The Supreme Court of South Carolina

In the Matter of Margaret
Adelia Davidson, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on March 7, 1988, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated January 31, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Margaret Adelia Davidson shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 23, 2012

The Supreme Court of South Carolina

In the Matter of Lonnie J.
McAlister, II, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 8, 1999, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated January 6, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Lonnie Julius McAllister shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 23, 2012

The Supreme Court of South Carolina

In the Matter of Julie Graves McKeel, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 2002, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated January 16, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Julie Graves McKeel shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 23, 2012

The Supreme Court of South Carolina

In the Matter of Venable Vermont, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1978, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Chief Justice Jean H. Toal, dated January 27, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Venable Vermont, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

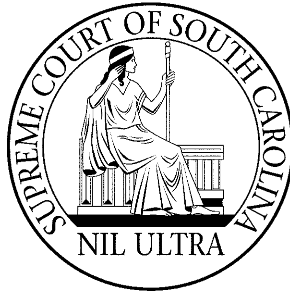
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 23, 2012



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
February 29, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

John M. Sterling, Jr., Appellant.

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

Opinion No. 27096
Heard October 4, 2011 – Filed February 29, 2012

AFFIRMED

William W. Wilkins, Kirsten E. Small and Andrew Mathias, all of Nexsen Pruet, of Greenville, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

JUSTICE PLEICONES: Appellant was charged with three criminal offenses: securities fraud in violation of S.C. Code Ann. § 35-1-501(3) (Supp. 2010);[1] making false or misleading statements to the State Securities Commission in violation of S.C. Code Ann. § 35-1-505 (Supp. 2010); and criminal conspiracy in violation of S.C. Code Ann. § 16-17-410 (2003). He was convicted of securities fraud, acquitted of making a false or misleading statement and conspiracy, and received a five-year sentence. He now appeals, alleging the trial judge abused his discretion in permitting testimony from investors, that he erred in denying appellant's directed verdict motion, and that he committed reversible error in charging the jury. We affirm.

FACTS

Appellant and several other businessmen invested in a company in the 1970s that leased railroad box cars. That company eventually declared bankruptcy, but emerged with one asset: a deferred tax asset (DTA). This DTA, which could be carried forward on a company's books to offset future profits, fluctuated in value depending on whether the company anticipated making a profit. This post-bankruptcy company was known as NRUC. In 1991, NRUC acquired a Pickens-based company, Carolina Investors, Inc. (CI).

CI had been founded in 1963, originally for the purpose of making loans to individuals purchasing cemetery plots. CI, which was funded by notes and subordinated debentures sold exclusively to South Carolina investors, eventually began making small household loans and, by 1970, was involved in non-conforming subprime mortgages. Non-conforming and subprime mortgages are made to persons who cannot qualify for regular (conforming) mortgages: non-conforming mortgages carry a higher interest rate reflecting the greater risk of default.

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[1] Appellant was actually indicted under the predecessor statute, S.C. Code Ann. § 35-1-1210(3) (1987), which was repealed and replaced by § 35-1-501(3) effective January 1, 2006.

CI had a policy of allowing investors to redeem their debentures at any time prior to maturity upon fifteen minutes' notice, albeit at a reduced interest rate. CI's investments were not federally insured, but because it made loans to persons who could not meet the credit standards required by conforming mortgage lenders, it paid higher than average interest rates on the notes and debentures.

NRUC was subsequently renamed Emergent and later HomeGold Financial (HGFin).[2] HGFin, the parent company, acquired a number of other financial subsidiaries, one of which, HomeGold, Inc. (HGInc), became a subprime lender. Thereafter, while CI continued to raise monies through the sale of notes and debentures, those funds were loaned to HGFin and its other subsidiaries, and used primarily to expand business operations and pay business expenses of those entities.

During the period 1995-97, the HGFin companies were very profitable. In 1996, HGFin went public, divesting itself of several subsidiaries and becoming a pure financial services entity. In late 1997, HGInc, the subprime lender subsidiary, lost its leader, who took much of his team with him. That loss, coupled with a worldwide credit crisis in 1998, caused HGInc to suffer enormous losses. In an effort to recover economic viability, HGFin sold most of its other financial service subsidiaries, keeping only HGInc and CI. From 1998 until HGFin declared bankruptcy in 2003, HGFin and HGInc[3] never had an operating profit.

The retail mortgage lending business relies on "warehouse lines" from large lenders in order to operate. Essentially, the warehouse lines provide the working capital for the lending business, and the stability of those lines, which is dependent upon the large bank's confidence in the lender, is critical to the mortgage lender's business.

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[2] We will refer to the parent company as HGFin for the remainder of the opinion.

[3] HGInc was sold to EMMCO before HGFin and CI's 2003 bankruptcies.

In its efforts to keep HGInc operational, with the hope it could repay to CI all the monies loaned by CI to HGInc (the intercompany debt), HGFin shrank both the number of subsidiaries and the operational aspects of HGInc. Eventually, HGFin began to look for a merger partner for HGInc in order to save the business. After several merger prospects fell through, HGFin settled upon a Lexington, South Carolina, subprime lender called HomeSense, which was owned by Ronald Sheppard. Appellant, who at the time of the 2000 merger between HomeSense and HGInc was CEO of both HGFin and HGInc, chairman of the board of both HGFin and HGInc, and on CI's board, was the leading proponent of the HomeSense merger.

The HomeSense-HGInc merger was not a success. First, due diligence completed after the merger demonstrated that HomeSense had significantly overstated its net worth. HGInc and Sheppard subsequently canceled a mutual indemnity agreement in exchange for Sheppard's remaining a guarantor on certain HomeSense debts. Second, Sheppard proved to be an abrasive leader whose leadership style and aggressive accounting maneuvers caused a number of HGInc and HGFin officers and executives to leave. Sheppard also placed personal expenses on the company books using HGInc to subsidize his extravagant lifestyle.

After the merger, appellant ceased to be an employee, but remained as chair of both the HGFin and HGInc boards, and remained on CI's board. He continued to be supplied with an office, an administrative assistant, and a salary. Over the next three years, the financial decisions made on behalf of HGInc resulted in numerous resignations by CFOs and others. In addition, the HGInc-HomeSense merger permitted HGInc's largest warehouse lender (CIT) to end the relationship.[4] As a result of the loss of CIT's warehouse line, HGFin and HGInc's continued financial woes, and their reliance on CI investor money to stay in business, it became increasingly difficult for HGInc to obtain sufficient warehouse lines to fund its loans even as it began to increase its share of the subprime mortgage market. HGFin and HGInc

[4] The contract between HGInc and CIT allowed the lender to end the relationship upon a change in HGInc's corporate structure.

continued to struggle and began moving debts and assets among the companies in order to hide its financial difficulties.

Appellant's defense was predicated in large part on the fact that the financial maneuvers that took place were approved by outside auditors, and that the Wyche Law Firm vetted and approved all of the companies' governmental filings and prospectuses. As stated above, the jury acquitted appellant of making false or misleading statements to the State Securities Division. Reliance upon the outside auditors' approval, however, is misleading. For example, the outside auditors agreed to an increase in the value of the DTA from $12 million to $22 million, as urged by appellant, in HGInc's unaudited third quarter 2000 10-Q. The auditor testified, however, that had he been told that this change in valuation was being made because HGInc needed to show a positive net equity in that quarter in order for it to renew its state mortgage licenses, that information would have "raised a red flag" and alerted him to the precarious nature of HGFin's finances.

Similarly, while the auditor was aware that CIT, HGInc's largest warehouse lender, was withdrawing its line of credit following the HomeSense merger, the auditor was never told that this secured lender had told appellant and others that it was ending the relationship because it "didn’t want to be standing in front of a little old lady in Pickens County during a bankruptcy proceeding." Again, this information would have raised a red flag for the auditors, indicating that a secured creditor was fearful of HGInc's financial worth. Moreover, there was evidence that the auditors were not informed of certain regulatory inquiries, in violation of their management letter.

Over time, the only thing keeping HGInc in the retail mortgage business was the influx of cash from CI investors. In 1999, the intercompany debt, owed by HGInc to CI, was about $67 million; in 2000, $100 million; by the end of 2001, $144 million; and at year end 2002, more than $243 million.

By 2001, the outside auditors expressed grave concerns over HGInc's ability to repay the intercompany debt to CI and its ability to remain a going

concern, and they criticized a number of its accounting decisions. HGFin and HGInc continued to rely on overly optimistic projections to suggest that the companies could recover viability. In October 2001, the auditors required HGFin to obtain an independent valuation of HGInc to determine whether the intercompany debt between HGInc and CI should be reported as "impaired." An impairment is an opinion by the auditors that the borrower cannot fully repay its debt.

On March 14, 2002, the auditors told HGFin that they would place a "going concern" paragraph in HGFin's 2001 audited financial statements. A "going concern" paragraph is an expression of doubt whether the business will still exist in a year. Moreover, the accountants rejected a valuation of HGInc for debt impairment purposes done by CBIZ, which had valued HGInc's net worth at approximately $170 million. HGFin then ordered a loan impairment valuation from Deloitte and Touche, which valued HGInc at between $130-$140 million. This valuation was accepted by the auditors, but because the 2001 year-end debt owed to CI stood at approximately $144 million, the auditors were required to report that the intercompany loan was impaired. As a result, HGFin's 2001 audited financial statement included both a "going concern" statement and a "loan impairment" opinion for the outside auditors. This impairment opinion stated that the auditors had determined that HGInc could not repay $6.7 million of the $144 million 2001 year-end debt owed to CI.

In April 2002, the CI prospectus acknowledged the "going concern" opinion of HGFin's outside auditors and the loan impairment, but also referred to the CBIZ and Deloitte valuations. Inclusion of these valuations violated the terms of the contracts between HGFin and the two companies, which provided the valuations were not for public use and were to be used solely for financial reporting purposes in calculating loan impairment. Although there was evidence that the inclusion of these valuations was improper and misleading to the extent they suggested a reliable market price for HGInc, these references in the CI prospectus were approved by the

Wyche firm, which did the securities work for HGFin and its subsidiaries.[5] Wyche attorneys testified they approved the reference to the CBIZ valuation, even though it had been rejected by the outside auditor, and to the inclusion of both CBIZ and Deloitte valuations in the prospectus as indicative of HGInc's value, even in light of the explicit limitations on their use, on the theory it was management's view of a material fact.

Throughout 2002, HGFin struggled. Following a run on CI deposits in August 2002, the HGFin board, from which appellant had resigned as chairman in June 2002 but remained as a member, met with a bankruptcy attorney. This meeting included a discussion whether CI should be placed in a conservatorship or receivership. Appellant was also on CI's board. As for CI, only appellant and Sheppard, who were both on CI's board, were aware of this meeting at which the future of CI was discussed.

In mid-2002, HGFin had begun a search for a buyer for HGInc, the retail mortgage operation. HGInc's warehouse lines were being reduced or withdrawn as a result of the going concern opinion and the loan impairment opinion in the company's 2001 financial statement. HGFin officers misled CI's board into believing that legitimate outside buyers were interested in purchasing HGInc's mortgage business, when in fact no viable deal could be found. Recall that appellant was on both the HGFin board and CI's board. In November 2002, the HGFin board agreed to allow Sheppard to form a corporation (EMMCO) to buy the HGInc subprime mortgage business, and began talking about a possible receivership for CI. Sheppard resigned from the HGFin board at this juncture. The CI board members who were not also on HGFin's board were unaware for several weeks of this November 2002 plan to sell HGInc to the new Sheppard business venture.

Although the CI board was told that HGFin and HGInc were no longer taking money from CI in August 2002, in fact HGFin continued to use these funds to keep HGInc in business. In January 2003, appellant asked two CI board members, Earle Morris and Larry Owen, to meet him at a restaurant.

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[5] Recall that appellant was acquitted of making false or misleading statements to the State Securities Commission.

Appellant told Morris and Owen that HGFin was looking into bankruptcy, but minimized the possibility. In February 2003, Larry Owen, president of CI and one of the CI board members who was at the restaurant meeting, learned from the state securities division that, in fact, HGFin was still using CI investors' money to fund HGInc's obligations.

In March 2003, matters came to a head. During the week of March 17, 2003, HGFin was monitoring CI's money situation closely, requiring CI to frequently report deposits made, and transferring money only as needed for CI to pay investor redemptions. In a March 20 call to the CI board, Karen Miller, then CFO for HGFin, told the CI board that HGInc should have money available very soon that would ease CI's cash flow issues. Appellant, who had remained on the CI board, resigned that night. At 9 am on March 21, Miller called and informed CI that it would have only $84,000 for the day, and scheduled another CI board call for 2 pm. At that 2 pm call, the CI board was informed that HGFin was filing bankruptcy, and that CI needed to find an attorney to represent it. Both CI and HGFin ceased operations on that Friday, and both subsequently declared bankruptcy.

ISSUES

1) Did the trial court err in permitting five CI investors to testify?

2) Did the trial court err in denying appellant's directed verdict motion?

3) Did the trial court err in charging the jury?

ANALYSIS

1. Investor Testimony

Appellant contends the lower court erred in permitting five CI investors to testify. This issue is not preserved for appellate review.

The record contains a partial transcript from a hearing before Judge Johnson on September 7, 2007. In the course of this transcript, Judge Johnson is apparently reviewing pretrial motions, and states that he has before him a motion to exclude some "kind of invested [sic] testimony." Judge Johnson then says that "a determination of whether or not the testimony being tendered by a particular investor is relevant and I don't know that I can make that all without hearing what the testimony is" and declines to rule on the motion at that juncture.

The record also includes "Defendant's Confidential Trial Brief for Judge Cottingham Only." This brief was presented to Judge Cottingham before the trial commenced on February 9, 2009.[6] This document contains this section:

> Investor Testimony
>
> The State will likely attempt to introduce testimony from individuals who lost substantial sums of money invested in the notes and debentures of CII. However, it appears that none of these investor witnesses will testify that they ever spoke to or corresponded with Jack Sterling about their investments. In previous related trials, witnesses testified to false and misleading statements made to them by Larry Owen and Earle Morris. The investors also provided heart-wrenching testimony about the impact of their losses. The defendant's objection to such testimony is stated in our Motion to Exclude Irrelevant and Unduly Prejudicial Investor Testimony filed on August 24, 2007.
>
> In summary, under Rule 403 of the South Carolina Rules of Evidence, the State should not be permitted to introduce emotionally charged and highly prejudicial testimony of investors who had no dealings with Sterling. Unless the State proves something more than a merely speculative connection between

[6] Judge Johnson passed away before the trial.

> Sterling and the false statements of others, the testimony is not probative of Sterling's guilt. Since the defense is prepared to stipulate to the amount of investor losses flowing from the bankruptcy of CII and HomeGold, any probative value of testimony from an investor who had no dealings with Sterling is vastly outweighed by its unduly prejudicial impact, which would seriously jeopardize Sterling's right to a fair trial.

There is no mention of this document nor any objection to any investor testimony in the record. Shortly before this case was to be heard on appeal, appellant's appellate attorneys filed a motion to supplement the record with the affidavit of his trial attorneys, which this Court granted without prejudice to our right to find no objection to the investors' testimony was preserved for appeal. The gist of this affidavit is that

> (1) the confidential trial brief was filed January 26, 2009; and
>
> (2) at trial, when the State proposed to call investor witnesses, trial counsel "strenuously objected to the admission of their testimony during one such in-chambers meeting. . . ."

This affidavit does not: (1) clarify when the objection was renewed at trial, and since the CI investors did not testify sequentially, it is impossible to determine whether one or more testified without objection; (2) specify what arguments were raised in this *in camera* motion; or (3) reflect the basis for the trial court's ruling.

a) Relevance

Appellant argues that the testimony of the CI investors was irrelevant to the question whether he had the intent to defraud them, as they had never met or spoken with him. However, the State was required to prove that at least one investor lost money, and if appellant was convicted, his sentence would

be determined by the amount of money lost. See S.C. Code Ann. § 35-1-508(a) (Supp. 2010). The CI investors' testimony was not "wholly irrelevant."

b) Impact evidence

Appellant argued in his pretrial brief that the anticipated testimony of the investors about the impact of those losses on their lives, coupled with the testimony of the amount of the losses, was more prejudicial than probative and should therefore be excluded under Rule 403, SCRE. We agree that it appears evidence of the impact is irrelevant to appellant's criminal charges, but in this situation it is critical to know exactly what appellant's Rule 403 argument was and exactly why the trial judge exercised his discretion and permitted this testimony. While it appears that the CI investors' testimony should have been limited to the amount of their pecuniary losses, there is no evidence appellant sought to limit their testimony in this manner. Rather, from the record, it appears that he sought to exclude these witnesses from testifying at all. On this record, we are unable to find any error in the trial judge's decision to deny appellant's request to disallow the CI investors' testimony. E.g., State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) (appellant's burden to present a sufficient record for appellate review).

2. Directed Verdict

At the close of the State's case, appellant made the following directed verdict motion:

> Attorney: At this time, your Honor, we'd move for a directed verdict on all three counts, but particularly on the count of filing the letter to the [state] Securities Commission, because it was clear from the course, in the light most favorable to the State, that from all their witnesses all we've heard is that that letter was run by the Wyche firm, there was testimony the letter may have been authorized by the Wyche firm, no

doubt advice of counsel and reliance, valid reliance on advice of counsel with fully informed counsel.

<u>The Court</u>: You're asking for a directed verdict as to what count?

<u>Attorney</u>: Count two, your honor.

<u>The Court</u>: Count two, be glad to hear from you.

<u>The State</u>: Thank you, your honor. I think Keith Giddens[7] said it was misleading and I think that's all we need to go to the jury.

<u>The Court</u>: Yes. The fact that there is some evidence from which the jury will consider as I rule on the motion for directed verdict, not the weight of it. I conclude that based on the totality of the facts that there is sufficient evidence to go forward on all counts, one, two and three.

<u>Attorney</u>: Your Honor, would you revisit that? We'll make the appropriate motions at the end of the full case.

<u>The Court</u>: No question about it, you're entitled to have it revisited in full.

<u>Attorney</u>: Thank you, your Honor.

<u>The Court</u>: And I can handle it better at that time after hearing the defense anyway.

<u>Attorney</u>: Yes, sir.

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[7] Giddens began work at CI when it was purchased in 1991, was president of Emergent and HGFin, then HGFin's COO by the time of the merger with HomeSense. He left after the merger.

At the end of the testimony, the following exchange occurred:

The Court: All right, sir. Any motions from the State at this time?

The State: None from the State, your Honor.

The Court: Any from the defendant?

Attorney: Your Honor, we'd renew our motions we made earlier at the end of the State's case for a directed verdict.

The Court: I accept those motions, and for the reasons previously stated, concluded that the issues to which you refer are questions of fact for the jury. As you well know, if there's some testimony on these various counts, that I'm obligated to send it to the jury. The jury's concerned with the weight of it. And there is sufficient evidence in the case to go forward. Your motions are respectfully denied.

Attorney: Thank you, your Honor.

Second Attorney: Your Honor, may I add one more motion to [Attorney's] motion?

The Court: Yes, sir.

Second Attorney: As to count two, we want to specifically ask the Court to dismiss count two regarding false statements to the[state] Securities Commission on the grounds that the indictment failed to allege the essential element of willfulness, and the grand jury did not pass on that essential element, and therefore

it's not a criminal offense and the count should be dismissed.

The Court: I anticipated your motion, and as I looked at count two count one, and count one specifically designates the word "willful." And count one is a part of count two. Would you like to be heard on that?

The State: Yes. We did incorporate the previous paragraph in the count.

The Court: That is incorporated in there and the word "willful" is contained therein. Again, thank you for calling that to my attention, but that motion for the reasons stated also is respectfully denied.

A directed verdict is properly denied where there is any evidence, direct or circumstantial, which reasonably tends to prove the defendant's guilt. State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011). When reviewing a denial of a directed verdict, "an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." Id. (citation omitted). A general directed verdict motion, however, does not preserve any issue for appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

At trial, the only count for which appellant identified deficiencies in the State's case was count 2, one of the two charges of which appellant was acquitted. There is no proper directed verdict issue concerning count 1 preserved for our review. State v. Bailey, *supra*. In any case, had a proper motion been made, it should have been denied. Appellant's indictment specifies numerous ways in which he is alleged to have violated § 35-1-501(3). In order to withstand appellant's directed verdict motion on count 1, the State need only have presented some evidence to support any one of these allegations.

Paragraph 32(i) of the indictment alleges that after appellant learned that the outside auditors were going to place a going concern statement and loan impairment in HGFin's audited 2001 financial statement, which would then be included in CI's 2002 prospectus, he

> . . . met with officers, directors and employees of [CI], several of which were investors in [CI] securities, in an effort to downplay negative information concerning the company and put a positive spin on [HG]'s speculative efforts to return to profitability. [Appellant] knew the misleading information shared with the officers, directors and employees of [CI] would be disseminated to potential or current investors in [CI] securities.

As explained below, the State presented evidence that appellant, "directly or indirectly . . . engage[d] in an act . . . that operate[d] . . . as a fraud or deceit upon another person" in violation of § 35-1-501(3) in connection with this meeting.

Larry Owen, the president and long-term board member of CI, testified that he felt enormous pressure to "embellish" once he learned the 2002 CI prospectus would contain both going concern and impaired loan statements. Appellant asked Owen to set up a meeting with the CI board members and CI's staff in early April 2002. Appellant decided that the CI employees ("investment counselors") who dealt with CI's customers would need a summary to help them understand how to explain the prospectus.[8] Owen and appellant discussed the information to be included in this document, which Owen typed up and his wife handed out at the meeting.

Appellant, Owen, and an HG officer spoke at this meeting. The investment counselors were told to play up the positives in the prospectus, including the valuations done by CBIZ and Deloitte of HGInc's financial

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[8] Former HG Board member Porter Rose, once Chief Investment Officer for Liberty Life and current partner in a private equity firm, testified that it is unlawful for a company to explain its prospectus to investors.

worth. Recall that these valuations were specifically restricted to private use to determine loan impairment only. As Owen explained, the point of the memorandum and meeting were to simplify and minimize the negative financial information in the prospectus because:

> [Y]ou know, most of our counselors had money there and their families had money there and their friends had money there and I knew if just the slightest conveyance of something negative like that was spilled, then it could cause a run.

Appellant helped prepare the memorandum by discussing most of its contents, and he was present at and participated in the meeting. There was evidence that the purpose of the April 2002 meeting and the memorandum was to divert the attention of investors (including the investment counselors present) from the grim news in the prospectus by directing it to the optimistic projections and valuations after having pointed out the impairment and going concern paragraphs. Indeed, an investment counselor testified that she left the meeting "feeling that the going concern language was not something that was that dire," at least in part because it had been emphasized that if HGInc were sold for the appraised values placed upon it by CBIZ or Deloitte, CI investors would be paid in full. This investment counselor left her $80,000 in CI, and lost it all when the business closed.

The State presented sufficient evidence to withstand any directed verdict motion on count 1, as the jury could have found from this evidence that appellant knew the misleading information he shared at the April 2002 meeting would be disseminated to "investors" as charged in ¶32(i).

Appellant did not properly preserve any directed verdict motion as to count 1. State v. Bailey, *supra*. Moreover, as there is evidence that he "engaged in an act that operated as a fraud or deceit upon another person" in violation of § 35-1-501(3), had the issue been raised, the trial judge would have been correct in denying a directed verdict on count 1.

3. Jury Charge

South Carolina law makes it unlawful for an individual to either directly or indirectly "engage in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person in connection with the offer, sale, or purchase of a security." §35-1-501(3). An individual who willfully violates this statute is punished in accordance with the provisions of § 35-1-508; see § 35-1-501 cmt. 6, "The culpability required to be pled or proved under section 501 is addressed in the relevant enforcement context . . . e.g. section 508 . . . where "willfulness" must be proven . . . ." Conduct is willful within the meaning of § 35-1-508 if the person acts intentionally, that is, he is aware of what he is doing. Willfulness does not require that the person act with an evil motive or with the intent or knowledge that the law, in this case § 35-1-501(3), is being violated. § 35-1-508 cmt. 2.

Thus, in order to violate the statute there must be evidence that the defendant's conduct was willful or intentional (§ 35-1-508) and that he did something that would or did operate as a fraud or deceit on another person (§ 35-1-501). Knowledge or intent that his conduct violated the securities law is not required (cmt. 2, *supra*) but the State must present evidence that the defendant made statements or committed acts that he knew presented a danger of misleading an investor. State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008). In Morris, this Court approved a jury charge on *mens rea* under these code sections that informed the jury it could find the defendant guilty if it found he knowingly committed misconduct, or if his actions "presented a danger of misleading buyers or sellers that is either known to [defendant] or is so obvious that [defendant] must have been aware [that it was misleading]." We found no error in charging the jury that it could find the defendant guilty if his misleading acts were either intentional or severely reckless, that is, he knew his conduct could mislead investors. Id.

Appellant's jury was charged:

> [A] material element of the securities fraud prosecution is the demonstration of the existence with [sic]what is called scienter. Scienter is a mental state embracing intent to deceive, manipulate or defraud. Mere negligence will not suffer [sic] for conviction. Allegations of scienter must be based on a substantial factual basis in order to create [sic] strong inference that the defendant acted with the required state of mind as required [sic]. I would further charge you that scienter may be established by a showing of knowing misconduct or severe recklessness. Proof of such recklessness would require a showing that the defendant's conduct was an extreme departure of [sic] ordinary care which would present a danger of misleading buyers or sellers that is known to the defendant or is so obvious that the defendant must have been aware of it.

Following the charge, appellant objected to the severe recklessness language as it related to count one on the ground the charge (1) is inconsistent with the statutory definition of intent and conflicts with federal authority; and (2) effectively lowers the burden of proof, violating both a defendant's right to a fair trial and due process. The objection was overruled on the basis that the charge was taken directly from the case of State v. Morris, *supra*, which this Court had recently affirmed. Appellant lodged no further objection to the charge, nor did he object to the trial court's remedies when the jury subsequently sought clarification of the charge.

We first address the issues raised at trial. Neither § 35-1-501 nor § 35-1-508 includes the word 'intent,' and we therefore do not understand the contention that the Morris charge is inconsistent with a statutory definition. We are within our authority to determine the level of intent required for a violation of the securities statute because the legislature did not specify any *mens rea*. Morris, *supra*; State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427

(1994). Moreover, in Morris, we held that because the General Assembly did not specify the requisite *mens rea* for a violation of the securities law, we should not weaken the legislators' decision to criminalize the making of these types of false or misleading statements by imposing a high standard of intent. Id. at 201-202, 656 S.E.d at 366.

In Morris, we construed the statute making it unlawful to engage in conduct that operates as a fraud or deceit upon another person (§ 35-1-501) with the statute (§ 35-1-508) that criminalizes an unlawful violation of § 35-1-501. In so doing, we were guided by the official comments to § 35-1-508, which informed us that willful means only that the person's conduct was intentional, not that his state of mind was evil or that he intended to violate § 35-1-501.[9] 'Recklessness' is one level of criminal intent, as are 'knowledge and negligence.' State v. Jeffries, *supra*.[10]

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[9] The dissent conflates the conduct standard (willfulness) with the mens rea standard. See e.g., State v. Reid, 383 S.C. 285, 679 S.E.2d 194 (Ct. App. 2009) fn. 2 ("generally a crime includes both an actus reus component and a mens rea component"). Here, the jury was charged that Sterling could only be convicted if he were found to have acted "knowingly, intentionally, and willfully." The jury was also charged that if Sterling's conduct was done by mistake or accident, or any reason other than willfully, he could not be convicted. What is at issue here is not whether Sterling acted intentionally, but whether his mental state met the *mens rea* standard we created in Morris, that is, did he know, or was it so obvious that he must have known, that the information he disseminated presented a danger of misleading buyers or sellers. The dissent conflates the conduct/*mens rea* standards and concludes that "A person must therefore act knowing his conduct will operate as a fraud upon another, not simply consciously disregard the risk that his conduct may do so." This blending of conduct and *mens rea* is directly refuted by cmt. 2, "Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required" for a criminal conviction under § 35-1-508(a); see also cmt. 6 § 35-1-501.

[10] The dissent also expresses concern that the Morris charge allows a conviction upon a showing of mere criminal negligence, despite a specific charge that mere negligence is not a sufficient basis. The Morris charge

Under Jeffries, intentional connotes a higher sense of awareness than mere recklessness. In Morris, we approved a charge that equated knowingly with severe recklessness. While severe recklessness is not a common criminal *mens rea* standard, under the charge approved in Morris, severe recklessness means simply that one cannot escape liability by "shutting one's eyes to what would otherwise be obvious." This is a longstanding tenet of criminal law. See State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549 (1975). Appellant's charge did not violate any statutory definition of intent. Further, we find no constitutional infirmity in the charge approved in Morris and given here. In addition, we note that appellant has not sought to argue against the Morris/Jeffries/Thompkins precedents. Finally, appellant's reliance on federal authority is misplaced, as we are interpreting only our state securities statutes. The trial judge committed no error in overruling appellant's only objections to the jury charge.

On appeal, appellant seeks to raise additional challenges to the jury charge. It is axiomatic that a party may not change his grounds of objection on appeal. E.g., State v. Meyers, 262 S.C. 222, 203 S.E.2d 678 (1974). We therefore address these arguments only briefly.

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permits a conviction not upon an accidental creation of an unknown risk, but only upon intentional acts that the defendant knew or must have known would cause harm. That standard most closely resembles our definition of knowingly: "One who shuts his eyes to avoid knowing what would otherwise be obvious" is said to act knowingly, not recklessly. State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549 (1975). In State v. Taylor, 323 S.C. 162, 473 S.E.2d 817 (Ct. App. 1996), the court relied upon the Model Penal Code's definition of criminal negligence, that one acts with criminal negligence when he "inadvertently creates a substantial and unjustifiable risk of which he ought to be aware." Id. at 166, 473 S.E.2d at 818. Here, the jury was charged that accidental or mistaken disclosure of information, i.e. inadvertent, which creates a risk, is not a violation of the statute. Morris does not permit a conviction based upon mere criminal negligence.

First, appellant contends he is arguing about the absence of a "willfully with bad purpose" charge. Under our securities act, "proof of evil motive or intent to violate that law" is not required. See cmt. 2 to § 35-1-508; State v. Morris, *supra*.

Appellant also complains that the jury charge given in connection with count 1 was confusing, and refers to the jury's repeated requests for clarifying instructions. At trial, however, appellant never raised the issue of the jury's apparent confusion, nor did he seek to have the trial judge alter his response to the jury's inquiries or object to the accuracy or sufficiency of these responses. Had he done so, he would have given the trial court the opportunity to alter the charge in some way. Having failed to raise any objection at trial, appellant cannot now do so on appeal. E.g., State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

Appellant now argues that the ruling in Morris upholding the jury charge on severe recklessness is dicta because the Court also held that the evidence showed Morris intentionally misled investors, and therefore Morris was not prejudiced by the charge even if it were improper. Appellant's argument admits too much: as was the case in Morris, there is abundant evidence that appellant intentionally engaged in acts, procedures, and a course of business that operated as a fraud or deceit upon others. Accordingly, even if we were to now alter or abandon the charge, appellant could not show any prejudice warranting relief.

CONCLUSION

Appellant's conviction and sentence are

AFFIRMED.

TOAL, C.J., BEATTY, J., and Acting Justice James E. Moore, concur. HEARN, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE HEARN: Respectfully, I concur in part and dissent in part. I agree with the majority that Sterling's challenges to the circuit court's denial of his motion for a directed verdict and the admissibility of investor impact testimony are not preserved for review.[11] However, I agree with the argument Sterling made at trial and in his brief that the court's charge lowered the *mens rea* for a conviction of securities fraud.

The charge given to Sterling's jury was culled from our decision in *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008). The language in the instant case to which Sterling objects reads as follows:

> I charge you that a material element of the securities fraud prosecution is the demonstration of the existence of what is called scienter.[12]
>
> Scienter is a mental state embracing intent to deceive, manipulate or defraud. Mere negligence will not suffer [sic] for conviction. Allegations of scienter must be based on a substantial factual basis in order to create a strong inference that the defendant acted with the required state of mind as required [sic].
>
> I would further charge you that scienter may be established by a showing of knowing misconduct or severe recklessness. Proof of such recklessness would require a showing that the defendant's conduct was an extreme departure of ordinary care which would present a danger of misleading buyers or sellers that

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[11] Nevertheless, I am troubled by the prejudicial nature of the investors' testimony regarding the impact their losses had on their lives and families.

[12] Although no party has objected to the circuit court's inclusion of scienter as an element of securities fraud, the *Morris* Court held the "statutory scheme expressly forecloses" this requirement. 376 S.C. at 202 n.5, 656 S.E.2d at 366 n.5. As discussed below, however, I do believe a prosecution for securities fraud necessitates a showing of intent to defraud.

is known to the defendant or is so obvious that the defendant must have been aware of it.

When broken down, this charge permitted the jury to convict Sterling based on any one of three different levels of intent: (1) knowing misconduct; (2) conscious disregard of a known risk; or (3) disregarding a risk that Sterling should have known about, but did not. My objection to the charge is two-fold. First, I believe the charge approved by the Court in *Morris* sanctioning a conscious disregard standard was erroneous and thus the circuit court here did not correctly charge the jury on the law of securities fraud in South Carolina. Second, assuming the correctness of *Morris* charge, the circuit court's charge in this case permitted a conviction upon a "should have known" standard, which is an even lower *mens rea* than that sanctioned by *Morris*. I would therefore reverse and remand for a new trial.

I.

In *Morris*, this Court held that knowing and intentional conduct is not required for a conviction of securities fraud. This holding was grounded in its belief that Section 35-1-508(a) of the South Carolina Code (Supp. 2010)[13] did not specify a necessary level of intent. 376 S.C. at 201, 656 S.E.2d at 366. Thus, the Court was "extremely reluctant to draw such [a] distinction[]" itself. *Id*. However, this central premise to *Morris* is erroneous because section 35-1-508 does, in fact, specify a *mens rea* requirement: it expressly states that a person must act willfully. *See* S.C. Code Ann. § 35-1-508(a) (Supp. 2010) ("A person that wil[l]fully violates this chapter . . . .").

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[13] Section 35-1-508(a) is the vehicle for criminal prosecution for violations of Section 35-1-501 of the South Carolina Code (Supp. 2010). Sterling was indicted for violating section 35-1-501(3), which provides that "[i]t is unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly, . . . to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."

As the comments to section 35-1-508 provide, willfulness requires "proof that a person acted intentionally in the sense that the person was aware of what he or she was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required." *Id.* cmt.2. Willfulness in this context thus goes

> no further than to denote that the actor had a purpose or willingness to commit a particular act or omission, in which case there is no requirement that the actor specifically intended to violate the law or injure another. In that event, the term "willful" requires only that the prohibited act occur intentionally, and merely implies that a person knows what he or she is doing, intends to do what he or she is doing, and is a free agent. Under this view, the essence of willfulness is that the actor be aware of what he or she is doing, which is to say that his or her actions are intentional, in contrast to that which is thoughtless or accidental.

21 Am. Jur. 2d *Criminal Law* § 130 (2011). When read with section 35-1-501(3), section 35-1-508(a) consequently criminalizes actions taken by a person who knowingly and intentionally engages in an act, practice, or course of business that operates as a fraud upon another person.

Morris, however, held that a conviction for securities fraud will stand when the defendant either intentionally misled investors or he "knew there was a danger that his conduct would mislead investors." 376 S.C. at 201, 656 S.E.2d at 365. The Court therefore approved of a recklessness-based conscious disregard standard: the defendant knew there was a risk his statements could mislead investors, but he proceeded anyway. 21 Am. Jur. 2d *Criminal Law* § 127 ("Recklessness involves a subjective realization of a risk of a particular result and a conscious decision to ignore it, but it does not involve intentional conduct, because one who acts recklessly does not have a conscious objective to cause a particular result."); *see also State v. Rowell*, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (noting that recklessness "connotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless

disregard thereof"). Thus, intentional conduct is not required to convict under this standard. Instead, the actor must merely be aware his actions *could* mislead and yet still engages in them.

Based on my reading of the statute, I believe this charge does not state the appropriate *mens rea* under section 35-1-508(a). Contrary to the Court's holding in *Morris* and the majority's position in this case, intentional and knowing conduct is required for criminal securities fraud. A person must therefore act knowing his conduct will operate as a fraud upon another, not simply consciously disregard the risk that his conduct may do so. While *Morris* may have a persuasive policy rationale in that a person should be prohibited from acting when he knows of the danger, it is not found in the language of the statute.

As to the majority's contention that my analysis conflates the concepts of the mental state required for one's conduct and *mens rea*, I do not dispute this as I see no meaningful difference between the two. Indeed, the majority's reference to *State v. Reid*, 383 S.C. 285, 679 S.E.2d 194 (Ct. App. 2009), validates my position. It is hornbook law that most crimes require both an *actus reus* and a *mens rea*. *See id.* at 293 n.2, 679 S.E.2d at 198 n.2. Section 35-1-501(3) provides the *actus reus* for this type of securities fraud, *viz.* engaging in conduct that operates as a fraud upon another in connection with the sale of securities. Section 35-1-508(a), in turn, supplies the *mens rea* by stating a person must do so willfully. The majority, however, holds that a person must willfully defraud another when selling securities (the majority's *actus reus*), but he may be convicted for doing so recklessly (the majority's *mens rea*). Putting aside the conflicting levels of intent under this view, it is only by combining the *mens rea* and *actus reus* requirements found in sections 35-1-501 and 35-1-508 into one *actus reus* can the majority find room for recklessness in the resulting vacuum. Willfulness in the criminal context, however, is not a type of conduct but instead is unmistakably one of the graduated levels of mental intent. These two statutes therefore provide both the requisite *actus reus* and *mens rea*, and I do not believe we as a Court have the opportunity to predicate a conviction for securities fraud upon anything else.

It may be that our disagreement emanates from the confusion occasioned by the statute as to the nature of securities fraud. Comment 2 to section 35-1-508 states that "[p]roof of evil motive or intent to violate the law or knowledge that the law was being violated is not required" in a prosecution for violations of section 35-1-501. Section 35-1-501(3), however, prohibits "engag[ing] in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person" when done "in connection with the offer, sale, or purchase of a security." Thus, the very conduct proscribed by section 35-1-501(3) is fraud, an act which is evil in and of itself. *See Huff v. Anderson*, 90 S.E.2d 329, 331 (Ga. 1955) ("It appears from the authorities to be the rule without exception, that the offense of obtaining money from another by fraud or false pretenses, or larceny after trust, are crimes *malum in se*, involving moral turpitude."). Proving that a person's *conduct* in contravention of section 35-1-501(3) was intentional, willful, and knowing (which the majority acknowledges is required) therefore necessitates the proof of an evil motive—an intent to deceive. Although section 35-1-508 suggests scienter is not required, the language in section 35-1-501 necessitates fraud. Because section 35-1-501(3) is the more specific statute, I believe it controls and intent to defraud is necessary.

Accordingly, I believe *Morris* was wrongly decided and would reverse Sterling's conviction because the charge given was taken directly from it. I also believe Sterling was prejudiced by the court's incorrect charge. In my opinion, there is not "abundant evidence" that Sterling intentionally defrauded investors. Rather, there is a significant amount of evidence showing Sterling simply was blind to the risks he may have taken. Indeed, one juror sent a note to the court asking if Sterling could be convicted based only on severe recklessness, thereby arguably expressing his view that the State had not shown a course of intentional conduct.

II.

Even if *Morris* did correctly hold that criminal recklessness is sufficient under section 35-1-508(a),[14] I believe the Court may have inadvertently sanctioned the use of a criminal negligence *mens rea* standard. The charge given in this case followed verbatim a portion of *Morris* wherein the Court quoted and tacitly approved of a charge which stated that a jury could convict upon finding the defendant took steps "which present[] a danger of misleading buyers or sellers that is either known to [the defendant] *or* is so obvious that [he] must have been aware of it."[15] 376 S.C. at 201, 656 S.E.2d at 365. (emphasis added). This charge accordingly includes both a "known" and a "should have known" standard.

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[14] Some authorities do suggest that this sort of criminal recklessness can satisfy the willfulness/intent element for securities fraud. *See United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005); *United States v. Tarallo*, 380 F.3d 1174, 1189 (9th Cir. 2004); *Sec. & Exchange Comm'n v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992); *see also State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) ("Extreme indifference is in the nature of 'a culpable mental state . . . and therefore is akin to intent.' In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." (citations omitted)). *But see United States v. O'Hagan*, 139 F.3d 641, 647 (8th Cir. 1998) ("[T]he statute provides that a negligent or reckless violation of the securities law cannot result in criminal liability; instead, the defendant must act willfully."). *Morris*, however, viewed these levels of intent as wholly separate. If this interpretation were to be adopted with respect to section 35-1-508(a), then *Morris* may have correctly held that recklessness is sufficient even if it did so for a different reason.

[15] The author of today's majority did approve substantively of this charge in *Morris*, but he would not "endorse the instruction as a model charge." 376 S.C. at 211 n.12, 656 S.E.2d at 370 n.12 (Pleicones, J., concurring).

Crucial to the concept of recklessness is the notion that the actor must subjectively be aware of the risk, and one is not criminally reckless for acting despite a risk he should have known. 21 Am. Jur. 2d *Criminal Law* § 127. In other words, liability for recklessness "cannot be predicated solely on an objective consideration of what a defendant 'should have known.'" *Id.* A hallmark of criminal negligence, on the other hand, is disregarding a risk one should have known about. *State v. Taylor*, 323 S.C. 162, 166, 473 S.E.2d 817, 818 (Ct. App. 1996); 21 Am. Jur. 2d *Criminal Law* § 126 ("A person acts with criminal negligence when he or she should have been aware of a substantial and unjustifiable risk he or she has created."). Thus, a defendant's subjective knowledge of the risk is irrelevant for criminal negligence. 21 Am. Jur. 2d *Criminal Law* § 126. Hence, the charge approved of in *Morris* includes both recklessness and the lower *mens rea* of negligence.

However, I do not believe the *Morris* Court actually intended to approve of criminal negligence as a permissible *mens rea* for securities fraud. Instead, I read *Morris* as only criminalizing acting with actual knowledge that one's conduct may mislead investors. Apart from this language, the Court never mentioned the negligence standard again. Notably, after quoting this "should have known" standard the Court wrote, "Stated differently, the court charged that in order to support a conviction, the jury needed to find that [Morris] intentionally misled investors, or that [Morris] knew that there was a danger that his conduct would mislead investors." *Morris*, 376 at 201, 656 S.E.2d at 365. Clearly, the Court believed the charge it was reviewing only concerned recklessness. It accordingly appears the Court unintentionally lowered the standard by implicitly sanctioning the "should have known" language when attempting to hold recklessness will sustain a conviction for securities fraud.[16] *See State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) (noting criminal negligence is a lower level of intent than criminal recklessless).

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[16] I believe the circuit court committed the same inadvertent error here. In charging the jury, the circuit court stated that "[m]ere negligence will not suffer [sic] for conviction." However, the court repeated the same "should have known" language quoted in *Morris.*

Furthermore, the Court's ultimate holding was a policy decision rooted in the notion that one should not be able to escape criminal liability for statements made with actual knowledge that they will mislead investors. *Id.* at 202, 656 S.E.2d at 366. However, this policy was limited by the Court to just acting with actual knowledge of the risk and did not embrace a situation where one should have known of the risk. I therefore read the Court's decision as only permitting a charge on recklessness, and the Court was neither asked to nor attempted to expand the net cast by section 35-1-508(a) to include negligence. Thus, the Court's references to the "should have known" standard are dicta. *See Ex parte Goodyear Tire & Rubber Co.*, 248 S.C. 412, 418, 150 S.E.2d 525, 527 (1966) ("'[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit . . . .'" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398 (1821)). I can also find nothing in section 35-1-508 itself which permits a conviction of securities fraud to stand on mere criminal negligence.

The majority today opines that the "should have known" language from *Morris* is not rooted in criminal negligence but instead is a species of knowing misconduct. After parsing the language of the charge, the majority's contention is that it sanctioned a willful blindness standard, not an accidental blindness one. While I may disagree with the majority's ultimate reading of the charge and whether it in fact states a willful blindness standard, there is an inherent danger in giving such a charge because it may permit the jury to slip down the slope into negligence. As the Fifth Circuit stated, "Because the instruction permits a jury to convict a defendant without a finding that the defendant was actually aware of the existence of illegal conduct, the deliberate ignorance instruction poses the risk that a jury might convict the defendant on a lesser negligence standard." *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

> The source of this risk is the potential for confusion about the degree of "deliberateness" required to convert ordinary, innocent ignorance into guilty knowledge. The concern is that once a jury

> learns that it can convict a defendant despite evidence of a lack of knowledge, it will be misled into thinking that it can convict based on negligent or reckless ignorance rather than intentional ignorance. In other words, the jury may erroneously apply a lesser *mens rea* requirement: a "should have known" standard of knowledge.

United States v. Skilling, 554 F.3d 529, 548-49 (5th Cir. 2009), *aff'd in part, vacated in part, and remanded*, 130 S.Ct. 2896 (2010). While this charge may be warranted under certain facts, I do not find them present in this case.[17] Accordingly, the circuit court's charge here did not state the correct law in South Carolina and permitted the jury to convict Sterling based on criminal negligence.

Even if recklessness is enough for a conviction, I still find sufficient evidence in the record that Sterling was not aware of the risks he took to warrant a finding of prejudice. I would therefore reverse Sterling's conviction and remand for a new trial.

III.

In sum, I would overrule *Morris* and hold that intentional and knowing conduct is required for a conviction of securities fraud. Because the charge given to Sterling's jury permitted a conviction on something less than willfulness, I would reverse and remand for a new trial. However, even assuming *Morris* correctly held that recklessness is sufficient for criminal securities fraud, the charge here incorporated criminal negligence, which is

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[17] In order to be warranted, the evidence adduced at trial must raise two inferences: "(1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." *Lara-Velasquez*, 919 F.2d at 951. While the evidence may permit the first inference, which would be in accord with reckless misconduct, I can find nothing in the record which demonstrates Sterling purposefully sought to avoid knowing what was going on.

even lower than recklessness in the hierarchy of criminal intent. Although the negligence language used by the circuit court in this case came directly from *Morris*, I do not believe the *Morris* Court intended to adopt this standard. Accordingly, I would still reverse Sterling's conviction and remand.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Glenn Oliver Gray, Respondent.

Opinion No. 27097
Heard January 24, 2012 – Filed February 29, 2012

PUBLIC REPRIMAND

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

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

PER CURIAM: In this attorney discipline matter, Respondent Glenn Oliver Gray was accused of misconduct, including the unauthorized practice of law, failure to communicate with a client, and failure to provide competent and diligent representation. A hearing was held before a panel of the Commission on Lawyer Conduct (the Panel) regarding the formal charges filed by the Office of Disciplinary Counsel (ODC). The Panel majority recommended that Respondent be publicly reprimanded. Respondent requests that the Court accept the Panel recommendation. We concur with the Panel majority recommendation that Respondent be publicly reprimanded.

I.

This Court placed Respondent on suspension for nine months in February of 2009. In re Gray, 381 S.C. 406, 673 S.E.2d 442 (2009) (imposing a nine month suspension for multiple rule violations for a pattern of excessive and fictitious client billing, including fictitious travel invoices and airline tickets).

II.

A.
Client Matter

There is only one client complaint at issue in the current proceeding. Respondent negotiated a settlement on the client's behalf in connection with a dispute with an automobile dealership. In September 2008, the dealership forwarded a check payable to the client to Respondent with the request that he hold the check in trust. The dealership also informed Respondent that the check carried a payment hold which would be lifted when the client executed a general release agreement. Respondent drafted a general release agreement, and his client thereafter signed it. Respondent then forwarded the agreement to the dealership in late October of 2008.

For reasons that are disputed, the client's claim against the dealership lingered and was not promptly resolved. The evidence shows that Respondent was not diligent in concluding the client's claim against the dealership. Following Respondent's suspension from the practice of law in February 2009, he continued representing the client, merely for the purpose of concluding the matter. Respondent failed to inform his client or the dealership of his suspension from the practice of law. In September of 2009, upon learning that the client had not received the settlement funds, Respondent located the check and realized it was stale. Respondent contacted the dealership, as the client's attorney, and requested a new check. Upon his receipt of the new check, Respondent forwarded it to the client. The matter was thus concluded.

According to Respondent, he failed to promptly conclude his client's claim and failed to notify his client of the suspension because he was distracted by his myriad of health issues. We find Respondent's testimony credible.

B.
Affidavit Matter

In connection with his 2009 suspension, Respondent was ordered to file an Affidavit of Compliance with this Court stating that he had complied with Rule 30, RLDE, Rule 413, SCACR.[1] Respondent filed an initial affidavit, dated March 4, 2009, and stating "I have not practiced law for three (3) years. I had no cases at the time of my definite suspension, so I have not notified any clients, courts, or opposing counsel of my suspension."

Respondent admitted this initial affidavit contained a false statement, but that he did not intend to mislead this Court or ODC. Respondent filed a corrected affidavit when the error was brought to his attention. ODC brought charges that the false affidavit constituted a violation of Rule 3.3 (candor towards the tribunal), but the Panel majority disagreed and recommended a dismissal of this charge. In this regard, ODC takes exception to the Panel report.

III.

In recommending a public reprimand, the Panel majority found Respondent violated the following Rules of Professional Conduct: Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 5.5(a) (unauthorized practice of law), Rule 7(a)(1) (violations of the Rules of Professional Conduct), and Rule 7(a)(5) (conduct tending to pollute the administration of justice). One Panel member recommends a letter of caution. In addition, the Panel recommends Respondent be ordered to pay the costs of this disciplinary action.

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[1] Specifically, Rule 30 requires notification to clients and opposing parties and the return of any client properties to the client.

The Panel considered only one aggravating factor: Respondent's disciplinary history, the nine month suspension noted above.

In mitigation, the Panel considered three factors: Respondent's serious health problems, his timely good faith effort to rectify the consequences of his inaccurate affidavit, and his cooperative attitude throughout the disciplinary proceedings. Regarding Respondent's health problems, the Panel considered Respondent's serious cardiac-related health issues, including several heart attacks and surgeries, and his testimony that during the relevant time period, he was depressed and receiving counseling.

Respondent takes no exception to the Panel report and recommendation. ODC takes exception to the Panel's finding regarding Rule 3.3 and Respondent's affidavit, and the Panel's recommended sanction. ODC seeks the imposition of a definite suspension.

IV.

"The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court." In re Boney, 390 S.C. 407, 414, 702 S.E.2d 241, 244 (2010). This Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission." Rule 27(e)(2), RLDE, Rule 413, SCACR. A disciplinary violation by a lawyer must be proven by clear and convincing evidence. In re Longtin, 393 S.C. 368, 376-77, 713 S.E.2d 297, 302 (2011).

V.

We find Respondent has committed misconduct in the respects identified by the Panel. Thus, we would find Respondent violated the following Rules of Professional Conduct: Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication), and Rule 5.5 (unauthorized practice of law). Because of these underlying violations, we also agree with the Panel's findings that Respondent violated Rule 7(a)(1) (violations of the Rules of Professional Conduct) and Rule 7(a)(5) (conduct tending to pollute the administration of justice) of the Rules for Lawyer Disciplinary Enforcement.

We reject ODC's challenge to the Panel's rejection of the claim that Respondent violated Rule 3.3. We are simply not persuaded by clear and convincing evidence that Respondent intentionally misrepresented the status of his law practice in the affidavit. Moreover, we note that Respondent, upon realizing the inaccuracy in the statement, filed a corrected affidavit with this Court. Additionally, we commend Respondent for his proactive and continued treatment for his serious health issues. We are persuaded that Respondent's attention to his many health problems explains his delay in not concluding his client's claim prior to the February 2009 suspension. We further note that Respondent, while suspended for nine months, has not begun the process to seek readmission although almost three years has passed. This too, in our judgment, is largely explained by Respondent's focused efforts on his health problems. And finally, we find it to Respondent's credit that he has maintained a forthright and cooperative attitude with ODC throughout the proceedings.

We find the Panel's recommendation of a public reprimand is appropriate in this case. See, e.g., In re Powell, 380 S.C. 115, 669 S.E.2d 89 (2008) (publicly reprimanding attorney where attorney admitted violating several Rules of Professional conduct, including the unauthorized practice of law, in connection with a real estate closing in which no one suffered any harm as a result of attorney's misconduct); In re Calhoun, 371 S.C. 403, 639 S.E.2d 679 (2007) (publicly reprimanding attorney where attorney reviewed closing documents for accuracy, but did not record the mortgage or take any steps to ensure that anyone else had); In re Boulware, 366 S.C. 561, 623 S.E.2d 652 (2005) (publicly reprimanding attorney where attorney admitted failing to provide competent representation, inadequate explanations, lack of safekeeping of client funds, and the assistance of the unauthorized practice of law in connection with real estate transactions).

VI.

We find Respondent has engaged in misconduct warranting a public reprimand. Accordingly, we hereby accept the Panel majority's recommendation and publicly reprimand Respondent for his misconduct. Further, Respondent is ordered to pay the costs of the Panel proceedings.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William R. Taylor, Respondent.

Opinion No. 27098
Heard January 24, 2012 – Filed February 29, 2012

DISBARRED

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

William R. Taylor, *pro se*, of Columbia.

PER CURIAM: In this attorney discipline matter, Respondent William R. Taylor has been accused of misconduct including, among other things, failure to remit funds owed to third parties, failure to safeguard clients' funds, and failure to respond to inquiries by the Office of Disciplinary Counsel (ODC). The allegations of misconduct arose from two separate sets of formal charges, to which Respondent failed to file any response. A single hearing was held before a panel of the Commission on Lawyer Conduct (the Panel) regarding both sets of formal charges. The Panel recommended that Respondent be disbarred. Respondent has not opposed this recommendation. In light of the egregious nature of Respondent's misconduct, we disbar Respondent.

I.

On October 9, 2009, Respondent was placed on Interim Suspension by order of this Court. In re Taylor, 395 S.C. 39, 716 S.E.2d 877 (2009). The current proceedings arise from eight separate complaints. Respondent failed to answer the formal charges against him. The factual allegations in the formal charges are summarized below.

A.
Failure to Safeguard Funds

In connection with four real estate transactions, Respondent failed to timely disburse loan payoff proceeds totaling $433,532. Respondent failed to properly safeguard funds belonging to First Citizens Bank.

B.
Misappropriation of Client Funds

In three separate matters, Respondent served as a qualified intermediary in connection with a real estate transaction. Respondent failed to timely deliver client funds, and checks totaling more than $672,766 were declined due to insufficient funds in Respondent's account. In each of the matters, Respondent had either converted or misappropriated the funds belonging to his clients.

Further, in one of the matters, Respondent failed to file with his financial institution a written directive requiring it to report to the Commission on Lawyer Conduct when any properly payable instrument drawn on Respondent's account was presented for payment against insufficient funds.

C.
Criminal Conviction

On April 14, 2010, Respondent pled guilty to one count of breach of trust with fraudulent intent, value of $5,000 or more, in violation of S. C. Code Ann. § 16-13-230(B)(3) (2003). Respondent was sentenced to ten years' imprisonment, suspended upon the service of three years' imprisonment and five years' probation. Respondent was also ordered to pay restitution in the amount of $349,713.56.[1]

D.
Incurring Debt in Wife's Name

Respondent secured a loan in the name of his wife without her knowledge and consent. Loan proceeds in the amount of $1,200 were made payable to Respondent's wife. Respondent endorsed the check by forging his wife's signature and used the loan proceeds for his own benefit.

Approximately six weeks later, Respondent forged his wife's signature to a promissory note, promising to pay the note's holders a sum of $27,707 in monthly installments. Like the loan mentioned above, the promissory note was executed without the knowledge and consent of Respondent's wife.

E.
Failure to respond

Respondent failed to respond to inquiries by ODC, even after receiving a follow-up letter pursuant to In re Treacy,[2] advising him to file a written response.

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[1] Respondent indicated during oral argument that this amount remains unpaid.

[2] 277 S.C. 514, 290 S.E.2d 240 (1982).

II.

At the hearing, the Panel considered as an aggravating factor the harm suffered by Respondent's clients as a result of his actions, noting the clients suffered substantial economic losses.[3] The Panel recommended Respondent be disbarred. The Panel further recommended that Respondent be ordered to pay restitution in the amount of $349,713.56 and the costs of these proceedings.[4]

Respondent took no exception to the Panel report.

III.

"The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court." In re Boney, 390 S.C. 407, 414, 702 S.E.2d 241, 244 (2010). This Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission." Rule 27(e)(2), RLDE, Rule 413, SCACR. An attorney's failure to answer the formal charges against him is an admission of the factual allegations set forth in those charges. Rule 24(a), RLDE, Rule 413, SCACR. "This Court has never regarded financial misconduct lightly, particularly when such misconduct concerns expenditure of client funds or other improper use of trust funds." In re Johnson, 385 S.C. 501, 504, 685 S.E.2d 610, 611 (2009) (internal quotations omitted).

IV.

We find Respondent has committed misconduct in the respects identified by the Panel. Thus, we find Respondent violated the

[3] Although Resondent appeared at the Panel hearing, he elected not to cross-examine any witnesses or offer any evidence in mitigation.

[4] Specifically, the Panel recommended that Respondent be ordered to pay restitution in accordance with the terms set forth by the circuit court in connection with his criminal charges and that Respondent be required to provide proof of all restitution payments to the Commission on Lawyer Conduct within fifteen days.

following Rules of Professional Conduct: Rule 1.15 (safekeeping property), Rule 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority), Rule 8.4(a) (misconduct), Rule 8.4(b) (criminal acts), Rule 8.4(d) (conduct involving dishonesty, fraud, deceit or misrepresentation), and Rule 8.4(e) (conduct prejudicial to the administration of justice). We also find Respondent's misconduct constituted grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement: Rule 7(a)(1) (violation of the Rules of Professional Conduct), Rule 7(a)(3) (knowing failure to respond to a lawful demand from a disciplinary authority), and Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice and to bring the courts and the legal profession into disrepute, and demonstrating an unfitness to practice law).

We find the Panel's recommendation of disbarment is appropriate in this case. See, e.g., In re Crummey, 388 S.C. 286, 696 S.E.2d 589 (2010) (disbarring attorney where attorney's misconduct included misappropriating client funds, failing to diligently pursue client matters, failing to communicate with clients, writing trust account checks that were returned for insufficient funds, and failing to cooperate with ODC); In re Williams, 376 S.C. 640, 659 S.E.2d 100 (2008) (disbarring attorney where attorney misappropriated $400,000 of client assets and pled guilty to one count of exploitation of a vulnerable adult); In re Cunningham, 371 S.C. 503, 640 S.E.2d 461 (2007) (disbarring attorney where attorney misappropriated approximately $70,000 in estate funds, failed to maintain separate trust and operating accounts, and provided false information to his client in an attempt to conceal his misappropriation of estate funds); In re Kennedy, 367 S.C. 355, 626 S.E.2d 341 (2006) (disbarring attorney where attorney falsified a HUD-1 Settlement Statement, failed to remit loan proceeds, issued title insurance policy which included a forged signature and false certifications, misappropriated at least $280,000 in client funds, and pled guilty to one count of mail fraud).

As we have recognized, "[t]he primary purpose of disbarment . . . is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney."

In re Burr, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976). The current allegations, which Respondent has admitted, include misconduct that has resulted in significant harm to his clients. Respondent admitted at oral argument he stole client funds simply to support a more lavish lifestyle. Moreover, Respondent has not raised any exceptions to the Panel's report recommending that he be disbarred. Accordingly, we find disbarment is an appropriate sanction.

V.

Respondent has engaged in egregious financial misconduct. We hereby disbar Respondent. Further, Respondent is ordered to pay restitution in the amount of $349,713.56, and Respondent must enter into a restitution agreement with ODC within ninety days of the date of this opinion.[5] Additionally, Respondent is ordered to pay the costs of this action within thirty days of the date of this opinion. Within fifteen days of the date of this opinion, Respondent shall surrender his certificate of admission to practice law and shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR.

DISBARRED.

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

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[5] The order of the circuit court requiring Respondent to pay restitution is not included in the record before the Court. To the extent that order provides for a timeframe within which the $349,713.56 in restitution must be paid, the agreement Respondent enters into with ODC shall be no less restrictive than the circuit court's order; however, this Court has no objection to those terms being incorporated in the restitution agreement Respondent must enter into with ODC.

The Supreme Court of South Carolina

In the Matter of John Barry Kern, Respondent.

ORDER

Respondent was suspended on February 1, 2012, for a period of ninety (90) days retroactive to the date of his Interim Suspension on August 8, 2011. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

February 22, 2012

The Supreme Court of South Carolina

In the Matter of Craig J. Poff, Petitioner.

ORDER

Respondent was suspended on August 22, 2011, for a period of six (6) months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

February 23, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ferguson Fire and Fabrication, Inc.,	Plaintiff,

v.

Preferred Fire Protection, LLC, Fair Forest of Greenville, LLC, Thomas F. Wong, and Immedion, LLC,	Defendants,
Of Whom Ferguson Fire and Fabrication, Inc., is	Appellant,
and Immedion, LLC, is	Respondent.

Immedion, LLC,	Third-Party Plaintiff,

v.

Rescom Construction, LLC,	Third-Party Defendant.

Appeal From Greenville County
R. L. McIntosh, Circuit Court Judge

Opinion No. 4947
Heard November 15, 2011 – Filed February 29, 2012

AFFIRMED

Robert E. Culver, of Charleston, for Appellant.

Ronald G. Tate, Jr., and Nicole J. Buntin, both of Greenville, for Respondent.

WILLIAMS, J.: On appeal, Ferguson Fire and Fabrication, Inc. (Ferguson Fire) argues the circuit court erred in holding Immedion, LLC (Immedion) was not liable on the materialman's lien when Immedion paid its general contractor in full after receiving notice from Ferguson Fire. Ferguson Fire also contends the circuit court erred in holding its notice to Immedion was ineffective under South Carolina law. In addition, Ferguson Fire claims the circuit court erred in determining South Carolina law does not protect a materialman's lien until after the materialman records and serves a statement of the lien. Finally, Ferguson Fire argues the circuit court erred in awarding Immedion attorney's fees related to the filing and prosecution of a third-party claim. We affirm.

FACTS/PROCEDURAL HISTORY

The facts in this appeal are not in dispute. Immedion contracted with Rescom, LLC (Rescom) to serve as general contractor in performing upfit work to Immedion's data center. Rescom, in turn, hired Preferred Fire Protection, LLC (Preferred Fire) as a subcontractor to perform work in

connection with the upfit of the property. In addition, Immedion separately contracted with Preferred Fire to install a pre-action fire suppression system in the data center for a contract price of $30,973. Preferred Fire subsequently hired Ferguson Fire and Fabrication, Inc. (Ferguson Fire) to provide the materials necessary for installation of the pre-action fire suppression system.

Beginning on August 24, 2007, and continuing through October 16, 2007, Ferguson Fire delivered the materials for the pre-action system. On September 21, 2007, Ferguson Fire sent a "Notice of Furnishing Labor and Materials" (Notice) to Immedion stating Ferguson Fire was employed by Preferred Fire and "ha[s] provided or will provide fire sprinkler/pipe/valve/fittings with an estimated value of $15,000." The Notice did not specify an "amount claimed to be due" and did not indicate when it expected delivery of the materials to be completed. Instead, the Notice provided that materials "were actually furnished or scheduled to be furnished by [Ferguson Fire] to the Project from Sep 10, 2007 [sic] through _______." The Notice further stated:

> Please be advised that this company is hereby providing you with notice of furnishing labor and materials to the Project described below pursuant to S.C. Code Ann. § 29-5-20(B) and § 29-5-40. It is important to note that this is not a lien. This is a routine procedure to comply with certain state requirements that may exist and should not reflect in any way on the integrity or credit standing of Preferred Fire Protection . . . . [1]

On August 30, 2007, prior to receiving Ferguson Fire's Notice, Immedion issued a check to Preferred Fire for $15,486.50, according to their agreement. After receiving Ferguson Fire's Notice, but prior to the date all materials were delivered by Ferguson Fire, Immedion issued a second check to Preferred Fire on October 3, 2007, in the amount of $14,513.50. On

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[1] Both parties concede the Notice gives Ferguson Fire no rights under section 29-5-20(B) of the South Carolina Code (Supp. 2011).

October 31, 2007, Immedion issued a third and final check to Preferred Fire for the remaining contract balance of $973. Although Immedion made full payment to Preferred Fire for the installation of the pre-action system, Preferred Fire failed to pay Ferguson Fire $15,548.93 for the materials it furnished.

On January 8, 2008, Ferguson Fire filed and served a notice of mechanic's lien to Preferred Fire and Immedion. Ferguson Fire subsequently filed a summons and complaint against Preferred Fire and Immedion alleging Ferguson Fire provided certain "materials, services, and/or labor to the improvements located on the Property pursuant to a binding contract and agreement with Preferred Fire and with the knowledge and permission of Immedion . . ." and sought to foreclose its mechanic's lien. Preferred Fire did not answer Ferguson Fire's complaint, and on January 14, 2009, Ferguson Fire obtained a default judgment against Preferred Fire that it has been unable to collect. Immedion answered, asserting Ferguson Fire's complaint should be dismissed because Immedion paid Preferred Fire all sums due to Preferred Fire on the contract prior to receiving Ferguson Fire's Notice. In addition, Immedion filed a third-party complaint against Rescom for breach of contract and attorney's fees. Immedion and Rescom subsequently settled the third-party claims and dismissed that action on July 20, 2009.

In the present action, Immedion filed a motion for summary judgment, contending it paid in full all work performed by its contractors. Ferguson Fire filed a cross-motion for summary judgment, arguing Immedion should have been on notice of its claim because Ferguson Fire provided Immedion the Notice prior to Immedion's full payment to Preferred Fire. The circuit court issued an order granting Immedion's motion for summary judgment, holding the Notice that Ferguson Fire provided was ineffective under section 29-5-40 of the South Carolina Code (Supp. 2011) as a notice of lien. The circuit court's order also awarded Immedion attorney's fees for successfully defending against the mechanic's lien. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCP; Tupper v. Dorchester Cnty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

When reviewing the grant of summary judgment, this court applies the same standard that governs the circuit court under Rule 56, SCRCP. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005) (internal citations omitted). "On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." Id. at 536, 611 S.E.2d at 925.

In addition, "the award of attorney's fees is left undisturbed absent abuse of the [circuit] court's discretion." Taylor, Cotton, & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 100, 641 S.E.2d 459, 464 (Ct. App. 2007) (internal citation omitted).

LAW/ANALYSIS

I. Ferguson Fire's Notice[2]

Ferguson Fire asserts the circuit court erred in holding its Notice was ineffective as a notice of lien under section 29-5-40. We disagree.

"A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate, by virtue of an agreement with or

[2] We combine Ferguson Fire's first and second arguments.

with the consent of the owner or his agent, shall have a mechanic's lien upon the real property to secure payment of the debt." See S.C. Code Ann. § 29-5-10(a) (Supp. 2011). "The right to a lien arises, inchoate, when labor is performed or material furnished." Preferred Sav. & Loan Ass'n, Inc. v. Royal Garden Resort, Inc., 301 S.C. 1, 3, 389 S.E.2d 853, 854 (1990) (emphasis added); see also Wood v. Hardy, 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959); Williamson v. Hotel Melrose, 110 S.C. 1, 30, 96 S.E. 407, 409 (1918). When the person claiming the lien was employed by someone other than the owner, he must notify the owner of the furnishing of labor or material in order for the lien to attach to the property. S.C. Code Ann. § 29-5-40 (Supp. 2011).

A mechanic's lien is purely statutory. Therefore, the requirements of the statute must be strictly followed. See Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) (holding mechanic's liens are purely statutory and issues concerning them must be decided in accordance with the terms of the statute). Section 29-5-40 allows a subcontractor or supplier to place an owner on notice of a lien as provided by section 29-5-20(a) of the South Carolina Code (Supp. 2011).[3] Section 29-5-40 provides, in pertinent part:

> Whenever work is done or material is furnished for the improvement of real estate upon the employment

[3] Section 29-5-20(a) provides, in pertinent part:

> Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the costs of the action and a reasonable attorney's fee which must be determined by the court in which the action is brought but only if the party seeking to enforce the lien prevails.

> of a contractor or some other person than the owner and such . . . materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof, the lien given by § 29-5-20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished. But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made.

(emphasis added). According to the plain language of the statute, a lien attaches to the real estate against the owner of the real estate for the value of the material furnished. The lien must be for "the amount of the work done or material furnished" and the materialman must notify the owner in writing of the same. § 29-5-40. Therefore, no lien attaches until the materials, which are the subject of the lien, have been delivered, and the written notice, including the value of those materials, is provided to the owner.

Ferguson Fire's Notice is insufficient under the statute, and has no legal effect. The September 21, 2007 Notice stated that Ferguson Fire would be supplying materials beginning September 10, 2007, but the Notice never provided a project completion date. Ferguson Fire's final delivery of materials to Preferred Fire was on October 16, 2007, yet it failed to provide notice after this date to Immedion that the material was furnished and its job was completed. In addition, the Notice listed an approximate value of the materials it planned to deliver, but the Notice contained no indication that any payment was due at the time. Accordingly, Ferguson Fire failed to follow the requirements of the statute because all of the materials had not been furnished, and it did not identify the final amount of the supplies yet to be delivered when it notified Immedion. See § 29-5-40 ("Whenever work is done or material is furnished . . . [the] materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof . . . .") (emphasis added).

In addition to failing to effectively notify Immedion pursuant to section 29-5-40, our jurisprudence also provides that no lien attaches to the property until notice of an actual demand for payment is made to the owner. See Sloan Constr. Co., v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008) ("[T]he owner's liability is limited to the remaining unpaid balance on the contract with the general contractor at the time the owner receives notice from the subcontractor of the general contractor's nonpayment.") (emphasis added). It is axiomatic that compliance with the notice provision of section 29-5-40, including a demand for payment, would be a prerequisite to recovery. Because Ferguson Fire's Notice was sent prior to furnishing all the material, failed to identify the final amount of the goods delivered, and never made a demand for payment, we find the notice was inadequate.

Ferguson Fire argues that our court's opinion in Stoudenmire Heating & Air Conditioning Co. v. Craig Bldg. P'ship, 308 S.C. 298, 417 S.E.2d 634 (Ct. App. 1992), controls this case. In Stoudenmire, we reversed a master's finding that Stoudenmire's notice of mechanic's lien was filed after the owner exceeded the amount due on the contract price. Id. at 302, 417 S.E.2d at 637. Our court found that a letter Stoudenmire wrote to the owner "provide[d] sufficient written notice to the owner to meet the requirements of § 29-5-40." Id. (citing Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 635, 93 S.E.2d 855, 863 (1956) (stating the statute does not prescribe the form of the notice)).

While we agree the statute does not prescribe the specific format of the notice, we find Stoudenmire distinguishable from the instant case. The letter that provided notice to the owner in Stoudenmire was sent after Stoudenmire's work on the project was complete, and it advised the owner that Stoudenmire had not been paid by the general contractor. Id. at 300, 417 S.E.2d at 636. Moreover, Stoudenmire demanded payment from the owner for its work on the project. Id. Here, on the other hand, Ferguson Fire's Notice was sent before it had completed the delivery of materials for the project and before any payment was due by Preferred Fire or Immedion. Although section 29-5-40 does not contain a time limit for providing written

notice to the owner, it is impossible for a notice of a lien to precede the actual performance of work that creates the lien. See § 29-5-40 (stating the lien attaches only after "work is performed or material is furnished"); cf. Wood, 235 S.C. at 138, 110 S.E.2d at 160 (holding although notice may be given at any time, it will be ineffective if the other prerequisites to the perfection and enforcement of the lien are not met). In addition, Ferguson Fire's Notice did not include a demand for payment. See Sloan Constr. Co., 377 S.C. at 121, 659 S.E.2d at 165. Accordingly, Ferguson Fire's reliance on Stoudenmire is misguided, and the circuit court did not err in finding the Notice was insufficient to notify Immedion of a lien.

Ferguson Fire also places great weight on Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 635, 93 S.E.2d 855, 863 (1956), arguing our supreme court held a materialman can provide a notice of furnishing material to an owner at anytime—even prior to completing the task. Such a reading misconstrues the holding in Lowndes.

Lowndes, the owner of the property, entered into a contract with Builders Lumber Company (Builders) for the construction of a building. Id. at 623, 93 S.E.2d at 856. Greenville Concrete Company (Greenville Concrete) furnished supplies to Builders between May 11 and August 12, 1953, and Builders failed to pay Greenville Concrete $2,800.46 for the materials utilized in the erection of the building. Id. at 623, 93 S.E.2d at 857. After all the material was furnished and the work was completed, Greenville Concrete filed a mechanic's lien on October 9, 1953, and served Lowndes the same day. Id. Several months later, Greenville Concrete sought to foreclose their mechanic's lien and served the petition upon Lowndes on January 28, 1954. Id. The master held, in pertinent part:

> [S]uch service did not comply with the requirement of Section 45-254[4] as to notice to the owner, for the

[4] Section 45-254 is the precursor to section 29-5-40 of the South Carolina Code (Supp. 2010), and the statutory sections are substantially identical.

> reason that Section 45-259[5] relates only to the dissolution of the lien obtained under Section 45-254, to which lien the notice under Section 45-254 is a condition precedent, and consequently, since the notice required by Section 45-254 had not been given prior to the recording and service of the certificate, no lien had ever been obtained.

Id. at 628-29, 93 S.E.2d at 859. Upon review from the circuit court, our supreme court concluded this finding was erroneous and stated the requirement that the materialman provide notice twice was simply that—needless duplication. Id. at 630, 93 S.E.2d at 860. In so holding, our supreme court stated:

> Section 45-254 specifies no time at which or within which notice of the furnishing of material is to be given to the owner. [Because a] delay in giving the notice cannot operate to the detriment of the owner, [the owner's] liability under the lien is limited to the balance due by [the owner] to the prime contractor at the time [the owner] receives the notice.

Id. at 629-30, 93 S.E.2d at 860. Because Greenville Concrete complied with the requirements of the statute by delivering all of the materials, detailing a specific amount for those materials, and subsequently sending notice, it was irrelevant that Greenville Concrete notified Lowndes in the process of perfecting its lien as Lowndes's liability was limited to the balance due at the time it received notice. Id. at 636, 93 S.E.2d at 863. Thus, the holding in Lowndes stands only for the proposition that notice can be sent anytime after a lienor completely furnishes the material. Accordingly, Ferguson Fire's reliance on Lowndes is misplaced, and the circuit court did not err in finding the Notice was insufficient to notify Immedion of a lien.

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[5] Section 45-259 is the precursor to section 29-5-90 of the South Carolina Code (Supp. 2010), and the statutory sections are substantially identical.

In light of our determination that the circuit court properly found Ferguson Fire's Notice was insufficient to notify Immedion of a lien, we need not reach Ferguson Fire's issue relating to the lienor's preference under section 29-5-50 of the South Carolina Code (2007). See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Attorney's Fees

Ferguson Fire next argues that, even if Immedion was entitled to summary judgment, the circuit court abused its discretion in granting attorney's fees relating to Immedion's filing and prosecution of a third-party claim. We disagree.

Section 29-5-20(A) of the South Carolina Code (Supp. 2011) provides that "[i]f the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court." In addition, the amount of attorney's fees that should be awarded under the mechanic's lien statute is within the sound discretion of the circuit court. D.A. Davis Constr. Co. v. Palmetto Props., Inc., 281 S.C. 415, 419, 315 S.E.2d 370, 372 (1984). The circuit court's decision regarding such a matter will not be disturbed absent an abuse of discretion. Id. An abuse of discretion occurs when, inter alia, the circuit court's ruling is based upon an error of law. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001).

In Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997), our supreme court held the following six factors should be considered when determining reasonable attorney's fees: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Id. at 308, 486 S.E.2d at 760 (internal citations omitted). "[O]n appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor." Id.

In the instant case, the circuit court considered each of the requisite factors, and the record supports the circuit court's finding. Initially, we note the circuit court reviewed detailed affidavits of Immedion's counsel outlining their respective experience and qualifications, and counsel provided a chart itemizing the time and expenses incurred in defense of Immedion. In addition, the circuit court conducted a separate hearing and considered the testimony of Immedion's counsel regarding expenses incurred in connection with Immedion's third-party complaint against Rescom. At the hearing, Immedion's counsel testified that he only submitted a request for fees which were necessitated by Ferguson Fire's filing of the mechanic's lien and he severed out "anything having to do with the kind of negotiation and the pre-agreement work" that was involved in Rescom's defense of the third-party complaint to prevent any duplication of fees. We agree with the circuit court's determination the attorney's fees incurred were reasonable in light of the nature of the work performed, particularly when counsel was required to research and address novel legal issues with regard to the mechanic's lien. Moreover, Immedion obtained a beneficial result when the circuit court granted summary judgment and dissolved the lien. Finally, we find the fee and the court costs did not exceed the amount of the lien as required by the statute. See § 29-5-20(A). We therefore find the circuit court did not abuse its discretion in awarding Immedion attorney's fees and costs in the amount of $14,472.55.

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Adrienne Hennes, Respondent,

v.

John Shaw, Appellant.

Appeal From Greenville County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4948
Heard November 15, 2011 – Filed February 29, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART

Candy M. Kern-Fuller, of Easley, for Appellant.

Ralph L. Gleaton, II, of Greenville, for Respondent.

WILLIAMS, J.: This appeal stems from a previously-litigated dispute between two upstate realtors over the sale and commission of a parcel of real estate on Lake Keowee. John Shaw (Mr. Shaw) claims the circuit court committed reversible error when it denied his motion for directed verdict on

Adrienne Hennes' (Ms. Hennes) claim for breach of contract and when it granted Ms. Hennes' motion for directed verdict on Mr. Shaw's claim for violation of the South Carolina Unfair Trade Practices Act (UTPA). Mr. Shaw also contends the circuit court erred in excluding evidence of attorney's fees he incurred from the prior related litigation with Ms. Hennes. He argues the fees were an element of damages in his tortious interference with a contract claim against Ms. Hennes in the current litigation. Finally, Mr. Shaw claims the circuit court erred when it sua sponte charged the jury on conversion. We affirm in part, reverse in part, and remand in part.

FACTS

Ms. Hennes and Mr. Shaw are licensed realtors in the upstate of South Carolina. The parties first met in April 2005 and decided to co-list approximately nine or ten real estate properties in both the commercial and residential sectors. According to Mr. Shaw, the parties' relationship began to deteriorate at the end of 2005 when Ms. Hennes systematically replaced his contracts on properties with those of her own, specifically a contract for the purchase of a piece of property on Lake Keowee (the Pelfrey Property). The owners of the Pelfrey Property brought a declaratory judgment action to determine whether Mr. Shaw's or Ms. Hennes' contract was the superior contract for purposes of purchasing the owners' property. After a bench trial, the master-in-equity issued an order dated March 7, 2007, in which it held that Mr. Shaw had a fully enforceable contract to purchase the Pelfrey Property for $460,000.

Subsequent to Mr. Shaw's purchase of the Pelfrey Property, Ms. Hennes filed suit against Mr. Shaw in circuit court alleging Mr. Shaw breached a loan agreement between the parties and owed Ms. Hennes $27,662.15. In response, Mr. Shaw answered and counterclaimed against Ms. Hennes, asserting claims for tortious interference with contract, violation of the UTPA, fraud, conspiracy, and breach of fiduciary duty. During trial, Ms. Hennes claimed she issued three checks to Mr. Shaw in the amounts of $20,000, $3,800, and $3,862.15 in anticipation of them "working together to expand real estate." To the contrary, Mr. Shaw testified Ms. Hennes

endorsed three checks in those amounts to him as a partial advance for commissions on properties they had co-listed. Once their relationship began to deteriorate, Ms. Hennes testified she requested Mr. Shaw return the money she gave to him for "the expansion of real estate" because the money was not a gift. Despite these requests, Ms. Hennes claimed Mr. Shaw refused to return the money, which prompted the present suit. In contrast, Mr. Shaw claimed he was entitled to keep these monies because Ms. Hennes and her realty company solely received the remainder of the commissions on several of the properties they co-listed.

At the conclusion of Mr. Shaw's case, the court directed a verdict in favor of Ms. Hennes on Mr. Shaw's claims for unfair trade practices and fraud. Mr. Shaw conceded his breach of contract claim against Ms. Hennes, but Ms. Hennes maintained her sole claim for breach of contract against Mr. Shaw. Mr. Shaw's remaining claims for tortious interference with contract, conspiracy, and breach of fiduciary duty went to the jury. At the conclusion of closing arguments, the court charged the jury on conversion, tortious interference with contract, conspiracy, and breach of fiduciary duty. The circuit court, however, failed to charge breach of contract to the jury.

The jury charge on conversion, which is before this court on appeal, was as follows:

> Now, the plaintiff alleges that defendant assumed and exercised an unauthorized right of ownership or dominion over personal property belonging to the plaintiff to the exclusion of the owner's rights. This may arise by some illegal use or misuse or by illegal detention of another's personal property. It is a wrongful act which may arise from either a wrongful taking or a wrongful detention. It cannot arise from the defendant's exercise of a legal right over property. Any act of the defendant inconsistent with the plaintiff's right of possession or subversive of her right to the property is conversion. The gist of

> conversion is the interference with control of the property. To recover in an action for conversion, the plaintiff must prove by the preponderance or greater weight of the evidence an interest by the plaintiff in the thing converted, the defendant converted the property to his own use and that the use was without the plaintiff's permission.

As soon as the jury exited the courtroom, Mr. Shaw objected to the jury charge on conversion on two grounds, stating, "[Ms. Hennes] never moved to amend under Rule 15(b) to add conversion. Their cause of action was breach of contract. I never hear [sic] the court instruct the jury that . . . [Ms. Hennes] must show that [Mr. Shaw] did this without [Ms. Hennes'] permission . . . ." The circuit court overruled Mr. Shaw's objection and stated,

> I think that I did charge without permission, wrongful detention. It's noted. I looked very carefully [at] plaintiff's claim or cause of action, and although it uses the word "loan agreement," he does not allege a contract that was given according to a contract [sic]. And the law of conversion really is nothing more than the wrongful detention of someone else's property when requested that it be returned. So I note your objection and request and I deny it for the record.

The jury subsequently returned a verdict for Ms. Hennes in the amount of $27,662.15 and a verdict for Mr. Shaw in the amount of $8,750.[1] Mr. Shaw moved for additur to his verdict based on the attorney's fees incurred in litigating his claim against Ms. Hennes in the previous action. Mr. Shaw also moved for judgment notwithstanding the verdict on the conversion claim. The court permitted ten days for the filing of post-trial motions. On

[1] The $8,750 figure represented half the commission for the sale of two properties co-listed by Ms. Hennes and Mr. Shaw.

December 12, 2008, the circuit court formally denied Mr. Shaw's motion for JNOV and new trial nisi additur as well as Ms. Hennes' motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. This appeal followed.

LAW/ANALYSIS

I. Directed Verdict

When reviewing a motion for directed verdict or judgment notwithstanding the verdict, the appellate court applies the same standard as the circuit court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). Accordingly, "[i]n deciding a motion for directed verdict, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party." Minter v. GOCT, Inc., 322 S.C. 525, 527, 473 S.E.2d 67, 69 (Ct. App. 1996). "If more than one inference can be drawn from the evidence, the case must be submitted to the jury." Id. Moreover, in reviewing a circuit court's grant or denial of a motion for directed verdict or JNOV, this court reverses only when there is no evidence to support the ruling or when the ruling is governed by an error of law. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010) (internal citation omitted).

1. Breach of Contract

First, Mr. Shaw claims the circuit court erred in denying his directed verdict motion on Ms. Hennes' breach of contract claim. We disagree.

The necessary elements of a contract are offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Valuable consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). With certain exceptions, a contract need not be in writing to be enforceable. Gaskins v. Firemen's Ins.

Co. of Newark, N.J., 206 S.C. 213, 216, 33 S.E.2d 498, 499 (1945) (noting that if there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral). To recover for a breach of contract, the plaintiff must prove: (1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

Viewing the evidence in the light most favorable to Ms. Hennes, we find conflicting evidence exists on whether a contract was formed, and thus, the circuit court properly denied Mr. Shaw's motion for a directed verdict on Ms. Hennes' breach of contract claim. Mr. Shaw maintained the parties did not have a "loan agreement," and Ms. Hennes was not entitled to a return of the money because the checks, which Mr. Shaw deposited into his business banking account, were an advance for commissions on the nine or ten properties they co-listed together. Despite the absence of a written contract, both parties' testimony indicates the checks were not a gift, but rather were given to Mr. Shaw as part of their agreement to buy and sell real estate together. We find the checks constituted valuable consideration in that they created a benefit to Mr. Shaw and a detriment to Ms. Hennes. See Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) ("[A] benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract."). Because the evidence as to the existence of an oral contract conflicted, we find the circuit court properly denied Mr. Shaw's directed verdict motion. See Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) (holding that if the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury).

2. The UTPA

Next, Mr. Shaw claims the circuit court erred in directing a verdict on his unfair trade practices cause of action based on the regulated industries exemption in the UTPA. In response, Ms. Hennes claims that even if the circuit court erred in relying on this exemption, Mr. Shaw failed to

demonstrate Ms. Hennes' actions adversely affected the public interest. We agree with Ms. Hennes.

An action for damages may be brought under the UTPA for "unfair methods of competition and unfair or deceptive acts or practices" in the conduct of trade or commerce. S.C. Code Ann. § 39-5-20(a) (Supp. 2010). A party's ability to bring suit under the UTPA is limited, however, by section 39-5-40 of the South Carolina Code (Supp. 2010). Subsection (a) provides the UTPA does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina state law." § 39-5-40(a).

The supreme court expounded on the breadth of subsection (a) in the case of Ward v. Dick Dyer & Assoc., Inc., 304 S.C. 152, 403 S.E.2d 310 (1991). In Ward, the supreme court determined whether buyers could bring an unfair trade practice claim against a car dealership for its alleged failure to disclose to the buyers that the car they purchased had been previously involved in an accident. Id. at 153-54, 403 S.E.2d at 311. In finding the buyers could bring an action against the car dealership, despite its regulation by a South Carolina regulatory agency, the court held "the exemption is intended to exclude those actions or transactions which are *allowed or authorized* by regulatory agencies or other statutes." Id. at 155, 403 S.E.2d at 312 (emphasis added). Finding the reasoning persuasive and applicable to our statutory exemption, the supreme court cited language from Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. App. 1987):

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the [UTPA] when it does something required by law, or does something that would otherwise be a violation of the [UTPA], but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the [UTPA]'s

> coverage every activity that is authorized or regulated by another statute or agency.

Id. at 156, 403 S.E.2d at 312.

In support of Mr. Shaw's claim that Ms. Hennes violated the UTPA, he produced evidence that Ms. Hennes repeatedly replaced his contracts with her own contracts and excluded him from commissions to which he otherwise would have been entitled. At the close of evidence, the circuit court granted Ms. Hennes' motion for a directed verdict on Mr. Shaw's unfair trade practices claim. The majority of the colloquy between the parties and the circuit court regarding this particular ruling was omitted in the record on appeal, but the circuit court cited Scott v. Mid Carolina Homes, Inc., 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987), in support of its decision.[2] While the circuit court acknowledged Scott had been overruled, it concluded it was "still good law as far as where the individual is a licensed realtor, and their action is premised on that." Although Ms. Hennes states in her brief that "cooperation with other real estate professionals and sub agency is permitted" under section 40-57-137 of the South Carolina Code (2011), she fails to specifically argue how the Department of Labor, Licensing, and Regulation specifically allowed or authorized her actions. Accordingly, we find the circuit court improperly relied on Scott, and furthermore, we find the regulated industries exemption from section 39-5-40(a) is inapplicable.

Despite the circuit court's error in relying on the regulated industries exemption, Mr. Shaw failed to present any evidence that Ms. Hennes' actions caused public harm, which is required for a viable claim under the UTPA. See Columbia E. Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989) ("To be actionable under the [UTPA], an unfair or deceptive act or practice must have an impact upon the public interest. The

[2] In Scott, the court of appeals held that the regulation of a mobile home seller by the manufactured housing board exempted the seller from liability under the UTPA. Id. at 201, 359 S.E.2d at 297. This holding was later overruled in Ward v. Dick Dyer & Assoc., Inc., 304 S.C. 152, 403 S.E.2d 310 (1991).

[UTPA] is not available to redress a private wrong when the public interest is unaffected."). The record on appeal fails to show Mr. Shaw introduced any evidence prior to Ms. Hennes' directed verdict motion to prove that her actions impacted the public interest. Furthermore, as the appellant, Mr. Shaw has the burden to include evidence in the record on appeal to support his claim. See Bonaparte v. Floyd, 291 S.C. 427, 444, 354 S.E.2d 40, 50 (Ct. App. 1987) (declining to address appellant's claim of error because appellant failed to furnish this court with a sufficient record on appeal to permit consideration of the issue). Without the inclusion of the circuit court's complete ruling on this issue or any testimony or evidence from trial to show Ms. Hennes' conduct was actionable under the UTPA, we decline to reverse the circuit court's ruling on this issue. See Sweatt v. Norman, 283 S.C. 443, 448, 322 S.E.2d 478, 481 (Ct. App. 1984) (finding defendant, as appealing party, has the burden of furnishing a sufficient record from which this court can make an intelligent review). Thus, we affirm the circuit court's decision to grant a directed verdict on the UTPA cause of action.

II. Jury Charge on Conversion

Mr. Shaw contends the circuit court committed reversible error when it sua sponte charged the jury on conversion. In response, Ms. Hennes contends this issue is not preserved because Mr. Shaw failed to request a continuance after the charge as required by Rule 15(b), SCRCP. We agree with Mr. Shaw.

In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the circuit court's decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error.

Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999).

Mr. Shaw's claim of error stems from the circuit court's jury charge on conversion. "Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003) (internal citation omitted). To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property. Id.

Although Ms. Hennes contends Mr. Shaw did not properly preserve this issue for appeal because Mr. Shaw failed to request a continuance under Rule 15(b), we find Rule 15(b) does not apply in this instance.[3] Pursuant to Rule 15(b), SCRCP,

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings . . . may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . . [T]he court may allow the pleadings to be amended and shall do so freely when the presentation of the merits

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[3] Ms. Hennes also makes a cursory assertion that Mr. Shaw failed to timely object to the circuit court's jury charge. We disagree and find that Mr. Shaw's counsel timely objected to the charge outside the jury's presence pursuant to Rule 51, SCRCP, which states, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

> of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence.

First, the record does not reflect the parties expressly consented to try the issue of conversion. See Rule 15(b), SCRCP (stating issues impliedly or expressly tried by consent are treated as if raised in the pleadings). Second, Mr. Shaw's objection after the circuit court charged the jury on conversion demonstrates there was no implied consent to try this cause of action. See Dunbar v. Carlson, 341 S.C. 261, 267, 533 S.E.2d 913, 917 (Ct. App. 2000) (internal citation and emphasis omitted) ("[T]his Court will not find implied consent to try an issue if all of the parties did not recognize it as an issue during trial, even though there is evidence in the record - introduced as relevant to some other issue - which would support the amendment."). Third, Ms. Hennes did not make a motion to amend the pleadings during the trial or even after judgment, despite Mr. Shaw's objection to the jury charge. See Rule 15(b), SCRCP ("Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment[.]"). Thus, this argument has no merit.

In the alternative, Ms. Hennes argues Mr. Shaw was not prejudiced because Mr. Shaw was on notice of a cause of action for conversion based on the language of the complaint. We disagree.

In Ms. Hennes' one-page complaint, she alleged the following: Ms. Hennes loaned Mr. Shaw $27,622.15; Ms. Hennes demanded payment; Mr. Shaw failed to make payment; and his actions were in breach of their loan agreement, which entitled her to damages for Mr. Shaw's "breach of the contract." We find the language in the complaint does not sufficiently place Mr. Shaw on notice of a claim for conversion as it specifically categorized

the action as a "breach of contract." While a conversion action may lie when the plaintiff shows unauthorized detention of property, after demand, we find the complaint failed to sufficiently flesh out the requisite facts to support a conversion claim. See Mackela v. Bentley, 365 S.C. 44, 48, 614 S.E.2d 648, 650 (Ct. App. 2005) ("A plaintiff claiming conversion may prevail based upon a showing of unauthorized detention of property, after demand."). Further, during trial and closing arguments, both parties only discussed Ms. Hennes' claim against Mr. Shaw in the context of breach of contract. Moreover, the circuit court charged conversion without notifying the parties that it would issue this charge, despite Mr. Shaw's request to review the charges.[4]

In conclusion, the circuit court's sua sponte jury charge prejudiced Mr. Shaw because he was deprived of the opportunity to prepare for the issue of conversion and to raise the appropriate affirmative defenses at trial. See Armstrong v. Collins, 366 S.C. 204, 230, 621 S.E.2d 368, 381 (Ct. App. 2005) ("In considering potential prejudice, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being formally raised."). Because this was Ms. Hennes' only cause of action against Mr. Shaw, and the jury returned a verdict against Mr. Shaw, the jury undoubtedly was influenced by this flawed jury instruction. See Ellison v. Simmons, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (finding an erroneous jury instruction is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction). Accordingly, we reverse and remand.[5]

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[4] In response to Mr. Shaw's request, the circuit court stated, "Well, I'm not going to let you look over the charge. I'll tell you what it is. You can take the exceptions to it after it's charged."

[5] In light of our disposition on this issue, we decline to address Mr. Shaw's remaining arguments. See Futch v. McAllister Towing Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address additional issues when one issue is dispositive).

CONCLUSION

Based on the foregoing, we affirm the circuit court's decision to grant Ms. Hennes' motion for a directed verdict on Mr. Shaw's UTPA cause of action. We affirm the circuit court's decision to deny Mr. Shaw's motion for a directed verdict on Ms. Hennes' breach of contract cause of action. However, the circuit court erred in sua sponte charging the jury on conversion. Therefore, we reverse and remand for a new trial on the remaining causes of action: breach of contract, tortious interference with contract, conspiracy, and breach of fiduciary duty.

Accordingly, the circuit court's decision is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

SHORT and GEATHERS, JJ., concur.