The Supreme Court of South Carolina

NOTICE AND REQUEST FOR WRITTEN COMMENTS

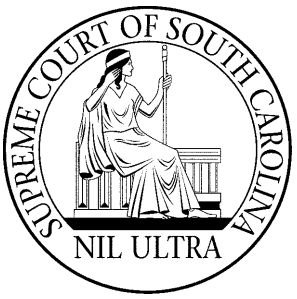
On May 24, 2002, Act No. 281 of 2002 became effective. This Act amended S.C. Code Ann. § 15-3-20 to read as follows:

> (A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.
>
> (B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

Members of the bench, bar and public are warned that this change has not been incorporated into the South Carolina Rules of Civil Procedure (SCRCP), and any amendments to the SCRCP to reflect this change cannot be submitted to the General Assembly until the next legislative session.

The Court intends to submit this matter to the Ad Hoc Civil Rules Committee for its recommendations regarding what changes, if any, should be made to the SCRCP in light of this statutory amendment. Further, any person who wishes to submit written comments regarding this matter may do so by filing an original and seven (7) copies with this Court on or before August 30, 2002. These written comments should be sent to Daniel E. Shearouse, Clerk, Supreme Court of South Carolina, P.O. Box 11330, Columbia, SC 29211.

Columbia, South Carolina
July 2, 2002



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

July 8, 2002

ADVANCE SHEET NO. 23

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dr. J. Gray Macaulay, James C. Perrin, Gladys L. Perrin, Neill M. Perrin, Mary P. Coxe, Joanne M. Cauthen, Dr. Neill W. Macaulay, Rebecca M. Clark, Theodica M. Greene, Henrietta M. Marett, Kathryn D. Durham, William B. DePass, Jr., Wilkes D. Macaulay, Kathryn M. Bishop, Isabel M. Schell, and Dr. Hugh H. Macaulay, Jr.,

Respondents,

v.

Wachovia Bank of South Carolina, N.A., Estate of Sara M. McLeod, James L. MacLeod, Individually and as Personal Representative of the Estate of Sara M. McLeod, William L. McLeod, Jr., and Kathryn M. DePass,

Defendants,

Of whom James L. MacLeod, Individually and as Personal Representative of the Estate of Sara M. McLeod, and William L. McLeod are,

Appellants.

Appeal From Greenville County
Susan Cobb Singleton, Probate Court Judge

Opinion No. 3524
Heard November 7, 2001 - Filed June 27, 2002

REVERSED

T. S. Stern, Jr. and Karen Creech, both of Covington, Patrick, Hagins, Stern & Lewis, of Greenville, for appellants.

Ben G. Leaphart, of Ashmore, Leaphart & Rabon, of Greenville, for respondents.

HOWARD, J.: This is an action to set aside an irrevocable life insurance trust based upon allegations of incompetence of the settlor and undue influence by the beneficiaries. Isabel M. Dusenberry executed a revocable trust ("the First Trust") and an irrevocable trust ("the Second Trust"). The Second Trust was funded by a newly acquired life insurance policy which had a single premium almost as great as the face amount of the policy due to her age and health. Several beneficiaries of the First Trust (collectively "Respondents") brought this action against Wachovia Bank, as Trustee, and the other named defendants, as beneficiaries of the Second Trust, to set aside the Second Trust and insurance policy. After a full hearing, the probate court concluded Dusenberry was incompetent and subject to undue influence when she executed the Second Trust and purchased the insurance policy. The court ordered the beneficiaries of the Second Trust to return the proceeds of the Second Trust for distribution to Dusenberry's heirs. Beneficiaries of the Second Trust (collectively, "Appellants") appeal.

FACTS

Dusenberry, one of ten children, was born in July 1899. She was an astute businesswoman, and though she could be generous with others, she was known to be frugal with her own expenses. Dusenberry had no children.

In October 1981, Dusenberry and her husband executed wills and revocable trusts leaving the bulk of their estates to each other in the event of death. Soon thereafter, Dusenberry's husband passed away and she began receiving income from her husband's marital trust, for which she held a power of appointment.

In 1987, Dusenberry became unhappy with the bank then administering her trust and moved it and its assets to South Carolina National Bank ("SCN"), which later merged into Wachovia. SCN did not want to hold a power of attorney for Dusenberry as the prior bank had; therefore, Dusenberry executed a durable power of attorney in December 1987 in favor of her sister Sara McLeod and her nephew James MacLeod.[1]

On April 5, 1988, Dusenberry executed a will and the First Trust, a revocable trust agreement with SCN as the named trustee. At this time, Sara McLeod and Kathryn DePass were Dusenberry's only living siblings. However, Dusenberry had over twenty nieces and nephews. The First Trust had assets of nearly two million dollars, with an estimated annual income of $131,000. Under the First Trust, 75% of the trust assets (Share A) was divided among numerous relatives and a few former employees. The remaining 25% (Share B) was apportioned among a dozen charities. Among the beneficiaries of Share A, Sara McLeod was to receive 15%, Kathryn DePass 5%, James MacLeod 4%, and William McLeod 3%.

In the will, Dusenberry exercised her power of appointment over the marital trust, giving 25% to Kathryn DePass and 75% to Sara McLeod or her heirs. On August 2, 1988, Dusenberry executed a codicil to her will which altered the power of appointment over the marital trust. The codicil gave 75% of the income of the marital trust to Sara McLeod. Upon Sara's death or upon Dusenberry's if Sara predeceased her, the income was to go to James MacLeod. Upon the death of the survivor of Sara and James, the trust was to be paid out 50% each to the heirs of James MacLeod and his brother William McLeod.

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[1] Although James MacLeod is the son of the late Sara McLeod and the brother of William McLeod, he spells his last name differently.

By August 1988, Sara McLeod, the sister Dusenberry had favored under her existing estate plan, was very ill with cancer. On August 18, 1988, Dusenberry filled out an application for a single premium whole life insurance policy with a face value of $250,000. Grady Jenkins, the insurance agent who assisted Dusenberry in obtaining the policy, testified that he had discussed purchasing the insurance with Dusenberry several times before the application was signed. According to Jenkins, Dusenberry was concerned that her estate would be tied up for some time and was interested in insurance because the proceeds would be distributed to the beneficiaries quickly, which would ensure that Sara McLeod's needs were funded. By the time the insurance company received all of Dusenberry's health information, several months had elapsed since the original application had been signed. Dusenberry therefore signed a second application at the request of the company on March 30, 1989. Because of Dusenberry's health and age, the premium for the life insurance policy was $238,750.

On April 29, 1989, Dusenberry executed the Second Trust, funded by the life insurance policy. Other than an initial ten dollar contribution, the insurance policy was the sole asset of the Second Trust. The Second Trust provided for payment of the anticipated $250,000 in proceeds as follows: (1) $150,000 to Sara McLeod, and if she did not survive Dusenberry, then to her descendants; (2) $50,000 to James MacLeod; and (3) $50,000 to Kathryn DePass.

Dusenberry had a series of strokes and was placed in a nursing home in December 1989. Appellants concede she was incompetent after that time until her death in April 1991. According to Appellants, the proceeds of the life insurance policies were paid in June 1991 as provided by the Second Trust. Because Sara McLeod died a few months before Dusenberry, James MacLeod received half of Sara's share of the proceeds, or $75,000, plus his own share of $50,000, for a total of $125,000.

Respondents brought this action seeking to set aside the Second Trust and insurance policy on the grounds that Dusenberry was incompetent when she executed the documents and that she was unduly influenced by James MacLeod and Sara McLeod. The probate court agreed, ruling Appellants must return the

proceeds of the Second Trust for distribution to Dusenberry's heirs. Appellants, beneficiaries of the Second Trust, appeal.

STANDARD OF REVIEW

"If the proceeding in the probate court is in the nature of an action at law, the [appellate] court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." Howard v. Mutz, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). "On the other hand, if the probate proceeding is equitable in nature, the [appellate] court, on appeal, may make factual findings according to its own view of the preponderance of the evidence." Id. at 361-62, 434 S.E.2d at 257-58.

The parties agree that Respondents principally sought, and the probate court awarded, equitable relief in the form of a constructive trust on the proceeds of the life insurance policy distributed from the Second Trust. An action to declare a constructive trust is one in equity and this Court may find facts in accordance with its own view of the evidence. Lollis v. Lollis, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987). The evidence must be clear, definite and unequivocal to establish a constructive trust. Id. A constructive trust results "when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." Hendrix v. Hendrix, 299 S.C. 233, 235, 383 S.E.2d 468, 469 (Ct. App. 1989).

Although this Court is not bound by the probate court's credibility determinations, deference to the probate court's findings is appropriate in circumstances where it is apparent from the record that the credibility of the witnesses was a key consideration in weighing the evidence. Weathers v. Bolt, 293 S.C. 486, 488, 361 S.E.2d 773, 774 (Ct. App. 1987) ("It is axiomatic that the probate court was in the best position to judge credibility.").

DISCUSSION

I. Mental Capacity

First, Appellants contend the probate court erred in finding Dusenberry lacked the requisite mental capacity to execute the Second Trust and insurance policy. We agree.

The parties agree that the relevant standard for capacity is a contractual standard. Therefore, in order to have the mental capacity required to execute the Second Trust and life insurance contract, Dusenberry must have had the mental capacity to understand or comprehend the subject of the contract, its nature, and its probable consequences. See Cathcart v. Stewart, 144 S.C. 252, 261, 142 S.E. 498, 500-02 (1928); Du Bose v. Kell, 90 S.C. 196, 207-08, 71 S.E. 371, 376 (1911).

"[A] 'transaction may be so improvident and unreasonable as in itself to justify the inference of mental incapacity or undue influence or both.'" Avant v. Johnson, 231 S.C. 119, 123-24, 97 S.E.2d 396, 398 (1957) (quoting Page v. Lewis, 209 S.C. 212, 240, 39 S.E.2d 787, 799(1946)). However, "[i]t is also equally true that 'an important element of the ownership of property is the right of the owner to convey it on any terms within [her] intention.'" Id. (quoting Brock v. Brock, 218 S.C. 174, 180, 61 S.E.2d 885, 888 (1950)). The party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. Grapner v. Atl. Land Title Co., 307 S.C. 549, 551, 416 S.E.2d 617, 618 (1992).

Both Appellants and Respondents presented copious testimony regarding Dusenberry's capacity. The probate court explained that its ruling turned largely on its assessment of the credibility of the witnesses. Specifically, the probate court stated:

> It was striking to the Court the obvious inconsistencies between the **spoken words** utilized by the witnesses and . . . other subtle non-verbal cues communicated as a part of each witnesses' [sic] testimony . . . not reflected in the transcribed record. It was clear

> that these highly educated individuals were more adept than average witnesses in carefully orchestrating their responses to questions in an attempt to promote their position in the litigation. . . . The Court finds these tactics and subtle nuances in the case lessened the credibility of the family witnesses on both sides of the case. The Court concludes that even the non-family witnesses who testified had bias or motive (i.e., financial gain, loyalty to the family, etc.) with the exception of Sara Drawdy . . . . The Court finds that Drawdy was the only witness whose testimony is one hundred percent consistent with the time line of events and voluminous exhibits that were presented to the Court over the course of the lengthy trial. Further her testimony is compelling and completely believable. Her testimony is consistent and uncontradicted by her actions.

Generally this Court defers to the probate court's findings regarding credibility of the witnesses. See Weathers, 293 S.C. at 488, 361 S.E.2d at 774. However, Drawdy's testimony at trial was presented through video deposition, which places us in an equal position to judge Drawdy's credibility. Nevertheless, though we agree that Drawdy was a credible witness, we do not find that her testimony supports a conclusion of incompetency. To the contrary, we conclude that the Respondents have failed to prove Dusenberry was incompetent.

Drawdy described her observations of Dusenberry's behavior during the times they spoke. However, Drawdy admitted she had little knowledge of Dusenberry and little contact with her. Drawdy met with Dusenberry between eight and twelve times during her administration of the First Trust. Drawdy testified that much of what she knew about Dusenberry had been told to her by either James MacLeod or William "Rusty" DePass and that she was unsure what she actually remembered and what she had been told. Drawdy acknowledged that the events in dispute had occurred a long time ago and that they were no longer clear in her mind. She stated that she noticed a change in Dusenberry's demeanor during the time she knew Dusenberry; however, she further stated, "I don't know how much of this can be ascribed to a change in her or my just being around her more and observing her interaction with others."

Drawdy's main concerns regarding Dusenberry's competence relate to her belief that the Second Trust was not a wise estate planning measure and that it deviated from Dusenberry's previous estate plans.[2] Drawdy asserted, and the probate court agreed, that no estate planning benefit was gained through the creation of the Second Trust.

It is undisputed that the funds from the Second Trust reached the intended beneficiaries within sixty days, while settlement of the First Trust took considerably longer. Jenkins, the insurance agent, testified that Dusenberry was concerned that settlement of her estate would take some time, while life insurance would be distributed to the beneficiaries quickly. Essie Arnold, Dusenberry's second cousin and a frequent visitor, echoed this testimony in her deposition. James MacLeod also testified that Dusenberry had been concerned regarding the length of time before beneficiaries would receive payment and that it indeed took several years for him to receive money from the First Trust. If Dusenberry's purpose was to supply her ill sister with funds as soon as possible after her death, such a strategy makes sense. In our view, the transaction is not so improvident or unreasonable in itself as to support an inference of incompetency. See Avant, 231 S.C. at 123-24, 97 S.E.2d at 398.

The probate court found further support for its decision in Drawdy's concern that the beneficiaries or beneficial interests of the Second Trust were different from those of the First Trust. Again, we disagree with this conclusion.

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[2] Drawdy had further expressed concern over the fact that Dusenberry had insufficient liquid funds to cover the check she wrote to pay the insurance premium. However, Drawdy admitted that the bank had been copied with several letters concerning the transaction prior to the check being written. One such letter, dated March 30, 1989, almost a month prior to Dusenberry's check, refers to a conversation attorney Frank Holleman had with the "trust officer" wherein he was informed that the First Trust would not possess enough liquid funds to pay the premium until the following month. According to this letter, Drawdy was aware of the need for liquid funds to pay the insurance premium almost a month in advance and the letter indicates an understanding that the funds would be ready "sometime next month."

Dusenberry was entitled to alter her estate plan in any way she saw fit.[3] As stated in Avant, "[A]n important element of ownership of property is the right of the owner to convey it on any terms within [her] intention." 231 S.C. at 123-24, 97 S.E.2d at 398.

Furthermore, though the forms of the trusts are different, the disposition of the property bears a strong resemblance to Dusenberry's previous estate planning. All of the beneficiaries of the Second Trust were beneficiaries under the First Trust. The shares of Dusenberry's sisters Sara McLeod and Katherine DePass under the 1981 will and trust, the First Trust, and the Second Trust are proportionally the same. James MacLeod took a larger share under the First Trust than several other relatives and friends, which is consistent with the Second Trust. In Dusenberry's exercise of her power of appointment in her will and the subsequent alteration in her codicil, she further demonstrated a consistent pattern of giving a larger portion of her assets or income to Sara McLeod and her children over other relatives.

Although the probate judge discounted the credibility of the other witnesses on both sides of this dispute, we note that the witnesses who had the most contact with Dusenberry testified that they believed she was competent, including those witnesses outside of the family who did not stand to gain from the Second Trust. Sara Cox, a friend and former employee, spent every Wednesday with Dusenberry until she was admitted to the nursing home in December 1989. Cox witnessed the signing of the Second Trust. She stated that Dusenberry had good days and bad days, but that she would not have witnessed Dusenberry's signature unless Dusenberry understood what she was doing. Pat Lara was hired to take care of Dusenberry at night before Dusenberry suffered her strokes. She stated that Dusenberry "was a lady of her own mind" and "took

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[3] We note that the First Trust was not a long established estate plan. Dusenberry's will and the First Trust were executed only a few months before she first applied for the life insurance policy. Dusenberry's only other will and trust in the record are documents executed in 1981 leaving the bulk of Dusenberry's estate to her husband.

care of her own things." Essie Arnold, a distant relative and friend, saw Dusenberry approximately twice a week and stated that Dusenberry's mind was still "sharp" before her strokes. Helen Dixon, also a friend and frequent visitor, stated that Dusenberry was still "sharp" and alert at ninety, although she occasionally had bad days.

In contrast to this testimony, the witnesses who testified Dusenberry was incompetent had considerably less contact with her. Hugh Macaulay, Jr., Dusenberry's nephew, saw her once a month. Rusty Depass, another of Dusenberry's nephews, saw her once every few months.[4] Kathryn DePass, Dusenberry's niece, saw Dusenberry only two or three times a year.

We conclude that Drawdy's testimony does not support a determination Dusenberry was incompetent, and we conclude that the Respondents failed to carry the burden of proof on this issue.

II. Undue Influence

Appellants assert the trial court erred in ruling that the Second Trust and life insurance were procured through undue influence. We agree.

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[4] Rusty DePass's assertion that Dusenberry was incompetent at the time she initiated the irrevocable insurance trust is inconsistent with his actions in the ensuing months. DePass, a real estate broker, listed and sold a tract of land owned by Dusenberry known as the Glassy Mountain property, making a commission on the sale. Sara McLeod and James MacLeod had Dusenberry's power of attorney at the time. The closing attorney requested that DePass ask the McLeods to sign the deed, in addition to obtaining the signature of Dusenberry, simply to avoid any questions of competence. However, they declined to sign the deed, claiming the transaction was not financially sound because it created a capital gain for Dusenberry, lost the estate tax advantage of a stepped-up basis for her heirs, and served no useful purpose. Despite their refusal to sign the deed, DePass defended Dusenberry's competence, the closing took place, and DePass collected his commission.

"[W]here a declaration of a trust is procured by undue influence it is invalid and unenforceable, but the influence exerted must be undue and operate to such a degree as to amount to coercion." Alexander v. Walden, 287 S.C. 126, 128, 337 S.E.2d 241, 243 (Ct. App. 1985). The coercion must be "the kind of mental coercion which destroys the free agency of the creator of the trust and constrains him or her to do that which is against his or her will and what he or she would not have done if he or she had been left to his or her own judgment and volition." Id. at 128-29, 337 S.E.2d at 243; see 17A Am. Jur. 2d. Contracts § 237 (1991) (stating that undue influence is "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare."). "[B]y the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." Byrd v. Byrd, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983).

Generally, the party challenging an instrument on the basis of undue influence must present evidence which "'unmistakenly and convincingly' shows the [party's] will was overborne by the [defendant] or someone acting on his behalf." Bullard v. Crawley, 294 S.C. 276, 280-81, 363 S.E.2d 897, 900 (1987) (quoting *In re* Will of Smoak, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985).). However, the existence of a confidential relationship creates a presumption that the instrument is invalid, and the burden then shifts to the proponent of the instrument to affirmatively show the absence of undue influence. Id. at 280, 363 S.E.2d at 900; see Hembree v. Estate of Hembree, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) ("In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship.")

The probate court found that James MacLeod and Sara McLeod had a fiduciary relationship with Dusenberry through the power of attorney, and Appellants do not challenge this finding. However, there is strong evidence to show Dusenberry did exactly as she wanted with respect to her financial affairs and that Sara McLeod and James MacLeod lacked the ability to influence her

when they wanted to do so. Under our view of the testimony, Appellants presented sufficient evidence to rebut a presumption of undue influence.

Drawdy testified and the probate court found that the McLeods were present whenever finances were discussed. However, neither Drawdy nor any of the Respondents were present when the life insurance policy was obtained or when the Second Trust was created and none of the Respondents had any personal knowledge concerning who was present during those occasions. In fact, Drawdy admittedly had very little contact with Dusenberry.

Jenkins, the insurance agent who obtained the policy, was a practicing attorney and magistrate for the State of Georgia at the time of trial. Jenkins denied witnessing any undue influence and stated that, to the contrary, he believed the policy was Dusenberry's idea. He noted she called him several times to check on his progress in procuring the policy. James MacLeod testified that he left Dusenberry alone to speak with Jenkins concerning the insurance policy. Jenkins also testified that he was alone with Dusenberry while discussing the life insurance policy and when she signed the application.

None of the Respondents alleged that they witnessed any instance of undue influence. Indeed, Hugh Macaulay, Jr. stated he was not asserting any undue influence, merely that Dusenberry was incompetent. Rusty DePass stated that he had no evidence of threats or coercion used by Appellants and that he was not accusing them of threatening her. He deduced that undue influence had occurred because he reasoned Dusenberry would have never come up with the idea of establishing the Second Trust in that manner. Dusenberry's niece Kathryn DePass testified similarly.

Witnesses who saw Dusenberry on a frequent basis prior to her strokes stated that she was not mentally incapacitated and was not subject to undue influence. Sara Cox stated she never witnessed Sara McLeod or James MacLeod threaten or coerce Dusenberry and that Dusenberry was not someone who would respond to threats. Pat Lara painted Dusenberry as a very strong-willed woman who "was a woman of her own mind." She also stated that she never saw Sara McLeod or James MacLeod threaten or coerce Dusenberry and

that "[y]ou couldn't make [Dusenberry] do something she didn't want to do." Essie Arnold concurred, testifying that she had never witnessed any coercion and that Dusenberry would not have responded to it.

The Appellants' inability to influence Dusenberry is further corroborated by Dusenberry's codicil executed in early August of the same year, close to the time when Dusenberry applied for the life insurance policy. The codicil altered her exercise of her power of appointment so as to give Sara McLeod or James MacLeod only the income from the marital trust, rather than 75% of the corpus. We think this change disproves any exertion of undue influence over Dusenberry.

The handling of the sale of Dusenberry's two hundred acre tract of land referred to as the Glassy Mountain property also weighs heavily in favor of the Appellants. The transaction took place, with the aid of Respondent Rusty DePass, after Dusenberry planned for the insurance policy and Second Trust. Appellants were not in favor of the sale because Dusenberry would incur a capital gains tax and the family would not receive the property at the stepped-up basis after Dusenberry's death. They refused Depass's request to execute the deed as attorneys in fact for Dusenberry, forcing the closing attorney to rely upon the efficacy of Dusenberry's signature. But the reticence of Sara McLeod and James MacLeod did not dissuade Dusenberry from consummating the transaction. Despite James MacLeod's and Sara McLeod's objections, Dusenberry proceeded with the sale.

Based upon the evidence, we conclude the Appellants rebutted any presumption or evidence of undue influence.

CONCLUSION

For the foregoing reasons, the order of the probate court is

REVERSED.

CURETON and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Mason Arscott and Teresa Helen Laws Arscott,

Appellants,

v.

Edgar Ira Bacon, Jr., Infant Baby Boy, and Mary Ford,

Respondents.

Appeal From Sumter County
Ruben L. Gray, Family Court Judge

Opinion No. 3525
Heard June 6, 2002 - Filed June 27, 2002

REVERSED

James F. Thompson, of Spartanburg, for appellants.

Richard H. Rhodes, of Burts, Turner, Rhodes & Thompson, of Spartanburg, for respondents.

Gary L. Williams, of Laurens, Guardian ad Litem.

PER CURIAM: The Arscotts sought to adopt Infant Baby Boy. The natural mother, Mary Ford, consented to the adoption. The Arscotts contended the natural father's consent was not statutorily required and alternatively sought to terminate his parental rights. The natural father, Edgar Ira Bacon, Jr., objected to the adoption and sought custody of the child. The family court held Bacon's consent to the adoption was necessary and there were no grounds to terminate his parental rights. We conclude Bacon's consent was not required and accordingly reverse the family court.

FACTUAL BACKGROUND

Although the relevant facts are largely undisputed, the parties do dispute the legal significance to be accorded those facts. In May 1999, Bacon and Ford began what the family court characterized as an "uncommitted" sexual relationship. From May until November, they engaged in sexual relations several times a week, usually at Bacon's home. Each maintained a separate residence. Bacon lived at his home on the lake, and Ford lived with another man, Shawn Harrell. According to Bacon's testimony, Ford told him that Harrell was homosexual and consistently denied an intimate relationship with Harrell. Apparently, however, Bacon had suspicions regarding Ford's relationship with Harrell. During that time, Bacon and Ford exchanged token gifts but did not provide monetary support to each other.

In October 1999, Ford took a home pregnancy test during a visit to Bacon's house and informed him the test was positive. There is no indication in the record that Bacon initiated any discussion with Ford at that time about marriage or having the child. Rather, Bacon testified that approximately two weeks after the pregnancy test, Ford told him she had had an abortion. There is no testimony from Bacon that he objected. In the first week of November, Bacon ended his relationship with Ford, ostensibly because of Harrell. Bacon maintained he did not really know if Ford was initially or still pregnant because her credibility with him was "very slim." He also did not know if she actually had an abortion because she never provided him with any paperwork concerning the abortion as she had promised.

In early November 1999, Ford and others were arrested in connection with a robbery at Bacon's home. Ford was incarcerated at the local jail until January 8, 2000. According to Bacon, he inquired at the jail about whether Ford was pregnant and was advised she had indicated to jail authorities that she was. Bacon also inquired of police authorities if Ford could be forced to take a pregnancy test at the jail but was advised she could not. When Ford was released on bond in January, she went to live at a local women's shelter. In the ensuing months, Bacon asked a number of people if Ford appeared to be pregnant. He also repeatedly drove by the women's clinic, a local health care facility, in attempts to observe Ford entering or leaving.

On May 22, 2000, Ford gave birth to a son weighing four pounds, thirteen ounces. When the child was born, Ford indicated to hospital personnel that she wanted to place him for adoption. The Arscotts, who had been trying to have a family for several years, were contacted by a family member who was on staff at the hospital and met with Ford and their attorney. Ford executed a consent to adoption, and on May 25, 2000, the Arscotts took the child home from the hospital. He has lived with them since that date and is now just over two years old.

On July 17, 2000, Ford appeared in criminal court on the burglary charge. Bacon was present and Ford told him at that time that she had given birth. She had a picture with her, but Bacon stated she would not let him see it. Even with this direct information from Ford, Bacon still did not believe that she had ever been pregnant and had given birth. On August 16, 2000, Bacon was served with this adoption action which had been filed by the Arscotts in July. According to him, this was the first time he actually believed Ford had given birth. Even so, Bacon testified he was not sure the child was his, although admittedly he was sexually involved with Ford during the relevant time period for conception. Bacon filed an answer and counterclaim opposing the adoption and seeking custody and paternity testing. Bacon alleged "the natural mother concealed her pregnancy from [him] and service of the Complaint was the first notice of the alleged paternal relationship. . . ." The family court ordered paternity testing which established Bacon as the biological father. At a temporary hearing on November 17, 2000, the family court ordered physical and legal custody of the

child to remain with the Arscotts. At his request, Bacon was ordered to pay child support of $75 per week and was permitted to have supervised visitation with the child.

Ford did not testify at the merits hearing which was held in July 2001. The court's order states she was served with pleadings but did not respond. Apparently, she appeared at the courthouse on the day of the hearing but left before it began. Therefore, Bacon's testimony was the only direct evidence regarding his relationship with Ford.

The family court found that, up until July 17, 2000, Bacon "made a sufficient prompt good faith effort to determine whether he was a father, and that the efforts did not reasonably answer the question." In making this finding, the judge stated he "[did] not observe that [Bacon] did all that he could have done, or approached an answer in the most effective manner possible. . . however, . . .a good faith effort does not so demand." The court found Bacon had sufficient information to "move into action after July 17th," when Ford told him she had given birth. Specifically, the court noted Bacon could have instituted court action. However, in reaching its conclusion that Bacon's consent to the adoption was necessary, the court observed:

> Whether Bacon knew that if Ford had a child it was given up for adoption and who had the child is not known to the Court. Bacon contends it was only clear to him upon being served that Ford did have a child on May 22, 2000; that he was being charged as the father, and that the child was in the care of the [Arscotts] in Laurens County. I am unable to conclude that because Bacon did not take any known affirmative steps to answer the question of paternity and otherwise assume his parental responsibilities between July 17, 2000, and August 16, 2000, his good faith efforts failed. From a purely practical point of view, it would have taken him at least as long after July 17th to get the matter before the Court as it actually did. What he might have done had the [Arscotts] not filed [the complaint] on July 5th will never be known. What is abundantly clear is that upon his being served and the paternity test results

> having been returned positive, [Bacon] has been aggressive and timely in taking the steps and pursuing relief indicative of a desire to exercise the responsibilities and opportunities on behalf of the minor child in issue.

LAW/ANALYSIS

The primary legal issue in this appeal is whether Bacon's consent to the adoption of Infant Baby Boy was required. Resolution of this issue involves an analysis of the facts of this case in light of prior South Carolina Supreme Court precedents interpreting S.C. Code Ann. § 20-7-1690 (Supp. 2001). Specifically, we must examine the facts of this case in light of Abernathy v. Baby Boy, 313 S.C. 27, 437 S.E.2d 25 (1993), and Doe v. Queen, 347 S.C. 4, 552 S.E.2d 761 (2001). In both of those cases, the supreme court found the father's consent to adoption was required. The importance of analyzing the facts of each specific case cannot be overstated. In Abernathy, the supreme court noted the "unusual facts before us." 313 S.C. at 32, 437 S.E.2d at 29. In Queen, the supreme court narrowed its holding to "the very limited facts of this case." 347 S.C. at 10, 552 S.E.2d at 764.

S.C. Code Ann. § 20-7-1690 (Supp. 2001) addresses the issue of consent for a child's adoption. The consent of the unmarried mother is required under section 20-7-1690(A)(3). If the father of the child is not married to the mother at birth and the child is placed with the prospective adoptive parents six months or less after the child's birth, the father's consent is required only if :

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the

> birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 20-7-1690(A)(5)(a) & (b) (Supp. 2001). In interpreting section 20-7-1690(A)(5)(b), our supreme court has held that literal compliance with the statute is not necessary in order for the father to possess a relationship with his child which is entitled to constitutional protection. Abernathy at 32, 437 S.E.2d at 29. Rather, an unwed father is entitled to constitutional protection not only when he meets the literal requirements of the statute "but also when he undertakes sufficient prompt and good-faith efforts to assume parental responsibility and to comply with the statute." Id.

In Abernathy, the father and mother were in the military when they began a casual sexual relationship. A few months later, mother informed father she was pregnant. He begged her not to consider an abortion and offered to support her and the child. Although he left shortly thereafter on naval sea duty, father turned over his automobile to mother and gave her access to his checking account. In correspondence to mother, he offered to send her to college and to stay home with the baby if she would work part-time. Id. at 29, 437 S.E.2d at 27. While father was on naval duty, mother informed him she no longer wanted to be involved with him. When he returned, mother informed him she intended to keep the child but rejected his offer of marriage. She also avoided contact with him and refused his telephone calls. When the child was born, mother gave her consent for adoption to the prospective adoptive parents. Father had been stationed elsewhere, but when he learned of the birth and pending adoption, he immediately sought to contest it. Id. at 29-30, 437 S.E.2d at 27. In concluding father's conduct constituted sufficient and good faith efforts to undertake parental responsibility, the supreme court stated:

> It is undisputed that [father] attempted to provide monetary support to [mother] during her pregnancy, but his efforts were rejected by her. In addition, [father] endeavored to keep apprised of [mother's] progress during the pregnancy, but she shielded herself from contact with him, even to the point of complaining to her superiors that [father] was harassing her by his numerous telephone calls.

> [Father] appeared at the hospital after learning that the child had been born and offered to pay medical expenses related to the birth, but was told there were no expenses because he and [mother] were in the Navy. Although [father] sought no legal advice regarding the means available for him to protect his parental interest in the child, his lack of action was engendered by [mother's] assurance to him that she would not place the child for adoption. Further, [father] immediately manifested his willingness to assume sole custody of the child once he discovered that adoption proceedings had commenced.

Id. at 33, 437 S.E.2d at 29.

In Queen, the father and mother lived together for several months during which mother informed father that she was pregnant and wanted an abortion. Father objected and the parties severed their relationship shortly thereafter due to the abortion issue. Mother later told father she had had the abortion in another state. 347 S.C. at 6, 552 S.E.2d at 762. Several months later, mother signed a criminal warrant against father for assault with a deadly weapon. A condition of father's bond was that he have no contact with mother. A consent order subsequently prohibited father from going near mother for one year. Id.

The child was born a few months later. Mother did not disclose father's address on the consent for adoption form. He was not notified of the birth until three months later when he was contacted by the prospective adoptive parents' attorney and asked to sign a consent for adoption. He advised the attorney he needed to consult with counsel, obtained counsel, and opposed the adoption. Between the time of his notification and the final hearing, father prepared a nursery and arranged medical insurance for the child. He testified that he had a bank account which contained savings for the child and had been putting money away since learning of the child's birth. Although the father did not make any contribution to the prospective adoptive parents for the child's support, father testified he was always willing to do so but they had obtained an order preventing disclosure of their names to either father or his counsel. He also testified he would reimburse them for their expenses. Id.

In concluding father had made sufficient prompt and good faith efforts to assume parental responsibility, the supreme court noted several facts: (1) mother represented she had obtained an abortion; (2) mother undertook extraordinary efforts to conceal her pregnancy from father; (3) the prospective adoptive parents prevented disclosure of their identity to father or his counsel by court order; (4) father offered to reimburse the prospective adoptive parents' expenses; and (5) father undertook steps to prepare a nursery, put money in a bank account, and arranged health insurance for the child. Id. at 9-10, 552 S.E.2d at 764.

We conclude the facts of this case, in contrast to the compelling facts of Abernathy and Queen, do not establish that Bacon undertook "sufficient prompt and good faith efforts to assume parental responsibility." Rather, the facts of this case bear striking similarities to Ex Parte Black, 330 S.C. 431, 499 S.E.2d 229 (Ct. App. 1998), and Parag v. Baby Boy Lovin, 333 S.C. 221, 508 S.E.2d 590 (Ct. App. 1998), where no constitutional right was found to attach. It is not for this court to expand the parameters set by our supreme court in interpreting section 20-7-1690 beyond the narrow facts of Abernathy and Queen. We decline to inject such an element of uncertainty into adoption proceedings beyond that intended by the legislation and those constitutional protections deemed necessary by the courts.

In Parag, this court held that the father's consent was not required under § 20-7-1690(A)(5)(b). Mother and father were both teenagers, and mother informed father she might be pregnant. He asked her on several occasions, asked her sister, and attempted to ascertain whether she was gaining weight and had a round shape, but mother never would confirm or deny that she was pregnant. She had the baby on vacation and consented to the adoption. Four months later, she told him about the birth. Id. at 223-24, 508 S.E.2d at 591. The adoptive parents filed an action for adoption and, pursuant to court order, an investigator contacted father. He initially indicated he was not interested in the child but seven days later, after talking with his father and grandmother, changed his mind and stated the child would stay with them until he was given a permanent posting in the Army and could raise the child himself. Upon being served, he asserted paternity and requested a DNA test. Father testified he

offered to "pay for anything" or take mother to the doctor, but because she refused to tell him, could not affirmatively determine she was pregnant. Id. at 224-25, 508 S.E.2d at 592.

In finding father failed to "demonstrate a full commitment to the responsibilities of parenthood," this court held father "failed to demonstrate sufficient prompt and good faith efforts to assume parental responsibility and comply with the statute." Id. at 227-28, 508 S.E.2d at 593-94. Specifically, despite father's claims he was thwarted, (1) father was aware mother might be pregnant at an early stage, (2) mother informed father of the pregnancy and birth, (3) father was aware that the child was placed for adoption and correctly assumed the area where the child was born and remained, (4) father had information allowing him to ascertain the child's exact location and cultivate a relationship. Id. Importantly, this court noted father's only actions, like Bacon's, were paternity testing and participation in the adoption proceeding. Unlike Bacon, father in Parag made no offer of financial support. Thus, there was no evidence father was thwarted in any way from demonstrating good faith efforts once he knew of the child's birth.

In Ex Parte Black, the mother was sexually active with two men and did not disclose Black as the father on the consent form. Black admitted he heard that mother might be pregnant but never tried to contact her. Id. at 432-33, 499 S.E.2d at 230. The family court relied primarily on father's lack of diligence in inquiring about the pregnancy. This court found no evidence father assumed any responsibility prior to the adoption action or attempted to help mother or the adoption agency with pregnancy or childbirth expenses. Rather, only after he was served with the adoption action did Black seek paternity testing and contest the adoption. Id. at 435-36, 499 S.E.2d at 231-32. Unlike Bacon, father never offered to support to the child after receiving the paternity test results five months before the hearing. However, as in Ex Parte Black, Bacon's response appears to be judicially motivated. Id. Bacon only asked his brother, an attorney, what steps he should take after he was served with the adoption action. His efforts came too late.

This is not a "thwarted birth father" case. In his answer, Bacon alleged Ford concealed the pregnancy from him and the first notice he had of the parental relationship was service of the complaint. The facts indicate otherwise. Ford told Bacon in October 1999 that she was pregnant. Although she told him she was going to have an abortion, Bacon stated he did not believe her, and she never produced the written proof which Bacon requested. Bacon asked authorities if Ford was pregnant and was advised she had completed a jail form indicating she was. Bacon continually asked people if Ford appeared pregnant. He drove past a local health care facility to see if he could observe her entering or leaving. He knew Ford was living in the community and staying at a local women's shelter. Although she could not contact him due to the conditions of her criminal bond, Bacon was not legally prohibited from contacting her or having someone else contact her. Most importantly, from July 17 to August 16, Bacon did nothing, despite knowing that Ford had a child and he could be the father.

The critical question is not whether Bacon believed Ford was pregnant but whether he was on notice of sufficient facts to pursue his legal rights and whether he was thwarted by the birth mother from doing so. Generally, courts rely on parties to be proactive in protecting their own rights. Bacon was on notice of sufficient facts to create an affirmative duty to investigate whether Ford was carrying or had delivered his child if he wished to claim constitutional protection. Under the provisions of the statute relating to unmarried fathers, paternity may frequently be in doubt. However, doubt as to paternity does not totally absolve a putative father of his responsibility to take steps to protect his rights. Most cases focus on pre-placement conduct except where there is no evidence the natural father knew of the birth. In light of the information Bacon had, and particularly given his personal distrust of Ford's credibility, his lack of initiative calls into question his concern about protecting his rights as a father. His actions fall short of the sufficient prompt and good faith efforts necessary for constitutional protection to attach. Thus, we conclude Bacon's consent to the adoption was not necessary.

Moreover, in the ultimate analysis, this court's lodestar is always the best interests of the child. See, e.g. Patel v. Patel, 347 S.C. 281, 285, 555 S.E.2d

386, 388 (2001) ("In a custody case, the best interest of the child is the controlling factor."); S.C. Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 298, 547 S.E.2d 506, 511 (Ct. App. 2001) ("The best interests of the child are paramount when adjudicating a TPR case."). Our supreme court recently overruled a long line of cases holding that the termination of parental rights statute should be strictly construed and determined that it should be liberally construed consistent with the purpose of facilitating prompt adoption and the best interests of the child. See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000). Likewise, we consider the child's best interests as a factor here. In Abernathy, the supreme court stated that the father's constitutional window is a limited one, balanced against the child's interest in stability. Abernathy at 32, 437 S.E.2d at 28. The record is clear that both the natural father and the adoptive parents would be fit parents and provide loving homes. However, the evaluating psychologist's testimony is also clear that taking the child out of the home he has known from birth until two years old would result in significant long-term trauma and possibly severe attachment issues. Thus, the best interests of Infant Baby Boy warrant reversal of the family court in this instance.

Due to its finding that Bacon's consent was required, the family court held the adoption by the Arscotts could not proceed. Given that Ford gave her consent to the adoption specifically to the Arscotts, the family court held that Ford could possibly initiate an action seeking to withdraw her consent for adoption. The court therefore declined to terminate her parental rights. No specific issue was raised by the appellants to the court's ruling regarding Ford. However, due to the role of the courts in protecting minors, this court may raise ex mero motu issues not raised by the parties. See Joiner at 107, 536 S.E.2d at 374. As in Parag, because Ford consented to the adoption and defaulted below, the family court erred in not terminating her parental rights. Parag at 229, 508 S.E.2d at 594. The record discloses no indication that Ford's consent to adoption of the child by the Arscotts was involuntary. Since we conclude Bacon's consent is not required, there is no reason to vitiate Ford's consent. Rather, it is in the best interests of the minor child to resolve this matter as expeditiously as possible. Therefore, we reverse the family court's decision not

to terminate Ford's parental rights. Ford's parental rights are terminated, and the adoption may proceed without Bacon's consent.

REVERSED.[1]

CURETON, STILWELL, and SHULER, JJ., concur.

[1] Based on our disposition, we need not address the additional issues on appeal of termination of the natural father's parental rights and the family court's alleged improper reliance on the guardian ad litem's recommendation.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas C. Joyner,

Respondent,

v.

Glimcher Properties and Smith Land Resources, Inc.,

Defendants,

Of whom,

Glimcher Properties is,

Appellant.

Appeal From Beaufort County
Gerald C. Smoak, Sr., Circuit Court Judge

Opinion No. 3526
Heard June 5, 2002 - Filed June 27, 2002

AFFIRMED

Scott A. Seelhoff, of Howell, Gibson & Hughes, of Beaufort, for appellant.

Paul H. Infinger, of Dukes, Williams & Infinger, of Beaufort, for respondent.

GOOLSBY, J.: Following a jury trial in magistrate's court, Thomas C. Joyner received a verdict against Glimcher Properties in the amount of $2,500.00. Glimcher appealed to the circuit court. The circuit court dismissed the appeal for failure to prosecute. Glimcher appeals. We affirm.

FACTS/PROCEDURAL HISTORY

Thomas C. Joyner was an invitee driving his van across the public parking lot at Cross Creek Shopping Center in Beaufort County. A tree limb fell on his van, destroying the vehicle and causing him personal injuries. He sued Glimcher Properties, the owner/manager of the commercial property, and Smith Land Resources, Inc., the landscaping/maintenance contractor for the property. The case was tried before a jury in magistrate's court on November 18, 1999. The jury returned a verdict in favor of Joyner in the amount of $2,500.00 against each of the two defendants.

Glimcher appealed to the circuit court on December 20, 1999. The magistrate who heard the case did not file a return within 30 days, as required by Rule 75, SCRCP. In fact, he never filed one.[1] Glimcher never requested the circuit court to issue a writ of mandamus to force the magistrate to do so.

On March 23, 2000, Joyner wrote the Chief Administrative Judge for the Fourteenth Judicial Circuit, requesting a court date on April 12, 2000, copying Glimcher with this letter. Glimcher made no response to this letter. On June 2, 2000, Joyner filed a motion to dismiss the appeal for failure to prosecute. The circuit court granted the motion and awarded interest on the judgment and attorney fees in the amount of $500.00. Glimcher appeals.

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[1] The magistrate resigned on February 2, 2000, forty-three days after the Notice to Appeal was given. See S.C. Code Ann. § 18-7-70 (1985) ("When a magistrate by whom a judgment appealed from was rendered shall have gone out of office before a return is ordered, he shall, nevertheless, make a return in the same manner and with the like effect as if he were still in office.").

LAW/ANALYSIS

Having timely appealed, Glimcher argues that the circuit court erred when it dismissed his appeal because the magistrate failed to issue a return. He argues that "the appellant from magistrate's court is under no duty to act once the notice of appeal has been filed," and that the duty to act rests solely with the magistrate.

Generally, the magistrate has a duty to complete the return. After the notice of appeal has been filed, "[t]he court below shall thereupon, after ten days and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court."[2]

Since the magistrate has no duty to provide a copy of the return to the parties, Glimcher argues there was no reasonable means for him to ensure that the return was timely filed. We disagree. Glimcher was on notice that a return had not been timely filed when he did not receive a notice in writing from the clerk of the circuit court.[3] Having received no such notice, he should have presumed no return had been filed and acted accordingly.

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[2] S.C. Code Ann. § 18-7-60 (1985); see also Rule 75, SCRCP (record must be transmitted within 30 days to the clerk of the court to which the appeal is taken).

[3] See Rule 75, SCRCP ("Upon receipt of the certified record, the clerk of the circuit court shall give notice in writing to the parties that the record has been filed.").

Citing S.C. Code Ann. § 18-7-80 (1985),[4] Glimcher argues the circuit court, by its own order, may compel that a return be made. When an inadequate or defective return has been filed, the burden is on the circuit court to direct the magistrate to file an amended return.[5]

No return, however, was filed in this case. When there is no return, the appellant from the magistrate's court must act with due diligence and seek a writ of mandamus if necessary to compel the return.[6]

Although some may view the result we reach as harsh, we feel compelled under the current case law to uphold the circuit court's decision to dismiss the appeal for failure to prosecute. The motion to dismiss was the only motion in front of the court, and the court was under no obligation to sua sponte direct the magistrate to file a return.

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[4] S.C. Code Ann. section 18-7-80 (1985) reads, in pertinent part:

> If the return be defective the appellate court may direct a further or amended return as often as may be necessary and may compel a compliance with its order.

[5] Chapman v. Computers, Parts & Repairs, Inc., 334 S.C. 387, 390, 513 S.E.2d 120, 122 (Ct. App. 1999) ("When the return provided is inadequate, the appropriate remedy is for the circuit court to direct the magistrate to file an amended return . . . .").

[6] See State v. Barbee, 280 S.C. 328, 329, 313 S.E.2d 297, 298 (1984) (citations omitted) ("The burden was on . . . the party appealing below to obtain the magistrate's compliance by mandamus if necessary."); State v. Adams, 244 S.C. 323, 326, 137 S.E.2d 100, 101 (1964) (citations omitted) ("When it became apparent to Respondent that the Magistrate had failed to perform the ministerial duty of transmitting the record of the trial Court to the appellate Court, it became incumbent upon Respondent to proceed by way of mandamus to enforce performance of his duty.").

AFFIRMED.

HEARN, C.J., concurs.

HOWARD, J., dissents in a separate opinion.

HOWARD, J. (dissenting).

I disagree with the majority's conclusion that the failure of Appellant to seek a Writ of Mandamus against the magistrate's court provides a basis for dismissal of the appeal under the circumstances of this case. I, therefore, respectfully dissent.

The circuit court dismissed the appeal on the grounds that Appellant failed to diligently prosecute the appeal. Dismissal by the circuit court based upon a failure to prosecute an appeal is a discretionary action. See Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). Therefore, we should reverse only if there is a manifest injustice resulting from that decision. Id.

The majority affirms the dismissal, concluding the failure to act with due diligence to seek a Writ of Mandamus against the magistrate is fatal to Appellant's position. In so holding, the majority concedes the result they have reached may be viewed as "harsh." I conclude dismissal is only warranted when there is at least some evidence of unreasonable neglect, which I find totally lacking in this case. Therefore, I would rule that dismissal is unduly harsh, resulting in a manifest injustice to Appellant.

As the majority points out, our supreme court has stated that the appellant has a burden to obtain the magistrate's compliance by mandamus, if necessary. See State v. Barbee, 280 S.C. 328, 329, 313 S.E.2d 297, 298 (1984); State v. Eaves, 260 S.C. 523, 524-25, 197 S.E.2d 282, 283 (1973); State v. Adams, 244 S.C. 323, 326, 137 S.E.2d 100, 101 (1964). However, in each case cited by the majority as the underpinning for its decision, the party appealing from the magistrate's court convinced the circuit court to reverse a criminal conviction because the magistrate failed to file a return. See Barbee, 280 S.C. at 329, 313

S.E.2d at 298; Eaves, 260 S.C. at 524-25, 197 S.E.2d at 283; Adams, 244 S.C. at 326, 137 S.E.2d at 101. Our supreme court held in each case that the failure of the magistrate to file a return is not a ground for the circuit court to reverse the magistrate's court judgment. See Barbee, 280 S.C. at 329, 313 S.E.2d at 298; Eaves, 260 S.C. at 524-25, 197 S.E.2d at 283; Adams, 244 S.C. at 326, 137 S.E.2d at 101. Without a return, the circuit court has no basis for reviewing the merits of the appeal. Barbee, 280 S.C. at 329, 313 S.E.2d at 298. In those circumstances, the burden falls to the litigant to force the magistrate to fulfill the ministerial duty of filing a return by seeking a Writ of Mandamus, if necessary.

In Adams, the appellant was convicted of Driving Under the Influence of Intoxicants, first offense, in magistrate's court. Id. at 323, 137 S.E.2d at 100. He appealed to the circuit court and moved to reverse the conviction and dismiss the charges because the magistrate failed to file a return. No notice of the motion was provided to the State, the Solicitor, or the Attorney General. The circuit court granted the requested relief, and the State appealed. On appeal, our supreme court reiterated the obligation of the moving party to "prosecute [the appeal] with due diligence and have it promptly disposed of." Id. at 326, 137 S.E.2d at 101. The court stated:

> Respondent is charged with knowledge of the time limit imposed on the Magistrate for filing the record and of the 60 day supersedeas provided by Section 46-189 of the Code. Having failed to take any step toward effecting a prompt disposition of his appeal, Respondent was not entitled to have his conviction set aside and the charges against him dismissed.

Id. The Court then reversed the order of the circuit court setting aside the conviction.

This language and the action taken by our supreme court in Adams is the basis for the majority's conclusion that dismissal is warranted under these circumstances. However, I conclude exclusive reliance upon this language is misplaced. In the later case of Eaves, our supreme court made it clear that under the same circumstances, even though reversal of the conviction was not

proper, the appellant below was still entitled to a remand of the appeal to require that the magistrate comply with the statute so that the matter could be heard on the merits. Id. at 523, 197 S.E.2d at 282; see also Barbee, 280 S.C. at 329, 313 S.E.2d at 298 (ruling "[t]he order of the circuit court is reversed. Respondent has ten days from issuance of this opinion to require the magistrate to file his record with the circuit court in compliance with section 18-3-40.").

The Writ of Mandamus is an extraordinary writ. Fort Sumter Hotel v. S.C. Tax Comm., 201 S.C. 50, 61, 21 S.E.2d 393, 398 (1942). From the earliest days of jurisprudence in this country to the present, it has been limited to those situations in which there is no other legal remedy. See Marbury v. Madison, 5 U.S. 137, 169 (1803); see also Willimon v. City of Greenville, 243 S.C. 82, 86, 132 S.E.2d 169, 170 (1963) ("The writ of mandamus is the highest judicial writ known to the law and according to long approved and well established authorities, only issues in cases where there is a specific legal right to be enforced or where there is a positive duty to be performed, and there is no other specific remedy. When the legal right is doubtful, or when the performance of the duty rests in discretion, or when there is other adequate remedy, a writ of mandamus cannot rightfully issue."). Essentially, it is a refuge of last resort within the legal system, called upon infrequently, and lying beyond the normal procedures. See Ehrlich v. Jennings, 78 S.C. 269, 277, 58 S.E. 922, 926 (1907) ("[I]n the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act.").

An action for a Writ of Mandamus is a separate proceeding. See Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 38-39, 512 S.E.2d 106, 111 (1999). It is recognized as coercive in nature. See id. (finding primary purpose of mandamus is to enforce an established legal right and corresponding imperative duty imposed by law); Godwin v. Carrigan, 227 S.C. 216, 222, 87 S.E.2d 471, 473 (1955) (noting mandamus is employed to compel performance, when refused, of a ministerial duty); 55 C.J.S. Mandamus § 3 (1998) (indicating "mandamus is used to compel action and to coerce the performance of an existing duty"); 52 Am. Jur. 2d Mandamus § 1 (2000) (stating mandamus is essentially a coercive writ). As our supreme court noted in Plum Creek, "[b]y issuing a writ of mandamus, the trial judge orders a public official to

perform a ministerial duty." Id. at 39, 512 S.E.2d at 111. Furthermore, "If the public official fails to comply with the writ, the plaintiff can petition the court for an order holding the official in contempt." Id.

I do not agree that a litigant's failure to take these extraordinary steps can reasonably be viewed as a failure to diligently prosecute the appeal, especially in the absence of some directive from the circuit court to do so. This is especially true where, as here, the litigant has complied with all statutorily imposed obligations in a timely fashion and the appeal has only been pending for five months.

In similar settings, our supreme court has been reluctant to affirm the drastic action of dismissing a suit unless the party's misconduct was intentional. For example, where the litigant failed to comply with a discovery order, and the exclusion of the witness eviscerated the party's case, our supreme court found the exclusion of the witness by the circuit court to be an abuse of discretion. In Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996), the court noted:

> [w]here the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party.
>
> Whatever sanction is imposed should serve to protect the rights of discovery provided by the rules. A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.

Id. at 511, 466 S.E.2d at 355 (alteration in original).

Furthermore, in those instances in which our supreme court has affirmed dismissal of the action based upon the failure to prosecute, the dismissal has been imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then, with a finding of unreasonable neglect. See Small, 254 S.C. at 438, 175 S.E.2d at 802 (finding no abuse in a dismissal where

counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for several hours); Don Shevey & Spires, Inc. v. Am. Motors Realty Corp., 279 S.C. 58, 60-61, 301 S.E.2d 757, 758-59 (1983) ("The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause."); Bond v. Corbin, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904) (finding where first case on trial docket is set on the first day of jury cases, and, when it is called, plaintiff is absent, and in the afternoon is also absent, and again when called the next morning, a dismissal for failure to prosecute is proper).

The ruling of the majority in this case accomplishes exactly the result condemned by our supreme court in each of its previous decisions on the subject. Here Respondent sought and received an advantage from the failure of a judicial officer to fulfill his statutorily assigned duty. Respondent did not apply for a Writ of Mandamus against the magistrate, a procedure equally available to him as to Appellant. Appellant did not refuse to comply with a mandate, or even a suggestion, from the circuit court to file a Writ of Mandamus. In fact, in Appellant's response to the motion to dismiss, Appellant offered to join in an action to compel the magistrate's compliance. Respondent sought dismissal in the first instance, and the circuit court granted it without giving Appellant an opportunity to undertake this extraordinary action. Under these circumstances, I would reverse the circuit court's order dismissing the appeal and remand to the circuit court for entry of an order requiring Appellant to file an action seeking a Writ of Mandamus within ten days.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tommy L. Griffin Plumbing & Heating Co.,

Appellant,

v.

Jordan, Jones & Goulding, Inc.,

Respondent.

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

Opinion No. 3527
Heard May 7, 2002 – Filed June 27, 2002

AFFIRMED

Marvin D. Infinger, of Haynsworth, Sinkler & Boyd, of Charleston; and David B. Ratterman and Joseph L. Hardesty, both of Stites & Harbison, of Louisville, KY, for appellant.

George D. Wenick, of Smith, Currie & Hancock, of Atlanta, GA; and Edward D. Buckley, Jr. and Stephen L. Brown, both of Young, Clement, Rivers & Tisdale, of Charleston, for respondent.

CURETON, J.: Tommy L. Griffin Plumbing and Heating Co. (Griffin) brought this action seeking to recover money damages from Jordan, Jones & Goulding, Inc. (JJ&G) for professional negligence and breach of implied warranty. The circuit court granted JJ&G's motion for summary judgment. Griffin appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

This case has a long and involved procedural history. In the spring of 1987, Griffin entered into a contract with the Commissioners of Public Works for the City of Charleston (CPW) to construct the second phase of the Peninsula Water Trunk Main project (PEN II). CPW hired JJ&G to serve as the design engineer for the project and to administer and supervise the PEN II contract between Griffin and CPW. In 1992, Griffin filed a complaint alleging it was damaged by JJ&G's actions relating to its administration of the contract and sought to recover damages from JJ&G under several different causes of action. JJ&G moved for summary judgment on all of Griffin's causes of action. The circuit court granted JJ&G's summary judgment motion and Griffin appealed to the supreme court which reinstated two of Griffin's causes of actions: malpractice based on professional negligence, and breach of implied warranty. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, 320 S.C. 49, 57, 463 S.E.2d 85, 89 (1995).

Griffin filed its second amended complaint on June 20, 1996, and a third amended complaint on Apri1 21, 1998. Griffin's third amended complaint alleged it was entitled to recover damages based upon JJ&G's negligence in the supervision, design, and administration of the contract and/or from a breach of implied warranty to provide suitable design plans. Griffin stated nine instances where JJ&G harmed it. JJ&G moved for summary judgment on seven of the nine claims. The circuit court granted JJ&G's motion for partial summary judgment on August 17, 1999.

Griffin's seven claims, dismissed pursuant to JJ&G's summary judgment motion, are as follows: (1) damages based on JJ&G's interference with Griffin's ability to bid on future projects resulting from a derogatory

letter JJ&G mailed to Griffin's bonding company, which allegedly resulted in a restriction of Griffin's bonding capability; (2) costs incurred due to a negligent design that failed to show a conflict with an existing sewer line at the McMillan Avenue Tunnel, which caused a delay in redesigning plans, resulting in additional dewatering costs; (3) damages due to the delayed awarding of the contract to Griffin, because of JJ&G's failure to become aware of an asbestos fill in the water tunnels at the Fiddler Creek crossing; (4) costs incurred by Griffin because JJ&G took one year to redesign around the asbestos fill area at Fiddler Creek Crossing; (5) costs incurred when JJ&G required incremental pipe testing, instead of testing the entire pipeline at one time; (6) costs incurred when JJ&G stopped Griffin from working for thirty-four days due to safety concerns at the St. Johns Avenue site; and (7) damages incurred in consultant costs because Griffin was required to get assistance in the collection of funds from CPW because of delays caused, and unsuitable design plans submitted, by JJ&G.

The circuit court denied Griffin's motion for reconsideration on March 28, 2000. The two parties entered into a consent order disposing of the two remaining claims on May 30, 2000. Griffin appeals the circuit court's grant of partial summary judgment.

LAW/ANALYSIS

I. Timeliness of Appeal

JJ&G contends Griffin's appeal should be dismissed because the notice of appeal was untimely served. We disagree.

Griffin's complaint alleged nine causes of actions against JJ&G. JJ&G moved for summary judgment on seven of the nine claims. After a hearing, the trial court granted JJ&G's motion for partial summary judgment. The order states, in part:

> THEREFORE, the Motion for Partial Summary Judgment of Defendant Jordan, Jones & Goulding, Inc. as to the seven enumerated claims is hereby

> GRANTED. The Court finds that there is no just reason for delay, and directs entry of judgment as to Plaintiff's seven claims, identified above.

Griffin's motion for reconsideration was denied and Griffin did not immediately appeal. Several months later, after the remaining two claims were dismissed without prejudice, Griffin served a notice of appeal challenging the partial summary judgment order.

JJ&G argues the appeal should be dismissed because the trial court essentially certified the order pursuant to Rule 54(b), SCRCP, and Griffin did not timely serve a notice of appeal pursuant to Rule 203(b)(1), SCACR. JJ&G cites federal law interpreting the federal counterpart to Rule 54, and Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990) in support of its position.

Griffin argues JJ&G did not move for certification under Rule 54(b), and the trial court's order does not cite the rule. Griffin also contends even if the language in the order constitutes certification under Rule 54(b), the appeal is timely pursuant to S.C. Code Ann. § 14-3-330 (1976).

Rule 54(b), SCRCP, provides:

> When more than one claim for relief is presented in an action, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order . . . however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims or parties, and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

An appeal following a Rule 54(b) certification is the exception rather than the rule. 10 Charles Alan Wright et al., Federal Practice and Procedure 2654 (3d ed. 1998). The rule does not require certification and if the trial court chooses to certify the judgment, it must do so in a definite, unmistakable manner. Id.

A certification under the federal rule, Rule 54(b), FRCP, which is virtually identical to our rule, must satisfy three prerequisites for the appellate court to obtain jurisdiction prior to adjudication of all claims in the action. There must be multiple claims for relief or multiple parties; the judgment entered on the certified claim must be a final judgment; and the district court must expressly determine that there is no just reason for delay. Wright, Federal Practice and Procedure at § 2656. A federal appellate court reviews the first two prerequisites using a de novo standard, but reviews the determination regarding no just reason for delay using an abuse of discretion standard. Stearns v. Consol. Mgmt., Inc., 747 F.2d 1105, 1108 (7th Cir. 1984).

The federal courts define multiple claims as separate claims with a view to avoiding double appellate review of the same issues. Fed. Deposit Ins. Corp. v. Elefant, 790 F.2d 661, 664 (7th Cir. 1986). In determining whether a claim is separate, the court must consider whether separate recovery is possible on the claims; mere variations of legal theories do not constitute separate claims. Stearns, 747 F.2d at 1108-09. Where there is a substantial factual overlap between the claim adjudged and the remaining claims, A[t]o take jurisdiction . . . would vitiate the most important purpose behind Rule 54(b)'s limitations--to spare the court of appeals from relearning the facts of a case on successive appeals." Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 702 (7th Cir. 1984). Because the adjudged claim must be separate and unrelated to the remaining claims, Rule 54(b) does not represent a departure from the fundamental principle limiting piecemeal appeals. Wright, Federal Practice and Procedure at § 2654.

Nor does Rule 54(b) alter the definition of a final judgment for purposes of appellate jurisdiction. Id. at §§ 2653, 2656. Under the South

Carolina Constitution, appellate jurisdiction is to be established by such regulations as the General Assembly may prescribe. S.C. Const. art. V, § 5. The General Assembly has prescribed such regulations through the enactment of S.C. Code Ann. § 14-3-330 (1976 & Supp. 2001). See generally Jean Hoefer Toal et al., Appellate Practice in South Carolina 89-95 (S.C. Bar 1999); Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 317, 368 S.E.2d 456, 456 (1988) (holding the right to appeal is controlled by statute). Section 14-3-330 provides in part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits . . . and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from. . . .

S.C. Code Ann. § 14-3-330(1) (1976 & Supp. 2001). If a judgment leaves some further act to be done by the court before the rights of the parties are determined, the judgment is not final. Mid-State Distribs. v. Century Importers, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993).

In Link v. School District of Pickens County, our supreme court held that under § 14-3-330(1), when a party timely files a notice of intent to appeal from a judgment, the appellate court may review any intermediate order necessarily affecting the judgment not earlier appealed. 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990) (finding the failure to immediately appeal the grant of partial summary judgment was not fatal as a party was entitled under § 14-3-330(1) to wait until final judgment to appeal an intermediate order). The court noted an order which is immediately appealable is not rendered unappealable because it has not been certified under Rule 54(b). Link, 302 S.C. at 4, 393 S.E.2d at 177.

The partial summary judgment order in Link was not certified pursuant to Rule 54(b). The court noted, however, that federal Rule 54(b) is not construed to alter federal appellate jurisdiction. Id. at 4-5, 393 S.E.2d at 178. See also Rule 82(a), SCRCP (stating the rules of civil procedure should not be construed to extend or limit the jurisdiction of any court of this state).

In a footnote in Link, the court acknowledged it has not addressed the effect of granting a Rule 54(b) certification on appealability. Link at 5 n.3, 393 S.E.2d at 178 n.3. The court explained: "Rule 54(b) certification purports to alter the definition of 'final judgment' by allowing a final judgment to be entered on certain claims before disposition of the entire case." Id. The court then cautioned: "Until this Court determines whether granting certification mandates an immediate appeal, the safer course is to immediately appeal any order certified under Rule 54(b)." Id.

After a trial court determines there are multiple claims or parties, and has directed judgment as to a claim, it must expressly determine there is no just reason for delay. Wright, Federal Practice and Procedure at § 2659. Although the appellate court reviews the trial court's decision with deference, the trial court's order is subject to reversal for an abuse of discretion. Id. The reviewing court "necessarily accord[s] the [trial] court less deference . . . when . . . the court offers no rationale for its decision to certify." Fox v. Baltimore City Police Dep't, 201 F.3d 526, 531 (4th Cir. 2000). In Braswell Shipyards v. Beazer East, the Fourth Circuit Court of Appeals stated in part:

> Where the district court is persuaded that Rule 54(b) certification is appropriate, the district court should state those findings on the record or in its order. The expression of clear and cogent findings of fact is crucial. In fact, numerous courts have held that where the district court's Rule 54(b) certification is devoid of findings or reasoning in support thereof, the deference normally accorded such a certification is nullified.

2 F.3d 1331, 1336 (4th Cir. 1993) (internal citations omitted).

In this case, we find the circuit court abused its discretion in certifying the partial summary judgment. The language in the order purporting to certify the partial summary judgment was not in response to a motion by either party. The circuit court did not cite Rule 54(b), and failed to make any findings in support of certification.

We find further support for our conclusion the circuit court erred in certifying the partial summary judgment as we find substantial factual overlap between the two remaining claims and the seven adjudicated claims. A number of the claims, including the two remaining claims, alleged JJ&G knew of existing conditions and knowingly interpreted the contract to frustrate Griffin, thereby breaching duties of professional responsibilities owed to Griffin. Most of the claims, including the two remaining claims, arose from continuous problems in the interaction between Griffin & JJ&G under the PEN II project. Accordingly, we find the adjudicated claims were not sufficiently separate to warrant certification under Rule 54(b).

As we find the circuit court erred in certifying the partial summary judgment without making findings, we need not address the remaining prerequisite of Rule 54(b) certification. Accordingly, we find the order on appeal was timely appealed.

II. Summary judgment motion on Griffin's PEN II claims

Griffin contends the circuit court erred when it granted JJ&G's summary judgment motion on its PEN II claims and Griffin advances three arguments in support of its contention. First, Griffin argues JJ&G failed to meet its initial burden as the moving party. Second, Griffin contends its PEN II claims were within the fact finder's common knowledge, and therefore, expert testimony was not required to prove the claims. Third, Griffin asserts that even if expert testimony was required, expert affidavits and the equivalent of expert affidavits were in the record and created a genuine issue of material fact, precluding a grant of summary judgment.

Summary judgment is proper only when it is clear that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). In determining whether any triable issue of fact exists, the evidence and inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. McNair v. Rainsford, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct. App. 1998). In Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991), the supreme court discussed the moving party's burden to support a summary judgment motion:

> Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' - that is, pointing out to the [trial] court - that there is an absence of evidence to support the nonmoving party's case." The moving party need not "support its motion with affidavits or other similar materials *negating* the opponent's claim."

Id. at 115, 410 S.E.2d at 545 (quoting Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Once a moving party sustains its initial burden, the opposing party cannot rest upon the allegations made in its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Midland Mut. Life Ins. Co. v. Harrell, 331 S.C. 394, 397-98, 503 S.E.2d 189, 190-91 (Ct. App. 1998).

Griffin initially contends JJ&G's affidavits in support of its summary judgment motion were legally insufficient to sustain JJ&G's burden as the party moving for summary judgment. Griffin argues that JJ&G's affidavits contained conclusory, non-probative statements, which inadequately addressed deficiencies in JJ&G's plans and specifications for, and administration and supervision of, the PEN II project. We disagree.

JJ&G, as the moving party, who in the posture of this case does not have the burden of proof, was not required to present affidavits to negate Griffin's claims. JJ&G can sustain its burden by simply pointing to the lack of evidence presented by Griffin to support its case. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. JJ&G's motion and affidavit adequately pointed out the absence of evidence in the record to support Griffin's claims, and therefore met its burden as the moving party. Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law.").

Griffin also contends he met the proof requirements by filing a verified complaint. The facts contained in a verified complaint operate as a substitute for an opposing affidavit for summary judgment when the facts contained in the verified complaint are based on personal knowledge. Dawkins v. Fields, 345 S.C. 23, 35, 545 S.E.2d 515, 519 (Ct. App. 2001). The record reflects Griffin filed its initial verified complaint on September 2, 1992. Griffin then filed an amended verified complaint on October 15, 1992. After the supreme court allowed Griffin to proceed with the two causes of action currently before this court, Griffin filed its second amended complaint on June 20, 1996. The second amended complaint was not a verified complaint, nor did it incorporate by reference the earlier verified complaints. Griffin filed its third amended complaint on March 31, 1998. The third amended complaint also was not verified, and although it incorporated the facts of the second amended complaint, it did not incorporate the earlier verified complaints. Therefore, Griffin's argument that its complaint constituted an affidavit in opposition to JJ&G's motion for summary judgment is without merit.

Griffin next contends the circuit court erred in finding that expert testimony was required to establish the breaches outlined in its complaint. Griffin argues that several of its claims fit into the exception to the

requirement for expert testimony, as they raise issues within the common knowledge or experience of the jury.

In South Carolina, a plaintiff in a professional malpractice action is required to introduce expert testimony to establish the defendant's standard of care. However, where the subject matter is of common knowledge or experience so that no special training is required to evaluate the defendant's conduct, expert testimony is not required. Smith v. Haynsworth, Marion, McKay, & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996) (stating that expert witness testimony is generally required to establish the standard of care in legal malpractice cases); see Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1996) (stating that unless the subject is a matter of common knowledge, expert witness testimony is required to establish both the standard of care and defendant's failure to conform to the standard in medical malpractice cases).

In Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990), Gilliland, an architect, sued Elmwood Properties for breach of contract to recover monies due under a construction contract. Elmwood Properties filed a counterclaim against Gilliland asserting that Gilliland was professionally negligent by failing to design the project in such a way to fulfill the terms of the contract. The supreme court stated:

> The well known rule still exists that generally, in a malpractice case, "there can be no finding of negligence in the absence of expert testimony to support it." The claimant in a malpractice claim must, through expert testimony, establish both the standard of care and the deviation by the defendant from such standard. Here, Elmwood presented no evidence from an expert that Gilliand had committed malpractice. Thus, summary judgment was, in this respect, proper.

Id. at 300-01, 391 S.E.2d at 580 (citations omitted).

The same rule exists for breach of implied warranty for negligent design claims. Cf. Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp., 332 S.C. 197, 209, 503 S.E.2d 761, 767 (Ct. App. 1998). Thus, both the professional negligence and breach of implied warranty claims require Griffin to present expert testimony to establish the standard of care, and JJ&G's deviation from the standard of care, unless proof of the claims fall within the common knowledge exception.

In this case, Griffin failed to timely present expert affidavits or other sworn-to pleadings in support of its response to JJ&G's motion for partial summary judgment. The trial court found Griffin also failed to properly move, pursuant to Rule 56(f), SCRCP, for additional time to supply affidavits. Consequently, there is no expert witness testimony in the record. Therefore, Griffin's PEN II claims must fall within the common knowledge exception in order to overcome the failure to provide affidavits or testimony from an expert. We now examine those claims individually.

A. Griffin's Claims

McMillan Avenue Tunnel/Fiddler Creek Crossing

Griffin argues it was injured by JJ&G's original design plan, which instructed Griffin to build a pipeline through an asbestos fill area, and to place a water pipeline in a location where sewer lines already existed, and Griffin additionally contends it was harmed by JJ&G's delays in providing it with redesigned plans for these areas.[1]

JJ&G argues it relied upon soil sample reports provided by CPW to design the plans for the Fiddler Creek Crossing site and the reports did not

[1] Griffin also claims JJ&G negligently misrepresented when it received a building permit for the area. We need not address Griffin s negligent misrepresentation claim. Any claim based upon negligent misrepresentation against JJ&G was barred by the supreme court s decision in Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, 320 S.C. 49, 57, 463 S.E.2d 85, 89 (1995).

indicate the presence of asbestos. Additionally, JJ&G argues it relied upon utility studies conducted by CPW when it created the design for placement of the water pipeline, and the CPW studies did not show an existing sewer line. JJ&G contends that it had no duty to survey the underground utilities, as the PEN II contract specifically states that the owner supplied the utility locations and that the "drawings indicate underground utilities or obstructions that are known to exist according to the best information available to the owner."

Regardless of JJ&G's duty to investigate the information furnished it by CPW, we find that under the circumstances of this case, expert testimony was required to establish the standard of care and a breach of that standard by JJ&G. Without expert testimony, a jury cannot determine whether JJ&G was negligent when it relied on CPW's studies in designing the project, because there is no way for a jury to compare JJ&G's actions with the actions other similarly situated engineering firms would have taken when confronted with the situation JJ&G faced. As to Griffin's claim for damages based on the length of time taken to redesign the plans, we again find that expert testimony is needed to evaluate what period of time is reasonable for the redesign of the plans.

Pipe Testing Requirement

Griffin argues it was damaged when JJ&G required it to test the pipeline from valve to valve, rather than testing the entire pipeline at one time after it was completed. The contract between Griffin and CPW instructed Griffin, "[w]hen a length of pipe approved by the Engineer is ready for testing, fill the line with water, bleed out all of the air and make a leakage test." The contract also provided that Griffin comply with the testing requirements of the American Water Works Association. The Association guidelines provide, "[a]fter the pipe has been laid, all newly laid pipe, or any valved section thereof shall be subjected to a hydrostatic pressure of at least 1.5 times the working pressure at the point of testing." Griffin argues these provisions are ambiguous, and are therefore for the trier of fact to determine if JJ&G erred by requiring the testing from valve to valve. We disagree.

We find as a matter of law the contract provisions are unambiguous. Inasmuch as the construction of the subject contract can be determined by consideration of the plain and unambiguous language of the contract, it becomes a question of law to be resolved by the court and is thus no bar to the grant of summary judgment. See Lyles v. BMI, Inc., 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987) (finding where a question as to the construction of a contract that is determined by the plain language of the contract, the question is one of law).

Work Stoppage on St. Johns Avenue

JJ&G required Griffin to stop construction at the St. Johns location for safety concerns. In addition, JJ&G imposed conditions upon Griffin before it would allow Griffin to continue construction at the site. The site was closed for thirty-four days. Griffin argues JJ&G was professionally negligent in its supervision of the contract in two ways: (1) in shutting down the site, and (2) by keeping the site closed for thirty-four days. The contract between CPW and Griffin required Griffin comply with all Occupational Safety and Health Administration (OSHA) safety regulations. John Bell, the JJ&G engineer supervising the site, noted the trench Griffin dug at the excavation site had no safety measures in place to prevent cave-ins. OSHA regulations require such safety precautions to be implemented when the trench exceeds a certain depth. As a result, Bell closed down the site until Griffin complied with OSHA regulations.

Griffin argues OSHA requirements are matters of common knowledge and do not require expert testimony. We disagree. Expert testimony respecting the standard of care for the professional engineering industry for such a situation is necessary to determine whether JJ&G behaved negligently by closing down the site for thirty-four days.

Consultant's Costs

Griffin contends it was required to hire consultants because of the negligent supervision and unsuitable design plans provided by JJ&G. It argues these costs constitute damages resulting from JJ&G's negligence and

breach of implied warranties. Since we find that the grant of summary judgment was appropriate on all causes of action, the circuit court did not err when it granted summary judgment on Griffin's claim to recover consultant costs.

III. Summary Judgment on Griffin's PEN III Claim

Griffin argues that a letter sent by JJ&G to Griffin's bonding company, USF&G, on November 6, 1987, resulted in USF&G restricting Griffin's bonding capacity. Griffin contends the restriction limited its ability to bid on other contracts during this period. The letter reads in pertinent part as follows:

> We [JJ&G] have noted that you [Griffin] have now completed approximately 45% of the project and have been paid 41.5% of the funds. This would normally be an acceptable ratio of work completed versus funds paid but in this case, we are concerned. Our reasons are that we feel that you have completed the less complicated portions of the work and that the remaining portions of the work would appear to be far more difficult and costly.
>
> As examples, you have not grouted any of the tunnels and you must still complete very difficult areas such as [t]he Filbin Creek Crossing, [t]he Fiddler Creek Crossing, Eubank Street, [t]he Meeting Street Crossing, Carver Street and Rexton Street to name a few.
>
> For all the above reasons [CPW] and its Engineer [JJ&G] require your advice as to your ability, intent, and financial capability to complete the [PEN II] project within the plans and specifications and contract completion time.

Harold Pruitt, USF&G's agent, stated in an affidavit, "[a]s a direct result of the receipt of JJ&G's status report and subsequent November 6, 1987 letter, [Griffin's] bonding capacity was completely restricted for approximately a month and a half, and restricted to small projects through March of 1988. USF&G did not extend authority to bond a substantial project until May 31, 1988, when it bonded a $2,000,000 project."

Griffin argues JJ&G was professionally negligent in its contract supervision role when it sent this letter to USF&G. Griffin however does not offer any expert testimony regarding the standard of care by professional engineering firms faced with the same facts confronting JJ&G. The appropriate behavior for a professional engineering firm in its supervisory role is not a matter of common knowledge. JJ&G met its burden as the moving party on summary judgment by showing Griffin failed to present expert testimony to prove this claim. Once the moving party has met its burden, the nonmoving party may not rest solely on the allegations raised in its pleadings. Midland Mut. Life Ins. Co. v. Harrell, 331 S.C. 394, 397-98, 503 S.E.2d 189, 190-91 (Ct. App. 1998). The trial court properly granted JJ&G's motion for partial summary judgment.

For the foregoing reasons the order of the trial court is

AFFIRMED.

STILWELL and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Buddy Darnell Tipton,

Appellant,

v.

Teresa Ann Tipton,

Respondent.

Appeal From Greenville County
Amy C. Sutherland, Family Court Judge

Opinion No. 3528
Submitted June 6, 2002 - Filed June 27, 2002

AFFIRMED IN PART & VACATED IN PART

James M. Robinson, of Robinson Law Firm, of Easley, for appellant.

Herman E. Cox, of Greenville, for respondent.

HEARN, C.J.: Buddy Darnell Tipton (Husband) commenced this action against Teresa Ann Tipton (Wife), seeking a divorce and equitable

distribution of marital property. The family court found no valid common law marriage existed; ordered Husband to comply with the provisions of a prior divorce decree requiring him to convey to Wife his interest in the marital home; and granted Wife certain affirmative relief. We affirm in part and vacate in part.

FACTS

The parties were divorced on March 15, 1994. In the divorce decree, the family court ordered Husband to convey his interest in the parties' home to Wife. This was never done by Husband.

Approximately two months after the divorce, the parties resumed cohabitation. They lived together until June 29, 1998, at which time Husband moved from the home. After Husband left the home, Wife placed his personal possessions in storage.

Husband commenced this action in July 1998. Wife answered, denying the existence of a common law marriage between the parties, and seeking judicial enforcement of the family court's prior order requiring Husband to convey to her his interest in the formal marital residence.

After a hearing, the family court issued an order finding (1) the parties were not married at common law and, therefore, Husband was not entitled to a divorce or equitable division; (2) Husband failed to convey his interest in the marital home to Wife pursuant to the 1994 divorce decree and must do so within 15 days; (3) Husband must pay Wife $770 for the cost of storing his personal property after he moved out of the residence; and (4) Husband must pay Wife $2,833.75 in attorney's fees and costs. This appeal follows.

ANALYSIS

I. Marital Home

Husband contends he is entitled to an interest in the residence whether or not there was a common law marriage between the parties because

he contributed to the mortgage following their divorce. In support of this position, he directs our attention to a line of cases holding that if spouses enter an agreement and then resume cohabitation, executory provisions of the separation agreement terminate while executed provisions are not affected. See Machado v. Machado, 220 S.C. 90, 66 S.E.2d 1049 (1910); Crawford v. Crawford, 301 S.C. 476, 392 S.E.2d 675 (Ct. App. 1990); Bourne v. Bourne, 336 S.C. 642, 646-47, 521-22 (Ct. App. 1990). His reliance on these cases is misplaced because the cited cases dealt with parties who were married at the time the agreements were made. Therefore, the family court had jurisdiction to determine whether and to what degree their separation agreements should be applied.

Here the parties entered into a separation agreement that was adopted by the family court and incorporated into a divorce decree. Once the parties were divorced, there no longer existed any "marital property" over which the family court could assume jurisdiction unless jurisdiction was reserved in the decree. See S.C. Code Ann. Section 20-7-473 (Supp. 2001) ("The [family] court does not have jurisdiction or authority to apportion nonmarital property."); Hayes v. Hayes, 312 S.C. 141, 144, 439 S.E.2d 305, 307 (holding family court lacks jurisdiction to modify equitable division unless specifically reserved in decree or authorized by statute). Further, Husband has not appealed the family court's determination that no common law marriage existed between the parties; therefore, that ruling is the law of the case. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (finding an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance"). Thus, we hold the family court correctly determined it lacked jurisdiction to award Husband any interest in the former marital home. Rather, the family court's authority was limited to enforcing the provisions of its prior order.[1]

[1] Given our disposition of this issue, we need not address Husband's argument that should the family court's order as to the home be reversed the award of attorney's fees should also be reversed.

II. Storage Expenses

Since the parties resumed cohabitation without the benefit of marriage or remarriage, and there has been no appeal from the family court's finding of no common law marriage, the court lacked subject matter jurisdiction to determine the parties' property rights in any way. See S.C. Code Ann. § 20-7-473 (Supp. 2001) (defining jurisdiction of family court in domestic matters). Accordingly, we vacate that portion of the family court's order awarding Wife her storage costs.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART AND VACATED IN PART.

HUFF and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Theressa A. Pustaver,

Respondent,

v.

Darrell J. Gooden,

Appellant.

Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3529
Heard May 7, 2002 - Filed June 27, 2002

AFFIRMED

Elford H. Morgan and Stanley T. Case, both of Butler, Means, Evins & Browne, of Spartanburg, for appellant.

Johnny F. Driggers, of North Charleston, for respondent.

HOWARD, J.: Theressa Pustaver obtained a judgment against Darrell Gooden arising from injuries sustained in an automobile accident. This

judgment exceeded Gooden's liability insurance coverage limits, and Gooden attempted to claim a set-off in the amount of Pustaver's underinsured motorist ("UIM") benefits. The trial court determined the UIM coverage was subject to the collateral source rule and, therefore, Gooden was not entitled to a set-off. Gooden appeals. We affirm.

FACTS

Pustaver and Gooden were involved in an automobile accident in Spartanburg County, South Carolina. Pustaver brought this action against Gooden for damages. A jury trial resulted in a verdict for Pustaver in the amount of $290,000.14. However, the jury also determined that Pustaver was fifty percent at fault, and the award was therefore reduced to $145,000.07.

Gooden maintained $50,000 in liability insurance coverage, and Pustaver had $100,000 in UIM coverage. Pustaver's UIM carrier filed a notice of intent to appeal the jury verdict. Pustaver then settled her UIM claim for $70,000, executing a policy release to her UIM carrier, in return for which the appeal was withdrawn.

Gooden tendered his liability limits in full satisfaction of the judgment, claiming the $50,000 in combination with the $100,000 UIM coverage available to Pustaver exceeded the amount of the judgment. Pustaver twice refused this tender. Pustaver filed an execution against Gooden's property in an attempt to satisfy the full judgment. Gooden responded with a motion requesting that the circuit court compel Pustaver to accept the $50,000.00 policy limits in full satisfaction of the judgment. The circuit court denied the motion, ruling that the UIM insurance proceeds constituted a collateral source and Gooden was not entitled to set off this benefit against the judgment. Gooden appeals.

DISCUSSION

Gooden argues the circuit court erred in ruling that UIM proceeds are subject to the collateral source rule. We disagree.

"South Carolina has long followed the collateral source rule that compensation received by an injured party from a source *wholly independent of the wrongdoer* should not be deducted from the amount of the damages owed by the wrongdoer to the injured party." Rattenni v. Grainger, 298 S.C. 276, 277, 379 S.E.2d 890, 890 (1989) (emphasis added); see Mount v. Sea Pines Co., 337 S.C. 355, 357, 523 S.E.2d 464, 465 (Ct. App. 1999). This rule has been applied liberally in South Carolina to preclude the reduction of damages. Citizens & S. Nat'l Bank v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

"The only requirement for qualification as a collateral source is that the source be wholly independent of the wrongdoer." Id. A source is wholly independent and therefore collateral when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer. Mount, 337 S.C. at 357, 523 S.E.2d at 465. The collateral source rule applies to insurance proceeds. Rattenni, 298 S.C. at 278, 379 S.E.2d at 890.

The collateral source rule acts to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995). A tortfeasor cannot take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is "an insurance company, an employer, a family member, or other source." Johnston v. Aiken Auto Parts, 311 S.C. 285, 287, 428 S.E.2d 737, 738 (Ct. App. 1993); see Dixon, 320 S.C. at 181, 463 S.E.2d at 640. "It is the tortfeasor's responsibility to compensate the injured party for all the harm that he causes, not the net loss the injured party receives." Dixon, 320 S.C. at 182, 428 S.E.2d at 640. "At times, then, 'while a Plaintiff's recovery under the ordinary negligence rule is limited to damages which will make him whole, *the collateral source rule allows a Plaintiff further recovery under certain circumstances even though he has suffered no loss*.'" Haselden v. Davis, 341 S.C. 486, 502-03, 534 S.E.2d 295, 304 (Ct. App. 2000) (quoting 22 Am. Jur. 2d Damages § 566 at 640 (1988) (emphasis added)), cert. granted (Jan. 1, 2001).

In Rattenni, the identical question presented in this case was decided by our supreme court. In that case, the decedent was killed in an automobile collision proximately caused by the defendant driver. Prior to trial, the plaintiff

settled with the UIM carrier for the full amount of the UIM coverage available, and the UIM carrier waived any right of subrogation it might have possessed. Following a jury verdict against the at-fault driver which greatly exceeded his liability insurance coverage, the at-fault driver asked the court for a set-off of the amount paid in UIM benefits against the verdict. The circuit court declined, ruling that the decedent's UIM coverage was a collateral source. Our supreme court agreed, concluding, "We find no persuasive reason to distinguish underinsurance proceeds from other insurance proceeds that are subject to the collateral source rule." Id. at 278, 379 S.E.2d at 890.

Gooden contends Rattenni is legally and factually distinguishable, and is therefore not controlling. He argues Rattenni and McMillan v. John M. Hughes Seafood Co., 328 S.C. 157, 493 S.E.2d 91 (1997), support his argument that the Legislature has adopted a statutory insurance scheme which contemplates that damage awards will be paid from the combined limits of the liability and the underinsured motorist coverages. We disagree.

Neither Rattenni nor McMillan is based upon the recognition of an overall statutory insurance scheme to prevent double recovery or to pay claims out of the combined insurance coverages available. In Rattenni, our supreme court ruled that UIM benefits are subject to the collateral source rule. In McMillan, the Court applied the clear language of the statute prohibiting subrogation and assignment of UIM benefits.

Furthermore, we see no practical difference between the waiver of subrogation, as in Rattenni, and the circumstances presented here, where subrogation is legislatively prohibited.[1] We decline to carve out an exception to the collateral source rule for UIM coverage by implication based upon the amendment forbidding subrogation or assignment. As our supreme court said in Rattenni, "Had the General Assembly intended to abrogate the collateral

[1] The statute regulating underinsured motorist coverage was amended after Rattenni deleting the provision allowing underinsured motorist carriers the right of subrogation or assignment. See S.C. Code Ann. § 38-77-160 (Supp. 2001).

source rule in regard to this particular class of insurance proceeds, it would have done so." 298 S.C. at 278, 379 S.E.2d at 891.

We find no reason to distinguish the Rattenni case from the facts of this case. Subsequent opinions by our appellate courts have clearly affirmed the collateral source rule. See Citizens & S. Nat'l Bank, 320 S.C. at 92, 463 S.E.2d at 318; Haselden, 341 S.C. at 502-03, 534 S.E.2d at 304; Mount, 337 S.C. at 357, 523 S.E.2d at 465; Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 304-06, 504 S.E.2d 347, 355-56 (Ct. App. 1998); Dixon, 320 S.C. at 181-82, 463 S.E.2d at 640; Johnston, 311 S.C. at 286-87, 428 S.E.2d at 738.

CONCLUSION

For the foregoing reasons, the decision of the trial judge is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: South Carolina Department of Revenue,

Appellant,

Sandra C. McClure,

Respondent

v.

Felder Elliott,

Defendant.

Appeal From Berkeley County
John B. Williams, Master-in-Equity

Opinion No. 3530
Submitted June 3, 2002 - Filed June 27, 2002

VACATED

General Counsel & Deputy Director Harry T. Cooper, Jr., Chief Counsel for Revenue Litigation Ronald W.

Urban and Counsel for Revenue Litigation Joe S. Dusenbury, all of Columbia, for appellant.

Troy Guerard Knight and Jennifer L. Queen, both of Summerville, for respondent.

HOWARD, J.: The South Carolina Department of Revenue ("SCDOR") appeals the master-in-equity's order extinguishing its lien on property owned by Feldor Elliott. SCDOR argues the master did not have personal jurisdiction to enter the order. We agree and vacate.

FACTS/PROCEDURAL HISTORY

In November 1998, Sandra McClure brought suit against Elliott, seeking to foreclose a mortgage McClure held against Elliott's property. Elliott failed to answer McClure's summons and complaint and a default judgment was entered against Elliott. The master ordered a public sale of the mortgaged property which was finalized in August, 2000.

Following the sale, McClure discovered SCDOR also held a lien against the foreclosed property. SCDOR was not named as a party in the initial suit. In March 2001, McClure filed a motion for a rule to show cause, which the master issued. The rule instructed SCDOR to appear on April 25, 2001, and show cause why it should not be required to protect its lien by paying McClure the amount due or have its lien extinguished pursuant to the master's initial Judgment of Foreclosure and Sale.

On April 4, 2001, SCDOR was served with the rule to show cause and an order binding it to the master's initial Judgment of Foreclosure and Sale, neither of which was accompanied by a summons and complaint. The order was recorded, and the Berkeley County Clerk of Court was ordered "to annotate the judgment roll so as to reflect that SC Dept. of Revenue and Taxation . . . [is]

bound by the aforedescribed Judgment of Foreclosure and Sale." SCDOR appeals.

STANDARD OF REVIEW

The court's exercise of personal jurisdiction over a party "will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law." Indus. Equip. Co. v. Frank G. Hough Co., 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950); see also Bargesser v. Coleman Co., 230 S.C. 562, 567, 96 S.E.2d 825, 827 (1957) (holding the exercise of personal jurisdiction over a party will not be disturbed on appeal unless unsupported by the evidence or influenced by error of law).

DISCUSSION

On appeal, SCDOR argues the master's rule to show cause did not contain the essential elements of a summons and, therefore, the master did not have personal jurisdiction over it. We agree.

"[A] judgment is void . . . if a court acts without [personal] jurisdiction." Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); see also Coogler v. Cal. Ins. Co. of San Francisco, Cal., 192 S.C. 54, 58-59, 5 S.E.2d 459, 461 (1939) ("[N]o order or judgment affecting the rights of a party . . . should be made or rendered without [proper] notice to the party whose rights are to be thus affected . . . ."). A court ordinarily obtains personal jurisdiction by the service of a summons. See State v. Sanders, 118 S.C. 498, 502, 110 S.E.2d 808, 810 (1920) ("The purpose of the summons is to acquire jurisdiction of the person of the defendant . . . ."); cf. Rule 3(a), SCRCP ("A civil action is commenced by filing and service of a summons and complaint."). However, our supreme court has "previously excused the use of the Rule to Show Cause [in place of a summons] to obtain jurisdiction when it contained the essential elements of a valid Summons." Citizens & S. Nat'l Bank of S.C. v. First Palmetto State Bank & Trust Co., 279 S.C. 252, 254, 305 S.E.2d 80, 80 (1983).

"[O]ne of the most important elements of a Summons is the time it allots for the defendant to appear." Id. at 254, 305 S.E.2d at 80-81. In Citizens & Southern, the rule to show cause provided it was returnable in twelve days, "rather than the twenty days then required of a Summons." Id. at 254, 305 S.E.2d at 81. Therefore, the court held the rule to show cause did not contain the essential elements of a summons. Thus, the circuit court did not properly have personal jurisdiction over the defendant. Id.

A defendant must be given thirty days in which to answer a summons. Rule 12(a), SCRCP. In the present case, SCDOR was served with a copy of the rule to show cause on April 4, 2001, and ordered to appear on April 25, 2001. SCDOR had only twenty-one days in which to respond, not thirty as required by Rule 12(a), SCRCP. According to our supreme court's holding in Citizen & Southern, the master's rule to show cause lacked an essential element of a summons.[1]

Therefore, the master lacked personal jurisdiction over SCDOR, and the order binding it to the master's initial Judgment of Foreclosure and Sale is void and must be vacated. See Thomas & Howard Co., 318 S.C. at 291, 457 S.E.2d at 343; Coogler, 192 S.C. at 58-59, 5 S.E.2d at 461.

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[1] Furthermore, in the present case, McClure based her motion for the rule to show cause on Rule 60 of the South Carolina Rules of Civil Procedure. This is an improper legal basis on which to grant the requested relief. "While a court may correct mistakes or clerical errors by its own process to make it conform to the record, it cannot change the scope of the judgment." Dion v. Ravenel, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994); see also Ex parte Strom, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000) (indicating Rule 60 cannot be used to expand the scope of a judgment). In addition, Rule 60 specifically provides for a party's relief *from* a judgment, not the enforcement of that judgment against non-parties. See Rule 60(a)-(b), SCRCP. Thus, attempting to bind a non-party to a judgment extinguishing its lien changes the scope of the original judgment and extends beyond the relief contemplated by Rule 60, SCRCP.

CONCLUSION[2]

For the foregoing reasons, we find the master did not have personal jurisdiction over SCDOR and, therefore, his order extinguishing its lien is

VACATED.[3]

HEARN, C.J., and HUFF, J., concurring.

[2] Because we find the master lacked personal jurisdiction to issue the rule to show cause, we need not address SCDOR's other assertions of error.

[3] Because oral argument would not aid the Court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Bay Van Ness, III,

Appellant,

v.

Eckerd Corporation,

Respondent.

Appeal From Charleston County
B. Hicks Harwell, Circuit Court Judge
Gerald C. Smoak, Sr., Circuit Court Judge

Opinion No. 3531
Heard June 3, 2002 - Filed June 27, 2002

VACATED IN PART & REMANDED IN PART

Stephen P. Groves, Sr., and Stephen L. Brown, both of Young, Clement, Rivers & Tisdale, of Charleston; Reese I. Joye, of the Joye Law Firm, of North Charleston, and John S. Nichols, of Bluestein & Nichols, of Columbia, for appellant.

Wade H. Logan, III, Elizabeth Scott Moise, and Mark C. Fava, all of Nelson, Mullins, Riley & Scarborough,

of Charleston, for respondent.

HEARN, C.J.: William Van Ness appeals from two orders issued by two different circuit court judges. First, he appeals an order setting aside an entry of default against Eckerd Corporation. Secondly, he appeals from an earlier order in which the circuit court judge *sua sponte* vacated his prior order denying Eckerd relief from entry of default. He contends there was no good cause shown to set aside the entry of default or, in the alternative, that the first circuit judge should not have vacated his order. We vacate both the order setting aside the entry of default and the decision vacating the original order and remand for further proceedings.

PROCEDURAL HISTORY

Van Ness filed a complaint against Eckerd asserting claims for false imprisonment, malicious prosecution, and slander. Eckerd was served on December 4, 1997. On January 6, 1998, Van Ness filed an affidavit of default indicating Eckerd had not answered or filed any other responsive pleading. The clerk of court entered default the same day.

On January 8, 1998, Eckerd mailed an answer and moved to set aside the entry of default pursuant to Rule 55(c), SCRCP. Judge B. Hicks Harwell denied Eckerd's motion to set aside default in an order filed May 28. Eckerd then filed a Rule 59(e), SCRCP, motion, requesting that Judge Harwell reconsider his determination that Eckerd had not shown good cause for the default.

In an order dated July 13, 1998, Judge Harwell stated "[he] discovered that one of the [his] brothers has a relationship to the corporate defendant which was unknown [to me] at the time this Court heard the Motions in question and entered the Order of May 28, 1998." He then vacated his earlier order and recused himself from the case.

Subsequently, Judge Gerald C. Smoak heard the Rule 55(c) motion

de novo and granted Eckerd's request for relief. Van Ness appeals.

DISCUSSION

Van Ness appeals Judge Harwell's decision to vacate his own order and recuse himself and Judge Smoak's later decision lifting the entry of default. We agree that Judge Harwell could not vacate his own order more than ten days after it was issued.

Initially, we note that "[i]ssues relating to subject matter jurisdiction may be raised at any time . . . and should be taken notice of by this court on our own motion." Bunkum v. Manor Props., 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct. App. 1996). In Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001), this court held that a family court judge lacked jurisdiction to *sua sponte* alter a judgment more than ten days after it was issued. Although trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e), SCRCP, motion is filed, after ten days that jurisdiction is lost.[1] Id. at 157, 543 S.E.2d at 229-30. In this case, as in Heins, the trial judge modified an order not as requested in a Rule 59(e) motion, but rather on his own initiative and after more than ten days had passed. He therefore lacked jurisdiction to vacate the original order.

Although Judge Harwell lacked the jurisdiction to *sua sponte* vacate his earlier order, we find that he had the inherent power to recuse himself with

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[1]We note that the question of whether the trial court retains jurisdiction for ten days if no Rule 59(e) motion is filed remains an open question in South Carolina. See Doran v. Doran, 288 S.C. 477, 478, 343 S.E.2d 618, 619 (1986) (holding trial court loses jurisdiction to modify order after the term in which the order was issued has expired); Pitman v. Republic Leasing Co., — S.C. —, —, — S.E.2d —, — (Ct. App. 2002) (noting that before the adoption of the South Carolina Rules of Civil Procedure, it was well-settled that a trial judge could modify his own judgments only until the expiration of the term of court and "[w]hether or not Rule 59(e), SCRCP, supersedes this rule entirely or is merely an exception to it has not been decided by our supreme court.")

respect to Eckerd's Rule 59(e) motion. A trial judge must recuse himself if "the judge or the judge's spouse or a person within the third degree of relationship to either of them, or the spouse of such a person: . . . is known by the judge to have more than a de minimis interest that could be substantially affected by the proceeding." Canon 3(E)(1)(d)(iii), Code of Judicial Conduct, Rule 501, SCACR. In this case, Judge Harwell did not know there was a potential conflict until nearly two months after he issued his original order. On realizing there might be a problem, Judge Harwell properly declined to take any further action in the case, but he should not have vacated his earlier order. Rule 63, SCRCP, directs as follows:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties . . . .

We construe the language "other disability" to include disqualification of the trial judge. Therefore, the Rule 59(e) motion should have been heard by another circuit judge.[2]

On appeal, Van Ness argues that Judge Harwell erred in recusing himself. Initially we note that this issue is not preserved for our review because Van Ness did not make a Rule 59(e) motion regarding Judge Harwell's recusal. To be preserved for appeal, an issue must have been raised to and ruled on by the trial judge. Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 24, 531

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[2]This approach is consistent with that applied by the Texas Court of Appeals in Bourgeois v. Collier, 959 S.W.2d 241 (Tex. App. 1997). There, the court vacated the trial judge's decision to grant a motion to modify a final order because it appeared that recusal was required.

S.E.2d 282, 284 (2000). If a trial judge grants "relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re* Estate of Timmerman, 331, S.C. 455, 460, 502 S.E.2d 920, 923 (Ct. App. 1998). Moreover, this argument is unavailing on its merits. The decision to recuse is within the discretion of the trial judge. Christy v. Christy, 317 S.C. 145, 149, 452 S.E.2d 1, 3 (Ct. App. 1994). "We will not second guess his determination, for whether or not he was able to exercise impartiality, he judiciously chose to avoid the appearance of impropriety." Id.

Because we vacate Judge Harwell's decision vacating his original order, we must also vacate Judge Smoak's *de novo* consideration of Eckerd's Rule 55(c) motion.[3] We remand this matter for consideration of Eckerd's Rule 59(e) motion and further proceedings consistent with this opinion.

VACATED IN PART AND REMANDED IN PART.

HUFF and HOWARD, JJ., concur.

[3]In light of our decision vacating Judge Smoak's order, we decline to reach Van Ness's argument that there was no good cause shown for purposes of relief from entry of default.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Beach Company,

Respondent,

v.

Twillman, Ltd., d/b/a The Washington Pen Company,

Appellant.

Appeal From Charleston County
Clifton Newman, Circuit Court Judge

Opinion No. 3532
Submitted June 3, 2002 - Filed July 8, 2002

AFFIRMED IN PART and REVERSED IN PART

Gregg Meyers, of Charleston, for appellant.

Bruce A. Berlinsky, of Pritchard & Berlinsky, of Charleston, for respondent.

CURETON, J.: The Beach Company (Beach) initiated this breach of contract action against Twillman, Ltd. (Twillman). Twillman answered,

requesting a jury trial and asserting a counterclaim. The trial court granted Beach's motion to strike the counterclaim and request for a jury trial. Twillman appeals. We affirm in part and reverse in part.

FACTS

Twillman, as tenant doing business as the Washington Pen Company, and Beach, as landlord, entered into a five-year lease of a storefront located at 211 King Street in Charleston, South Carolina. Twillman has not paid all the rent due under the terms of the contract and is in default of the lease absent a justified excuse to the contrary. Section 27.16 of the "Miscellaneous Provisions" section of the lease, entitled "Waiver of Counterclaim" provides:

> Tenant waives any and all right to trial by jury or to interpose any counterclaim in any summary proceeding for eviction or nonpayment of Rent. Any and all claims or 'counterclaims' that may be asserted by Tenant shall only be made the subject of a separate action. In such separate action, it is agreed that trial by jury shall be waived by both parties.

At a hearing on the motion to strike, Beach argued the waiver provision should control and the court should grant the motion to strike the counterclaim and the request for a jury trial. Twillman argued the lease provision violates South Carolina law governing compulsory counterclaims and jury trials. The trial court concluded:

> The Court finds that the lease agreement between the parties is controlling in determining this matter; that the parties have agreed in the lease that there will be no demand for jury trial or any jury trial on any issue relating to eviction or nonpayment of rent; that in a commercial lease setting the parties can make such an agreement and that type of an agreement is not against public policy or contrary to the judicial economy as

> compared with the right of a party to recover property and rent as may be applicable. The Court would therefore grant the motion of the plaintiff to strike the counterclaim and request for jury trial.

Twillman appeals.

DISCUSSION

Waiver of Compulsory Counterclaim

Twillman argues the trial court erred in granting Beach's motion to strike Twillman's counterclaim. Twillman first asserts its counterclaim is compulsory.

Counterclaims are governed by Rule 13, SCRCP, which provides:

> A pleading shall state as a [compulsory] counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Rule 13(a), SCRCP.

"[R]ules of procedure, like statutes, should be given their plain meaning." Valentine v. Davis, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." First-Citizens Bank & Trust Co. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. See Hucks, 305

S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a trustee regarding the administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty); N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518-19, 381 S.E.2d 903, 905 (1989) (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower).

Beach's complaint alleges Twillman is in breach of the lease agreement. Twillman's counterclaim alleges a breach of the same agreement by Beach. As we find these claims are logically related to each other, we agree Twillman's counterclaim is compulsory.

Twillman next argues a compulsory counterclaim must have been pursued in Beach's lawsuit or be forever waived, thus the trial court erred in striking the counterclaim based on the waiver in the lease agreement. We agree.

Rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. The purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) (interpreting the federal counterpart to South Carolina's Rule 13(a)).

If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997). The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted." The Reporter's Note also notes that South Carolina's Rule 13(a) is the same as the federal rule on counterclaims. Accordingly, we may rely on federal law to interpret our Rule 13. See Brown v. Leverette, 291 S.C. 364, 366-67, 353 S.E.2d 697, 698-99 (1987) (utilizing federal law to interpret a state rule that tracked the language of the corresponding federal rule).

When the Federal Rules of Civil Procedure were adopted in 1938, counterclaims were, for the first time, classified as either compulsory or permissive. W.R. Habeeb, Annotation, Failure to Assert Matter as Counterclaim as Precluding Assertion Thereof in Subsequent Action, Under Federal Rules or Similar State Rules or Statutes, 22 A.L.R.2d 621, 624 (1952). In December 1946, effective March 19, 1948, the Rule was amended into language similar to its current language.[1] The purpose of the amendment was "to insure against the 'undesirable possibility presented under the original rule whereby a party having a . . . compulsory counterclaim could avoid stating it . . . by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.'" Sparrow v. Nerzig, 228 S.C. 277, 283, 89 S.E.2d 718, 721 (1955) (quoting Rule 13, SCRCP, advisory committee's notes on amendments).

Federal Rule 13(a) was amended a second time effective July 1, 1963.[2] It now requires that a compulsory counterclaim be pleaded and adjudicated or all right of action thereon is foreclosed. New Britain Mach. Co. v. Yeo, 358 F.2d 397, 410 (6th Cir. 1966). The rule prohibiting a party from asserting a compulsory counterclaim in a subsequent action under Federal Rule 13 is

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[1] Rule 13(a), FRCP, eff. March 19, 1948, reads:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

Sparrow v. Nerzig, 228 S.C. 277, 283, 89 S.E.2d 718, 721 (1955) (quoting the 1948 version of the federal rule).

[2] See Habeeb, 22 A.L.R.2d at § 3 (Supp. 1996).

mandatory. Id.

Given the express purpose behind the civil rules of procedure and the mandatory nature of compulsory counterclaims, we find the provision in the lease agreement purporting to waive Twillman's right to assert a compulsory counterclaim in Beach's breach of lease action is unenforceable. See Loader Leasing Corp. v. Kearns, 83 F.R.D. 202, 204 (W.D. Pa. 1979) (finding that a compulsory counterclaim waiver provision is unenforceable in a federal forum); Atl. Coast Line R. Co. v. U.S. Fid. & Guar. Co. 52 F.Supp. 177, 189 (M.D. Ga. 1943) (finding a contractual waiver of compulsory counterclaims provision not enforceable under Federal Rule 13 as the rule "prohibits the very thing which the parties contracted to do."). Accordingly, we agree with Twillman the trial court erred in striking its counterclaim based on the waiver provision.

Waiver of Right to Jury Trial

Twillman also argues the waiver of its right to a jury trial was invalid. We disagree.

A party may waive the right to a jury trial by contract. N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). Such a waiver must be strictly construed as the right to trial by jury is a substantial right. Id. However, terms in a contract provision must be construed using their plain, ordinary and popular meaning. Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994).

The waiver provision in the lease plainly provides that in any claim asserted by Twillman, "trial by jury shall be waived by both parties." We find the clause is a valid waiver of Twillman's right to a jury trial.

Severability

Twillman argues even if the right to jury trial was validly waived, the waiver clause cannot be severed from the remainder of Section 27.16, and the

unenforceability of the waiver of a compulsory counterclaim renders the waiver of a jury trial likewise unenforceable. We disagree.

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 n.2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. Scruggs v. Quality Elec. Servs., Inc., 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984).

> A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent.
>
> A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention.

Columbia Architectural Group, Inc. v. Barker, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (quoting Packard & Field v. Byrd, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905)).

Reading Section 27.16 with or without the reference to the counterclaim provision, Twillman unequivocally "waive[d] any and all right to trial by jury." Twillman's right to a jury trial and its right to assert a compulsory counterclaim are separate and distinct rights. We find the portion of Section 27.16 in the lease

agreement between Twillman and Beach that is adverse to Rule 13(a), SCRCP, regarding compulsory counterclaims, is severable from the remaining portion of the lease.

CONCLUSION

For the foregoing reasons, we find Twillman waived its right to a trial by jury but may assert its compulsory counterclaim to Beach's action for breach of the lease agreement. Accordingly, the order on appeal is

AFFIRMED IN PART and REVERSED IN PART.

STILWELL and SHULER, JJ., concur.