v. Greene, 311 S.C. 88, 91, 427 S.E.2d 692, 694 (Ct. App. 1993).

We find no evidence in the record suggesting that Dr. Feldman or Columbia Heart Clinic acted intentionally or recklessly to inflict severe emotional distress on Melton. Moreover, while Dr. Feldman's decision to dismiss Melton as a patient so close to the date of his scheduled surgery was arguably insensitive, we can hardly deem such conduct "so extreme and outrageous as to exceed all possible grounds of decency" or "utterly intolerable in a civilized community," especially in light of the fact that

Melton admitted Dr. Feldman provided him with the name of another cardiologist. Shupe, 315 S.C. at 517, 445 S.E.2d at 655.

Accordingly, we find no error in the circuit court's grant of summary judgment on this cause of action.[4]

B. Abandonment and Medical Malpractice

Melton argues the tort of medical abandonment is separate from and independent of the tort of medical malpractice. Consequently, he contends the circuit court erred in characterizing his abandonment cause of action as a "de facto claim[] for medical malpractice" and analyzing it under the traditional medical malpractice framework. We disagree.

"A physician commits medical malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) (citing Durham v. Vinson, 360 S.C. 639, 650-51, 602 S.E.2d 760, 766 (2004)). "[O]nce employed, a physician must attend the case as long as it requires attention, unless the relation of physician and patient is ended by mutual consent or is revoked by the dismissal of the physician. A physician cannot abandon a case without reasonable notice to the patient." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 56, 677

[4] Although Melton argues on appeal that Dr. Feldman's outrageous conduct consisted of implanting a defective device, failing to inform Melton of the risks involved with ICDs, failing to inform Melton for a year of the potential defect in his ICD, and abandonment, Melton's original complaint appears to limit his outrage cause of action to the alleged abandonment alone. Moreover, counsel for Melton conceded at oral argument that the abandonment was the only basis for the outrage cause of action. Consequently, we limit our analysis of the outrage cause of action to Dr. Feldman's alleged abandonment of Melton.

S.E.2d 32, 37 (Ct. App. 2009) (citing Johnston v. Ward, 288 S.C. 603, 610, 344 S.E.2d 166, 170 (1986)).

We find no South Carolina cases explicitly recognize medical abandonment as a tort separate from medical malpractice. Melton, however, argues Johnston recognizes medical abandonment as a separate tort, and that pursuant to Johnston, expert opinion was not necessary to establish that Dr. Feldman's abandonment of Melton did not comport with the recognized and accepted standard of care. Johnston involved wrongful death and survival actions brought by an executor against a number of physicians and a hospital for medical malpractice after the decedent died of a silicate overdose while at the hospital. Johnston, 288 S.C. at 605, 344 S.E.2d at 167. The only issue on appeal relating to abandonment was whether the trial court erred in allowing the psychiatrist's expert to testify that the psychiatrist's responsibility to the decedent terminated when the psychiatrist assigned care of the decedent to another doctor at the hospital. Id. at 610, 344 S.E.2d at 170.

We find Johnston does not recognize abandonment as a tort separate from medical malpractice; in fact, it illustrates that abandonment is but one form of medical malpractice. First, the court recognized at the outset of its opinion that the claim of abandonment was brought in the context of an action for medical malpractice. See Johnston, 288 S.C. at 605, 344 S.E.2d at 167 ("These wrongful death and survival actions . . . involve allegations of medical malpractice.") Second, expert testimony is required in cases involving medical malpractice claims. See David, 367 S.C. at 248, 626 S.E.2d at 3. Thus, the fact that the testimony regarding abandonment in Johnston came from an expert witness suggests that the claim for abandonment was merely part of the more general claim for medical malpractice.

A review of cases from other jurisdictions reveals medical abandonment is but one form of medical malpractice and that claims for medical abandonment are properly analyzed under the traditional medical malpractice framework. See Granek v. Texas St. Bd. of Med. Examiners, 172 S.W.3d 761, 766 n.2 (Tex. App. 2005) ("Patient abandonment is a form

of breach of duty in a medical malpractice action."); Bradford v. Rossi, 548 S.E.2d 70, 71 (Ga. App. 2001) ("A claim of abandonment, which is a tort, amounts to the same as negligent treatment. As such, the claim requires that the plaintiff file an expert affidavit.") (internal quotations and footnotes omitted); Lewis v. Capalbo, 720 N.Y.S.2d 455, 457 (N.Y. App. Div. 2001) ("It is well established that a doctor who undertakes to examine and treat a patient (thus creating a doctor-patient relationship) and then abandons the patient may be held liable for medical malpractice.") (citation omitted); Norton v. Hamilton, 89 S.E.2d 809, 812 (Ga. App. 1955) ("If a physician abandons a case without giving such notice or providing a competent physician in his place, it is a failure to exercise that care required by law, which failure amounts to a tort.").

Furthermore, we find the reasoning of Linog v. Yamplonksy, 376 S.C. 182, 656 S.E.2d 355 (2008) applicable to the present situation. In that case, our supreme court was asked to decide "whether South Carolina should recognize a separate and independent cause of action for medical battery, or whether such theories of liability are more properly analyzed under alternative and well-established causes of action." Id. at 187-88, 656 S.E.2d at 358. The supreme court held it should not, stating:

> We see little need to recognize an additional cause of action related to tortious injuries arising out of interactions with medical providers when the tort of medical malpractice fully covers all acts performed in relation to medical services and when the remaining area of private tort law applies to acts not related to medical services.

Id. at 187, 656 S.E.2d at 358 (emphasis added).

Medical abandonment, like medical battery, would "constitute an unnecessary and superfluous cause of action." Id. Consequently, medical abandonment should be analyzed as a medical malpractice claim because the act of improperly terminating the doctor-patient relationship logically fits into

the more general category of "not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances." David, 367 S.C. at 247, 626 S.E.2d at 3.

Accordingly, we find no error in the circuit court's ruling that Melton's claim for abandonment is a "de facto claim[] for medical malpractice."

C. Medical Malpractice

Melton argues the circuit court erred in granting summary judgment in favor of Dr. Feldman on his medical malpractice claims because he presented sufficient evidence to create a genuine issue of material fact as to that cause of action. We disagree.

Medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine issue of material fact to exist. David, 367 S.C. at 247, 626 S.E.2d at 3. Specifically, a patient alleging medical malpractice must provide evidence, through expert testimony, showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the physician's field of medicine under the same or similar circumstances, and (2) that the physician departed from the recognized and generally accepted standards. Id. at 247, 626 S.E.2d at 4. Additionally, the plaintiff must show that the defendant's departure from such generally recognized practices and procedures was the proximate cause of his alleged injuries and damages. Id. at 248, 626 S.E.2d at 4.

Expert testimony need not come from a specialist in the same field as the defendant. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997) ("Defects in an expert witness' education and experience go to the weight, rather than the admissibility, of the expert's testimony"); Creed v. City of Columbia, 310 S.C. 342, 345, 426 S.E.2d 785, 786 (1993) ("A physician is not incompetent to testify merely because he is not a specialist in the particular branch of his profession involved."). However, "[r]egardless of the area in which the prospective expert witness

practices, he must set forth the applicable standard of care for the medical procedure under scrutiny and he must demonstrate to the court that he is familiar with the standard of care." David, 367 S.C. at 250, 626 S.E.2d at 5. Further, if the expert merely testifies as to his own personal standard of care, rather than the generally recognized and accepted standard of care, such testimony is insufficient to survive summary judgment. See Guinan, 383 S.C. at 57, 677 S.E.2d at 37-38 (holding expert's testimony was insufficient to survive summary judgment because the testimony, at most, showed the defendant deviated from the expert's personal standard of care rather than the generally recognized and accepted standard of care).

After reviewing Melton's arguments, we distill five instances in which he believes Dr. Feldman's conduct departed from the recognized standard of care: (1) failing to properly apprise Melton of the risks involved in implanting an ICD; (2) implanting a defective ICD; (3) using improper criteria to select the ICD from among other available models; (4) failing to inform Melton of the defect in the ICD and remove it in a timely manner; and (5) abandoning Melton on the "eve of surgery." We analyze each argument in turn.

1. Failure to properly advise of risks

Melton first argues Dr. Feldman committed malpractice by failing to properly inform him of the risks before implanting the ICD. We disagree.

Under the doctrine of informed consent, a physician who performs a diagnostic, therapeutic, or surgical procedure has a duty to disclose to a patient of sound mind, in the absence of an emergency that warrants immediate medical treatment, (1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved in the procedure, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure. Hook v. Rothstein, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct. App. 1984). The basis of the doctrine is the patient's right to exercise control over his or her own body by deciding intelligently for himself or

herself whether or not to submit to the particular procedure. Id. at 547-48, 316 S.E.2d at 695. "[T]he scope of a physician's duty to disclose is measured by those communications a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances." Id. at 553, 316 S.E.2d at 698.

"An informed consent action is no different from any other action for professional malpractice." Id. at 551, 316 S.E.2d at 696. A plaintiff must ordinarily establish the professional standard governing the scope of a physician's duty to inform a patient of the material risks inherent in a proposed treatment or procedure by expert medical evidence. Id. at 551, 316 S.E.2d at 697.

In this case, Melton failed to present evidence as to what was required of Dr. Feldman under the accepted and recognized standard of care governing informed consent between a cardiologist and patient. Neither Dr. Gaddy, Dr. Venegas, nor Dr. Beard testified as to what a cardiologist in Dr. Feldman's position should have done under the circumstances in terms of disclosure.

Furthermore, Melton failed to provide evidence that Dr. Feldman's failure to apprise him of the risks of ICD implantation was the proximate cause of his injuries. Specifically, Melton did not testify that, if he had been apprised of the risks, he would have chosen not to have an ICD implanted. See Hanselmann v. McCardle, 275 S.C. 46, 48-49, 267 S.E.2d 531, 533 (1980) ("Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided."). When asked whether he would have changed his decision to have the ICD implanted if Dr. Feldman had "sat [him] down and went through all the details of the operation," Melton replied, "I don't know because it didn't happen . . . I guess it would depend on what I heard."

Consequently, Melton failed to create a genuine issue of fact as to whether Dr. Feldman's failure to apprise him of the risks involved in implanting the ICD constituted malpractice.

2. Implanting a Defective ICD

Respondents argue the expert testimony in this case was insufficient to establish either (1) the standard of care for cardiologists implanting ICDs, or (2) that the ICD was defective. We agree.

Dr. Gaddy testified, "I don't put pacemakers in and . . . I'm not a cardiologist." Further, when Dr. Gaddy was asked whether he was going to render "any opinions as to whether or not Dr. Feldman deviated from the standard of care as a cardiologist in rendering any treatment to the plaintiff in this case," he responded:

> No, I don't think that I would. I mean, I'm not a cardiologist.
> . . .
>
> I think it would be inappropriate for me to, just as it would be inappropriate for radiologists to or urologists or anybody else of the same specialty.

Similarly, Dr. Venegas testified that as a family physician, he does not implant pacemakers and he would defer to the knowledge of a cardiologist on that issue. When Dr. Venegas was asked if he believed Dr. Feldman deviated from the standard of care in her treatment of Mr. Melton, he responded, "I cannot see where from the note[s] that I've been given from [Dr. Feldman] that she deviated from the standard of care in her medical treatment of Mr. Melton."

Dr. Gaddy and Dr. Venegas[5] failed to establish the standard of care for implanting ICDs, and therefore, their testimony was insufficient to create a genuine issue of material fact. See Botehlo v. Bycura, 282 S.C. 578, 587, 320 S.E.2d 59, 65 (Ct. App. 1984) (holding expert testimony by an

[5] Dr. Beard did not testify about the installation of the Medtronic ICD or whether he thought it was defective.

orthopedic surgeon in a case of alleged medical malpractice by a podiatrist failed to create a genuine issue of material fact because (1) the material question in the case was the standard required of podiatrists, not orthopedic surgeons, (2) the witness admitted he was not familiar with the procedure the defendant performed, and (3) when the orthopedic surgeon was asked if he held himself out as an expert, he answered, "No, not in podiatry, no").

Furthermore, Melton presented no evidence that the battery in the ICD was defective. If anything, his testimony suggests the battery in the ICD device was working too well; the ICD activated at times when he believed his heart rate was normal. At one point, Melton testified that the battery powering the ICD "never malfunctioned between the date that it was implanted and the date it was explanted." Further, to the extent the ICD was "defective" in the sense that it was prone to over-activation, Melton also failed to present evidence that Dr. Feldman or Columbia Heart Clinic knew this at the time Dr. Feldman implanted the ICD.

Accordingly, Melton failed to create a genuine issue of material fact as to whether Dr. Feldman's implantation of the ICD, in and of itself, constituted malpractice.

3. Improper Criteria for Selecting the ICD

Respondents contend even assuming, arguendo, the expert testimony on this issue establishes both the standard of care and a breach of that standard, summary judgment was nevertheless proper because Melton failed to present evidence of a causal link between Feldman's selection criteria and Melton's injuries. We agree.

When Dr. Gaddy was asked whether it would ever be proper for a physician to base the selection of a particular medical device on how much the physician liked the manufacturer's sales representative, he answered, "I never use that [as a criterion]." This testimony is insufficient to create a genuine issue of material fact because it only shows Dr. Feldman departed from Dr. Gaddy's personal standard of care; it does not show Dr. Feldman

departed from the generally accepted standard of care. See Guinan, 383 S.C. at 57, 677 S.E.2d at 37-38 (holding expert's testimony was insufficient to survive summary judgment because the testimony, at most, showed the defendant deviated from the expert's personal standard of care rather than the generally accepted standard of care).

When Dr. Venegas was asked the same question, however, he stated, "Definitely not, definitely not." Instead, Dr. Venegas testified it would be proper for a physician considering a medical device or drug to evaluate it based on "[t]he benefits outweighing the risks, the appropriateness of the situation . . . the various side effects, risks, alternatives." Arguably, this testimony constitutes evidence of both the generally accepted standard of care and a breach thereof.

Ultimately, however, we need not decide whether the expert testimony establishes the standard of care or breach because Melton presented no evidence showing that Dr. Feldman's selection criteria was the proximate cause of his injuries. See David, 367 S.C. at 248, 626 S.E.2d at 4 (holding the plaintiff must show that the defendant's departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages). See also Tumblin v. Ball-Incon Glass Packaging Corp., 324 S.C. 359, 365, 478 S.E.2d 81, 84 (Ct. App. 1996) (holding expert testimony is generally required to establish proximate cause in medical malpractice cases). Specifically, Melton failed to present evidence showing that, had Dr. Feldman employed different selection criteria, either (1) it would have led her to choose a different ICD, or (2) that a different ICD would not have caused him the same or similar problems. Hanselmann, 275 S.C. at 48-49, 267 S.E.2d at 533 ("Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided.").

Accordingly, Melton failed to create a genuine issue of fact as to whether Melton's selection criteria constituted medical malpractice.

4. Failure to Timely Inform of Defect

Here again, Respondents argue even if the expert testimony establishes that Dr. Feldman's failure to inform Melton of the potential defect in the ICD was a breach of the generally accepted standard of care, there is no evidence establishing that Dr. Feldman's failure to inform Melton of the potentially defective battery was the proximate cause of any of Melton's alleged injuries. We agree.

When Dr. Gaddy was asked, "Would it be an acceptable practice for a physician to wait over a year to inform a patient [that his ICD has the potential to fail without warning][,]" he responded:

> I would not think that would be appropriate. I mean, I think any time you have the potential of a problem with a device . . ., then I think it's incumbent upon [the physician] to make them aware of it.
> . . .
>
> I think [the physician] ought to let [the patient] know as soon as they are aware of it.

When Dr. Venegas and Dr. Beard were asked the same question, they responded, "That would be a long time," and "A year would be a little long," respectively. Thus, as with the testimony regarding the selection criteria, the testimony from the physicians arguably establishes that waiting a year to inform Melton was a departure from the generally recognized standard of care for any physician.

However, Melton presented no evidence establishing that Dr. Feldman's failure to inform Melton of the potential defect was the proximate cause of his injuries. None of the three experts testified that, in their professional opinion, Melton's injuries resulted from Dr. Feldman's failure to inform Melton of the defect. See Martasin v. Hilton Head Health System, 364 S.C. 430, 438, 613 S.E.2d 795, 799-800 (Ct. App. 2005) (citing Ellis v.

Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996)) ("When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the expert must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence.").

Furthermore, Melton testified that his injuries in this case derived, in part, from his inability to engage in his normal activities due to the fear that the ICD would discharge unexpectedly. However, this "injury" is ostensibly shared, in varying degrees, by everyone who has an ICD implanted in his or her, even a properly functioning one.[6] Consequently, even if Dr. Feldman had informed Melton of the potential defect in a timely manner and replaced the ICD with a properly functioning one, the possibility of an unexpected discharge would still loom, thereby leaving Melton in much the same state in which he now finds himself. Therefore, a jury could not have reasonably inferred a causal connection between Dr. Feldman's failure to inform and Melton's alleged injuries. See Green v. Lilliewood, 272 S.C. 186, 191, 249 S.E.2d 910, 912 (1978) (holding when both expert testimony and circumstantial evidence of a physician's culpability are presented, the inquiry is whether there was sufficient competent evidence from which the jury may have inferred a causal connection).

Accordingly, Melton failed to create a genuine issue of material fact as to whether Dr. Feldman's failure to inform him of the defect in the ICD constituted malpractice.

[6] During Melton's deposition, which was taken after he had the ICD replaced with a different Medtronic ICD, he was asked what the ICD prevented him from doing. He responded, "One thing is I thought I might die. [I] still might. . . . I try not to put myself under stress physically or mentally. I do not want this device to go off again because it is thoroughly unpleasant." He also testified his damages in this case include the "mental concern and wondering every day if this thing is going to go off or not prematurely."

5. Abandonment

Respondents argue Melton failed to produce evidence of the standard for dismissing a patient, breach, or proximate causation. We agree.

When Dr. Gaddy was asked whether it would be acceptable to "simply terminate the [doctor-patient] relationship without any notice," he responded, "I think it depends a lot on the circumstances around it, but I think that the best way to do it is to give them an option if they feel like . . . they're going to terminate the professional relationship." Further, when asked whether a physician has a responsibility to help the patient locate a new health care provider, he responded, "[W]hat I've done in the past [is] I usually give them the names of three doctors, that I know . . . ." At best, Dr. Gaddy's testimony establishes only his personal standard of care in terminating the doctor-patient relationship, rather than the generally recognized and accepted standard of care. As noted above, such testimony is insufficient to survive summary judgment. Guinan, 383 S.C. at 57, 677 S.E.2d at 37-38.

When Dr. Venegas was asked whether terminating a doctor-patient relationship two days before scheduled surgery would be proper, he responded, "That would not be common." When asked whether a doctor should give thirty days notice to a patient prior to termination and attempt to find another doctor for the patient, Dr. Venegas stated it would be "common practice," to do that, but that it was not "written in stone," and was not "the standard for all physicians in South Carolina." We find this testimony falls short of establishing the standard of care for terminating the doctor-patient relationship.

Finally, when Dr. Beard was asked what the proper procedure for terminating a doctor-patient relationship, he responded, "I'll tell you how I do it, and it varies probably from individual to individual. But I personally like a face-to-face encounter . . . ." Again, this testimony only established Dr. Beard's personal standard of care. Further, when asked whether it would be

proper to unilaterally terminate a patient with a serious heart problem days before scheduled surgery, Dr. Beard testified:

> [A]gain, it depends on the situation. If you've got a really bad relationship--trust is so important. Nobody wants to go into an operation with a doctor they don't trust, and if you have the opportunity to change it . . . that may be a better option. It's not a good thing to leave somebody hanging out, but on the other hand, trust is [] very important.

We find Dr. Beard's testimony does not establish a general standard for termination and, to the extent it does, it does not establish that Dr. Feldman's actions constituted a breach of that standard.

Accordingly, Melton failed to create a genuine issue of material fact as to whether Dr. Feldman's termination of the doctor-patient relationship constituted malpractice.

D. Common Knowledge Exception

Melton argues even if the expert testimony was insufficient to establish the generally recognized standard of care, breach, and proximate causation, expert testimony was unnecessary because the nature of the malpractice was such that the common knowledge exception should apply. We disagree.

While expert testimony is generally required in medical malpractice cases, it is not required if the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants. See Pederson v. Gould, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986) ("Expert testimony is not required, however, in situations where the common knowledge or experience of laymen is extensive enough for them to be able to recognize or infer negligence on the part of the doctor and also to determine the presence of the required causal link between the doctor's actions and the patient's medical problems."). "When expert

testimony is not required, the plaintiff must offer evidence that rises above mere speculation or conjecture." Welch v. Whitaker, 282 S.C. 251, 258, 317 S.E.2d 758, 763 (Ct. App. 1984). The application of the common knowledge exception in proving negligence in a case involving medical malpractice depends on the particular facts of the case. Sharpe v. S.C. Dept. of Mental Health, 292 S.C. 11, 14, 354 S.E.2d 778, 780 (Ct. App. 1987).

In support of his argument, Melton cites Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978). In that case, a patient sued for malpractice after her physician failed to remove an intrauterine device (IUD) during her tubal ligation, despite the fact that the patient had asked the physician to remove the IUD. Id. at 189, 249 S.E.2d at 911. Our supreme court held the trial court erred in granting the defendant physician's motion for directed verdict because the plaintiff presented sufficient evidence from which the jury could have reasonably inferred the physician committed malpractice. Id. at 193, 249 S.E.2d at 913. In arriving at this conclusion, the court held, "[i]t is a matter of common knowledge that a tubal ligation renders an IUD or any other birth control device useless." Id. at 192, 249 S.E.2d at 913.

Melton asserts "it is a matter of common knowledge that a medical device powered by a battery with a shorting mechanism that causes the device to lose power without warning is defective," and that "the failure to remove the 'useless' device in Green is no different than the implementation [of] and subsequent failure to remove a defective device for a year." However, we find this comparison unpersuasive. Although Melton insists on describing the ICD as "defective," in that it was subject to a potential rapid loss of power, the evidence clearly shows that was not the case with Melton's ICD. Melton even conceded that his injuries did not result from the ICD losing power. Thus, Melton's injuries, if any, could only have resulted from the ICD's tendency to discharge excessively and/or unnecessarily. We do not find it would be within the province of a lay jury to determine whether something so complex as an ICD was operating properly; to do so would not only require the jury to know the electrical ins and outs of the device itself, but also whether the discharges were brought on by a malfunction or an

irregularity in Melton's heartbeat. Accordingly, Green does not support the applicability of the common knowledge exception in this case.

Melton also cites Thomas v. Dootson, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008). In that case, a patient sued his doctor for malpractice after the patient's mouth was burned during oral surgery by an overheating drill. Id. at 295, 659 S.E.2d at 254. The doctor's counsel conceded there was an equipment malfunction and that there had "never been any real dispute that a defective surgical drill resulted in the burn to [the patient's] lip." Id. On appeal, however, the doctor attempted to resurrect the need for expert testimony by arguing that because a surgical drill is such a complex machine, "the proper operation of a surgical drill is not something within the lay knowledge of jurors." Id. at 296, 659 S.E.2d at 254. This court rejected the doctor's argument because the doctor had already conceded that the drill was not functioning properly at the time of the injury, thereby removing the need for expert testimony regarding the standard of care for operating the drill properly. Id.

The Respondents made no such concession in this case. Moreover, as stated previously, the evidence in this case suggests that the battery in the ICD was functioning correctly. Accordingly, Thomas does not support the applicability of the common knowledge exception in this case.

Finally, Melton argues the common knowledge exception should apply to the analysis of the alleged abandonment, improper selection criteria, and the one-year delay in informing. However, he supports these arguments by making reference to the expert testimony. We find it contradictory for Melton to argue, on the one hand, that a jury would not need the assistance of expert testimony in this case, but then support that argument by citing to expert testimony. In sum, the common knowledge exception does not apply in this case.

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

FEW, C.J., and LOCKEMY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cricket Cove Ventures, LLC, Appellant,

v.

Elizabeth Gilland, Harold G. Worley and Persons Unknown, being "Jane Doe" and "Richard Roe," Defendants,

Of Whom Elizabeth Gilland and Harold G. Worley are Respondents.

Appeal From Horry County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4730
Submitted June 1, 2010 – Filed August 25, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Kenneth R. Moss, Jr., of Little River, for Appellant.

Emma Ruth Brittain, of Myrtle Beach, for Respondents.

GEATHERS, J.: Appellant Cricket Cove Ventures, LLC (Cricket Cove) brought this civil conspiracy action against Horry County Council Chairperson Elizabeth Gilland and Council member Harold G. Worley (collectively, Respondents), seeking relief from the County's refusal to review a sketch plan of a proposed development within Worley's electoral district. Cricket Cove challenges the circuit court's order dismissing its complaint pursuant to Rule 12(b)(8), SCRCP. We affirm the circuit court's dismissal of Cricket Cove's injunction and mandamus causes of action on the ground that they are unsustainable under Rule 12(b)(6), SCRCP. We reverse the dismissal of the civil conspiracy cause of action and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

On October 18, 2005, Cricket Cove brought an action against Horry County and Horry County Council (Council) seeking relief for the refusal of Horry County staff to review Cricket Cove's sketch plan of its proposed development within Worley's electoral district. The complaint alleged that in January 2005, Cricket Cove purchased approximately 27 acres in the Little River area of Horry County. The property was located in a Resort Commercial zoning district, where construction height was unlimited, subject to parking and flight path ordinances. On July 7, 2005, Council held a special meeting and gave first reading to Ordinance 107-05 for the purpose of limiting the height of all new construction within the Little River area to sixty feet. The meeting was not properly advertised, and Cricket Cove was not informed of Council's intent to give first reading to the ordinance.

Cricket Cove also claimed that on August 3, 2005, it submitted a sketch site plan to the county's planning department for review and comment. Cricket Cove advised planning department employees of its intent to construct two condominium buildings that would contain over 200 units each. The planning department accepted the sketch plan for review.

Cricket Cove further alleged that on August 4, 2005, Ordinance 107-05 was referred to the Horry County Planning Commission (Commission) for

review. The Commission voted to recommend disapproval of the ordinance. On August 16, 2005, Council deferred a second vote on the ordinance and referred it to Council's Infrastructure and Regulations Committee. Meanwhile, a planning department employee sent a letter to Cricket Cove stating that its sketch plan needed several modifications. After making the modifications, Cricket Cove scheduled a meeting with the employee for review of the plan. Several county representatives attended the meeting to advise Cricket Cove that the plan could not be reviewed because it contemplated new construction that would exceed sixty feet in height. Cricket Cove's agents requested a written rejection or a letter stating the reason for the refusal to review the sketch plan, but county representatives refused the request.

In its October 2005 complaint against Horry County and Council, Cricket Cove sought a declaratory judgment that the County and Council had violated Ordinance 49-05, was acting upon an invalid pending ordinance (draft Ordinance 107-05), and was violating Cricket Cove's vested right to have its plan reviewed. It also alleged the County and Council were taking its property without just compensation, violating its due process rights, and denying it equal protection under the law. Cricket Cove also sought a writ of mandamus requiring the County and Council to review its proposed plan.

On July 14, 2006, nine months after filing the action against the County and Council, Cricket Cove brought the present action against Worley, Gilland and "Persons Unknown, being 'JaneDoe' [sic] And 'Richard Roe,'" seeking damages for civil conspiracy and injunctive relief. Cricket Cove sought to prohibit Respondents from giving orders or instructions to county employees in violation of section 4-9-660 of the South Carolina Code (1986) and also to prohibit Respondents from discussing outside a public forum those matters coming before Council at its meetings.

The complaint alleged many of the same facts asserted in the action against Horry County, including inadequate advance notice of Council meetings. It also alleged that Council conducted a meeting on October 25, 2005, and "draft Ordinance 107-05 was voted on with a series of

amendments." Gilland announced that a public hearing on the proposed draft Ordinance 107-05, as amended, would be conducted at a Third Reading of the proposed ordinance. The county attorney advised that the changes made to the draft ordinance "constituted a major change to the text of the proposed [o]rdinance and that it should be referred to Horry County Planning Commission for consideration." After an unscheduled recess, Gilland admitted that discussion between Council members concerning the proposed ordinance had occurred outside the public forum.

Cricket Cove further claimed that at Council's January 2006 meeting, draft Ordinance 107-05 was under review for Third Reading, and when a Council member sought to amend the draft, Worley asked for a recess. During the recess, certain Council members discussed the proposed ordinance outside the public forum. Upon return to the public forum, the proposed amendment was not discussed, but a vote was taken to defer Third Reading until the next scheduled Council meeting. At the February 2006 meeting, Council adopted an amendment to the proposed ordinance that changed the height limitations to affect only Worley's district and to exempt from the height limitations all other areas of the county. Council also adopted an amendment that had the effect of changing the height limitation for construction in Worley's district from 180 feet to 120 feet. During the meeting, an unscheduled recess occurred. After the recess, Gilland admitted that Council members had discussed Ordinance 107-05 outside the public forum.

The complaint alleged Gilland and Worley, in their individual capacities, as well as persons unknown engaged in a civil conspiracy to harm Cricket Cove. The complaint also sought to enjoin Gilland and Worley from giving orders to County staff in furtherance of the conspiracy and from discussing draft ordinances with other Council members outside the public forum. Cricket Cove also requested a writ of mandamus requiring Gilland to

properly advertise Council meetings. On August 24, 2006, Gilland and Worley filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCP, and Rule 12(b)(8), SCRCP.[1]

On May 31, 2007, Cricket Cove amended its complaint in the action against Horry County to add as defendants the individual members of Council in their official capacities, to seek a declaration that the application of pending ordinance 107-05 was invalid, and to seek an injunction preventing Council members from discussing draft ordinances outside the public forum.

In the present action, on October 4, 2007, the circuit court granted the motion to dismiss pursuant to Rule 12(b)(8) and stated that it was unnecessary to address the 12(b)(6) motion. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court properly apply Rule 12(b)(8), SCRCP, to the present action?

[1] Rule 12(b)(6) and (8) state in pertinent part:

> Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state facts sufficient to constitute a cause of action . . . (8) another action is pending between the same parties for the same claim.

2. Did the circuit court err in failing to include in its order a conclusion that the present action should be consolidated with the first action?

3. Did the circuit court err in failing to include in its order a conclusion that Cricket Cove should be allowed to amend its complaint in the first action to include the causes of action alleged in the present action?

4. Should the circuit court's decision be affirmed on the additional sustaining ground that the complaint could have been dismissed pursuant to Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action?

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), SCRCP. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). A defendant may seek dismissal of an action pursuant to Rule 12(b)(8) when another action is pending between the same parties for the same claim.

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Id.

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the

complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Id. "The trial court and this [C]ourt on appeal must presume all well pled facts to be true." Morrow Crane Co. v. T.R. Tucker Constr. Co., 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citation omitted). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. Doe, 373 S.C. at 395, 645 S.E.2d at 248.

LAW/ANALYSIS

I. Dismissal under Rule 12(b)(8), SCRCP

Cricket Cove contends that the circuit court erred in concluding dismissal of its action under Rule 12(b)(8) was appropriate. We agree.

Under Rule 12(b)(8), dismissal is appropriate when another action is pending between the same parties for the same claim.

A. Identity of Parties

Cricket Cove argues that its claims against Respondents in their individual capacities dictate against the application of Rule 12(b)(8) to the present action because the claims in the first action were against Respondents in their official capacities as Council members. We agree.

To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in their same capacities. 1 C.J.S. Abatement and Revival § 54 (2005). In Corbett v. City of Myrtle Beach, S.C., this Court concluded that the trial court properly dismissed the complaint pursuant to Rule 12(b)(8) because the plaintiff's claim for negligent infliction of emotional distress against a beach service involved the same parties and was "based upon the same facts and circumstances" as the plaintiff's first two wrongful death actions against the

beach service and the City of Myrtle Beach. 336 S.C. 601, 610, 521 S.E.2d 276, 281 (Ct. App. 1999). However, it is noteworthy that the Court attached significance to the capacity in which the plaintiff brought her two actions:

> Mrs. Corbett brought the Kinard claim in her individual capacity. The consolidated wrongful death and survivorship actions were brought in Mrs. Corbett's individual capacity and in her capacity as the Personal Representative of her husband's estate. Hence, the Kinard claim involves the same parties and is based upon the same facts and circumstances as the first two civil actions.

Id.

Here, Respondents were sued in their individual capacities in the present action. However, they were sued in their official capacities in the first action. Therefore, the circuit court erred in concluding that the present action and the first action involved the same parties.

B. Identity of Claims

In Corbett, this Court concluded the plaintiff's claim for negligent infliction of emotional distress against a beach service involved the same claim as the plaintiff's first two wrongful death actions against the beach service and the City of Myrtle Beach because it was "based upon the same facts and circumstances." 336 S.C. at 610, 521 S.E.2d at 281. Notably, the circuit court in the present action relied on the "same facts and circumstances" test when it ruled that dismissal under Rule 12(b)(8) was appropriate.

This Court revisited the "same claim" component of Rule 12(b)(8) in Capital City, and interpreted the rule narrowly:

> The rule has historic ties to a former statute providing a defendant a similar opportunity to demur; our

> supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. We find this approach consistent with modern day practice under rules similar to our Rule 12(b)(8). Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).

382 S.C. at 105-06, 674 S.E.2d at 531-32 (citations omitted) (emphasis added).

Here, the cause of action for civil conspiracy is not covered in the first case, and the writ of mandamus cause of action in the present case seeks relief that is different from the relief sought in the causes of action in the first case. Under the narrow interpretation of Rule 12(b)(8) set forth in Capital City, the circuit court's application of the rule was incorrect because the civil conspiracy claim against Respondents in their individual capacities was neither "precisely the same" nor "substantially the same" as any claim in the first proceeding.[2]

II. Consolidation and Amendment of Complaint (Issues 2 and 3)

At the hearing on Respondents' motion to dismiss, Cricket Cove requested that the present action be consolidated with the first action and it be allowed to amend its complaint in the first action. Because Respondents were represented by different attorneys on each action, the circuit court directed Cricket Cove to contact opposing counsel in the first action and to set up a hearing or obtain opposing counsel's consent to the requested relief.

Cricket Cove failed to complete the circuit court's instructions. Certainly, the circuit court had no authority in the present action to issue an

[2] We note the circuit court did not have the benefit of the Capital City opinion when it dismissed the present case.

order affecting the parties in the first action without the presence of counsel for those parties. Any such ruling would have been the result of impermissible ex parte communications. Cf. Burgess v. Stern, 311 S.C. 326, 330, 428 S.E.2d 880, 883 (1993) (stating that the judicial practice of merely signing an order prepared by counsel of one party denies to the deprived parties an opportunity to be heard in matters that affect them). Therefore, the circuit court properly declined to make such a ruling.

III. Rule 12(b)(6), SCRCP (Issue 4)

Respondents argue as an additional sustaining ground that this Court may affirm the circuit court's dismissal of Cricket Cove's complaint pursuant to Rule 12(b)(6). As discussed below, we believe the complaint states facts sufficient to constitute a cause of action for civil conspiracy only. We will address each cause of action in turn.

A. Civil Conspiracy

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); see also Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) ("Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another."); Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage."). The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design. Vaught, 300 S.C. at 208, 387 S.E.2d at 95.

In a civil conspiracy claim, one must plead acts in furtherance of the conspiracy that are separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit

the dismissal of the claim. See Todd, 276 S.C. at 293, 278 S.E.2d at 611 (dismissing plaintiff's civil conspiracy cause of action because it did no more than incorporate the complaint's allegations in the previous causes of action and because the only alleged wrongful acts pled were those for which damages had already been sought). Further, the damages alleged must go beyond the damages alleged in other causes of action. See Vaught, 300 S.C. at 209, 387 S.E.2d at 95 (holding that Todd barred a conspiracy cause of action because no special damages were alleged aside from the damages already alleged for the plaintiff's breach of contract cause of action in that case).

Here, the complaint alleges that Respondents conspired with county staff and with each other outside the public forum to obstruct Cricket Cove's development plans. The complaint also alleges the rejection by county staff of Cricket Cove's sketch site plan in furtherance of the conspiracy. Further, Cricket Cove seeks the special damages of the costs incurred on the acquisition of the real property in question and its development costs. The remaining three causes of action in the complaint seek injunctive relief rather than damages. Therefore, as contained within the present action, the conspiracy claim meets the requirements set forth in Todd and Vaught.

Respondents argue that the facts ostensibly supporting the conspiracy claim are alleged within an official capacity setting and therefore the alleged acts arise in the context of a principal-agent relationship, preventing the combination of two or more persons necessary to prove a conspiracy. We disagree. In McMillan, our Supreme Court limited this "intracorporate conspiracy" doctrine to persons acting within the scope of their employment. 367 S.C. at 564-65, 626 S.E.2d at 887. Other jurisdictions have similarly limited the doctrine. See ePlus Tech., Inc. v. Aboud, 313 F.3d 166, 179 (4th Cir. 2002) ("[T]he intracorporate immunity doctrine does not apply where a corporate 'officer has an independent personal stake in achieving the corporation's illegal objectives.'" (quoting Greenville Pub. Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974))); McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1036 (11th Cir. 2000) ("Simply put, under the doctrine, a corporation cannot conspire with its employees, and its

employees, when acting in the scope of their employment, cannot conspire among themselves.") (emphasis added); Garza v. City of Omaha, 814 F.2d 553, 556 (8th Cir. 1987) ("While it is true that a corporation cannot conspire with itself, an intracorporate conspiracy may be established where individual defendants are also named and those defendants act outside the scope of their employment for personal reasons.").

Here, Cricket Cove asserts the civil conspiracy claim against Respondents in their individual capacities rather than their official capacities as Council members. It may be reasonably inferred from the complaint as a whole that Cricket Cove is alleging Respondents had a personal stake in preventing Cricket Cove from moving forward with its development plans. Therefore, the intracorporate conspiracy doctrine does not apply to Cricket Cove's conspiracy claim against Respondents in their individual capacities.

Based on the foregoing, we believe Cricket Cove's complaint states facts sufficient to constitute a cause of action for civil conspiracy.

B. Section 4-9-660 of the South Carolina Code (1986)

Cricket Cove's second cause of action includes a request for a declaration that Respondents' actions in giving orders or instructions to county employees and members of county commissions violate section 4-9-850 of the South Carolina Code (1986). Respondents assert that section 4-9-850 applies to the county manager form of government and that Horry County has adopted the administrator form of government. Respondents argue that the comparable provision for the administrator form of government, section 4-9-660 of the South Carolina Code (1986), does not create a private right of action.[3]

[3] Paragraph 11 of Cricket Cove's complaint references section 4-9-660 (administrator form of government) rather than section 4-9-850 (county manager form of government). Therefore, the subsequent, inconsistent references to section 4-9-850 in the complaint's allegations under the second cause of action were likely scrivener's errors, and we will base the remainder

Section 4-9-660 states:

> Except for the purposes of inquiries and investigations, the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees.

Respondents are correct that section 4-9-660 does not create a private right of action. No provision in Chapter 9 of Title 4 of the Code creates any private right of action. Further, an injunction should be granted only when some irreparable injury is threatened for which the parties have no adequate remedy at law. Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009). Cricket Cove has failed to allege in its complaint that it will be irreparably harmed if an injunction is not granted or that it has no adequate remedy at law. On the contrary, in its conspiracy cause of action, which is based on the same conduct of Respondents, Cricket Cove seeks a remedy of law—an amount "not less than the costs incurred to date by [Cricket Cove] on the acquisition of the Real Property and development costs associated directly therewith . . . ."

Based on the foregoing, Cricket Cove has not stated facts sufficient to constitute a cause of action for an injunction against violation of section 4-9-660.

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of our discussion on that assumption. See Wilson v. Niesse, 244 N.E.2d 436 (Ind. 1969) ("We do not feel that the use of a misspelled word, a misplaced comma or a period should deny litigants the right to have their controversies settled where it is apparent from the general context of the pleading what the meaning is.").

C. Freedom of Information Act

In its third cause of action, Cricket Cove is seeking to enforce section 30-4-70(c) of the South Carolina Code (2007). Section 30-4-70(c) is part of the Freedom of Information Act (FOIA) and prohibits the use of any chance meeting, social meeting, or electronic communication in circumvention of the spirit of FOIA requirements to act on a matter over which the public body has supervision, control, jurisdiction, or advisory power. The FOIA, specifically section 30-4-100 of the South Carolina Code (2007), contains a civil enforcement provision granting standing to a South Carolina citizen to seek injunctive relief against a violation of any FOIA provision. Section 30-4-100(a) states the following:

> Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

(emphasis added).

Assuming, without deciding, that Cricket Cove has standing as a "citizen of the State," it is suing Respondents in their individual capacities. The FOIA was created to allow citizens to be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. S.C. Code Ann. § 30-4-15 (2007). Hence, the facts as stated in Cricket Cove's complaint fail to state a FOIA cause of action.

D. Writ of Mandamus

In its fourth cause of action, Cricket Cove seeks a writ of mandamus requiring Gilland to perform her duties as Council's chairwoman to properly publish notice of Council meetings. The following elements are necessary to obtain a writ of mandamus requiring the performance of an act: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. See Sanford, 385 S.C. at 494, 685 S.E.2d at 606.

Respondents correctly assert that a writ of mandamus, by its very nature, cannot be issued against a person in his individual versus official capacity. Because no relief can be granted on this particular claim, its dismissal under Rule 12(b)(6) would have been proper.

CONCLUSION

The circuit court incorrectly concluded that the parties in the present action are identical to those in the first action. Further, the circuit court's "same claim" analysis under Rule 12(b)(8), SCRCP, was based on a standard that is no longer controlling in South Carolina. However, we affirm the circuit court's dismissal of Cricket Cove's injunction and mandamus causes of action on the ground that they are unsustainable under Rule 12(b)(6), SCRCP. We reverse the dismissal of the civil conspiracy cause of action and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

HHHunt Corporation, Eddy Huckabee and Eugenia Mabry Huckabee, Appellants,

v.

Town of Lexington, Respondent.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4731
Submitted April 1, 2010 – Filed August 25, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

John F. Beach and John J. Pringle, Jr., of Columbia, for Appellants.

Clifford O. Koon, Jr., and Robert L. Brown, of Columbia, for Respondent.

R. Hawthorne Barrett and Danny C. Crowe, of Columbia, for Amicus Curiae Municipal Association of South Carolina

GEATHERS, J.: Appellants HHHunt Corporation (Hunt), Eddy Huckabee, and Eugenia Mabry Huckabee (collectively Appellants) brought this action against Respondent Town of Lexington (the Town), seeking an order requiring the Town to provide water and wastewater services to the Huckabees' parcel in Lexington County, outside the Town's territorial limits. Appellants challenge the circuit court's order dismissing their complaint pursuant to Rule 12(b)(6), SCRCP. We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

The Huckabees own a nineteen-acre parcel (the Property) located on Sunset Boulevard in Lexington County and surrounded by the Town's territorial limits. The Huckabees have entered into a contract to sell the Property to Hunt, and Hunt intends to establish a mixed-use development on the Property consisting of approximately 250 residential units. In early 2007, Hunt sought to have the Property annexed into the Town, but the Lexington Town Council denied the annexation request and preemptively denied any request for water and sewer service that might be made in connection with the Property.

Appellants then brought this action seeking an order requiring the Town to provide water and wastewater services to the Property. Their complaint includes the following causes of action: "Violation of the [Town's] Ordinances;" "Violation of Various Contractual and Statutory Obligations;" "Violation of [Appellants'] Fifth and Fourteenth Amendment Rights (42 U.S.C. § 1983);" "Waiver/Estoppel/Vested Right;" "Mandamus;" "Injunction;" and "Declaratory Judgment." In support of these causes of action, Appellants alleged that in 1985, the Huckabees granted the Town a "Water Line Easement" across the Property. By means of this easement, the Town agreed to provide water service to the Property. A copy of the easement document states, in pertinent part, the following:

> By acceptance and recording of this easement and right of way the Town of Lexington agrees to

> provide the grantors two ¾ inch water taps free of charge at any time in the future to serve their property upon which this easement is located, provided that the property is annexed into the Town of Lexington at that time.

(emphasis added).[1] As a result of the easement, the Town's water facilities "cross and physically occupy a portion of the property."

Appellants also claimed that with the Town's full knowledge, the Huckabees constructed a sewer line for connection to the Town's sanitary sewer system and paid the Town $1,350 for it to inspect the line and to process and review the Huckabees' application for approval of the line. As part of the application process, the Huckabees obtained a Wastewater Construction permit from the South Carolina Department of Health and Environmental Control (DHEC) to construct a sanitary sewer system to connect to the Town's system. Appellants further alleged that the Central Midlands Regional Planning Council certified that the Huckabees' proposed sewer line conformed to the local water quality management plan required by the federal Clean Water Act. Although the Town's Planning Commission recommended granting Hunt's request to annex the Property, the Lexington Town Council declined to annex the Property or to provide water and sewer services to the Property.

Appellants argued that the Town's ordinances give no authority to the Town Council to rule on requests for water and wastewater services and that the Town Council's reasons for refusing these services were unrelated to

[1] We presume that when Appellants attached a copy of the easement document as an exhibit to the complaint, they intended for it to be incorporated into the complaint even though they did not specifically indicate that they were incorporating the document by reference to it. See Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); see also Brazell v. Windsor, 682 S.E.2d 824, 826, 384 S.C. 512, 512 (2009) (citing Rule 10(c)).

considerations applicable to water and wastewater services as set forth in the Town's ordinances. Appellants also maintained that the Town has been providing water and wastewater services to each parcel contiguous to and surrounding the Property and that the Town routinely provides water and wastewater services to parcels located outside its territorial limits and to customers similarly situated to Appellants. The Town filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action. The circuit court granted the motion, and this appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in ruling that the complaint failed to allege facts showing the Town's duty to provide water or wastewater services to the Property?

2. Did the circuit court err in summarily ruling that the Town's status as a designated management agency pursuant to section 208 of the Clean Water Act, 33 U.S.C. § 1288, and the South Carolina Pollution Control Act, S.C. Code Ann. § 48-1-10 to -350 (2008 & Supp. 2009), does not create a duty to provide wastewater service to the Property?

3. Did the circuit court err in concluding that the Town's ordinances do not create a duty to provide utility services to non-residents?

4. Did the circuit court err in concluding that Appellants failed to plead causes of action based on their Fifth Amendment rights?

5. Did the circuit court err in concluding that the Town cannot be estopped from denying water and wastewater services to the Property?

6. Did the circuit court err in dismissing Appellants' causes of action for mandamus, injunction, and declaratory relief?

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Id.

In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, state any valid claim for relief. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). "The trial court and this [C]ourt on appeal must presume all well pled facts to be true." Morrow Crane Co. v. T.R. Tucker Constr. Co., 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citation omitted). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Doe, 373 S.C. at 395, 645 S.E.2d at 248.

LAW/ANALYSIS

I. Failure to plead a duty

Appellants contend that the circuit court erred in ruling that their complaint failed to allege facts showing the Town's duty to provide water or wastewater services to the Property. We agree.

A. Breach of Contract claim

Here, Appellants asserted the following pertinent facts in their complaint: "In 1985, the Huckabees granted [the Town] a 'Water Line Easement' across the Property. By means of this 'Water Line Easement', [the Town] agreed to provide water service to serve the Property." Appellants also attached the easement document to their complaint. The pertinent provisions state:

> By acceptance and recording of this easement and right of way the Town of Lexington agrees to provide the grantors two ¾ inch water taps free of charge at any time in the future to serve their property upon which this easement is located, provided that the property is annexed into the Town of Lexington at that time.

(emphasis added). Thus, the complaint alleges that the Huckabees and the Town entered into a contract for the provision of water service. Further, in paragraph 59 of the complaint, Appellants allege that the Town breached the contract by refusing to provide water and wastewater services to the Property.

The Town contends that the contract is subject to the condition precedent that the Property must be annexed into the Town's territorial limits.[2] The Town argues that because the Property has not been annexed, the Huckabees have not satisfied the condition precedent and therefore the complaint fails to state a contractual duty to provide water and wastewater services. We disagree.

In evaluating a 12(b)(6) motion, the trial court and this Court "must presume all well pled facts to be true." Morrow, 296 S.C. at 429, 373 S.E.2d

[2] The Municipal Association of South Carolina has filed an amicus brief in support of the Town's position.

at 702. Further, a court should not dismiss the complaint merely because the court doubts the plaintiff will prevail in the action. Doe, 373 S.C. at 395, 645 S.E.2d at 248. Therefore, we find it improper to examine the merits of a contractual defense, such as a condition precedent, in determining the sufficiency of the complaint's factual allegations to support a breach of contract cause of action. Viewing the complaint's allegations, and the inferences from them, in the light most favorable to Appellants, we find that they have pled facts sufficiently specific to state a claim for breach of contract.

B. Equal Protection claim

Appellants' complaint also states facts sufficient to support a claim for violation of their equal protection rights. Under our federal and state constitutions, no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. To satisfy equal protection, a municipality's classification must meet the following criteria: (1) the classification must bear a reasonable relation to the legislative purpose sought to be achieved; (2) members of the class must be treated alike under similar circumstances; and (3) the classification must rest on some rational basis. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004).[3]

Here, Appellants have alleged "[u]pon information and belief, the [Town] routinely provides water and sewer service to customers similarly situated to [Appellants]" and "the [Town] routinely agrees to provide water and sewer service outside its municipal boundaries in circumstances similar, if not identical, to those applicable to [Appellants]." At the 12(b)(6) stage of

[3] The rational basis standard, not strict scrutiny, is applied in an action involving water and wastewater services because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage. See Sunset Cay, 357 S.C. at 428-29, 593 S.E.2d at 469 (holding that the rational basis standard applied to a developer's case challenging limits on the expansion of a city's wastewater system).

the proceedings, the court must accept these factual allegations as true. See Morrow, 296 S.C. at 429, 373 S.E.2d at 702 ("The trial court and this [C]ourt on appeal must presume all well pled facts to be true.").

The Town argues that the Sunset Cay opinion precludes Appellants' equal protection argument because our Supreme Court rejected the equal protection argument in that case. However, in that opinion, the Court noted that any disparate treatment within the class was relatively insignificant:

> City has created two classes—one consisting of residents inside the C-1 and C-2 districts and one consisting of residents outside those districts. City generally has treated residents within each of those classes alike under similar circumstances, although City admits it previously has extended sewer service to at least one property in a C-3 district.

357 S.C. at 429, 593 S.E.2d at 469 (emphases added).

Here, according to the allegations of Appellants' well pled complaint, the Town, unlike the municipality in Sunset Cay, routinely provides water and wastewater services outside its municipal boundaries in circumstances similar, if not identical, to those applicable to Appellants. Viewing these allegations, and the inferences from them, in the light most favorable to Appellants, they have pled facts sufficiently specific to state a claim for violation of their equal protection rights.

Based on the foregoing, the circuit court erred in ruling that Appellants' complaint failed to allege facts showing a duty on the part of the Town to provide water or wastewater services to the Property.

II. Clean Water Act

Appellants claim that the circuit court erred in summarily concluding that the Town's status as a designated management agency (DMA) pursuant

to section 208 of the Clean Water Act, 33 U.S.C. § 1288 (section 208), and the South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 to -350 (2008 & Supp. 2009), does not create a duty to provide wastewater service to the Property. We disagree.

In their complaint, Appellants state that they are "informed and believe that the [Town's] status as the Section 208 DMA requires the [Town] to provide water and wastewater services to all landowners in its service area, provided that the service is available." (emphases added). Appellants argue that the circuit court was obligated to accept this allegation as true. However, on a 12(b)(6) motion, the court is required to presume all well pled facts, not propositions of law, to be true. See Morrow, 296 S.C. at 429, 373 S.E.2d at 702 ("The trial court and this [C]ourt on appeal must presume all well pled facts to be true."). Appellants cannot transform an unsupported proposition of law into a statement of fact merely by stating that they are informed and believe it to be so. Appellants do not cite in their brief any case law recognizing a DMA's duty to provide wastewater services under either section 208 or the South Carolina Pollution Control Act. Further, they fail to explain in their brief why they believe the Town's DMA status is accompanied by such a duty. Therefore, Appellants have not presented to this Court any valid theory of relief to which they are entitled. See Brazell, 384 S.C. at 515, 682 S.E.2d at 826 (holding that in deciding whether a 12(b)(6) dismissal is proper, the appellate court must consider whether the facts and inferences alleged in the complaint state any valid claim for relief and that if the facts and inferences would entitle the plaintiff to relief on any theory, then dismissal for failure to state a claim is improper). Because Appellants' argument concerning the Town's duty as a DMA is conclusory, we deem it abandoned. See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (holding that an issue is abandoned if the appellant's brief treats it in a conclusory manner); see also State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned).

Based on the foregoing, we must affirm the circuit court's conclusion that the Town's DMA status does not create a duty to provide wastewater service to the Property.

III. Ordinances

Appellants assert the circuit court erred in ruling that the Town's ordinances do not create a duty to provide utility services to non-residents. We disagree.

In their complaint, Appellants alleged that in refusing their request for service, the Town Council failed to apply any of the specific mandatory criteria from the Town's water and sewer ordinances and that the Town Council had no authority to rule on service requests. Appellants further alleged that none of the reasons articulated by Town Council in its March 5, 2007 meeting qualified as permissible criteria for a service request. The circuit court addressed this particular cause of action by stating that there are no provisions in the Town's water and sewer service ordinances that prevent the Town Council from addressing, granting, or denying water or sewer services to any prospective customer. The circuit court further stated that the Town Council was well within its authority to address and deny water and sewer services. The circuit court then stated "[a]ccordingly, any allegation that the Town of Lexington in any way violated its own Town Ordinances is without merit and must be dismissed for failure to state a claim upon which relief could be granted."

Appellants do not cite in their brief any specific provision in the Town's ordinances that Town Council has violated or that creates even an implied duty to provide water service to non-residents. Therefore, Appellants have not presented to this Court any valid theory of relief to which they are entitled. See Brazell, 384 S.C. at 515, 682 S.E.2d at 826 (holding that in deciding whether a 12(b)(6) dismissal is proper, the appellate court must consider whether the facts and inferences alleged in the complaint state any valid claim for relief). Further, Appellants do not cite any law supporting

their proposition that the Town has no authority to rule on service requests. Therefore, Appellants have abandoned these arguments, and we must affirm the circuit court's ruling that the Town's ordinances do not create a duty to provide utility services to non-residents. See Duckett by Duckett v. Payne, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this Court that the trial court erred."); R & G, 343 S.C. at 437, 540 S.E.2d at 120 ("An issue is deemed abandoned if the argument in the brief is only conclusory.").

IV. Substantive Due Process

Appellants contend that the circuit court erred in concluding that they failed to plead a cause of action based on substantive due process. We disagree.

Appellants do not explain how the facts pled in their complaint state a claim for violation of their substantive due process rights or cite any authority to support this contention. Therefore, Appellants have not presented to this Court any valid theory of relief to which they are entitled, and they have abandoned their substantive due process argument. See R & G, 343 S.C. at 437, 540 S.E.2d at 120 ("An issue is deemed abandoned if the argument in the brief is only conclusory."). Accordingly, we must affirm the circuit court's ruling on this issue.

V. Estoppel

Appellants maintain that the circuit court erred in concluding that the Town cannot be estopped from denying water and wastewater services to the Property. We agree. Appellants also maintain the circuit court improperly stated that the Town has not acted in any manner that would induce Appellants to believe that they would be granted water or wastewater services before the Property was annexed into the Town. We agree.

Generally, estoppel will not lie against a governmental body for the unauthorized acts of its officers and agents. Townes Assocs., Ltd. v. City of

Greenville, 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976). However, where the officers or agents of a governmental body act within the proper scope of their authority, a municipality cannot escape liability on a contract within its power to make, on the ground that the officer executing it on its behalf was not technically authorized to do so, where he was the proper person to enter into such a contract. Id. In Townes, our Supreme Court held that the City of Greenville was estopped to deny a contract when the officer executing the contract was a proper person to enter into such a contract. Id. at 87-88, 221 S.E.2d at 776.

If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position. Grant v. City of Folly Beach, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001).

Here, Appellants have alleged in their complaint that the Town entered into a contract with the Huckabees to provide water service to the Property and that the Town's employees took additional specific actions on which Appellants relied by making substantial investments in water and wastewater facilities located on the Property. Appellants further alleged that they made these investments with the Town's full knowledge and acceptance of fees in connection with the construction of water and wastewater facilities. Appellants have also alleged that after they made these substantial investments, obtained governmental approvals, and paid fees to the Town, the Town's legislative body improperly voted to deny annexation and utility services for the Property.

We believe Appellants have pled facts sufficient to constitute a cause of action for equitable estoppel. Therefore, the circuit court erred in dismissing the cause of action by concluding that the Town cannot be estopped from denying utility services to the Property. Further, the circuit court's statement that the Town has not acted in any manner that would induce Appellants to believe that they would be granted utility services before the Property was annexed is misleading because it presupposes that the parties' contract made

annexation a condition precedent to any duty of performance. Such a conclusion is inappropriate within the context of a 12(b)(6) motion. See Doe, 373 S.C. at 395, 645 S.E.2d at 248 (holding that, in evaluating a 12(b)(6) motion, a court should not dismiss the complaint "merely because the court doubts the plaintiff will prevail in the action"). Therefore, the circuit court erred in making this statement.

VI. Mandamus, Injunction, and Declaratory relief

Finally, Appellants contend that the circuit court erred in dismissing their causes of action for mandamus, injunction, and declaratory relief. We agree.

As to Appellants' cause of action for declaratory relief, the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (2005), provides in pertinent part as follows:

> Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-30 (2005) (emphasis added). Because Appellants have pled that they have a contract with the Town, they are entitled to seek declaratory relief under section 15-53-30 to determine the Town's contractual duty to provide water and wastewater services to Appellants.

Likewise, Appellants are entitled to seek injunctive relief. An injunction may be granted where some irreparable injury is threatened for which the parties have no adequate remedy at law. Sanford v. S.C. State

Ethics Comm'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009). Here, Appellants have alleged in their complaint that they will be irreparably harmed if they are unable to obtain water and wastewater services from the Town because they have no other alternative for these services. They also state that they have no adequate remedy at law because the Town's ordinances provide no method by which an aggrieved party can seek review of a decision to deny a water or wastewater permit. Moreover, because denial of the requested services would severely restrict Appellants' use of their property, it is unlikely that money damages would provide an adequate remedy. See K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989), cited in CVM Holdings, LLC v. Gamma Enters., Inc., No. 5:10-CV-103-BO, 2010 WL 2541093, at *2 (E.D.N.C. June 22, 2010) ("Real estate has long been thought unique, and thus, injuries to real estate interests frequently come within the ken of the chancellor.").

As to a writ of mandamus requiring the performance of an act, Appellants must assert facts supporting the following elements: 1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. See Sanford, 385 S.C. at 494, 685 S.E.2d at 606 (setting forth the elements necessary to obtain a writ of mandamus). Appellants have asserted facts, which if taken as true, establish a clear duty of performance under the Town's contract with the Huckabees. Because the duty alleged is not discretionary, and because Appellants have alleged that they have no other remedy to obtain the utility services, they have asserted facts sufficient to state a claim for entitlement to a writ of mandamus.

CONCLUSION

Accordingly, we affirm the circuit court's conclusions that the Town's DMA status does not create a duty to provide wastewater services to the Property and that the Town's ordinances do not create a duty to provide utility services to non-residents. We also affirm the circuit court's conclusion that the complaint failed to state a cause of action for violation of substantive due process. We reverse the circuit court's conclusion that the complaint failed to

allege any facts showing the Town's duty to provide water or wastewater services to the Property as well as the conclusion that the complaint failed to allege facts supporting causes of action for breach of contract, equal protection, estoppel, mandamus, injunction, and declaratory relief. We remand this case for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CURETON, A.J., concurs.

PIEPER, J., concurring in part and dissenting in part: I concur in the majority's decision to reverse the circuit court's dismissal of Appellants' claims for breach of contract, equal protection, estoppel, mandamus, injunction, and declaratory relief. However, I respectfully dissent as to the finding that Appellants abandoned their claims pursuant to the Clean Water Act, municipal ordinances, and the Due Process clause. Instead, I would find Appellants alleged sufficient facts in their complaint on these claims to withstand a motion to dismiss. Accordingly, I would reverse the dismissal of Appellants' complaint in full and remand for a trial. See Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (finding this court must construe the complaint in the light most favorable to Appellants to determine if the facts alleged and inferences reasonably deducible therefrom would entitle Appellants to relief on any theory of the case); Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007) (finding the trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law).