The Supreme Court of South Carolina

In the Matter of O. Allen Alexander, Respondent.

ORDER

The Office of Disciplinary Counsel seeks the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. See In the Matter of Alexander, Op. No. 26079 (S.C. Sup. Ct. filed December 12, 2005) (Shearouse Adv. Sh. No. 47). Respondent consents to the appointment of an attorney to protect his clients' interests.

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that John Thomas Falls, Jr., 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. Falls' 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

December 12, 2005

The Supreme Court of South Carolina

In the Matter of Craig J. Poff, Respondent.

ORDER

The Office of Disciplinary Counsel seeks the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. See In the Matter of Poff, Op. No. 26080 (S.C. Sup. Ct. filed December 12, 2005) (Shearouse Adv. Sh. No. 47). Respondent consents to the appointment of an attorney to protect his clients' interests.

IT IS ORDERED that Anthony O'Neil Dore, 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. Dore shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Dore 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 Anthony O'Neil Dore, 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 Anthony O'Neil Dore, 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. Dore'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

December 12, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 47

December 12, 2005
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of O. Allen Alexander, Respondent.

Opinion No. 26079
Submitted October 11, 2005 - Filed December 12, 2005

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

O. Allen Alexander, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to either a definite suspension not to exceed two years or an indefinite suspension. We accept the Agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

In October 2003, a client retained respondent to initiate post-divorce litigation. The client advised respondent that her ex-husband travels frequently out of the country and she made respondent aware of his travel schedule. The client expressed concern regarding her ex-husband's instability and her own safety. Despite apparent opportunities, the client's ex-husband had not been served at the time the client filed her complaint on July 28, 2004.

Matter II

In February 2004, respondent ordered a transcript from a court reporter. The court reporter sent respondent more than ten statements requesting payment. As of the date of the Agreement, respondent had not paid the court reporter.

Matter III

Clients retained respondent to assist with a property damage claim on their automobile. Respondent accepted the settlement check on the condition he would send the insurance company title to the automobile. Respondent disbursed the monies but never sent the title.

Matter IV

Respondent was retained to proceed in a collection matter. Respondent accepted approximately $1,125.00 in fees and costs and then ignored all inquires by the client and has not completed his services to the client.

Matter V

A couple retained respondent to represent them in regard to a non-disclosure issue in a real estate transaction. Respondent accepted a retainer of approximately $2,030.00 but failed to complete the services and subsequently refused all contact with the couple. The couple filed a claim with the Resolution of Fee Disputes Board which awarded them $1,530.00. Respondent failed to refund the unearned fee as awarded.

Matter VI

A circuit court judge reported respondent had failed to appear in his court for several matters even though he had been scheduled and notified to appear. Respondent's failures to appear were to the detriment of his clients. All of the judge's attempts to contact respondent about his failure to appear were unsuccessful.

Respondent has fully cooperated with ODC in connection with these matters.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information)); Rule 1.5 (lawyer's fee shall be reasonable); Rule 1.15 (lawyer shall promptly deliver any fees or property that a client or third person is entitled to receive); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in

conduct that is prejudicial to the administration of justice).[1] In addition, respondent admits his misconduct constitutes grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate the Rules of Professional Conduct), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice), Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken upon admission to practice law in this state), and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of the Resolution of Fee Disputes Board).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. ODC shall 1) determine the amount of restitution owed to respondent's clients and others who have been harmed as a result of respondent's misconduct and 2) institute a meaningful restitution plan. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.[2]

INDEFINITE SUSPENSION.

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

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[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

[2] The parties agreed to the appointment of an attorney to protect respondent's clients' interests. By separate order, the Court will appoint an attorney to protect respondent's clients' interests.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Craig J. Poff, Respondent.

Opinion No. 26080
Submitted October 24, 2005 - Filed December 12, 2005

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Craig J. Poff, of Beaufort, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension not to exceed sixty (60) days. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a sixty (60) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

In or about May 2003, the complainant obtained a home equity line of credit from Navy Federal Credit Union (Navy Federal). She was told by Navy Federal that Don Young would be the closing attorney. Don Young is the owner of American Title & Abstract; he is not a licensed attorney.

Respondent represents that, on the morning of May 12, 2003, a member of Mr. Young's office contacted him and asked if he could handle a closing in the afternoon. Respondent agreed to handle the closing. Respondent did not attend the closing; he represents he was unable to attend the closing at the scheduled time because he was in court on an unrelated matter.

Because he was unable to attend the closing, respondent telephoned a staff member at American Title & Abstract, where the closing was to occur, and requested that the complainant postpone the closing until he could arrive. When the complainant indicated she did not want any delay, respondent instructed the staff member to let the complainant execute the closing documents and leave them for him to review. Respondent never spoke with the complainant prior to executing the closing documents; he was not present at the closing itself; and respondent did not speak with the complainant after the closing.

Respondent represents he arrived at American Title & Abstract the following morning and, for the first time, reviewed the closing documents. Respondent asserts he spoke with a staff member at American Title & Abstract who stated that she had been present when the complainant executed the closing documents. The staff member provided respondent with the mortgage which the complainant had signed at the closing the day before. On page seven of the mortgage, the staff member verified to respondent that her own signature appeared on the line designated as Witness #1 and that she had personally observed the complainant execute the mortgage.

Respondent admits he affixed his signature on the line designated as Witness #2 even though he had not been present for the closing and had not personally witnessed the complainant execute the mortgage. On page eight of the mortgage, respondent notarized the staff member's statement that she, along with the other witness delineated on page seven (i.e., respondent), had witnessed the execution of the mortgage. Respondent admits this was a false statement as he was not personally present at the time the complainant executed the mortgage. He further admits he allowed the staff member to falsely swear before him as a Notary Public.

Respondent admits that, after reviewing the mortgage and settlement statement, he returned all original documents to Navy Federal pursuant to Navy Federal's instructions. Respondent represents he did not file the mortgage as this was not within the scope of his representation when contacted to handle the closing by American Title & Abstract. Respondent admits he assisted American Title & Abstract and Navy Federal in engaging in the unauthorized practice of law and that he participated in a real estate closing in clear violation of this Court's precedent.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.2 (when lawyer knows client expects assistance not permitted by Rules of Professional Conduct, lawyer shall consult with client regarding relevant limitations on lawyer's conduct); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the unauthorized practice of law); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct

that is prejudicial to administration of justice).[1] In addition, respondent admits his misconduct constitutes grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period.[2] Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur. MOORE, J., not participating.

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[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

[2] In the event the Court suspended respondent, the parties agreed to the appointment of an attorney to protect respondent's clients' interests. By separate order, the Court will appoint an attorney to protect respondent's clients' interests.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John E. Cooke and Barbara Cooke, Respondents,

v.

Palmetto Health Alliance d/b/a Palmetto Richland Memorial Hospital, and Latisha C. Corley, Appellants.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4054
Heard October 11, 2005 – Filed December 12, 2005

AFFIRMED

Charles E. Carpenter, Jr., George C. Beighley, S. Elizabeth Brosnan and Drew Hamilton Butler, all of Columbia, for Appellants.

John S. Nichols and Robert B. Ransom, both of Columbia, for Respondents.

HEARN, C.J.: This is an appeal from the order of the circuit court, finding John E. Cooke was not a statutory employee of Palmetto Health Alliance (the Hospital) when he was injured. Because of this ruling, the circuit court found Cooke's negligence action and his wife's loss of consortium action were not barred by the exclusive remedy provision of the Workers' Compensation Act. We affirm.

FACTS

Cooke was employed as a pilot for Petroleum Helicopter, Inc., which contracted with the Hospital to transport critically injured patients to the emergency room. On December 13, 1999, Cooke tripped and fell over a metal rod that Latisha Corley, an employee of the Hospital, allegedly used to prop open a door at the Hospital. Because Cooke's injury occurred while in the course of his employment with Petroleum Helicopter, Cooke filed for and received workers' compensation benefits.

In addition to his workers' compensation claim, Cooke and his wife, Barbara, filed a complaint against the Hospital, alleging negligence and loss of consortium. After the court ruled that the Hospital could not be sued for punitive damages because of its status as a charitable organization, the Cookes amended their complaint to add Latisha Corley individually, alleging her method of propping open the door amounted to gross negligence.

In their answer, the Hospital and Corley (collectively Appellants) asserted, among other things, that Cooke was either the Hospital's statutory employee or borrowed servant at the time of the accident, and therefore, the exclusive remedy provision of the Workers' Compensation Act served as a complete bar to the Cookes' tort action.[1] After filing their answer, Appellants notified the Cookes of their intent to seek summary judgment. However, before the summary judgment motion was heard, Appellants, with the consent of the Cookes, made a motion for a hearing on the merits to

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[1] Section 42-1-540 of the South Carolina Code (1985) provides that workers' compensation is the exclusive remedy against an employer for an employee's work related accident.

determine whether "the exclusive jurisdiction and exclusive remedy" was with the workers' compensation commission or with the circuit court.

At the hearing, the circuit court judge characterized the action before her as a "motion hearing" on "jurisdictional issues." The Appellants' attorney did not agree with the judge's characterization and said: "Your honor, this [is] not a motion. It was originally a motion for summary judgment. We're here today on the merits of whether . . . Mr. Cooke qualifies as a statutory employee of the hospital; and, therefore, barred under workmen's (sic) compensation." The attorney for the Cookes added: "We're here today to decide the merits of that. It's a question of law anyway, so it would be for your decision. But we decided to tee this issue up before we go further with the case, since this issue may decide the – will obviously decide the future course of the case." After hearing those explanations, the circuit court judge stated: "Well, that's why it seems to come up as a motion to dismiss the case . . . I didn't consider it to be a hearing on the merits where there would be testimony from an individual who would provide information about who his employer was and the contract, and all that information."

The hearing then proceeded, and although there were no live witnesses, both parties submitted deposition testimony in support of their respective positions. The Appellants argued that Cooke was a statutory employee because helicopter transport allows paramedics to reach critically injured patients more quickly than other forms of transportation, and therefore, helicopter service is essential to the Hospital's business of saving lives. The Appellants further argued that Cooke was a borrowed servant of the Hospital because there was a contract for hire, the work Cooke performed benefited the Hospital, and the Hospital had control over Cooke. To illustrate that control, the Appellants' attorney pointed out that Cooke had a uniform and identification tag issued by the Hospital, and the Hospital told Cooke where to pick up and deliver patients.

The Cookes' attorney argued Cooke was not a statutory employee because the Hospital was not in the business of transporting patients, the helicopter service was only a miniscule part of the overall business of the Hospital, and the Hospital and Petroleum Helicopter entered a contract in

which they agreed that pilots were not employees of the Hospital. In regards to the Hospital's borrowed servant argument, the Cookes' attorney pointed out that the Hospital does not decide "if or when the helicopters ever fly," nor does the Hospital have any say in who Petroleum Helicopters hires as pilots.

After hearing arguments, the circuit court judge issued a written order, finding Cooke was not a statutory employee or borrowed servant of the Hospital. In her order, the judge characterized the action as "a motion to dismiss for lack of subject matter jurisdiction," and the last sentence of her order denied "Defendant's Motion to Dismiss." This appeal followed.

STANDARD OF REVIEW

"The determination of whether a worker is a statutory employee is jurisdictional and therefore the question on appeal is one of law." Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999) (citing Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997)). Thus, the appellate court reviews the entire record and decides the jurisdictional facts in accord with the preponderance of the evidence. Id.

LAW/ANALYSIS

The Appellants argue the circuit court erred by failing to find Cooke was either a statutory employee or borrowed servant of the Hospital. The Cookes argue, initially, that the order of the circuit court is not immediately appealable. Thus, before delving into the merits of the Appellants' arguments, we first address the threshold issue of appealability.

I. Appealability

An order denying a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable. Deskins v. Boltin, 319 S.C. 356, 461 S.E.2d 395 (1995); Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995), *overruled on other grounds by* Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). However, the issue before the circuit

court was not brought via a motion to dismiss; rather, both parties consented to have a non-jury hearing on the merits of the Hospital's exclusivity defense. Furthermore, pursuant to Sabb v. South Carolina State University, the exclusivity provision of the Workers' Compensation Act does not involve subject matter jurisdiction. 350 S.C. at 423, 567 S.E.2d at 234.

Here, the circuit court held a hearing to determine the merits of the Hospital's exclusivity defense. The circuit court rejected this defense, but the merits of the Cookes' action has yet to be determined. Thus, the circuit court's order is interlocutory.

For an interlocutory order to be appealable, the order must "involve the merits." S.C. Code Ann. § 14-3-330 (1985). To involve the merits, an order '"must finally determine some substantial matter forming the whole or a part of some cause of action or defense . . . ."' Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (quoting Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)). Here, the circuit court weighed the evidence and concluded that the exclusivity provision did not apply because Cooke was neither a statutory employee nor a borrowed servant of the Hospital. In so holding, the circuit court "finally determined a substantial matter forming a part of the Hospital's defense," and thus, the order is appealable.

II. Statutory Employee

On the merits, the Appellants first argue the trial court erred in failing to find Cooke was a statutory employee of the Hospital. We disagree.

To qualify as a statutory employee under the Workers' Compensation Act, an individual must be engaged in an activity that "is a part of [the employer's] trade, business or occupation." S.C. Code Ann. § 42-1-400 (1985). A particular activity is part of the putative employer's "trade, business or occupation" if it "(1) is an important part of the [employer's] business or trade; (2) is a necessary, essential, and integral part of the [employer's] business; or (3) has previously been performed by the

[employer's] employees." Olmstead v. Shakespeare, 354 S.C. 421, 424, 571 S.E.2d 483, 485 (2003).

We agree with the circuit court's determination that none of these criteria is met. First, as is apparent from its articles of incorporation, the Hospital is in the business of providing health care, not transportation.[2] While air transportation of patients helps facilitate the Hospital's treatment of critically injured patients, that alone does not make transportation an important or essential part of the Hospital's general business. See Abbott v. The Limited, 338 S.C. 161, 163-64, 526 S.E.2d 513, 514 (2000) (holding that a truck driver who delivered goods to a clothing store was not a statutory employee of the store because, even though it was important for the store to receive those goods, the store was in the business of retail sales not transportation). Second, helicopter service is not "necessary, essential, or integral" to the Hospital's operation because less than one percent of the Hospital's patients use the service and the Hospital's emergency room services do not cease when the helicopter cannot fly. Finally, the Hospital did not have an FAA certificate and has never directly employed helicopter pilots. Thus, the preponderance of the evidence supports the circuit court's determination that Cooke was not a statutory employee of the Hospital.

II. Borrowed Servant

The Hospital next argues the circuit court erred in failing to find Cooke was a borrowed servant. We disagree.

Under the borrowed servant doctrine, when a general employer lends an employee to a special employer, that special employer is liable for workers' compensation if: (1) there is a contract of hire between the employee and the special employer; (2) the work being done by the employee is essentially that of the special employer; and (3) the special employer has the right to control the details of the employee's work. Eaddy v. A.J. Metler

[2] According to the Hospital's articles of incorporation, its corporate purpose is to "provid[e] hospital facilities and health care services for inpatient medical care of the sick and injured."

Hauling & Rigging Co., 284 S.C. 270, 272, 325 S.E.2d 581, 582-83 (Ct. App. 1985). While the circuit court found that the first two prongs of the borrowed servant doctrine were met, it found the Hospital did not control the details of Cooke's work, and therefore, the third prong was not satisfied.

When determining whether a special employer has the right to control the details of an employee's work, courts consider the following four factors: "(1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishings of equipment; and (4) right to fire." Chavis v. Watkins, 256 S.C. 30, 33, 180 S.E.2d 648, 649 (1971). Although the hospital provided Cooke with a helicopter, Cooke was paid by Petroleum Helicopters, which was also charged with hiring (and presumably firing) its pilots. Furthermore, pursuant to the contract between the Hospital and Petroleum Helicopters, "the methods and details" of each flight were not left up to the Hospital. Thus, we agree with the circuit court's determination that Cooke was not the Hospital's borrowed servant.

CONCLUSION

Based on the foregoing, we find Cooke is neither a statutory employee nor a borrowed servant of the Hospital. Accordingly, the circuit court's order resolving the merits of the Hospital's exclusivity defense is

AFFIRMED.

STILWELL and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Aiken, Respondent,

v.

World Finance Corporation of South Carolina and World Acceptance Corporation, Appellants.

Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4055
Heard November 9, 2005 – Filed December 12, 2005

AFFIRMED

Judson K. Chapin, III, of Greenville, for Appellants.

Matthew Price Turner and Rhett D. Burney, both of Laurens, for Respondent.

BEATTY, J.: World Finance Corporation of South Carolina and World Acceptance Corporation ("Appellants") appeal the circuit court's order denying their motion to compel arbitration. We affirm.

FACTS

Beginning in October 1997 through late 1999, Richard Aiken entered into a series of consumer loan transactions with Appellants. In conjunction with each of these loan agreements, Aiken signed an arbitration agreement,[1] which provided that the parties agreed to settle all disputes and claims through arbitration.

In late 2002, after Aiken had paid his loan in full, former employees of Appellants used Aiken's personal financial information to illegally procure loans and embezzle the proceeds from those loans.[2] Upon discovering the misuse of his personal information, Aiken filed suit against Appellants seeking a jury trial for damages arising out of the following causes of action: intentional infliction of emotional distress; negligence; negligent hiring/supervision; and unfair trade practices. In response, Appellants denied the allegations and filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, and a motion to compel arbitration.

After a hearing, the circuit court denied Appellants' motions to dismiss and to compel arbitration. In reaching this decision, the court found the creditor/debtor relationship between Appellants and Aiken ended once Aiken satisfied his loan in full. As a result, the court concluded the "effectiveness of the arbitration clause ceased when the relationship of the parties ceased." The court also held the tort claims raised by Aiken were not subject to arbitration because the acts of Appellants' employees were "completely independent of the loan agreement." This appeal followed.

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[1] Aiken signed several arbitration agreements. However, the only agreements pertinent to this appeal are those executed on February 3, 1999 and July 21, 1999.

[2] The former employees pleaded guilty for these offenses and were sentenced in the United States District Court for the District of South Carolina.

STANDARD OF REVIEW

"The question whether a claim is subject to arbitration is a matter of judicial determination, unless the parties have provided otherwise. Appeal from the denial of a motion to compel arbitration is subject to de novo review." Chassereau v. Global-Sun Pools, Inc., 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005) (citations omitted).

DISCUSSION

Appellants argue the circuit court erred in denying their motion to compel arbitration.[3] Specifically, they contend that once the court determined that an arbitration agreement existed between the parties, the court's "decisional function" was completed and any decisions regarding the validity of the agreement and the arbitrability of Aiken's claims were to be decided by an arbitrator. Even if the circuit court was authorized to determine the effectiveness of the agreement, Appellants claim the broad terms of the arbitration agreement encompassed any disputes beyond the expiration of the underlying loan transactions between the parties.

As a threshold matter, we find Appellants' argument that the circuit court's authority was strictly limited to determining whether the parties entered into an arbitration agreement is not properly before this court. First, Appellants did not raise this precise argument in their motion to compel arbitration or during the hearing before the circuit court. Secondly, the circuit court did not address this issue in its order, but instead, only ruled on the effectiveness of the arbitration agreement. Appellants did not file a motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to challenge this omission. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) (recognizing that in order for an issue to be preserved for appellate review, with few exceptions, it must be raised to

[3] Although Appellants raise four issues in their brief, we have consolidated these issues in the interest of brevity and clarity.

and ruled upon by the trial court); Hawkins v. Mullins, 359 S.C. 497, 502, 597 S.E.2d 897, 899 (Ct. App. 2004) (noting an issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment).

In terms of the merits of Appellants' motion to compel arbitration, we turn to recently established precedent. "Arbitration is a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement." Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct. App. 2004), cert. denied (July 8, 2005). Our supreme court has outlined the analytical framework for determining whether a particular claim is subject to arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118-19 (2001). In Zabinski, the court stated:

> To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Hinson v. Jusco Co., 868 F.Supp. 145 (D.S.C. 1994); S.C. Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 437 S.E.2d 22 (1993). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Towles, supra. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Great W. Coal, 312 S.C. at 564, 437 S.E.2d at 25. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Tritech, supra.

Id. at 597, 553 S.E.2d at 118-19. The court further articulated that "[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Id. at 119, 553 S.E.2d at 598.

With respect to tort claims, the supreme court noted the test from other jurisdictions stating, "the focus should be on the factual allegations contained in the petition rather than on the legal causes of actions asserted." Zabinski, 346 S.C. at 597 n.4, 553 S.E.2d at 119 n.4. The court elaborated:

> The test is based on a determination of whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable.

Id.

Shortly after the supreme court issued its decision in Zabinski, this court had the opportunity to apply the principles set forth and to interpret the "significant relationship" test. Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2003). Although this court utilized the Zabinski principles to analyze the question of whether separate arbitration agreements previously executed by the parties mandated arbitration for the claims in dispute, we believe the holding is, nevertheless, instructive. In Vestry, we concluded, "the mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties." Id. at 209, 588 S.E.2d at 140.

The arbitration agreement in the instant case provides in relevant part:

> ALL DISPUTES, CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN CONNECTION WITH THE LOAN AGREEMENT, OR ARISING OUT OF ANY TRANSACTION OR RELATIONSHIP BETWEEN LENDER AND BORROWER OR ARISING OUT OF ANY PRIOR OR

> FUTURE DEALINGS BETWEEN LENDER AND BORROWER, SHALL BE SUBMITTED TO ARBITRATION AND SETTLED BY ARBITRATION IN ACCORDANCE WITH THE UNITED STATES ARBITRATION ACT, THE EXPEDITED PROCEDURES OF THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "ARBITRATION RULES OF THE AAA"), AND THIS AGREEMENT.

(Emphasis added). We would also note the arbitration agreement contained a provision that stated, "This Agreement applies even if the Loan Agreement is paid in full, charged-off by Lender, or discharged in Bankruptcy."

Given the broadly worded terms of the arbitration agreement, it is plausible that one could initially conclude that Aiken's claims were subject to arbitration. However, as discussed above, the terms alone are not dispositive of this determination. Instead, we are required to focus on the factual allegations of the underlying causes of action to analyze whether a "significant relationship" existed between the claims and the loan contract. Moreover, because Aiken had satisfied his loan in full at the time his claims arose, we must also look at the parties' intent to assess whether the arbitration agreement extended beyond the termination of the contract. See Towles v. United Healthcare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999)("When a party invokes an arbitration clause after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract."); see Zabinski, 346 S.C. at 596, 553 S.E.2d at 118 ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

Applying the foregoing principles to the specific facts of this case, we agree with the circuit court's conclusion that Aiken's claims were not subject to arbitration. Initially, we reject Appellants' contention that the claims arose out of the loan agreement simply because Appellants' employees would not have had access to Aiken's personal financial information but for the loan agreement. Although Appellants' assertion is factually accurate, it disregards

the analytical framework for determining whether claims are arbitrable. Aiken's tort claims are independent of the loan agreement and require no reference to the contract. At the time Appellants' employees misused Aiken's personal financial information, Aiken had paid off his loan in full. Thus, a "significant relationship" does not exist between Aiken's claims and the loan agreement. Moreover, it is inconceivable that Aiken intended to agree to maintain a contractual relationship with Appellants in perpetuity after he paid off his loan. Given Aiken had satisfied his contractual obligation, no further dealings with Appellants were necessary. Finally, we do not believe he could have foreseen the future tortious conduct of Appellants' employees at the time he entered into the loan agreements.

Additionally, we believe our holding is consistent with this court's recent decision in Chassereau v. Global-Sun Pools, Inc., 363 S.C. 628, 611 S.E.2d 305 (Ct. App. 2005). In Chassereau, a homeowner entered into a contract for the construction of a pool by Global-Sun Pools. The contract contained an arbitration provision that applied to "any disputes arising in any manner relating to this agreement." Id. at 633, 611 S.E.2d at 307. After construction was completed, the homeowner began to experience problems with the pool. Because Global-Sun Pools failed to repair the pool, the homeowner stopped making payments on the pool. Id. at 630, 611 S.E.2d at 306. A few months later, the homeowner filed a complaint against the pool company and one of its employees, alleging this employee and other employees made a series of harassing and intimidating telephone calls to her workplace. The homeowner claimed the pool company's employees made defamatory statements about her to her co-workers and they disclosed information regarding her personal finances. Additionally, the homeowner asserted these same employees made numerous telephone calls to her home as well as to her relatives in an effort to intimidate and harass her. Id.

In her complaint, the homeowner sought damages based on causes of action for defamation, violation of South Carolina Code of Laws section 16-17-430 which prohibits unlawful use of a telephone, and intentional infliction of emotional distress. Id. at 631, 611 S.E.2d at 306. The pool company and its employee filed a motion to compel arbitration, alleging the provisions of the construction contract mandated arbitration. The circuit court denied the

motion, finding "[t]he complaint is based upon tortious conduct of the employees of [Global-Sun Pools] unrelated to the contract" and the "allegations of the complaint do not arise out of nor do they relate to the contract[.]" Id. at 631, 611 S.E.2d at 306-07.

On appeal, this court affirmed the circuit court's decision. In so holding, we found the homeowner's claims did not arise out of the construction contract and could be proved independently of the contract. We further concluded the causes of action alleged in the complaint "constitute[d] tortious behavior that the parties . . . could not have reasonably foreseen and for which we seriously doubt they intended to provide a limited means of redress." Id. at 634, 611 S.E.2d at 308.

Similar to the homeowner's tort claims in Chassereau, Aiken's tort claims did not arise out of the loan agreement and could be proved independently of this agreement. Although we are cognizant of the policy favoring arbitration, we do not believe arbitration is warranted for Aiken's claims. See Zabinski, 346 S.C. at 596, 553 S.E.2d at 118 ("The policy of the United States and South Carolina is to favor arbitration of disputes.").

Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy Jackson, Appellant,

v.

City of Abbeville, Riley's BP,
and Angela McCurry,
Defendants,
of whom City of Abbeville is Respondent.

Appeal From Abbeville County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4056
Submitted October 1, 2005 – Filed December 12, 2005

AFFIRMED

Fletcher N. Smith, Jr., of Greenville, for Appellant.

James D. Jolly, Jr., of Anderson, for Respondent.

KITTREDGE, J.: This is a civil action brought under the South Carolina Tort Claims Act for violation of the state constitution, malicious prosecution and false arrest. Timothy Jackson appeals from an order of the circuit court granting the City of Abbeville's (City) motion for summary judgment and denying Jackson's motion for summary judgment. At issue is whether a City police officer had probable cause to arrest Jackson at a convenience store in Abbeville on February 22, 1999. We hold the officer had probable cause to arrest Jackson and affirm.

FACTS

On February, 22, 1999, Jackson entered Riley's BP, a convenience store located in Abbeville, South Carolina, and asked the attendant whether he could put up a flyer in the store for a party he was having at his club. The attendant said he could not. A video surveillance tape from the store indicates that Jackson became enraged, accusing the attendant of racism. She asked Jackson to leave the premises. Jackson refused to leave, and the attendant called the police.

When the officer arrived, Jackson repeatedly interrupted the officer while he was attempting to find out what happened from the attendant. The officer told Jackson to be quiet several times, but Jackson refused to do so. The attendant again told Jackson to leave the premises. When Jackson refused to leave, the officer put Jackson on trespass notice. Jackson continued to interrupt. The officer told Jackson to be quiet or he would be arrested. Jackson ignored the officer's repeated demands, and the officer attempted to place him under arrest. A scuffle ensued as Jackson resisted and backup was summoned to effect the arrest.

After being arrested and taken to jail, Jackson was charged with disorderly conduct and resisting arrest. Jackson was not charged with trespass after notice. The municipal judge dismissed the charges.[1]

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[1] The record is not clear as to the basis of the dismissal of the charges in municipal court. According to the City's brief, the disorderly conduct charge was dismissed because Jackson's "actions did not rise to the level of 'fighting words' as required by Houston v. Hill, 482 U.S. 451 (1987) and State v.

Jackson sued the City of Abbeville[2] under the South Carolina Tort Claims Act[3] for: (1) violation of the South Carolina Constitution, (2) malicious prosecution, and (3) false arrest. Both sides moved for summary judgment. After a hearing, the circuit court granted the City's motion for summary judgment and denied Jackson's motion. This appeal followed.

STANDARD OF REVIEW

Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002).

LAW/ANALYSIS

An essential element in each of Jackson's causes of action is the lack of probable cause to arrest him.[4] The dispositive issue before us is whether the

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Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991)." The resisting arrest charge was also dismissed, apparently on the belief that the dismissal of the underlying charge precluded a stand-alone prosecution for resisting arrest. The present uncertainty as to the reasons why the charges against Jackson were dismissed does not impact this appeal, because the City—for purposes of its summary judgment motion—assumed a lack of probable cause concerning the charged offenses.

[2] Riley's BP and Angela McCurry have been dismissed from the case.

[3] S.C. Code Ann. §§ 15-78-10 to -200 (2005).

[4] Jackson predicated his constitutional violation claim on the lack of probable cause. His false imprisonment claim also requires lack of probable cause. See Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999) ("An action for false imprisonment may not be maintained where the plaintiff was arrested by lawful authority . . . [and] [t]he fundamental issue in determining the lawfulness of an arrest is whether

"probable cause to arrest" determination is confined to the actual charges or whether consideration of an uncharged offense is appropriate. The City concedes for purposes of this appeal the absence of probable cause to arrest Jackson for disorderly conduct and the related offense of resisting arrest. The City contends, however, that it may—to defeat Jackson's claims—properly rely on the presence of probable cause in connection with an uncharged offense. We hold that the determination of "probable cause to arrest" for the purpose of Jackson's tort claims may properly include consideration of an uncharged offense.

The uncharged offense for which the City asserts probable cause existed is trespass after notice. Trespass after notice is a misdemeanor criminal offense prohibited by section 16-11-620 of the South Carolina Code (Supp. 1998). "Statutory criminal trespass involves . . . the failure to leave a dwelling house, place of business or premises of another after having been requested to leave." State v. Cross, 323 S.C. 41, 43, 448 S.E.2d 569, 570 (Ct. App. 1994). The City has an ordinance patterned after section 16-11-620. A police officer may, without a warrant, arrest a person who commits trespass after notice—or any misdemeanor—in the officer's presence. See S.C. Code Ann. § 17-13-30 (1985); State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974).

Jackson has the burden of demonstrating lack of probable cause. Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965). Probable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983). "'Probable cause' is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and

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there was 'probable cause' to make the arrest."). Finally, a malicious prosecution action fails if the plaintiff cannot show malice and lack of probable cause. Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965); see also Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986) (listing the elements of malicious prosecution, including "want of probable cause").

cautious man, under the circumstances, to believe likewise." Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). Probable cause is determined as of the time of the arrest, based on facts and circumstances—objectively measured—known to the arresting officer. The determination of probable cause is not an academic exercise in hindsight. George, 323 S.C. at 509, 476 S.E.2d at 911; Eaves v. Broad River Elec. Co-op., Inc., 277 S.C. 475, 478, 289 S.E.2d 414, 415-16 (1982); State v. Goodwin, 351 S.C. 105, 110, 567 S.E.2d 912, 914 (Ct. App. 2002); State v. Robinson, 335 S.C. 620, 634, 518 S.E.2d 269, 276-77 (Ct. App. 1999); 5 Am. Jur. 2d Arrest § 40; 6A C.J.S. Arrest § 25 (2004). "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Horton v. California, 496 U.S. 128, 138 (1990).

Concerning the narrow issue before us, we find no South Carolina case directly on point, but we find the reasoning of three cases persuasive.

The first case is State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999). There, police officers responded to a call and found an "escalating altercation" between Tyndall and his father. Id. at 12, 518 S.E.2d at 280. The father asked Tyndall to leave the house. Id. The officers told Tyndall that if he did not comply he would be arrested for trespass after notice. Id. at 12-13, 518 S.E.2d at 280. Tyndall refused to leave, and when the officers attempted to arrest him, he became belligerent and attacked the officers. Id. at 13, 518 S.E.2d at 280. Tyndall was charged with multiple offenses, but not trespass after notice. He was convicted of two counts of assault and battery with intent to kill and resisting arrest.

Tyndall appealed from the trial court's refusal to dismiss the resisting arrest charge because "he was never arrested or prosecuted for trespass after notice . . . ." Tyndall, 336 S.C. at 14, 518 S.E.2d at 281. His specific contention was "that[] because no judicial determination was made as to the officers' probable cause to arrest him for trespass after notice, 'the actions taken by the officers were absent probable cause . . . .'" Id. at 15, 518 S.E.2d at 282. This court rejected Tyndall's argument and found as a matter of law the existence of probable cause to arrest for the uncharged offense of trespass after notice: "Because Tyndall committed this crime [trespass after notice in

violation of section 16-11-620] in the presence of the police officers, they had the power and authority to arrest Tyndall without a warrant. There was no requirement for a judicial determination as to probable cause to arrest for trespass after notice." Id. at 16, 518 S.E.2d at 282.

The second case is Ruff v. Eckerd Drugs, Inc., 265 S.C. 563, 220 S.E.2d 649 (1975). Ruff was approached while leaving an Eckerds Drug Store by the store's manager and accused of shoplifting. An altercation occurred when the manager attempted to make a citizen's arrest. Id. at 566, 220 S.E.2d at 650. Ruff was charged with simple assault and disorderly conduct. He was convicted on the assault charge, but the disorderly charge was dismissed. Because of the dismissal, Ruff filed an action for malicious prosecution. Id. Ruff prevailed at trial, but lost on appeal. Our supreme court's analysis in rejecting Ruff's claim has application in the case before us.

The salient portions of the Ruff analysis include the observation that one "may not maintain an action for malicious prosecution because he was charged with the wrong offense." Id. at 567, 220 S.E.2d at 651. The court further noted:

> The fact [Ruff] was discharged by the magistrate on the charge of disorderly conduct is not conclusive on the question of probable cause; that is, if it appears affirmatively from the facts [that Ruff] was guilty of a misdemeanor, although one which contains different elements, there still would not be an absence of probable cause.

Id. at 568, 220 S.E.2d at 651.

The court concluded by finding that the drugstore manager was "in possession of knowledge of the existence of such facts and circumstances as would excite the belief in a reasonable mind that [Ruff] had committed a crime." Id. at 568, 220 S.E.2d at 652.

The third case is State v. Freiburger, Op. No. 26042 (S.C. Sup. Ct. filed Sept. 26, 2005) (Shearouse Adv. Sh. No. 37 at 26). Freiburger was hitchhiking when he was stopped by a Tennessee state trooper. The trooper patted Freiburger down prior to placing him in the patrol car. The pat-down yielded a pistol, and Freiburger was arrested for "carrying arms," but not hitchhiking. Id. at 27. The pistol was traced to a homicide in Columbia, South Carolina. Id. at 27-28.

At the murder trial in South Carolina, Freiburger unsuccessfully challenged the admissibility of the pistol seized in Tennessee—the murder weapon—on several grounds. The relevant ground for our purposes is Freiburger's claim that search was illegal because he was not charged with hitchhiking, and hence probable cause was lacking. Our supreme court rejected this argument, noting that "the fact Freiburger was not ultimately arrested for hitchhiking is not dispositive." Id. at 30. The Freiburger court held that "an officer's 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause . . . .'" Id. (quoting Devenpeck v. Alford, 125 S.Ct. 588, 594 (2004) (repeating the settled principle that "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action'"); Whren v. United States, 517 U.S. 806, 813 (1996) (quoted in Devenpeck)).

We find the reasoning in Tyndall, Ruff and Freiburger leads to the conclusion that the State may rely on an uncharged offense to establish probable cause. We believe this legal principle applies in a false imprisonment or malicious prosecution claim and holds true here although Jackson was not convicted of a crime. As previously noted, in the context of a tort action, Jackson has the burden of proving lack of probable cause. Although there was no finding of probable cause—as to the offense of trespass after notice—in the underlying criminal case, such a judicial determination is not required. Tyndall, 336 S.C. at 16, 518 S.E.2d at 282.

We now turn to the factual question presented—did the police officer have probable cause to arrest Jackson for the offense of trespass after notice? Although the question of whether probable cause exists is ordinarily a jury

question, it may be decided as a matter of law when the evidence yields but one conclusion. Parrott, 246 S.C. at 323, 143 S.E.2d at 609. We have carefully reviewed the record in the light most favorable to Jackson and conclude that, as a matter of law, the facts known to the officer "would induce an ordinarily prudent and cautious man, under the circumstances, to believe" that Jackson had committed the offense of trespass after notice. Jones, 301 S.C. at 65, 389 S.E.2d at 663. Jackson was put on notice to leave the premises, and he refused to do so. The fact that Jackson was not charged with trespass after notice is immaterial. Since the law sanctions the City's reliance on the uncharged offense of trespass after notice—and concomitantly the presence of probable cause—the circuit court properly granted summary judgment to the City.

CONCLUSION

We hold, to the exacting summary judgment standard, that the City police officer had probable cause to arrest Jackson for trespass after notice, an uncharged offense. We further hold that the City's reliance on the uncharged offense is sufficient to defeat Jackson's claims. Thus, summary judgment was properly granted for the City on all causes of action.[5]

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.

[5] We need not address the City's alternative basis for disposing of the malicious prosecution claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Southern Glass & Plastics Co., Respondent,

v.

Angela Duke, Appellant.

Appeal From Calhoun County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4057
Heard October 11, 2005 – Filed December 12, 2005

AFFIRMED IN PART and REVERSED IN PART

Manton M. Grier, Jr., Victoria L. Eslinger, and Susan B. Lipscomb; all of Columbia, for Appellant.

Charles E. Carpenter, Jr., and Harry A. Swagart, III; both of Columbia, for Respondent.

HEARN, C.J.: Southern Glass & Plastics Co. instituted an action against Angela Duke, one if its former employees, seeking to recover money it alleges she distributed without authorization. Angela denied the allegations and asserted numerous counterclaims. The trial court granted summary judgment for Southern Glass on Angela's defenses of waiver and estoppel,

and on her counterclaims for outrage, abuse of process, and wrongful termination. The trial court also granted partial summary judgment on Angela's counterclaim for defamation. Angela appeals from this order, and we affirm in part and reverse in part.

FACTS

Angela worked as the administrative office manager for Southern Glass from May 1992 until her termination in October 2001. For the majority of the time Angela worked there, Alan and Joanne Epley each had a fifty percent ownership interest in the company. Joanne was Angela's immediate supervisor.

At some point, the Epleys' relationship soured, and from 2000 to 2001, they were involved in both a divorce action and a shareholder derivative action. While the couple's divorce was pending, an order was issued in the derivative action which required Alan and Joanne to discuss and come to an agreement on issues such as hiring, firing, promoting, demoting, changing compensation, and awarding benefits. Several months after the order was issued, Joanne sent a copy of it to Angela with a cover memo explaining that "there are to be no changes in compensation of any managerial level employees without agreement between Alan Epley and Joanne Epley . . . ." After receiving the memo, Angela conferred with a human resource consultant who told her the order applied to the actions of Joanne and Alan, but not to her own actions.

In June of 2001, Angela e-mailed Joanne to ask about the status of her bonus, which Angela had received every year since 1996. Joanne replied via e-mail, explaining Southern Glass had not performed as well as expected, and therefore, Angela would not be receiving a bonus this year. Six weeks later, however, Joanne e-mailed Angela announcing that Southern Plastics was now showing a profit. Because the company's numbers had improved, Joanne directed Angela to include a $4,500 bonus for herself and a $6,500 bonus for another employee (who happened to be Joanne's sister) on the payroll transmission for August 13, 2001. Angela did so, and Joanne signed the checks.

After the checks had been prepared, but one day prior to their disbursement, Alan told Angela to disobey any instructions Joanne had given her regarding checks. According to Angela, this directive was issued by Alan because two insurance checks had been voided and re-cut, and he wanted information on the two additional checks. Alan, however, claims that he specifically asked Angela about the bonus payments, and she told him she knew nothing about them.

In the early fall of 2001, the Epleys settled their divorce action. In the settlement, Joanne agreed to sell Alan her interest in Southern Glass. On October 4, 2001, Joanne, Alan, and Southern Glass executed a release in which all parties agreed to "forever discharge each other, together with any and all of their . . . employees . . . who are or may be responsible for or jointly or severally liable for the same, from any and all liabilities, causes of action, [and] claims . . . that they have asserted or could have asserted in [the divorce proceeding or shareholder derivative suit]." The release further explains that its intent is to "fully and finally release all other parties from any and all claims, past, present, or future, arising from or connected with the issues and transactions arising out of the relationship among the parties as set forth in [the divorce proceedings or shareholder derivative action]."

Within three weeks of signing the release, Alan called Angela into his office and demanded she repay her bonus. She refused, and Alan fired her. After her termination, Angela applied for unemployment benefits. Southern Glass challenged her application, and turned the unemployment claim over to the human resource consultant group it had on retainer to handle employment-related issues. In a handwritten letter to the consultant group, Alan alleged Angela was fired for, among other things, theft, forgery, and taking money under false pretenses. The consultant group incorporated parts of Alan's letter into its own letter to the South Carolina Employment Security Commission, but ultimately, the Commission found in Angela's favor and awarded benefits.

Alan wrote a letter to Angela in January of 2002, demanding she return her 2001 bonus. Because Angela did not return the money, Southern Glass initiated an action in magistrate's court, seeking the repayment of both her

bonus and the bonus paid to Joanne's sister. Together, these bonuses amounted to $11,000. Angela filed an Answer denying Southern Glass's allegations and asserting numerous counterclaims. She also filed a motion to transfer the case to the court of commons pleas, which was granted.

Once the case was transferred, both Southern Glass and Angela made motions for summary judgment. The trial court granted summary judgment in favor of Southern Glass on Angela's defenses of waiver and estoppel and her counterclaims for outrage, abuse of process, and wrongful termination. The court also granted partial summary judgment in favor of Southern Glass on Angela's counterclaim for defamation, finding communications between Southern Glass and its human resources consultant were absolutely privileged. However, the court refused to grant summary judgment with regard to false statements Alan allegedly made to a friend. This appeal, filed by Angela, followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Even if there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.

Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

LAW/ANALYSIS

I. Release Defense

Angela claims the trial court erred in failing to find the release Southern Glass signed constituted a waiver to its claims against her. We agree.

By signing the release, Alan, Joanne, and Southern Glass agreed to:

> mutually release, acquit, and forever discharge each other, together with any and all . . . employees . . . who are or may be responsible for or jointly or severally liable for . . . all liabilities, causes of action, [and] claims . . . known or unknown, now existing or which may accrue hereafter, against any of the parties . . . which they now have, have had in the past, or may have in the future . . . and any other claim that they have asserted or could have asserted in the [the divorce and shareholder derivative actions].

There is no dispute that Angela was an employee of Southern Glass at the time this release was signed.[1] What is disputed is whether Southern Glass's

[1] Although no one disputes that Angela was an employee of Southern Glass at the time the release was signed, Southern Glass nevertheless argues we should not allow a non-signatory to benefit from the release. However, the clear language of the release includes employees of the signatories, and "[p]ublic policy does not require consideration from each party where a general release purports to release not only the paying party, but all other potential defendants, from any and all future liability." 76 C.J.S. Release § 9 (1994); see also Hyman v. Ford Motor Co., 142 F.Supp.2d 735, 742 (D.S.C.

cause of action against Angela was intended to be waived when the parties signed this release. The trial court found the claim against Angela was not waived because the release "applies **only** to claims that could have been asserted in the divorce or shareholder derivative action." (Emphasis in original.) We do not believe the parties, at the time they signed the release, intended for it to be so narrowly construed.

A release is a contract, and the scope of a release is gathered by its terms. Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 309 (1950); Bowers v. Dep't of Transp., 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004). "In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties." The Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F. Supp. 416, 425 (D.S.C. 1995).

Here, the release itself reveals the parties' intent:

> [I]t being the intent of this Release for all parties to fully and finally release all other parties from any and all claims, past, present, or future, arising from or connected with the issues and transactions arising out of the relationship among the parties as set forth in [the divorce and shareholder derivative actions].

This language makes clear the parties' intent to release all other parties from any claim connected to the transactions arising out of the divorce action and shareholders' derivative action. Here, the foundation of Southern Glass's cause of action against Angela is the order from the derivative action requiring mutual agreement between Alan and Joanne. Absent that order, Angela would unquestionably have been authorized to issue the bonus checks once Joanne gave her that directive. Thus, Southern Glass's claim against Angela is "connected with . . . transactions arising out of the relationship among the parties as set forth in [the shareholder derivative action]," and therefore, the parties intended it to be covered by the release.

2001) (upholding a release even though beneficiary did not provide consideration).

Accordingly, we find the trial court erred in granting summary judgment in favor of Southern Glass on Angela's defense of waiver. Instead, we find Southern Glass's claim against Angela is barred, and therefore, summary judgment should have been entered in Angela's favor.[2] See Campbell v. Hilton Head No. 1 Pub. Serv. Dist., 354 S.C. 190, 197, 580 S.E.2d 137, 141 (2003) (reversing trial court's grant of summary judgment in favor of respondent, and instead finding "summary judgment should have been granted in appellants' favor").

II. Privilege to Defamation

Next, Angela argues the trial court erred by concluding the statements Southern Glass made to its human resources consultant, who it hired to dispute Angela's claim for unemployment, were absolutely privileged. We disagree.

Section 41-27-560 of the South Carolina Code (1986) provides that communications made from an employer to the Employment Commission, or any of its agents, representatives, or employees, in connection with an application for unemployment compensation, are privileged. Angela argues the statute only protects statements made to agents of the Commission, not statements made to agents of the employer.

We find Angela's interpretation illogical considering business entities must always use either an employee or agent to communicate with the Commission. Furthermore, the principles of common law provide that an absolute privilege is not lost simply because an agent is used. See Rodgers v. Wise, 193 S.C. 5, 9, 7 S.E.2d 517, 518-19 (1940) (holding the attorney-client privilege was not waived when an attorney dictated a letter to a stenographer). Because "[a] statute is not to be construed as in derogation of

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[2] Because we propose to find the release applies to Southern Glass's cause of action against Angela, we need not address her estoppel argument.

common-law rights if another interpretation is reasonable,"[3] we agree with the trial court that section 41-27-560 applies to the statements Southern Glass made to its human resource consultant. Accordingly, we find no error in its grant of partial summary judgment on Angela's counterclaim for defamation.

III. Abuse of Process

Angela next argues the trial court erred by granting summary judgment on her counterclaim for abuse of process. We disagree.

To overcome summary judgment on her counterclaim for abuse of process, Angela must show there was some evidence Southern Glass had an ulterior purpose for filing its suit against her, and Southern Glass committed some "willful act not proper in the regular course of the proceeding." Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136-37, 492 S.E.2d 103, 107 (1997). "[L]iability [for abuse of process] exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 75, 567 S.E.2d 251, 256 (Ct. App. 2002). Furthermore, "[t]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Hainer, 328 S.C. at 136, 492 S.E.2d at 107.

Even assuming without deciding there was some evidence Southern Glass had an ulterior motive for bringing this action against Angela, there is no evidence Southern Glass engaged in a "willful act," an element essential to the abuse of process cause of action. The willful act element requires "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process." Id. Here, Southern Glass filed a lawsuit seeking to collect the money it alleges Angela disbursed without authorization. There is no evidence Southern Glass engaged in any improper acts during the course of the proceeding, and we find the trial court correctly

[3] Doe v. Marion, 361 S.C. 463, 473, 608 S.E.2d 556, 561 (Ct. App. 2004).

granted summary judgment in its favor on Angela's counterclaim for abuse of process.

IV. Wrongful Termination

Finally, Angela argues the trial court erred by granting summary judgment in favor of Southern Glass on her counterclaim for wrongful termination. Specifically, she argues there was evidence her termination violated public policy because it was based on her refusal to pay back a duly earned wage. We disagree.

Although Angela was an at-will employee and therefore could be terminated at any time, for any reason, even at-will employees can bring a cause of action for wrongful termination when the employer's reason for termination violates a clear mandate of public policy. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). Our courts have found the public policy exception to clearly apply in cases where the employer either (1) requires the employee to violate the law, or (2) the reason for the employee's termination is itself a violation of criminal law. Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 350, 532 S.E.2d 259, 260 (2000). Angela argues there was evidence in the record supporting her counterclaim for wrongful termination because (1) her refusal to repay the bonus was the reason she was fired; (2) the Payment of Wages Act requires employees to pay all wages when due; (3) her bonus was a duly earned wage; and (4) it would be a violation of law to require an employee to return a duly earned wage in order to continue her employment.

According to the Payment of Wages Act, employers are required to pay all wages when due. S.C. Code Ann. § 41-10-40(a) (Supp. 2004). However, employers may withhold disputed wages. S.C. Code Ann. § 41-10-60. Here, Angela's entitlement to her bonus was clearly disputed. Because Southern Glass would have been able to withhold the bonus pursuant to the Act, we believe it was not a clear violation of public policy for it to request that Angela return the bonus. Accordingly, we find no error in the trial court's grant of summary judgment in favor of Southern Glass on Angela's counterclaim for wrongful termination.

CONCLUSION

We find the trial court erred in granting summary judgment to Southern Glass on Angela's defense of waiver; instead, summary judgment should have been granted in Angela's favor. However, we agree with the trial court's grant of summary judgment in favor of Southern Glass on Angela's counterclaims for defamation, abuse of process, and wrongful termination. Accordingly, the order of the trial court is

AFFIRMED IN PART and REVERSED IN PART.

STILWELL and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kelvin R. Williams, Appellant.

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

Opinion No. 4058
Heard October 11, 2005 – Filed December 12, 2005

REVERSED AND REMANDED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General W. Rutledge Martin; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

STILWELL, J.: Kelvin Williams appeals the trial court's refusal to charge that an individual lawfully being placed under arrest has the right to defend himself against the use of excessive force by the police officer. We reverse and remand.

FACTS

Williams was tried and convicted of resisting arrest and assaulting a law enforcement officer. The circumstances of this case arise from Deputy Warren Gadson's attempt to serve a family court bench warrant on Williams at his residence. The facts of the resulting encounter are thereafter in dispute.

Gadson, of the Richland County Sheriff's Office, testified he knocked on Williams' door and appropriately identified himself. There was no response, but Gadson heard movement from within the apartment. Gadson then obtained a key to Williams' apartment from the complex manager and attempted to enter the premises. Williams testified he did not know of Gadson's presence until the officer attempted to enter his apartment but was stopped by a bar lock on the entry door.[1] Williams asked Gadson to identify himself, and Gadson verbally identified himself and showed Williams his badge. Williams testified that Gadson had inserted his foot into the opening in the doorway, and he requested that Gadson remove his foot so that the bar bolt could be removed and the door opened completely. Williams testified that Gadson drew his gun and told him to open the door or he would kick it in. According to Williams' testimony, when he stepped outside Gadson charged him, tackled him, pressed his gun into his ribs, and threatened to kill him.[2] At that point, Williams threw Gadson off him, and the two scuffled until Gadson subdued Williams and other officers arrived at the scene.

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[1] The lock on the door was apparently similar to a traditional chain lock except composed of a metal bar and ball mechanism. The lock would allow an occupant to partially open the entry door, but prevent it from opening completely.

[2] Gadson testified Williams charged him when he opened the apartment door, thereby initiating the physical altercation.

At the close of trial, Williams requested a charge that he was justified in resisting the officer's use of excessive force in the execution of the arrest warrant. The trial court denied the request. Williams appeals.

STANDARD OF REVIEW

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." Id. at 390, 529 S.E.2d at 539. If there is any evidence to support a charge, the trial court should grant the request. State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The requesting party must have been prejudiced by the trial court's failure to give the instruction in order to warrant reversal on appeal. Clark, 339 S.C. at 390, 529 S.E.2d at 539.

LAW/ANALYSIS

Williams argues the trial court erred in failing to instruct the jury that an individual being arrested is permitted to defend himself against excessive force by the arresting officer during a lawful arrest. We agree.

This case actually involves two issues, one of which presents a novel question in South Carolina. First, we must determine whether the evidence presented at trial supports giving the requested charge. In addition, we must consider whether the charge requested in this case is based on a sound principle of law. South Carolina has yet to clearly and definitively recognize the right of a suspect to resist excessive force by a police officer when such force is incident to a lawful arrest. We will discuss each issue in turn.

I. Was the requested charge warranted under the evidence presented?

Williams testified that as he opened the apartment door and stepped across the threshold, Gadson "threw me to the ground, took his gun, shoved it up into my ribs. And he told me that if I didn't stop he was going to kill me. And I threw [Deputy Gadson] off me." In evaluating the record for evidence supporting Williams' position, we must consider all the evidence presented and consider what reasonable inferences a jury could draw therefrom. According to Williams' testimony, he resisted Gadson only in response to the unprovoked use of force against him.

This case is distinguishable from State v. Weaver, 265 S.C. 130, 217 S.E.2d 31 (1975), and State v. Galloway, 305 S.C. 258, 407 S.E.2d 662 (Ct. App. 1991). In Weaver, the accused testified he protested his arrest and was handcuffed by three officers and beaten by a fourth one. He claimed that he did not attack any officer or resist arrest. Id. at 135, 217 S.E.2d at 33. The supreme court concluded Weaver could not assert compliance with the arrest and also claim that his actions were excused due to the arresting officers' use of excessive force. Id. at 137, 217 S.E.2d at 34.

Citing Weaver as controlling authority, this court likewise disposed of the same issue in Galloway. Galloway, 305 S.C. at 266-67, 407 S.E.2d at 667. There the accused claimed that he did not resist arrest, and his acts of resistance were fabricated by police in order to prevent him from filing a civil lawsuit for injuries he sustained during the incident. Id. at 262, 407 S.E.2d at 665.

In this case, the State points to Williams' testimony during cross-examination that he did not respond to Officer Gadson with force. In the context of Williams' entire testimony, we interpret that response by Williams to mean that during the initial phase of the encounter he cooperated with Officer Gadson and did not use force until after the officer employed excessive force against him. Williams admitted he "threw off" Gadson. He conceded that he and Gadson had physical contact and struggled. Such a progression of events supports Williams' argument that he was entitled to the

requested charge and does not render his testimony inconsistent. Therefore, the evidence in the record supports the giving of the requested charge.

In order to warrant a new trial, the court's failure to give a requested jury instruction must be prejudicial. In the instant case, the jury was charged as follows regarding assaulting an officer while resisting a lawful arrest:

> The State must prove . . . that the defendant knowingly and willfully assaulted, beat or wounded a law enforcement officer who was serving, executing or attempting to serve a legal writ or process; or in other words, an arrest warrant, or that the defendant assaulted, beat, or wounded an officer when the defendant was resisting arrest being made by a person that the defendant knew or reasonably should have known was a law enforcement officer.

Neither this charge, nor any of the other general charges given the jury, allowed the members to consider whether Williams' resistance could have been justified in response to excessive force by Gadson. Had the jury chosen to believe Williams' version of events, it could have concluded that Williams' actions were justified. If so, the jury would have needed to understand the legal implications of that factual conclusion in order to apply it to the verdict. Therefore, the failure to give the requested instruction was prejudicial.

II. Does the requested charge accurately reflect the law of this State?

Having determined that the evidence warranted such a charge, we must now reach the issue of whether the requested charge accurately reflects the law of South Carolina. We conclude that South Carolina does recognize a person's right to use reasonable force to defend against the use of excessive force by a police officer incident to a lawful arrest.

Weaver and Galloway did not require the court to address this precise issue since the facts in those cases did not warrant the giving of such a

charge. Therefore, we will look to our own general principles of law as well as the law of other jurisdictions for instruction. In McCracken v. Commonwealth, 572 S.E.2d 493 (Va. App. 2002), the court held that an individual has the right to resist excessive force during a lawful arrest. "A lawful arrest, when made with unlawful force, may be resisted." Id. at 497. North Carolina and Georgia have also recognized such a right. See State v. Anderson, 253 S.E.2d 48, 51 (N.C. App. 1979) ("[T]he right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest . . . ."); see also Cunningham v. State, 471 S.E.2d 273, 274 (Ga. App. 1996) (approving a jury charge stating "that a person being arrested, even though the arrest itself is lawful, has the right to resist the use of excessive and unlawful force by those making the arrest to the extent that the person reasonably believes that the degree of resistance used is necessary to defend himself against the officer's use of unlawful or excessive force"). Numerous other jurisdictions have recognized an arrestee's right to self-defense as well. See generally Dag E. Ytreberg, J.D., Annotation, Right to Resist Excessive Force Used in Accomplishing Lawful Arrest, 77 A.L.R. 3d 281 (2005).

There is no question that South Carolina allows a police officer to use force reasonably necessary to effect an arrest. See State v. DeBerry, 250 S.C. 314, 320, 157 S.E.2d 637, 640 (1967); State v. Weaver, 265 S.C. 130, 136, 217 S.E.2d 31, 34 (1975). However, as long ago as 1870, South Carolina recognized that such right cannot be unfettered, even within the context of fulfilling a lawful duty. "If the simple fact that the plaintiff was a policeman, and was acting as such when the violence was committed, is sufficient to justify the violence, . . . then any degree of violence may, under the same rule of law, be justified, without reference to the necessities of the case." Golden v. State, 1 S.C. 292, 300 (1870).

After examining the holdings in other jurisdictions and our own jurisprudence, we conclude that an individual, under the appropriate circumstances, has the right to utilize the amount of resistance reasonably necessary to defend himself in the event excessive force is utilized incident to a lawful arrest. This should not be interpreted to mean anyone is entitled to resist a lawful arrest or that the arrest becomes unlawful for purposes of prosecuting the underlying offense. On the contrary, to be entitled to the

requested instruction, the evidence must clearly show that the accused complied fully with all requirements placed upon citizens subject to a lawful arrest and resisted only to the extent necessary to protect himself from serious physical harm. The facts of this case warrant a jury charge to that effect.

REVERSED AND REMANDED.

HEARN, C.J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tawanda Simpson, Respondent,

v.

World Finance Corporation of South Carolina and World Acceptance Corporation, Appellants.

Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4059
Heard November 9, 2005 – Filed December 12, 2005

AFFIRMED

Judson K. Chapin, III, of Greenville; for Appellants.

Matthew Price Turner, of Laurens; Rhett D. Burney, of Laurens; for Respondent.

BEATTY, J.: World Finance Corporation of South Carolina and World Acceptance Corporation ("Appellants") appeal the circuit court's order denying their motion to compel arbitration. We affirm.

FACTS

Beginning in March 2001 through July 2002, Tawanda Simpson entered into a series of consumer loan transactions with Appellants. In conjunction with each of these loan agreements, Simpson signed an arbitration agreement, which provided that the parties agreed to settle all disputes and claims through arbitration.

In late 2002, after Simpson had paid her loan in full, former employees of Appellants used Simpson's personal financial information to illegally procure loans and embezzle the proceeds from those loans.[1] Upon discovering the misuse of her personal information, Simpson filed suit against Appellants seeking a jury trial for damages arising out of the following causes of action: intentional infliction of emotional distress; negligence; negligent hiring/supervision; and unfair trade practices. In response, Appellants denied the allegations and filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, and a motion to compel arbitration.

After a hearing, the circuit court denied Appellants' motions to dismiss and to compel arbitration. In reaching this decision, the court found the creditor/debtor relationship between Appellants and Simpson ended once Simpson satisfied her loan in full. As a result, the court concluded the "effectiveness of the arbitration clause ceased when the relationship of the parties ceased." The court also held the tort claims raised by Simpson were not subject to arbitration because the acts of Appellants' employees were "completely independent of the loan agreement." This appeal followed.

STANDARD OF REVIEW

"The question whether a claim is subject to arbitration is a matter of judicial determination, unless the parties have provided otherwise. Appeal

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[1] The former employees pleaded guilty for these offenses and were sentenced in the United States District Court for the District of South Carolina.

from the denial of a motion to compel arbitration is subject to de novo review." Chassereau v. Global-Sun Pools, Inc., 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005) (citations omitted).

DISCUSSION

Appellants argue the circuit court erred in denying their motion to compel arbitration.[2] Specifically, they contend that once the court determined that an arbitration agreement existed between the parties, the court's "decisional function" was completed and any decisions regarding the validity of the agreement and the arbitrability of Simpson's claims were to be decided by an arbitrator. Even if the circuit court was authorized to determine the effectiveness of the agreement, Appellants claim the broad terms of the arbitration agreement encompassed any disputes beyond the expiration of the underlying loan transactions between the parties.

As a threshold matter, we find Appellants' argument that the circuit court's authority was strictly limited to determining whether the parties entered into an arbitration agreement is not properly before this court. First, Appellants did not raise this precise argument in their motion to compel arbitration or during the hearing before the circuit court. Secondly, the circuit court did not address this issue in its order, but instead, only ruled on the effectiveness of the arbitration agreement. Appellants did not file a motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to challenge this omission. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) (recognizing that in order for an issue to be preserved for appellate review, with few exceptions, it must be raised to and ruled upon by the trial court); Hawkins v. Mullins, 359 S.C. 497, 502, 597 S.E.2d 897, 899 (Ct. App. 2004) (noting an issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment).

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[2] Although Appellants raise four issues in their brief, we have consolidated these issues in the interest of brevity and clarity.

In terms of the merits of Appellants' motion to compel arbitration, we turn to recently established precedent. "Arbitration is a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement." Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct. App. 2004), cert. denied (July 8, 2005). Our supreme court has outlined the analytical framework for determining whether a particular claim is subject to arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118-19 (2001). In Zabinski, the court stated:

> To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Hinson v. Jusco Co., 868 F.Supp. 145 (D.S.C. 1994); S.C. Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 437 S.E.2d 22 (1993). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Towles, supra. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Great W. Coal, 312 S.C. at 564, 437 S.E.2d at 25. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Tritech, supra.

Id. at 597, 553 S.E.2d at 118-19. The court further articulated that "[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Id. at 119, 553 S.E.2d at 598.

With respect to tort claims, the supreme court noted the test from other jurisdictions stating, "the focus should be on the factual allegations contained in the petition rather than on the legal causes of actions asserted." Zabinski, 346 S.C. at 597 n.4, 553 S.E.2d at 119 n.4. The court elaborated:

> The test is based on a determination of whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable.

Id.

Shortly after the supreme court issued its decision in Zabinski, this court had the opportunity to apply the principles set forth and to interpret the "significant relationship" test. Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2003). Although this court utilized the Zabinski principles to analyze the question of whether separate arbitration agreements previously executed by the parties mandated arbitration for the claims in dispute, we believe the holding is, nevertheless, instructive. In Vestry, we concluded, "the mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties." Id. at 209, 588 S.E.2d at 140.

The arbitration agreement in the instant case provides in relevant part:

> ALL DISPUTES, CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN CONNECTION WITH THE LOAN AGREEMENT, OR ARISING OUT OF ANY TRANSACTION OR RELATIONSHIP BETWEEN LENDER AND BORROWER OR ARISING OUT OF ANY PRIOR OR FUTURE DEALINGS BETWEEN LENDER AND BORROWER, SHALL BE SUBMITTED TO ARBITRATION AND SETTLED BY ARBITRATION IN ACCORDANCE WITH THE UNITED STATES ARBITRATION ACT, THE EXPEDITED PROCEDURES OF THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN

ARBITRATION ASSOCIATION (THE "ARBITRATION RULES OF THE AAA"), AND THIS AGREEMENT.

(Emphasis added). We would also note the arbitration agreement contained a provision that stated, "This Agreement applies even if the Loan Agreement is paid in full, charged-off by Lender, or discharged in Bankruptcy."

Given the broadly worded terms of the arbitration agreement, it is plausible that one could initially conclude that Simpson's claims were subject to arbitration. However, as discussed above, the terms alone are not dispositive of this determination. Instead, we are required to focus on the factual allegations of the underlying causes of action to analyze whether a "significant relationship" existed between the claims and the loan contract. Moreover, because Simpson had satisfied her loan in full at the time her claims arose, we must also look at the parties' intent to assess whether the arbitration agreement extended beyond the termination of the contract. See Towles v. United Healthcare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999)("When a party invokes an arbitration clause after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract."); see Zabinski, 346 S.C. at 596, 553 S.E.2d at 118 ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

Applying the foregoing principles to the specific facts of this case, we agree with the circuit court's conclusion that Simpson's claims were not subject to arbitration. Initially, we reject Appellants' contention that the claims arose out of the loan agreement simply because Appellants' employees would not have had access to Simpson's personal financial information but for the loan agreement. Although Appellants' assertion is factually accurate, it disregards the analytical framework for determining whether claims are arbitrable. Simpson's tort claims are independent of the loan agreement and require no reference to the contract. At the time Appellants' employees misused Simpson's personal financial information, Simpson had paid off her loan in full. Thus, a "significant relationship" does not exist between Simpson's claims and the loan agreement. Moreover, it is

inconceivable that Simpson intended to agree to maintain a contractual relationship with Appellants in perpetuity after she paid off her loan. Given Simpson had satisfied her contractual obligation, no further dealings with Appellants were necessary. Finally, we do not believe she could have foreseen the future tortious conduct of Appellants' employees at the time she entered into the loan agreements.

Additionally, we believe our holding is consistent with this court's recent decision in Chassereau v. Global-Sun Pools, Inc., 363 S.C. 628, 611 S.E.2d 305 (Ct. App. 2005). In Chassereau, a homeowner entered into a contract for the construction of a pool by Global-Sun Pools. The contract contained an arbitration provision that applied to "any disputes arising in any manner relating to this agreement." Id. at 633, 611 S.E.2d at 307. After construction was completed, the homeowner began to experience problems with the pool. Because Global-Sun Pools failed to repair the pool, the homeowner stopped making payments on the pool. Id. at 630, 611 S.E.2d at 306. A few months later, the homeowner filed a complaint against the pool company and one of its employees, alleging this employee and other employees made a series of harassing and intimidating telephone calls to her workplace. The homeowner claimed the pool company's employees made defamatory statements about her to her co-workers and they disclosed information regarding her personal finances. Additionally, the homeowner asserted these same employees made numerous telephone calls to her home as well as to her relatives in an effort to intimidate and harass her. Id.

In her complaint, the homeowner sought damages based on causes of action for defamation, violation of South Carolina Code of Laws section 16-17-430 which prohibits unlawful use of a telephone, and intentional infliction of emotional distress. Id. at 631, 611 S.E.2d at 306. The pool company and its employee filed a motion to compel arbitration, alleging the provisions of the construction contract mandated arbitration. The circuit court denied the motion, finding "[t]he complaint is based upon tortious conduct of the employees of [Global-Sun Pools] unrelated to the contract" and the "allegations of the complaint do not arise out of nor do they relate to the contract[.]" Id. at 631, 611 S.E.2d at 306-07.

On appeal, this court affirmed the circuit court's decision. In so holding, we found the homeowner's claims did not arise out of the construction contract and could be proved independently of the contract. We further concluded the causes of action alleged in the complaint "constitute[d] tortious behavior that the parties . . . could not have reasonably foreseen and for which we seriously doubt they intended to provide a limited means of redress." Id. at 634, 611 S.E.2d at 308.

Similar to the homeowner's tort claims in Chassereau, Simpson's tort claims did not arise out of the loan agreement and could be proved independently of this agreement. Although we are cognizant of the policy favoring arbitration, we do not believe arbitration is warranted for Simpson's claims. See Zabinski, 346 S.C. at 596, 553 S.E.2d at 118 ("The policy of the United States and South Carolina is to favor arbitration of disputes.").

Accordingly, the decision of the circuit court is

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.