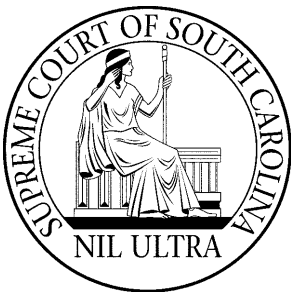

OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

February 25, 2002

ADVANCE SHEET NO. 5

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

L. W. Linder and Muriel Linder, Petitioners,

v.

Insurance Claims Consultants, Inc., a/k/a ICC, Inc., Jeffrey Raines, and Gerald Moore, Jr., individually, and as employees/agents of Insurance Claims Consultants, Inc., Respondents.

IN THE ORIGINAL JURISDICTION

Opinion No. 25417
Heard September 25, 2001 - Filed February 25, 2002

Daniel W. Williams, of Bedingfield & Williams, of Barnwell, for petitioners.

Fleet Freeman, of Freeman & Freeman, of Mt. Pleasant, for respondents.

Henry B. Richardson, Jr., and Barbara M. Seymour, of the Office of Disciplinary Counsel, of Columbia, for amicus curiae the Disciplinary Counsel.

Arnold S. Goodstein and Mary Perrin O'Kelley, of Goodstein Law Firm, of Summerville, for amicus curiae National Association of Public Insurance Adjusters.

Elizabeth Van Doren Gray, of Columbia, for amicus curiae the South Carolina Bar.

JUSTICE WALLER: We granted petitioners' request to hear this declaratory judgment action in our original jurisdiction. Petitioners seek to have the Court declare that the actions of respondents, as public insurance adjusters, constitute the unauthorized practice of law. A lawsuit between these parties is currently pending in circuit court based on respondents' claim against petitioners for breach of contract. That lawsuit has been stayed pending the Court's decision in the instant matter.

FACTUAL BACKGROUND

The factual background for this case is both general and specific. We first take a look at the business of public insurance adjusting, in general, and then detail the circumstances surrounding the dispute between the parties.

Public Insurance Adjusting

Insurance adjusting is the business of settling an insurance claim. Black's Law Dictionary defines an "adjuster" as one "appointed to adjust [i.e., settle] a matter; . . . One . . . who makes any adjustment or settlement, or who determines the amount of a claim." BLACK'S LAW DICTIONARY 27 (6th ed. 1991).

First-party public insurance adjusting involves the situation where "an insured hires a public adjuster to assist the insured in filing a claim of loss with its insurer" and is based on contract law. Utah State Bar v. Summerhayes & Hayden, 905 P.2d 867, 868 (Utah 1995). Specifically, a first-party adjuster is retained to:

> determin[e] the amount of loss recoverable under the policy. The adjuster documents and measures damages, gathers relevant facts, determines repair or replacement costs, and submits the claim to the insurance company. The adjuster then negotiates with the insurance company, or the insurance company's adjuster, to obtain the best settlement for the insured.

Id.

In contrast, third-party adjusting involves the situation where a "stranger to the insurance contract" asserts a claim against an insured tortfeasor. Id. "In third-party adjusting, an adjuster represents an injured client in making a claim under a liability insurance contract against an insurance company that insures or indemnifies a third person who is or may be liable for the injury caused to the adjuster's client." Id. at 870. Therefore, the third-party adjuster "must determine the extent of the liability, rights, and duties of the parties before attempting to resolve the issue of a settlement amount." Id. at 868-69.

A first-party adjuster is generally considered to be synonymous with the term "public adjuster." According to the National Association of Public Insurance Adjusters (NAPIA), the term "Public Insurance Adjuster" means a representative of an insured regarding the adjustment of an insurance claim for loss resulting from "fire and its allied lines." In its *amicus* brief, NAPIA asserts that the main question a public adjuster is hired to answer is that of "how much?" In that capacity, the public adjuster "documents and measures the damage caused by a property loss to the insured."

Recently, a new South Carolina statute went into effect regulating

public insurance adjusting. See S.C. Code Ann. §§ 38-48-10 through -160 (Supp. 2000). Under the statute, "Public Adjusting" is defined as:

> investigating, appraising or evaluating, and reporting to an insured in relation to a first party claim arising under insurance contracts, that insure the real or personal property, or both, of the insured. Public adjusting does not include acting in any manner in relation to claims for damages to or arising out of the operation of a motor vehicle. Public adjusting does not include any activities which may constitute the unauthorized practice of law. Nothing in this chapter shall be construed as permitting the unauthorized practice of law.

§ 38-48-10(2) (emphasis added). Thus, South Carolina restricts public adjusting to first-party claims involving only real or personal property.[1]

Facts of the Underlying Lawsuit

Petitioners ("the Linders") suffered property loss due to a fire at their home in February 1996. While their claim was being adjusted by the insurance company, the Linders had many concerns about how the repairs to their home were being handled. One of the repairmen recommended respondent Insurance Claims Consultants, Inc. ("ICC") to Mrs. Linder. Mrs. Linder called ICC and met with respondent Gerald Moore.[2]

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[1]Additionally, the statute, *inter alia*: sets forth licensing requirements (§§ 38-48-20 through -60); provides standards of conduct for the public adjuster (§ 38-48-70); regulates the written contract (§ 38-48-80); prescribes the manner in which a public adjuster may advertise (§ 38-48-100); and authorizes the Department of Insurance to promulgate regulations necessary to carry out the statute's provisions (§ 38-48-160).

[2]Respondents are ICC, Moore, and Jeffrey Raines. Raines is president of ICC, Moore is vice-president, and each owns 50% of ICC's stock.

In that initial meeting with Moore, the Linders discussed the fact that the insurance company had rejected their claim for the full value of Mr. Linder's gun collection. According to Mrs. Linder, Moore advised them the guns should be covered under their policy. Moore indicated that he advised the Linders to read their insurance policy and that he and Mr. Linder read the policy together. Respondent Jeffrey Raines states in an affidavit that they "were successful in obtaining payment for Mr. Linder's guns which was originally and erroneously denied by the company."

The Linders entered into a contract with ICC and agreed to pay ICC 10% of the total amount adjusted or otherwise recovered. In addition, they executed a "Notice" to their insurance company which indicated that ICC had been hired for the preparation of their claim and that ICC should be contacted for "any further information and negotiations" concerning their claim. After executing the contract with ICC, the Linders released the lawyer they had retained a couple of weeks before contacting ICC.

ICC communicated directly with the insurance company's adjuster both orally and in writing, as well as with the insurance company's attorney. The majority of the communications reflect that the adjusters concentrated on cost-related issues, such as completing the contents inventory and the sworn statement of proof of loss, as well as discussions on the extent and amount of repairs. Indeed, Raines stated that ICC spent over 300 man hours preparing the detailed inventory of the damaged household contents. According to Raines, ICC was able to obtain an almost $12,000 increase in what the insurance company originally agreed to cover. The Linders approved the claim, but the insurance company delayed payment. Raines stated that he then recommended to Mrs. Linder that she get an attorney. When the attorney settled the claim, the Linders executed a release of all claims.

On a "fact sheet" given to Mrs. Linder by Moore, ICC describes itself as a "professional Loss Consulting Firm" which represents a client's "best interest" while handling a property damage claim. The fact sheet states that ICC will provide, *inter alia*: an assessment of property loss; a leading law firm to review the insurance policy (at ICC's expense); a complete inventory of

damaged contents; engineers, architects, accountants, etc., if required (at ICC's expense); all required documentation to properly project and substantiate additional living expenses and/or business interruption; and assistance in the preparation with the timely filing of the sworn statement of proof of loss. ICC stated that its main goal is to provide the client with an initial comprehensive study of the loss and damages. Finally, the following was printed at the bottom of the fact sheet:

> REMEMBER, your insurance company has already appointed a professional to protect THEIR interest. ICC WILL PROTECT YOURS!

ICC states it no longer utilizes this exact fact sheet and has not used it for years, although it is not disputed that it was given to the Linders in 1996.[3]

The Linders also presented an envelope showing an ICC logo – a large "I" with two smaller "C"s underneath; the logo represents scales, and the Linders suggest that it is supposed to be the scales of justice. Respondents allege that the logo was designed to suggest an appropriate balancing between the insured and the insurance company.

The Linders did not pay ICC the 10% fee, as they had agreed in the contract. ICC brought suit against the Linders for the recovery of this contingency fee. The Linders answered the complaint, asserting, *inter alia*, that respondents engaged in the unauthorized practice of law and therefore the contract between them is void *ab initio*. In an amended answer, the Linders added counterclaims for negligence and breach of contract. The Linders then also attempted to assert a claim for unfair trade practices and sought to have a

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[3]According to Raines, the fact sheet and the notice improperly state that ICC will associate with an attorney, if necessary. Raines explained that Florida allows such associations of adjusters and attorneys, but South Carolina does not; therefore, on advice of South Carolina counsel, ICC has stopped using the language on these forms.

class certified to get relief for respondents' alleged unauthorized practice of law. At that point, the circuit court denied the Linders' request to amend their answer and stayed the action to allow them to seek declaratory relief in the original jurisdiction of this Court.

In their "Complaint for Declaratory Judgment," the Linders allege that: (1) ICC "solicited and advertised itself as a corporation providing services that are recognized as being the practice of law;" (2) Moore engaged in the unauthorized practice of law by advising the Linders regarding the language and interpretation of their policy; and (3) Raines engaged in the unauthorized practice of law by negotiating on behalf of the Linders. The Linders ask the Court to: (1) declare these practices the unauthorized practice of law; (2) declare the contract between the Linders and ICC void; and (3) "acknowledge a private right of action for matters declared by this Court to be the unauthorized practice of law."

ISSUES

1. Does the business of public insurance adjusting constitute the unauthorized practice of law?

2. Did respondents engage in the unauthorized practice of law?

3. Is the contract between petitioner and ICC void as a matter of public policy?

4. Is there a private right of action for the unauthorized practice of law?

1. Public Insurance Adjusting Does Not Constitute the Unauthorized Practice of Law

Under the South Carolina Constitution, this Court has the duty to regulate the practice of law in South Carolina. See S.C. Const. art. V, § 4; In

re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992); see also S.C. Code Ann.§ 40-5-10 (1986) (the Supreme Court has inherent power with respect to regulating the practice of law). Our duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law. See State v. Buyers Service Co., Inc., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987). Indeed, protection of the public is our "paramount concern" in these matters. Id. at 434, 357 S.E.2d at 19.

The practice of law "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability. Often, the line between such activities and permissible business conduct by non-attorneys is unclear." Id. at 430, 357 S.E.2d at 17. Indeed, we have recognized "it is neither practicable nor wise" to attempt to formulate a comprehensive definition of what constitutes the practice of law. Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124. Because of this ambiguity, what is, and what is not, the unauthorized practice of law is best decided in the context of an actual case or controversy. See id. Moreover, it is this Court that has the final word on what constitutes the practice of law.

The issue of whether insurance adjusters engage in the unauthorized practice of law is a novel one in South Carolina, but has been entertained by many courts in other jurisdictions. See generally James McLoughlin, Annotation, *Activities of Insurance Adjusters as Unauthorized Practice of Law*, 29 A.L.R.4th 1156 (1984 & Supp. 2000).

For example, in Rhode Island Bar Ass'n v. Lesser, 26 A.2d 6 (R.I. 1942), a man doing business as "Rhode Island Fire Loss Appraisal Bureau," was found to have engaged in the unauthorized practice of law. The Rhode Island Supreme Court held that the adjuster's activities of negotiating and obtaining adjustments of claims for losses under fire insurance policies, which involved, "directly or indirectly, advice or counsel with reference to their claims and rights under the policies," and charging a contingency fee for his services, constituted

the unauthorized practice of law. Id. at 8. The Lesser court found that these activities exceeded a mere "appraisal service." However, in affirming the injunction against the adjuster, the Court noted that the injunction decree expressly reserved to Lesser the right "to solicit from the general public the work of appraising damage caused by fire, making inventory of real and personal property so damaged, appraising the value of such property both prior to and immediately following a fire, and submitting to the owners of the same a complete and itemized statement showing sound value and loss." Id. at 9. Thus, the Lesser court was primarily concerned with the adjuster's activities of: (1) advising clients on their claims and rights under the policy, (2) negotiating settlements for the claim, and (3) accepting a contingency fee.[4]

The Pennsylvania Supreme Court in Dauphin County Bar Ass'n v. Mazzacaro, 351 A.2d 229 (Pa. 1976), declared that a "licensed casualty adjuster" who represented clients on their damage claims against tortfeasors or their insurers was correctly enjoined from handling these third-party claims. The court found that pursuant to Pennsylvania's Public Adjuster Act, only first-party adjusting was authorized. In handling third-party claims, Mazzacaro would investigate the accident, estimate the amount of damages sustained, write a demand letter and attempt to negotiate a settlement. He argued that his representation was permissible because his clients' claims were ones in which liability was presumed and the only issue was damages. The Pennsylvania Supreme Court rejected his argument, noting that it "ignore[d] the vital role that legal assessments play in the negotiation process between a victim of an injury and an alleged tortfeasor or insurer." Id. at 233. Significantly, the Mazzacaro

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[4]Respondents argue Lesser is no longer binding in Rhode Island because statutes were subsequently enacted regulating public adjusting. R.I. Gen. Laws § 27-10-1 *et seq.* (1998); see also R.I. Gen. Laws §11-27-9 (2000) (where, as part of Rhode Island's statutory chapter regulating the practice of law, there are specifically restrictions on the practices of public adjusters, including a prohibition on advising a claimant on his legal rights). We need not decide whether Lesser remains good law in Rhode Island; we review other jurisdictions' decisions simply for guidance on this issue.

court stated the following:

> While the objective valuation of damages may in uncomplicated cases be accomplished by a skilled lay judgment, an assessment of the extent to which that valuation should be compromised in settlement negotiations cannot. Even when liability is not technically 'contested,' an assessment of the likelihood that liability can be established in a court of law is a crucial factor in weighing the strength of one's bargaining position. A negotiator cannot possibly know how large a settlement he can exact unless he can probe the degree of unwillingness of the other side to go to court. Such an assessment, however, involves an understanding of the applicable tort principles . . ., a grasp of the rules of evidence, and an ability to evaluate the strengths and weaknesses of the client's case vis a vis that of the adversary. The acquisition of such knowledge is not within the ability of lay persons but rather involves the application of abstract legal principles to the concrete facts of the given claim. As a consequence, it is inescapable that lay adjusters who undertake to negotiate settlements of the claims of third-party claimants must exercise legal judgment in so doing.

Id. at 233-34.

Although the Mazzacaro case clearly applied only to third-party adjusting, the above language was specifically cited in a 1977 South Carolina Attorney General opinion. 1977 Op. S.C. Att'y Gen. 308 (1977). In this opinion, the Attorney General addressed a question from a representative about a proposed bill regulating public adjusters. The adjuster's "appraisal activities" were not at issue; only the adjuster's "advice to the insured and negotiations with the insurance company" were the subject of the inquiry. The Attorney General found that the analysis of Mazzacaro applied not only to third-party adjusting, but to public adjusters handling first-party claims as well. Therefore, it was the opinion of the Attorney General that all public adjusters would engage

in the unauthorized practice of law and that any legislation which permitted public adjusting would be unconstitutional.

The Texas Court of Appeals has spoken twice on whether public adjusters engage in the unauthorized practice of law. In Brown v. Unauthorized Practice of Law Committee, 742 S.W.2d 34 (Tex. Ct. App. 1987), writ denied (Jan 27, 1988), the court found the actions of Brown, who apparently handled both first-party and third-party claims, were clearly the unauthorized practice of law. Brown had accepted settlement checks as "Ron Brown, Attorney at Law." The court found he advised clients as to their rights and the advisability of making claims and approved settlements. Furthermore, the court found Brown's course of conduct encouraged litigation. As to Brown's assertion that he handled only "uncontested" claims, the court stated that "because the evidence shows that Brown negotiated, at least on damage issues, we cannot agree that Brown handled only undisputed and uncontested cases." Id. at 40. The court held that such negotiation requires "the use of legal skill and knowledge and, thus, constituted the practice of law." Id. at 42.

In 1991, the Texas Court of Appeals decided Unauthorized Practice of Law Committee v. Jansen, 816 S.W.2d 813 (Tex. Ct. App. 1991), writ denied (Jan 8, 1992). Jansen was a first-party public adjuster. At the trial level, the trial court found various activities by Jansen constituted the unauthorized practice of law, and enjoined him from, *inter alia*: (1) advising clients on whether to accept an offer from an insurance company, and (2) advising clients of their rights, duties, or privileges under an insurance policy. Jansen did not appeal. The trial court specifically found the following practices did not constitute the unauthorized practice of law:

> A. Advising clients to seek the services of a licensed attorney if they have questions relating to their legal rights, duties and privileges under policies of insurance;
>
> B. Measuring and documenting first party claims under property insurance policies and presenting them to insurance companies on behalf of clients;

> C. Discussing the measurement and documentation presented to the insurance company with representatives of insurance companies;
>
> D. Advising clients that valuations placed on first party property insurance claims by insurance companies is or is not accurate[.]

Id. at 814.

The Unauthorized Practice of Law Committee (UPLC) appealed these findings and argued that the measure and documentation of first-party claims, the presentation of these claims to insurance companies, and the discussion of the claims with insurance company adjusters all constitute the unauthorized practice of law. The Jansen court disagreed:

> We cannot agree with UPLC's contention that providing an estimate of property damage and filling out the appropriate forms to present a claim constitutes the practice of law. In reality, this is the same procedure any insured is required to follow to collect on an insurance policy. The fact that appellee is paid for his services and expertise does not convert his actions into the practice of law. Our holding is not to be construed as authorizing discussions or "negotiations" with insurance companies into coverage matters. Nor do we mean to imply that "presenting" a claim to the insurance company by a public insurance adjuster is the same as negotiating a settlement. The former is, in essence, merely delivering necessary paperwork and data while the latter entails the practice of law. Interpretation of insurance contracts would also most likely cross the line into the practice of law. Appellee agrees that if the issue to be submitted to an insurance company involves a coverage dispute, then the services of an attorney are required. We find that the trial court arrived at a suitable accommodation that

> will not totally eliminate the profession of public insurance adjusting in the State.

Id. at 816.

The Jansen court then distinguished its earlier decision in Brown, and held that a public adjuster may have discussions with an insurance company adjuster about competing property-damage valuations, provided that liability under the policy is uncontested. The court found Brown's activities regarding personal injury claims were sufficiently different from Jansen's activities: "An opinion concerning the valuation, whether it be repair cost or replacement cost, of a damaged piece of property hardly equates to counseling a client to settle a claim." Id.

The Jansen case therefore represents a somewhat different viewpoint on what is allowable for first-party public adjusters. Although interpreting policies and getting involved in coverage disputes remained a concern for the Jansen court, it was not willing to rule that negotiating on valuations of property damage in uncontested cases constitutes the unauthorized practice of law.

In our opinion, the business of public insurance adjusting does not *per se* constitute the practice of law. We note the parties agree that public adjusters may act as appraisers. Since a public adjuster may use his expertise to determine a value, we simply do not see why it would be beyond his expertise to discuss that value, and the insurer's competing value, with the client and the insurer's adjuster. This type of negotiation activity – as long as it is limited to valuations of property and repairs – does not require legal skill and knowledge. Accord Jansen, 816 S.W.2d at 816 ("An opinion concerning the valuation, whether it be repair cost or replacement cost, of a damaged piece of property hardly equates to counseling a client to settle a claim.").

Nonetheless, because the activities of public insurance adjusters may bring them close to the line between permissible business conduct by non-attorneys and the unauthorized practice of law, we must clarify what is and is not appropriate conduct by public adjusters. After analyzing the decisions in

other jurisdictions, we are most persuaded by the reasoning expressed by the Texas court in the Jansen case.[5] Like the Jansen court, we feel that a suitable accommodation may be made to preserve the business of public adjusting, yet protect the public from the dangers of the unauthorized practice of law.

Specifically, we find there is no problem with a public adjuster measuring and documenting insurance claims, and then presenting those valuations to the insurance company. See id. at 816 (providing an estimate of property damage and filling out the appropriate forms to present a claim does not constitute the practice of law because this is what an insured is required to do to collect on an insurance policy). Therefore, we declare the following practices permissible:

A. Providing an estimate of property damage and repair costs, i.e., any purely appraisal-oriented activities by the public adjuster.

B. Preparing the contents inventory and/or sworn statements on proof of loss.

C. Presenting the claim to the insurance company, i.e., delivering the necessary paperwork and data to the insurer.

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[5]We reject the conclusion of the 1977 Attorney General opinion, based on the logic of the Mazzacaro court, that legal analysis necessarily is required in any negotiations with the insured. Mazzacaro involved third party adjusters and the settlement of tort actions, and we find that first party claims are sufficiently distinguishable from third party claims. Furthermore, South Carolina law has not authorized third-party public adjusting; only first-party public adjusting is permitted. See § 38-48-10 (defining public adjusting as the handling of first-party claims).

In addition, we do not share the concern indicated by the Lesser court that charging a contingency fee is a primary consideration on this issue. A contingency fee arrangement, in and of itself, is not the practice of law.

D. Negotiating with the insurance company, as long as the discussions only involve competing property-damage valuations.

As to what activities are prohibited, we declare that public adjusters shall not:

A. Advise clients of their rights, duties, or privileges under an insurance policy regarding matters requiring legal skill or knowledge, i.e., interpret the policy for clients.

B. Advise clients on whether to accept a settlement offer from an insurance company.

C. Become involved, in any way, with a coverage dispute between the client and the insurance company.

D. Utilize advertising that would lead clients to believe that public adjusters provide services which require legal skill.

We believe that these guidelines are consistent with South Carolina's recently enacted statute regulating the business of public adjusting. See, e.g., § 38-48-70(h) (a public adjuster shall not "offer or provide advice as to whether the insured's claim is covered by the insured's contract with the insurer."); § 38-48-100 ("All advertising by a public adjuster shall fairly and accurately describe the services to be rendered and shall not misrepresent either the public adjuster or the public adjuster's abilities. . . ."). Although we reiterate that it is the duty of this Court, and not the Legislature, to delineate the practice of law, we note that the statutory scheme regulating public adjusting specifically addresses many of the concerns that are implicated by the issue before the Court today, and, in our opinion, deals with those concerns appropriately.

In sum, the business of public adjusting does not, in and of itself, embody the practice of law. We are confident that the parameters set out above

will inform public adjusters of the limits of their occupation.[6]

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[6] The dissenting opinion would allow public adjusters to interpret insurance contracts, negotiate coverage disputes, and advise their clients whether to accept settlement offers. Clearly, these activities require legal training and therefore constitute the practice of law. See State v. Buyers Service Co., Inc., 292 S.C. at 430, 357 S.E.2d at 17 (activities which entail specialized legal knowledge and ability are the practice of law). Simply because public adjusters have expertise in adjusting, i.e., valuating property insurance claims, does not mean they have legal expertise in interpreting insurance policies and negotiating coverage disputes.

Indeed, respondents themselves concede in their brief that disputed matters involving coverage are matters outside the scope of the public adjuster's expertise. Furthermore, section 38-48-40(h) quite plainly states that a public adjuster shall "not offer or provide advice as to whether the insured's claim is covered by the insured's contract with the insurer." While the dissent interprets § 38-48-40(h) "merely to prohibit public adjusters from making any promise of guarantee of recovery to their clients," the plain language of this subsection does not support such an interpretation.

Nor does § 38-48-130(b). Section 38-48-130(b) states that it is unlawful for a person to "adjust or aid in the adjustment, either directly or indirectly, of a claim arising under a contract of insurance not authorized by the laws of this State." The dissent cites this section to support its conclusion that a public adjuster "is required to determine the legality of a contract before undertaking to adjust a loss under it." We find no such requirement implied in § 38-48-130(b). Moreover, a determination of "the legality of a contract" is, without a doubt, an activity requiring specialized legal knowledge, and one that only should be undertaken by lawyers and judges.

2. By Some of Their Actions, Respondents Engaged in the Unauthorized Practice of Law.

The question remains whether respondents engaged in the unauthorized practice of law. Although they certainly did not have the benefit of the guidelines we announce today, we nevertheless must decide whether respondents crossed the line into the unauthorized practice of law. Because they advised the Linders on their rights under the insurance policy and became involved with a known coverage dispute, we conclude that they did.

We find from the record before us that respondents advised the Linders on the extent of coverage for Mr. Linder's gun collection, and then subsequently discussed this with the insurance adjuster. While this "advice" may simply have been pointing out the policy language to the Linders, it still constituted counsel on the Linders' rights under the policy. Moreover, Moore knew at the time that the insurer had limited liability on the gun collection based on its interpretation of the policy. It matters not that the insurance company was mistaken. This clearly was a coverage dispute between the Linders and their insurer, and therefore, respondents should not have become involved. Their involvement went beyond an evaluation on the vital question of "how much" the gun collection was worth, and transgressed into an evaluation of whether, and to what extent, the guns should be covered pursuant to the policy language.

The acts of (1) interpreting and advising the clients on the insurance policy, and (2) negotiating with the insurer on coverage disputes, require legal knowledge and skill, and therefore are not permitted without a law license. See State v. Buyers Service Co., Inc., 292 S.C. at 430, 357 S.E.2d at 17 (activities which entail specialized legal knowledge and ability are the practice of law). We find that respondents stepped over the line and that these acts constituted the unauthorized practice of law.[7]

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[7]As to the Linders' allegation that ICC's logo was impermissible in some way because it represented the "scales of justice," we disagree. Simply by using a logo that represented scales does not automatically indicate that ICC was

3. The contract between petitioner and ICC is not void.

The Linders argue that the contract between them and ICC is against the public policy of South Carolina and the Court should declare it void. Given our holding above that the business of public adjusting does not inherently constitute the unauthorized practice of law, we find the contract is not void as a matter of law. The Linders, however, also argue that the contract, as performed, amounted to the practice of law and thus should not be enforced.

This Court has the duty to regulate the practice of law in South Carolina. See S.C. Const. art. V, § 4; In re Unauthorized Practice of Law Rules, supra. We have found that respondents did commit some acts that amounted to the unauthorized practice of law. We note, however, that the majority of respondents' work appears to have not entailed the unauthorized practice of law. We therefore hold that the most appropriate manner in which to sanction respondents for their transgressions is for the trial court, in the underlying action, to determine the value of respondents' work which did not constitute the unauthorized practice of law. Respondents are entitled to that amount, but are not to be compensated for any amount attributable to their unauthorized activities.

4. There is no private right of action for the unauthorized practice of law.

Finally, the Linders maintain that once an act is declared to be the unauthorized practice of law, then the circuit court has jurisdiction to hear various causes of action, including a tort action for damages. Respondents, on the other hand, argue that there is no private right of action for the unauthorized practice of law. We agree with respondents.

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advertising itself as a provider of legal services. Surely, the legal profession does not claim to have a monopoly on the graphical use of scales in advertising. We also find that in the context of its other printed materials, including the Fact Sheet, ICC's use of the scales logo would not lead to a reasonable conclusion that ICC's employees, as public adjusters, were providing legal services.

In bringing the instant action, the Linders acted in accordance with this Court's decision in Unauthorized Practice of Law Rules, where we urged "any interested individual who becomes aware of such conduct [which may be the unauthorized practice of law] to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct." Unauthorized Practice of Law Rules, 309 S.C. at 307, 422 S.E.2d at 125. We did not, however, authorize a private right of action. Furthermore, there are statutes which prevent the unauthorized practice of law, and while they state such activity will be deemed a crime, they do not sanction a private cause of action. S.C. Code Ann. §§ 40-5-310 and -320 (2001).

When faced with a similar issue, the Supreme Court of Hawaii found that its criminal statutes prohibiting the unauthorized practice of law, while providing remedies such as declaratory and injunctive relief, as well as criminal sanctions, did not create a private claim for damages. Reliable Collection Agency, Ltd. v. Cole, 584 P.2d 107 (Haw. 1978). We adopt that reasoning and hold there is no private right of action in South Carolina for the unauthorized practice of law.

CONCLUSION

In sum, we declare that the business activities of first-party public adjusters do not constitute the practice of law, subject to the restrictions outlined in this opinion. However, because respondents did engage in acts which we now have announced are prohibited, we direct the circuit court in the underlying action to determine the value of respondents' authorized work. Finally, we hold there is no private right of action for the unauthorized practice of law.

JUDGMENT DECLARED.

MOORE and BURNETT, JJ., concur. PLEICONES, J., dissenting in part in a separate opinion in which TOAL, C.J., concurs.

JUSTICE PLEICONES: I agree with the majority that the contract between the Linders and ICC is not void, and that there is no private cause of action for the unauthorized practice of law. Unlike the majority, however, I would permit licensed public adjusters to interpret insurance contracts to the extent necessary to adjust their clients claim,[8] to negotiate coverage disputes, and to advise their clients whether to accept settlement offers.[9] Public adjusters are hired for their expertise in the handling of insurance claims, and I would permit them to use their specialized knowledge in aid of their clients' claims. Compare In re The Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123

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[8]I am aware of S.C. Code Ann. §38-48-70 (h) (Supp. 2000) which provides that "A public insurance adjuster shall not offer or provide advice whether the insured's claim is covered by the insured's contract with the insurer." I find it difficult to reconcile this prohibition with the definition of public adjusting in §38-48-10 (2) (Supp. 2000) which states, "'Public adjusting' means investigating, appraising or evaluating, and reporting to an insured in relation to a first party claim . . . ," and with the statutory provision that makes it a felony for an adjuster to "adjust or aid in the adjustment, either directly or indirectly, of a claim arising under a contract of insurance not authorized under the laws of this State . . . ." S.C. Code Ann. §38-48-130 (b) (Supp. 2000). The public adjuster is required to determine the legality of a contract before undertaking to adjust a loss under it, §38-48-130 (b), and to investigate, evaluate, and report to his client regarding the client's claim, §38-48-10 (2), but is forbidden to advise whether the insured's claim is covered. I would read §38-48-70 (h) merely to prohibit public adjusters from making any promise or guarantee of recovery to their clients.

[9]As the majority acknowledges, an adjuster is one who determines or settles an insurance claim. *Black's Law Dictionary* 27 (6th ed. 1991). Further, our statute authorizes a public adjuster to investigate, appraise, evaluate a claim, and report to his insured. S.C. Code Ann. §38-48-10(2) (Supp. 2000). In my opinion, an adjuster must be able to construe the contract and advise on settlements in order to met the statutory definition of her role. To require her to abstain, however, should a coverage dispute arise is to undermine her ability to "determine or settle" a claim.

(1992)(CPAs do not engage in the unauthorized practice of law when practicing in their area of expertise.)

For example, the majority concludes that ICC engaged in the unauthorized practice of law when it assisted the Linders in recovering the full value of their gun collection. I would not deny the Linders the benefit of the very expertise which led them to hire ICC in the first place, nor would I require ICC to remain silent when it perceived a coverage issue not apparent to the client. I would, however, require the public adjuster to refrain from advising the client at the point where the insurance company involves an attorney in the matter or when the legal process is invoked.

For the reasons given above, I join parts 3 and 4 of the majority opinion, but dissent in part from parts 1 and 2. I would find that ICC did not engage in the unauthorized practice of law.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sean
Bannon Zenner, Respondent.

Opinion No. 25418
Heard January 24, 2002 - Filed February 25, 2002

PUBLIC REPRIMAND

Attorney General Charles M. Condon and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

S. Jahue Moore, of Wilson, Moore, Taylor & Thomas, P.A., of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct filed formal charges against respondent. Respondent filed a response and later agreed to a stipulation of facts. After a hearing, the Panel recommended respondent be given a public reprimand.

FACTUAL BACKGROUND

The charges against respondent stem from his involvement with a collection agency, the Collect America Network. U.S. Collections, a franchise of Collect America, and the Zenner Law Firm entered into a

contract on February 16, 2000.

Refinance America, a wholly owned subsidiary of Collect America, purchased uncollected debt from, for example, credit card companies and forwarded it to Collect America, who then forwarded it to respondent's firm. Collect America would send batches of these accounts in contract form. According to the accounts contract, a placement of the amount with respondent's firm was made for a limited period of 120 days for a contingency fee of twenty-five percent (25%) of any recovered funds.

Collect America operated with two types of franchise agreements, including one in which a private corporation, for example U.S. Collections, bought the franchise and the license to use a particular software (STARS) to collect the debt. As a franchise, U.S. Collections was required to retain an attorney, such as respondent, to collect the debt.

U.S. Collections employed collectors and paid them through respondent's payroll account.[1] Further, U.S. Collections owned the computers and telephones, and provided respondent with an office for his private practice, adjacent to the property leased by U.S. Collections. All collectors made telephone calls to debtors, identifying themselves as "Zenner Law Firm," in the adjacent building.[2]

Each collector was required to generate collections of $30,000 each month. They were paid a base salary and received a bonus of a percentage of any excess collected over $30,000.

Respondent's first contract with U.S. Collections allowed him ten

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[1]Respondent testified the collectors were employees of his law firm and that they each received a W-2 from his law firm.

[2]One collector testified that when respondent visited the area where collection calls were made, his supervisors told the collectors to "behave," and to watch their "P's and Q's because he was an attorney."

percent of the total amounts collected and paid his costs, except for payroll. Under his last contract, which was imposed on respondent and not reduced to writing, he received a flat $3,000 per month. U.S. Collections then paid the collectors through respondent's account.

There were no client files in the traditional sense, with all materials relating to the debtors stored on computers owned by Collect America. For example, in the Violet Pfaff Matter, her "file" in the computer was owned by Collect America. This electronic file was respondent's firm's file to the extent that he was representing Collect America and was the attorney collecting debt from Violet Pfaff. Respondent had limited access to the file, and this access ceased when he terminated his relationship with Collect America.

Collectors reported to Jim Wooley and Craig Howard, who were partners/owners of the U.S. Collections franchise. Craig Howard's salary was paid by U.S. Collections through respondent's payroll account.

Respondent did not have the authority to hire and fire collectors without first going through a supervisor employed directly by U.S. Collections. As a result of these disciplinary complaints, respondent attempted to fire a collector, Joyl LaRoy, for violating the Fair Debt Collections Act,[3] but was told by U.S. Collections that he could not.

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[3]Two statutes govern debt collectors' conduct when contacting debtors. S.C. Code Ann. § 37-5-108 (Supp. 2000) prohibits a debt collector from:

> (1) threatening to use criminal prosecution against the consumer;
>
> (2) communicating with the consumer at frequent intervals during a twenty-four hour period or at unusual hours so that it is a reasonable inference the primary purpose of the communication was to harass the consumer;

Respondent represented that he had fired the collector, Billy Melton, for similar conduct, but there was no written document in Melton's personnel file reflecting that he had been fired or discharged.

The collectors, LaRoy and Melton, committed misconduct when contacting debtors. The following matters are based on that conduct.

Izola Wilson Matter

During a telephone call Wilson received from Melton on June 28, 1999, Melton engaged in the following: (1) offered legal advice; (2) threatened criminal prosecution;[4] (3) referred to the creditor as "my client;" (4) gave a legal opinion that jurisdiction was vested in Richland County; (5) used abusive language by describing Wilson's situation as the same as if she used a gun and robbed the creditor and "ripped them off;" and (6) referred to Wilson's owing of an unpaid debt as equivalent to welfare.

> (3) communicating with a consumer at any unusual time or place known or which should be known to be inconvenient to the consumer, with convenient time being between 8 a.m. and 9 p.m.;
>
> (4) contacting a consumer at his place of employment after the consumer or his employer has requested in writing that no contacts be made;
>
> (5) using obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

The Federal Consumer Protection Act, 15 U.S.C. §§ 1671, et. seq., also prohibits the debt collector from engaging in the conduct listed above.

[4]Melton admitted at the hearing that he would sometimes threaten criminal prosecution when conversing with debtors.

Violet C. Pfaff Matter

Pfaff, a Michigan resident, was told by one of respondent's employees that, "We don't deal with lawyers or law firms. Tell your lawyer that!" During two separate telephone calls, Pfaff was called a "bloodsucker," a "liar," a "swindler," and a "leech."

Greg Leaf Matter

Respondent, in January 1999, mailed a letter to Ilene Chase, a New Mexico attorney, regarding an attempt to collect a debt on behalf of Wells Fargo in the amount of $5,471.98. The letter was sent to Chase's business address. Thereafter, Chase and/or her husband, Greg Leaf, received a number of telephone calls from respondent's employee. During these conversations, the employee was belligerent, profane, and accused Leaf of making promises to pay and not keeping those promises.

Telephone calls ceased after Leaf wrote a letter to respondent requesting the telephone contact cease pursuant to the Federal Consumer Protection Act.

Peggie Kay Ungerer Matter

Ungerer, a Pennsylvania resident, received telephone calls from Melton regarding the collection of a debt. Calls were made to her employer's office twice on July 14, 1999, once on July 15, twice on July 16, twice on July 22, twice on July 23, twice on July 29, twice on July 30, and once on November 18. Calls were also made to her home on July 24 and July 31. During an August 4th telephone call, Melton referred to Ungerer as a "liar." When she returned a call to respondent's firm she spoke with Melton, who again called her "a liar" and hung up on her.

During the July 14th call, Melton threatened criminal prosecution and offered a legal opinion that Ungerer's wages would be garnished, without determining whether garnishment was lawful under Pennsylvania or South

Carolina law. During this conversation, Melton also used profane language and called Ungerer back five minutes later.

During a July 16th call, an employee of respondent called Ungerer at her employment and her employer directed him not to call the office again. Respondent's employee began cursing at Ungerer's employer.

Ungerer was also called at home on July 14th. In this call, respondent's employee called her while she was still asleep and directed the person answering the phone to "wake her . . . up and put her on the phone." (Expletive deleted).

Shirley Benson Matter

Benson, a Texas resident, received a telephone call from one of respondent's employees regarding the collection of a debt. This employee screamed and yelled at Benson, used profanity, called her "very low names," and referred to her as a "worthless deadbeat." Four days later, the employee called Benson at her office while she was on another line. Benson's employer answered the phone and asked respondent's employee if he would like to leave a message. The employee yelled at Benson's employer not to hang up on him. When she did, the employee called back immediately and asked to speak to the manager. When told he was speaking with the manager, the employee began yelling. Benson's employer hung up the telephone. A few minutes later, when Benson's employer picked up the phone to make an outgoing call, respondent's employee was still on the line laughing at her.

Linda McClain Matter

McClain, a Nevada resident, received a letter from respondent which advised that his firm had been authorized to offer her a settlement of $1,410.00, a discount from her original debt of $2,851.21. The letter offered to accept six equal payments per month, and concluded that upon receipt, respondent would take the steps necessary to update her credit report.

McClain made the payments and they were accepted by respondent's firm.

Thereafter, McClain attempted to receive a response from respondent's law firm to no avail. She wrote a letter of complaint to the North Carolina State Bar which was subsequently forwarded to the Commission on Lawyer Conduct. At his Notice to Appear, respondent testified McClain's case had been marked closed as a result of her making the payments.

Special Investigator Matters

A special investigator interviewed a few debtors who had been contacted by Joel LaRoy. Eight debtors reported early morning calls, profanity, and/or threats of criminal prosecution.

Panel's Findings

The Panel found the following violations of Rule 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: (1) violating the Rules of Professional Conduct, Rule 7(a)(1); and (2) engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute, Rule 7(a)(5).

The Panel further found respondent, through the actions of the collectors, violated certain rules from the Rules of Professional Conduct, Rule 407, SCACR. The Panel found violations of Rule 4.4, respect for rights of third persons (using means that have no purpose other than to embarrass, delay, or burden a third person); Rule 4.5, threatening criminal prosecution; Rule 5.3, responsibilities regarding non-lawyer assistants (lawyer shall make reasonable efforts to ensure that his firm has in effect measures giving reasonable assurance that non-lawyer employee's conduct is compatible with lawyer's professional obligations, and shall make reasonable efforts to ensure that person's conduct is compatible with those obligations, and shall be responsible for that person's conduct if lawyer has direct supervisory authority over the person, and knows of conduct at time when its

consequences can be avoided, but fails to take reasonable remedial action).

The Panel also found respondent had violated Rule 5.4 (professional independence of a lawyer), Rule 5.5(b) (unauthorized practice of law), and Rule 8.4 (violation of a rule of professional conduct), of the Rules of Professional Conduct, Rule 407, SCACR.

The Panel found the following mitigating factors: (1) respondent's inexperience; (2) respondent's full cooperation; and (3) respondent's lack of a disciplinary history. The Panel recommended respondent be given a public reprimand, and that he be directed to pay the costs of the proceedings against him.

DISCUSSION

The authority to discipline attorneys and the manner in which discipline is given rests entirely with the Supreme Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The Court may make its own findings of fact and conclusions of law, and is not bound by the Panel's recommendation. In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The Court must administer the sanction it deems appropriate after a thorough review of the record. *Id.*

The Panel's recommendation that respondent be publicly reprimanded is appropriate. In the past, we have imposed this sanction for similar conduct. *See*, *e.g.*, In re Edens, 344 S.C. 394, 544 S.E.2d 627 (2001) (attorney publicly reprimanded for failing to properly supervise real estate transactions involving refinancing of client's property without client's knowledge or consent); In re Cromartie, 340 S.C. 54, 530 S.E.2d 382 (2000) (attorney publicly reprimanded for, among other things, failing to supervise non-lawyer employees who were responsible for giving correct wiring instructions to lenders for funds to be wired to real estate trust account); In re Davis, 338 S.C. 459, 527 S.E.2d 358 (2000) (same); In re Reeve, 335 S.C. 169, 516 S.E.2d 200 (1999) (attorney publicly reprimanded for failing to properly supervise non-lawyer employees and assisting person in

unauthorized practice of law).

Further, we agree with the Panel's finding that respondent violated Rule 5.5(b), of Rule 407, of the Rules of Professional Conduct. Respondent assisted the collection agency in performing activities that constituted the unauthorized practice of law. Pursuant to S.C. Code Ann. § 40-5-320(A) (2001), it is unlawful for a corporation or voluntary association to:

> (3) hold itself out to the public as being entitled to practice law, render or furnish legal services, advise or to furnish attorneys or counsel, or render legal services in actions or proceedings;
>
> (4) assume to be entitled to practice law or to assume, use, or advertise the title of lawyer, attorney, attorney at law, or equivalent terms in any language as to convey the impression that it is entitled to practice law or to furnish legal advice, services, or counsel.

See generally A.L. Schwartz, Annotation, *Operations of Collection Agency as Unauthorized Practice of Law*, 27 A.L.R. 3d 1152 (1969).

U.S. Collections, through its collectors, who were respondent's employees, held themselves out to debtors as being the "Zenner Law Firm." In the Izola Wilson Matter, a collector offered Wilson legal advice, referred to the creditor as "my client," and gave a legal opinion that jurisdiction was vested in Richland County. In the Peggie Kay Ungerer Matter, a collector offered the legal opinion that Ungerer's wages would be garnished, without determining whether such garnishment was in fact lawful. Therefore, by these actions, U.S. Collections held "itself out to the public as being entitled to practice law." Further, respondent's lack of control over the files and over the hiring and firing of employees lends support to the finding that he assisted in the unauthorized practice of law because the collection agency controlled his actions.

We agree with the Panel and find respondent's conduct warrants a

public reprimand.

PUBLIC REPRIMAND.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Newberry County
Magistrate Charles M.
Rushton, Respondent.

Opinion No. 25419
Submitted January 29, 2002 - Filed February 25, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

William P. Donelan, Jr., of Columbia, for respondent.

PER CURIAM: In this judicial grievance matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent, a former magistrate for Newberry County, admits misconduct and consents to a public reprimand. We accept the Agreement and publicly reprimand respondent, the most severe sanction we are able to impose in these circumstances. The facts as admitted in the Agreement are as follows.

Facts

I. Sheriff's Department Investigation

The Newberry County Sheriff's Department began a criminal investigation of a former narcotics officer. Respondent asked a Sheriff's Department investigator about the status of this investigation, and stated that he had learned about the investigation from a correctional officer at the Newberry County Detention Center. At least two Sheriff's Department officials told respondent that he should not inquire about the investigation.

Subsequently, respondent asked an employee at the Newberry County Central Court to relay a message to the former narcotics officer who was under investigation. Respondent stated that he did not think the officer would be treated fairly by the Newberry County Sheriff's Department, and he wanted to warn him about the status of the investigation. Respondent asked the employee to have the former narcotics officer telephone him at home. The court employee informed both her supervisor and the Newberry County Sheriff's Office of this conversation. The court employee tape-recorded a second conversation with respondent, in which he reiterated that he wanted to warn the former narcotics officer of the investigation.

II. Failure to Follow Proper Procedure

Based upon a signed affidavit by the complainant, respondent issued an arrest warrant against an individual for simple assault. On the date of trial, the complainant was unable to appear, and respondent dismissed the case. Respondent then issued a warrant against the complainant for failure to appear in court. Respondent signed the warrant as both the affiant and the issuing judge, and asked a deputy to serve a photocopy of this warrant on the complainant. The Sheriff's Department contacted the Chief Magistrate because of concerns about the validity of the warrant. The Chief Magistrate advised the Sheriff's Department that the warrant was invalid. Accordingly, the Sheriff's Department refused to serve the warrant. Both the Chief Magistrate and the Office of Court Administration informed respondent that

the warrant was invalid, and that the proper procedure would be to issue a Rule to Show Cause against the complainant.

Unaware that the simple assault case had been dismissed, the complainant telephoned respondent to learn when the case would be tried. Respondent asked the complainant to come to his office, not disclosing to her either that the case had been dismissed, or that he had attempted to serve a warrant upon her. Upon arriving at respondent's office, the complainant was arrested. Respondent subsequently found the complainant guilty of contempt of court and sentenced her to fifteen days in jail. The complainant had not been served with a subpoena to appear at the simple assault trial, nor had she been served with a Rule to Show Cause. The circuit court granted the complainant's petition for a writ of habeas corpus, finding that respondent had not followed proper procedure in his treatment of the complainant, and did not have proper jurisdiction to sentence her for contempt of court.

Law

By his actions, respondent has violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 1(A) (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2(A) (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3(B)(2) (a judge shall not be swayed by partisan interests, public clamor, or fear of criticism); Canon 3(B)(8) (a judge shall dispose of all judicial matters promptly, efficiently, and fairly); Canon 3(E) (a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned); and Canon 5(A)(1) (a judge shall refrain from inappropriate political activity). These violations also constitute grounds for discipline under the following Rule for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (violation of the Code of Judicial Conduct).

Conclusion

We accept the Agreement for a public reprimand because respondent has tendered his resignation to the Governor and because he has agreed not to hereafter seek another judicial position in South Carolina unless first authorized to do so by this Court. As previously noted, this is the strongest punishment we can give respondent given the fact that he has already resigned his duties as a magistrate. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

In the Matter of Theron
James Curlin, Respondent.

O R D E R

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Kenneth E. Ormand, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Ormand shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of

respondent's clients. Mr. Ormand may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

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

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

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

Columbia, South Carolina

February 19, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Dennis Bowers,

Respondent,

v.

Gregory S. Bowers,

Appellant.

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

Opinion No. 3449
Heard February 5, 2002 - Filed February 25, 2002

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED IN PART

J. Falkner Wilkes, of Meglic, Wilkes & Godwin; and Kimberly F. Dunham, both of Greenville, for appellant.

David M. Collins, Jr., of Inman, for respondent.

ANDERSON, J.: In this domestic action, Gregory S. Bowers ("Husband") appeals from several aspects of the Family Court's order. We affirm in part, reverse in part, and modify in part.

FACTS/PROCEDURAL BACKGROUND

Husband and Linda Dennis Bowers ("Wife") were married in December 1991 and separated in the fall of 1997. No children were born to the marriage.

Wife instituted this divorce action against Husband in October 1997. At the time of the final hearing, the issues before the court for disposition included: divorce, alimony, equitable distribution of marital assets, allocation of marital debts, disposition of pending allegations of contempt against Wife, and attorney's fees.

By order dated April 10, 2000, the Family Court awarded Wife a divorce on the ground of adultery, rehabilitative alimony of $1,000 per month for twelve months, and $8,915 in attorney's fees. The judge also identified, valuated, and equitably apportioned the parties' marital property and debts. Specifically, the court:

(1) valued the parties' marital home at $260,000, awarded ownership to Husband, and awarded one-half of the equity ($17,932.03) to Wife;

(2) valued and apportioned the furniture in the marital home;

(3) identified Husband's 401(k) account as marital, valued the asset at $39,395.38, and awarded one-half of the account to Wife;

(4) identified Husband's 10,000 shares of Southern Water Treatment stock as marital property, valued the stock at $50,000, and awarded Wife one-half the value of the asset;

and

(5) ordered Husband to repay Wife $20,611 for loans made between the parties' corporations.

To effectuate the award of equitable distribution, the court ordered Husband to pay Wife $70,990.72, payable in three $23,663.57 monthly installments with payments due on May 1, 2000, June 1, 2000, and July 1, 2000. The court additionally ordered Husband to pay Wife $8,915.00 in reasonable attorney's fees, payable in three $2,971.67 monthly installments with payments due on April 1, 2000, May 1, 2000, and June 1, 2000.

Husband appeals the Family Court's: (1) inclusion of cash disbursements in the court's scheme of equitable distribution; (2) valuation of several marital assets; (3) failure to consider tax consequences in arriving at its award of equitable distribution; (4) identification of marital debts; and (5) award of attorney's fees.

STANDARD OF REVIEW

On appeal from the Family Court, this Court has jurisdiction to find the facts in accordance with its view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). This tribunal, however, is not required to disregard the Family Court's findings. Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Likewise, we are not obligated to ignore the fact the Family Court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (ruling that because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the Family Court's findings where matters of credibility are involved); Terwilliger v. Terwilliger, 298 S.C. 144, 378 S.E.2d 609 (Ct. App. 1989) (holding the resolution of questions regarding credibility and the weight given to testimony is a function of the Family Court judge who heard the testimony).

LAW/ANALYSIS

I. Valuation of the Marital Home

Husband asserts the Family Court's valuation of the marital home is not supported by the evidence. We agree.

In arriving at its valuation of the parties' marital home, the Family Court noted the parties listed the home for sale at $252,500 and that a contemporaneous appraisal assigned the same value to the home. The court further noted Wife valued the home at $265,000 on her marital assets sheet. In ultimately valuing the home at $260,000, the Family Court took "judicial notice of the increase of the value of homes in Greenville County, particularly on the eastside of Greenville County where this property is located." This was error.

We agree with Husband that Wife's valuation of the marital home was so unsubstantiated as to be useless for purposes of assigning a value for equitable distribution. Wife offered no credible explanation of her $265,000 estimate of the home's value. Her failure in this regard is particularly telling since the home failed to sell at a $252,500 listing price. In fact, Wife admitted her valuation of the home was "a guesstimate based on just some conversation I had with Prudential Company. But they would not, again, give me a firm answer."

As a general principle, a landowner, who is familiar with her property and its value, is allowed to give her estimate as to the value of the land and damages thereto, even though she is not an expert. Seaboard Coast Line R. R. v. Harrelson, 262 S.C. 43, 202 S.E.2d 4 (1974). However,

> [s]econd hand testimony of a "ball park figure" given by some unidentified (and not necessarily knowledgeable or reliable) "real estate agent" as to what he "thought" the property could be sold for, would obviously be entitled to small weight, if competent at all. There is no presumption that a person is competent to give his opinion as to the value of real property. His competency must be shown. City of Spartanburg v. Laprinakos, 267 S.C. 589, 230

> S.E.2d 443 (1976). If the person is someone other than the owner of the property, the source of his knowledge must be revealed to remove his opinion from the realm of mere conjecture. A bare declaration of his knowledge of the value of the property is insufficient. [Id.]

Rogers v. Rogers, 280 S.C. 205, 209, 311 S.E.2d 743, 745-746 (Ct. App. 1984).

Here, Wife's valuation was clearly not based on any personal knowledge she possessed regarding the true value of the home. Rather, the value she assigned was admittedly bottomed and premised entirely upon the unsupported and unsubstantiated advice of an unknown third party. There being nothing to take Wife's parroting of an unknown third party's valuation of the home out of the realm of pure speculation, we hold the Family Court erred in assigning any weight to the valuation.

Moreover, we hold the court's act of taking "judicial notice" of increased property values in the area where the parties' home was located was highly improper.

Rule 201, SCRE, which governs the taking of judicial notice of adjudicative facts, provides:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
>
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> **(c) When Discretionary.** A court may take judicial notice, whether requested or not.

> **(d) When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> **(e) Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.
>
> **(g) Instructing Jury.** The court shall instruct the jury to accept as conclusive any fact judicially noticed.

See also Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 201App.01[2] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2001) (stating subsection (e) of Fed. R. Evid. 201 is a useful safeguard to protect a party's right to be heard in matters relating to judicial notice).

Furthermore,

> [a] trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. Moss v. Aetna Life Ins. Co., 267 S.C. 370, 228 S.E.2d 108 (1976). A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability. Masters v. Rodgers Dev. Group, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).

Eadie v. H.A. Sack Co., 322 S.C. 164, 171-172, 470 S.E.2d 397, 401 (Ct. App. 1996).

Here, the valuation of the marital residence, or any appreciation therein, was one of the primary issues in dispute. Any finding concerning the value of the home, particularly a valuation outside the realm of competent evidence offered at trial, required proof. The record is completely devoid of any such proof. There exists no competent evidence in the record establishing even a range by which such homes generally appreciated during the time period relevant to this case, let alone by how much the parties' home would have appreciated. We reject the application of the doctrine of judicial notice to valuations of marital residence.

Based on our own review of the competent evidence in the record before us, we reverse the Family Court's valuation of the marital home and modify the court's order by assigning a value of $252,500 to the home.

II. Cash Disbursements

Husband contends the Family Court erred in ordering him to make three equal monthly cash disbursements to Wife in realization of her share in the marital estate without first considering the economic impact on his ability to meet this financial obligation. While we question the reasonableness of this scheme of equitable distribution given the amount owing from Husband to Wife pursuant to the award of equitable distribution, we decline to reverse the Family Court on this issue. Husband has, at the very least, been on notice of the provisions of the Family Court's final order during the pendency of this appeal and therefore has had ample time to make financial preparations for payment to Wife. We are particularly convinced Husband is able to make the cash disbursements as ordered by the Family Court in light of his testimony that his $10,000 per month salary from his company is the result of a self-imposed pay-scale. Accordingly, we decline to reverse the Family Court's order regarding the cash disbursements.

III. Valuation of Southern Water Treatment Stock

Husband argues the Family Court erred in valuing his shares of Southern Water Treatment stock at $50,000 based on the share price Husband paid during

a stock repurchase that occurred in 1999, well after the date marital litigation was commenced. We find no error.

Subject to limited exceptions not applicable to the facts of this case, "marital property" includes "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation …." S.C. Code Ann. § 20-7-473 (Supp. 2001). Generally, for purposes of equitable distribution, the value of marital property is the value of the property at the time of the commencement of the marital litigation. See Mallett v. Mallett, 323 S.C. 141, 151, 473 S.E.2d 804, 810 (Ct. App. 1996) ("Marital property is valued as of the date of the filing of the complaint.") (citations omitted); Jamar v. Jamar, 308 S.C. 265, 267, 417 S.E.2d 615, 616 (Ct. App. 1992) ("The proper date to value marital property is the time the marital litigation is filed or commenced.") (citation omitted).

Initially, we note we disagree with Husband's allegation the Family Court failed to assign a value to the marital portion of his stock in Southern Water Treatment as of the date marital litigation was commenced. In support of this contention, Husband points out the Family Court's reference to a 1999 stock repurchase agreement by which Husband purchased 10,000 shares of stock for $50,000. We note, however, the court also referred to Husband's own financial declarations submitted to his bank, wherein he valued his total stock in Southern Water Treatment at $4,000,000 at the time of the marriage and $6,000,000 at time marital litigation was commenced. The court declined to value Husband's stock based solely on the documentation he submitted to his bank in recognition that "overvaluation" or "puffing" is often present in financial statements given to financial institutions for purposes of obtaining loans. Our reading of the order convinces us that rather than simply valuing the marital portion of Husband's Southern Water Treatment stock as of the date of the stock repurchase in 1999, the Family Court considered that figure and other evidence in an attempt to arrive at a fair evaluation of the value of the marital stock as of the date of filing.

Moreover, we find no abuse of discretion in the Family Court's refusal to

adopt the valuation of the stock offered in deposition by Dr. Charles L. Alford, III, an expert in the field of evaluating businesses. Dr. Alford opined the marital portion of Husband's stock was worth very little at the time marital litigation was commenced, but admitted his valuation was "just based on book value." See Santee Oil Co. v. Cox, 265 S.C. 270, 273-74, 217 S.E.2d 789, 791 (1975) (holding that for the purpose of a judicial valuation of shares, "the trial court must undertake to compute the fair value by establishing 'the fair market value of the corporate property as an established and going business,'" and determining three factors should ordinarily be considered in a stock valuation case: (1) net asset value; (2) market value; and (3) the earnings or investment value of the dissenting stock) (citation omitted); Belk of Spartanburg, S.C., Inc. v. Thompson, 337 S.C. 109, 522 S.E.2d 357 (Ct. App. 1999) (holding the significance of an appraisal that did not take Santee factors into account must be discounted).

Of the evidence presented to the trial court, we find the 1999 stock purchase agreement most probative of the value of the marital portion of Husband's business at the time of filing. We are convinced this value is more accurate than that presented by Husband's expert at trial, who offered a value that did not account for the business as an ongoing concern. We also find particularly compelling Husband's admission on appeal, as well as his expert's testimony at trial, that the value of the business did not increase after the date marital litigation was commenced.

Accordingly, we affirm the Family Court's valuation of the martial portion of Husband's Southern Water Treatment stock.

IV. Valuation and Distribution of Husband's 401(k) Account

Husband asserts the Family Court erred in assigning his 401(k) account a value of $39,395.30 — the account's face value at the time marital litigation was commenced — because the account was used to secure a loan with an outstanding balance of $8,450.39. Husband further asserts the Family Court erred in apportioning this asset without considering the tax consequences of a forced liquidation. We find no error.

The apportionment of marital property is within the Family Court judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Bungener v. Bungener, 291 S.C. 247, 353 S.E.2d 147 (Ct. App. 1987). Section 20-7-472 lists fifteen factors for the Family Court to consider when making an equitable apportionment of the marital estate. The statute vests the Family Court with the discretion to decide what weight should be assigned to the various factors. On review, this Court looks to the overall fairness of the apportionment, and if the result is equitable, that this Court might have weighed specific factors differently than the Family Court is irrelevant. Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988).

Here, the Family Court correctly apportioned both marital assets and debts among the parties. In so doing, the court appropriately treated the 401(k) account as an asset, which the court apportioned equally between the parties, and the outstanding balance on the loan as a debt, which the court apportioned to Husband. In light of this treatment, and because we can discern no unfairness resulting to Husband, we find no error in the court's assignment of face-value to the 401(k) account.

We further find no error in the Family Court's failure to expressly consider tax consequences resulting from its award to Wife of one-half the value of Husband's 401(k) account. Where an order of equitable apportionment does not contemplate the liquidation or sale of an asset, it is an abuse of discretion for the court to consider the tax consequences from a supposed sale or liquidation. Ellerbe v. Ellerbe, 323 S.C. 283, 473 S.E.2d 881 (Ct. App. 1996). Here, the court's order does not require or contemplate liquidation of Husband's 401(k) account and there is no evidence indicating either party anticipated liquidation of the account.

V. Loans as Debts

Husband avers the Family Court erred in considering loans among the parties' respective corporations as marital debts. This position is untenable because Husband did not object to the treatment of the loans as marital debt at trial and, in fact, attempted to show Wife was indebted to him for loans his

company made to her company. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (citations omitted). Moreover, to the extent Husband's argument concerning this issue amounts to a challenge that the Family Court erred in accepting the testimony of Wife regarding the amount of outstanding loan debt owing from Husband, we defer to the Family Court's findings as to credibility. See Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981) (holding an appellate court is not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony).

VI. Attorney's Fees

Husband maintains the Family Court failed to make requisite findings of fact relevant to its award of attorney's fees to Wife. We disagree.

Rule 26(a) of the South Carolina Rules of Family Court requires the court to "set forth the specific findings of fact and conclusions of law to support the court's decision." However, not every violation of Rule 26(a) requires reversal: "[W]hen an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court 'may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'" Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct. App. 1998) (quoting Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991)). Here, the record on appeal is sufficient for this Court to make necessary findings of fact relating to the award of attorney's fees. Specifically, the record contains the wife's attorney fee affidavit.

An award of attorney's fees will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988). Before awarding attorney's fees, the Family Court should consider: (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. E.D.M. v. T.A.M., 307

S.C. 471, 415 S.E.2d 812 (1992); Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001). In determining the amount of attorney's fees to award, the court should consider: (1) the nature, extent, and difficulty of the services rendered; (2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991); Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000).

Having reviewed the award of attorney's fees in light of the applicable factors — particularly the beneficial results obtained by Wife's counsel regarding equitable distribution and the inherent difficulty attendant to this case given the controversy surrounding the valuation of major marital assets — we find no abuse of discretion in the award.

CONCLUSION

Husband shall remit a total of $76,155.72 to Wife.[1] This amount reflects

[1] This sum was calculated as follows:

$14,182.03 (50% of the equity in the couple's marital home)
5,500.00 (value of Wife's share of home furnishings)
19,697.69 (50% of face value of Husband's 401K)
25,000.00 (50% of value of Southern Water Treatment shares)
20,611.00 (amount of Wife's overpayment of loans)
8,915.00 (reasonable attorney's fees)

$93,905.72 Sub-Total Amount Due to Wife

- 16,500.00 (Wife's obligation for Carolina First credit line debt)
1,250.00 (Wife's obligation for Husband's attorney's fees for contempt action)

a $7,500 reduction in the equity calculation of the couple's marital home due to this Court's reversal and modification of the Family Court's valuation of the home.[2] Husband shall pay this award to Wife in three consecutive monthly installments of $25,385.24. Payment shall be made on the following dates: May 1, 2002, June 1, 2002, and July 1, 2002.

Upon Husband's payment of the amount owed to Wife, Wife shall execute a fee simple warranty deed to Defendant for her one-half interest in the couple's marital home.

For the foregoing reasons, the decision of the Family Court is

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED IN PART.

CURETON and GOOLSBY, JJ., concur.

$76,155.72 Total Amount Due to Wife

[2] The modified equity of the couple's family home was calculated as follows:

$252,500.00 (Court of Appeals' valuation of the home)
- 224,135.95 (Amount of first and second mortgages at the time of filing = $189,689.65 + 34,446.30)

$ 28,364.05 Total equity

Wife's share is 50% of the $28,364.05 total equity = $14,182.03.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mixson, Inc. d/b/a
The General Store,

Appellant,

v.

American Loyalty
Insurance Company, Old
Dominion Insurance
Company and Insurance
Service of Beaufort, Inc.,

Defendant,

Of Whom American
Loyalty Insurance
Company, Old Dominion
Insurance Company, are

Respondents.

Appeal From Hampton County
Ernest Kinard, Circuit Court Judge

Opinion No. 3450
Heard September 4, 2001 - Filed February 25, 2002

REVERSED AND REMANDED

Paul W. Owen, Jr., of Paul W. Owen, Jr., LLC, of Columbia, for appellant.

J.R. Murphy, of Columbia, for respondents.

HOWARD, J.: Mixson, Inc. ("Mixson") filed this suit against American Loyalty Company and Old Dominion Insurance Company (collectively "American")[1] for breach of a commercial insurance contract, bad faith refusal to pay an insurance claim, and statutory attorneys' fees. The circuit court granted partial summary judgment to Mixson on its breach of contract claim, but granted summary judgment to American on the remaining claims, concluding there was no evidence of bad faith. Mixson appeals from the partial summary judgment awarded to American. We reverse and remand.

FACTS

Mixson operates convenience stores in South Carolina. On November 11, 1996, one of its stores was burglarized, and $1,940.00 in cash was stolen from a MiniATM Model 9500 Automatic Teller Machine ("the ATM") located inside the store. Mixson filed a claim, which included the stolen cash, under its policy with American. American paid Mixson's claim except for the cash, which American denied because the policy did not provide coverage for stolen

[1] Old Dominion was added as a party because American merged with Greentree Financial Holdings, whose claims are handled by Old Dominion.

valuables not located inside a "properly locked safe or vault."[2] American concluded the ATM was not a safe. Asserting the ATM was a safe, Mixson filed this suit for breach of contract, bad faith refusal to pay an insurance claim, and attorneys' fees.

Both parties ultimately filed motions for summary judgment, with supporting affidavits and deposition testimony. Mixson asserted the ATM is a locked metal container in which valuables are stored, which fits the common definition of a safe. Mixson supported its assertion with the affidavit of a locksmith. The policy did not contain any definition for the word safe, and Mixson argued the common definition was, therefore, controlling. Mixson also asserted a question of fact was presented as to bad faith and unreasonable conduct by American in the handling and denial of the claim, precluding summary judgment on the bad faith and attorneys' fee claims. Mixson supported this assertion with the adjuster's claim file notes and the affidavit of an insurance expert.

Respondents filed portions of its adjusters' deposition testimony, who testified that the claim was denied because their research revealed no precedent for classifying an ATM as a safe and a breakdown of the "functionality" of an ATM led them to conclude it was in the nature of a cash register. They noted the ATM was directly accessible to customers and its function was to dispense cash. In addition, Respondents presented an affidavit from a supervising technician employed by the manufacturer, noting that the ATM does not have

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[2]The commercial insurance policy contained the following coverage:

A. COVERAGE-We will pay for loss of...
1. Section 1.-Inside The Premises . . .
b. Safe Burglary
(1) Covered Property: "Money" and "securities" in a safe or vault within the "premises" or "banking premises".

an industry certification for twenty-four hour security, but is certified only to "business hours" security standards.

The circuit court awarded summary judgment to Mixson on the breach of contract claim, concluding the ATM constituted a safe under the common definition of the word and, because the policy contained no further definition of a safe or criteria for differentiating the ATM from a safe, Mixson was entitled to payment of the claim. Although American does not wish to concede that an ATM is a "safe," that issue is not before us because American did not appeal this ruling. Therefore, it is the law of this case. See ML-Lee Acquisition Fund v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997).

The trial court then concluded the question of whether the ATM fit within the definition of a safe was a legitimate issue of novel impression which the insurance company was entitled to litigate and, therefore, the Respondents were entitled to summary judgment on the bad faith claim and the claim for attorneys' fees. Mixson appeals from this ruling.

DISCUSSION

I. Summary Judgment

Summary judgment is appropriate when it is clear there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any issue of fact exists to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party . Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

A. Bad Faith Refusal to Pay

Mixson argues the trial court erred in granting summary judgment to Respondents on the claim for bad faith refusal to pay and its alternative claim for attorneys' fees pursuant to South Carolina Code Annotated section 38-59-40

(Supp. 2001), contending more than one inference can be drawn from the evidence. We agree.

> Bad faith refusal to pay . . . benefits under a contract of insurance includes: (1) the existence of a mutually binding contract of insurance between the plaintiff and defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.

Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 451, 450 S.E.2d 582, 586 (1994). In the present case, the only element in dispute is whether Respondents acted unreasonably or in bad faith.

Generally, if there is a reasonable ground for contesting a claim, there is no bad faith in the denial of it. See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 7, 466 S.E.2d 727, 730 (1996); Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 359-60, 415 S.E.2d 393, 396-97 (1992). In this regard, our supreme court has ruled that an insurance company should be able to litigate novel issues without fear of being accused of acting in bad faith. See Nelson v. United Fire Ins. Co., 275 S.C. 92, 267 S.E.2d 604 (1980); Myers v. Gov't Employees Ins. Co., 279 S.C. 70, 302 S.E.2d 331 (1983); see also Smothers v. U.S. Fid. & Guar. Co., 322 S.C. 207, 470 S.E.2d 858 (Ct. App. 1996). American argues this is such a case because there is no clear-cut precedent establishing that the ATM is a safe. American contends the trial court was correct in ruling that the issue is a novel one, rendering the denial of the claim reasonable as a matter of law.

We disagree with this conclusion under the posture of this case. The trial court ruled that the ATM undisputedly fits within the common definition of a safe. There being no additional criteria superimposed upon this common definition by the policy terms, he ruled no factual issue was presented and Mixson was entitled to summary judgment on his breach of contract cause of action. These rulings by the trial court are not appealed, and they are the law of

this case. See ML-Lee Acquisition Fund, 327 S.C. at 238, 489 S.E.2d at 470.[3] Under these circumstances, we conclude a factual issue is presented as to whether or not American acted reasonably in denying the claim.

Once the trial judge concluded the ATM fit within the common definition of a safe, the legal precedent he relied upon to arrive at his ultimate conclusion that it was covered under the terms of the policy is well established in this State and is far from novel.

> It is a well settled rule that the terms of an insurance policy must be construed most liberally in favor of the insured and where the words of a policy are ambiguous, or where they are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured. However, in cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense. If the intention of the parties is clear, the Courts have no authority to change the contract in any particular. The Court has no power to interpolate into the agreement between the insurer and the insured a condition or stipulation not contemplated either by the law or by the contract between the parties.

Rhame v. National Grange Mut. Ins. Co., 238 S.C. 539, 544, 121 S.E.2d 94, 96 (1961) (citations omitted).

An insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case. In Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 498, 473 S.E.2d 52 (1996), our supreme court underscored its holding from

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[3]This court renders no opinion as to whether the ATM is or is not a safe, either under a commonly accepted definition of the word, or under the wording of the policy in question.

previous cases that the covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed. The court recognized that "the benefits due an insured are not limited solely by those expressly set out in the contract." Id. at 503, 473 S.E.2d at 55. Our supreme court has consistently made this point. See Howard, 316 S.C. at 451, 450 S.E.2d at 586 (holding jury could have found the insurer was unreasonable in failing to pay claims it received after the original injury, viewing the evidence and its inferences in light most favorable to insured, notwithstanding insurer relied upon lack of definitive prior case law and its own attorney's advice to deny a claim for medical expenses); Varnadore v. Nationwide Mut. Ins., 289 S.C. 155, 345 S.E.2d 711 (1986) (finding insurer not entitled to directed verdict on claim of bad faith refusal to pay when it claimed its own investigation provided reasonable basis to deny claim).

In light of the trial court's unappealed rulings, and viewing the evidence in a light most favorable to Mixson, we conclude a factual issue is presented as to whether American's refusal to pay the claim was unreasonable.

B. Statutory Attorneys' Fees

Mixson next argues the trial court erred in granting summary judgment on the issue of statutory attorneys' fees because the facts warranted further development to determine whether American acted in bad faith or without reasonable cause in denying Mixson's claim. For the reasons articulated in connection with Part A of this opinion, we agree.

An insurer is liable to the policy holder for all reasonable attorneys' fees for the prosecution of the case against the insurer if the trial judge finds the refusal to pay the policyholder's claim was without reasonable cause or in bad faith. S.C. Code Ann. § 38-59-40 (Supp. 2001). As stated above, the circuit court improperly concluded there was no evidence to support a conclusion that Respondents' refusal to pay Mixson's claim was unreasonable or in bad faith. Therefore, we reverse this issue and remand it for further proceedings.

II. Discovery

Mixson next argues the trial court erred in granting summary judgment on the same day that it granted Mixson's motion to compel production of documents, without affording time for the production and review of the requested documents.

The record does not reveal that Mixson objected to the court's consideration of the motion for summary judgment or that the court denied a motion for continuance pending further discovery. Therefore, this issue is not preserved for our review. See Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992) (stating whether court erred in granting summary judgment while appellants had motion to compel outstanding was not preserved when appellants failed to move for a continuance and did not request motion for summary judgment be held in abeyance until after ruling on discovery motion); Pryor v. Northwest Apartments, Ltd., 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996) (holding whether judge erred in granting summary judgment because discovery requests were outstanding was not preserved when appellant did not ask for a continuance to complete discovery).

CONCLUSION

Based on the foregoing reasons, the decision of the trial court is

REVERSED AND REMANDED.

HEARN, C.J., and CURETON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of: Timothy C. M., a minor under the age of seventeen,

Appellant.

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

Opinion No. 3451
Heard January 10, 2002 - Filed February 25, 2002

AFFIRMED

Assistant Appellate Defender Katherine Carruth Link, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Norman Mark Rapoport; and Solicitor Robert M. Ariail, of Greenville, for respondent.

HEARN, C.J.: Timothy Chad M., appeals from the family court's

finding of contempt for violation of a family court order. Timothy asserts the family court lacked subject matter jurisdiction because he was eighteen at the time of the hearing and the violation occurred when he was seventeen. We disagree and affirm.

FACTS

Timothy was charged with two counts of grand larceny, two counts of forgery, and one count of petit larceny. He was found delinquent on the grand larceny charges and was placed on probation until his eighteenth birthday and ordered to pay restitution. At a later hearing, Timothy was required to serve weekend jail time until he completed payment of restitution. On April 11, 2000, the State issued a petition for probation violation/contempt, and the following day the family court issued a rule to show cause for Timothy's failure to pay restitution and failure to serve weekend jail time.

Timothy turned eighteen on May 29, 2000. The violation of probation/contempt hearing was held on August 23, 2000. Timothy's counsel made a motion to dismiss the case for lack of subject matter jurisdiction, arguing that the family court had no authority to hear the case because Timothy was eighteen. The family court denied Timothy's motion, finding that subject matter jurisdiction existed to punish willful contempt of prior family court orders, in this case an order of probation. Thereafter, Timothy pled guilty to contempt based upon his failure to comply with the probation order. He was sentenced to six months, suspended upon the service of ninety days, and was required to enroll for evaluation at Behavioral Health Service for drug treatment within 48 hours of his release.

DISCUSSION

Timothy first contends on appeal that the family court lacked subject matter jurisdiction to hear the probation violation and find him in contempt because he was eighteen at the time of the hearing and the statutory limit on the period of his probation was his eighteenth birthday. In support of his argument, Timothy relies on S.C. Code Ann. § 20-7-400(B) (Supp. 2000), stating in part:

> Any child who has been adjudicated delinquent and placed on probation by the court remains under the authority of the court only until the expiration of the specified term of his probation. This specified term of probation may expire before but not after the eighteenth birthday of the child.

Timothy contends that this code section operates to deprive the family court of jurisdiction to punish him for contempt after he turned eighteen. We disagree.

Our goal in construing statutes is to prevent an interpretation that would lead to a result that is plainly absurd. Florence County v. Moore, 344 S.C. 596, 601, 545 S.E.2d 507, 509 (2001). To construe the statute as proposed by Timothy would create an absurd result and deprive the family court of its inherent jurisdiction to punish juveniles who violate its court orders. Because Timothy was on probation when he violated the order, he was still under the jurisdiction of the family court. That jurisdiction was not lost simply because he turned eighteen prior to the hearing. See Taylor v. Robinson, 508 S.E.2d 289, 292 (N.C. Ct. App. 1998) ("Jurisdiction is determined based on the age of the juvenile at the time of the offense.")

The family court has the inherent power to punish for contempt of its orders. See In Interest of Darlene C., 278 S.C. 664, 666, 301 S.E.2d 136, 137 (1983). "That power is essential to the preservation of order in judicial proceedings, and to the enforcement of the courts' judgments, orders, and writs and consequently to the due administration of justice." Id., see generally S.C. Code Ann. §§ 20-7-1330 through -1350 (Supp. 2000) (establishing broad contempt powers within the family court).

> If the juvenile court is to be saddled with the responsibility for [such offenders], it must also be afforded the tools and authorities to handle those cases. Courts must have coercive authority or they cease being courts. . . . It is simply not fair to a juvenile court

> judge to whom the community looks for help to so restrict him that he cannot put his orders or decisions into effect.

In re Francisco S., 102 Cal. Rptr. 2d 514, 522 (Cal. Ct. App. 2000).

Here, Timothy was still subject to the jurisdiction of the family court when he violated the court order. The jurisdiction of the family court attached to this action for contempt when the petition for contempt was filed and served. We refuse to hold that this jurisdiction evaporated when Timothy turned eighteen prior to the hearing on the contempt charge. In denying Timothy's motion for dismissal, the family court stated, "I think the underlying authority of the court is always there to deal with acts of contempt regardless of the age of the individual. . . ." We agree. See generally State v. Estridge, 320 S.C. 288, 291, 465 S.E.2d 91, 93 (Ct. App. 1995) ("The magistrate's court was not divested of subject matter jurisdiction to render final judgment. . . merely because its action in concluding the case stretched beyond the deadline.")

Timothy further argues that the family court lacked subject matter jurisdiction to hold him in contempt because the offenses leading to the probation violation occurred after his seventeenth birthday. Timothy submits that the violation of probation committed when he was seventeen operates as a new and separate offense, placing him beyond the jurisdiction of the family court. Timothy reasons that since the family court lacks authority to adjudicate a juvenile offense which occurs after the juvenile reaches the age of seventeen, it has no jurisdiction to consider a violation of probation or contempt of court charge which occurs at that time. We disagree.

We believe that any subsequent violation of a court order, issued as a result of the original charge, is not a new and separate offense, but instead flows from the original charge. Although Timothy's argument would have merit if the family court were attempting to try him for a new offense occurring after he reached the age of majority for juvenile delinquency purposes, the fact that Timothy has since reached the age of majority does not render his acts violating the probation order outside the jurisdiction of the family court. To hold

otherwise would leave the family court without an enforcement mechanism and would allow juvenile offenders to disobey the terms of their probation once they have reached the age of seventeen.

Because we find no error in the family court's finding of contempt, we affirm the decision of the family court.

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Isaiah Rollins,

Appellant.

Appeal From Charleston County
Paul M. Burch, Circuit Court Judge

Opinion No. 3452
Heard February 4, 2002 - Filed February 25, 2002

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Ralph E. Hoisington, of N. Charleston, for respondent.

HEARN, C.J.: Isaiah Rollins was convicted of distribution of crack cocaine and distribution within one-half mile of a school. On appeal, Rollins argues the trial judge erred in allowing the State to cross-examine him about prior convictions from 1992, 1993, and 1997. We affirm.

FACTS

Rollins was arrested following an undercover, marked buy of crack cocaine. Deputy Sheriff Michael Constanzo testified that an unidentified man sold him a $20 rock of crack cocaine at Rollins' direction. The unidentified man then gave Rollins the marked bill. After leaving the scene, Constanzo described the two men to some other officers. The officers located the two subjects in "a well-known drug area where dealers hang out." Both subjects fled, and Rollins was apprehended as he tried to hide. Rollins had approximately $1400 in cash in his possession, including the marked bill. He claimed that he was the victim of mistaken identification and testified that he obtained the marked bill when he made change for one of two men standing by the road outside his mother's house. According to Rollins, the money was to be used to hire a lawyer for his brother.

Rollins had convictions for simple possession and distribution of crack cocaine in 1992 and 1997. During trial, the judge allowed the State to impeach Rollins with the prior convictions.[1] However, he did not allow the

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[1]The testimony in question was as follows:

> Q. Mr. Rollins do you have any prior conviction?
> A. Yes, I did.
> Q. Do you have a prior conviction from 1992?
> A. Yes.
> Q. Do you have a prior conviction from 1993?
> A. No.

State to tell the jury the convictions were for drug offenses, noting that the danger of prejudice is increased if the prior convictions are for the same crime for which the defendant is on trial. The jury convicted Rollins of both counts.

DISCUSSION

On appeal, Rollins argues that his two or three prior convictions for similar drug offenses were inadmissible under Rule 609, SCRE, and that the procedure adopted by the trial judge allowed the jury to speculate freely about the nature of those prior convictions. He further contends the vague reference resulted in prejudice outweighing any probative value. We disagree.

The admission or exclusion of evidence falls within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of that discretion. State v. Huggins, 325 S.C. 103, 110, 481 S.E.2d 114, 118 (1997). Rule 609, SCRE, governs the admissibility of evidence of prior crimes to impeach a witness's credibility. It provides that evidence an accused has been convicted of a prior crime punishable by death or imprisonment in excess of one year is admissible if the court determines that its probative value outweighs its prejudicial effect to the accused. In a post-conviction relief setting, our supreme court concluded that trial counsel was ineffective for failing to object that the prejudicial effect of the defendant's prior conviction for the same offense outweighed its probative value. Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). Although the Green court specifically declined to hold similar convictions inadmissible in all cases, it directed trial courts to weigh the probative value of the prior convictions against their prejudicial effect in determining whether to admit evidence of similar prior convictions. In determining whether to admit evidence of prior convictions, the following factors should be considered:

1. The impeachment value of the prior crime.

Q. Do you have a prior conviction from 1997?
A. Yes.

2. The point in time of the conviction and the witness's subsequent history.

3. The similarity between the past crime and the charged crime.

4. The importance of the defendant's testimony.

5. The centrality of the credibility issue.

Id. at 433-34, 527 S.E.2d at 101; State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).

In addition to providing the above analytical framework, the court noted: "One tactic the Fourth Circuit Court of Appeals employs is to allow the prosecutor to ask the defendant about the existence of prior convictions, but not their nature." Green, 338 S.C. at 433 n. 5, 527 S.E.2d at 101 n. 5 (citing U. S. v. Boyce, 611 F.2d 530, n.1 (4th Cir.1979) ("In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the Government to prove the nature of the offense on the ground that to do so would amount to unfair prejudice.")). This approach ostensibly reduces the risk of enhanced prejudice based on the similarity of prior crimes.

In this case, the trial judge reviewed Rollins' history of convictions and adopted the tactic mentioned in the Green footnote. In addition to limiting the amount of detail about the prior convictions, the trial judge instructed the jury that the prior convictions could only be considered in determining Rollins' credibility. This procedure minimized the prejudice to Rollins. Accordingly, we find no abuse of discretion and affirm Rollins' convictions.

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Lionel Cheatham,

Appellant.

Appeal From Charleston County
Luke N. Brown, Jr., Special Circuit Court Judge

Opinion No. 3453
Heard February 6, 2002 - Filed February 25, 2002

REMANDED

Assistant Appellate Defender Katherine Carruth Link, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Christie Newman

Barrett, all of Columbia; and Solicitor Ralph E. Hoisington, of North Charleston, for respondent.

ANDERSON, J.: Lionel Cheatham was convicted of first degree burglary and sentenced to twenty years imprisonment. He raises three issues on appeal. We remand, finding the trial court erred in refusing to conduct a pretrial hearing on identification matters.

FACTS/PROCEDURAL BACKGROUND

At approximately 7:30 p.m. on February 9, 1999, the victim, Kalpna Patel, and her infant were in their apartment. The sliding glass door on the patio was left slightly open to allow a breeze into the apartment. Patel heard a noise and saw a man enter her apartment through the sliding glass door. The man attempted to hide his face with a pillow. Patel fought with the man. During the struggle, Patel was able to see the intruder's face briefly. Patel recognized the man as someone who had previously come into her store. The intruder grabbed Patel's purse from her dining room table and ran away. The purse contained $500 in cash receipts from the business owned by Patel and her husband.

The intruder was described in the police report taken after the incident as a Hispanic male, six feet two inches tall, weighing approximately190 pounds, with brown hair, a round face, and between 20- and 30-years-old. The police report did not indicate whether the intruder had a mustache or the color of the intruder's eyes. Patel testified at trial she never described the intruder as Hispanic. According to Patel, she informed police that he was a tall, well-built, light-skinned man of both Caucasian and African-American descent, aged in his late thirties to forties, with dark hair, a round face, a mustache, and brown eyes. No fingerprint evidence was recovered at the scene that linked Cheatham to the crime.

Patel's neighbor, Tim Nates, saw the intruder in the parking lot before the burglary and watched him run away from Patel's apartment clutching an object.

Both Patel and Nates picked Cheatham's picture out of a photographic lineup.

Cheatham did not dispute that Patel was robbed, but argued at trial he was not the perpetrator. Persephone Brown testified she was a former co-worker of Cheatham's wife, Cynthia, and attended church with Cynthia until Brown moved. Brown averred that on the evening of the burglary, she got off work at 8:00 p.m. and went to a Bi-Lo grocery store to purchase a few items. As she exited the store at approximately 8:15 p.m., she encountered both Cheatham and Cynthia in the parking lot approaching the store. She spoke with Cynthia for approximately thirty minutes.

Cynthia also testified. She stated she had specific recollections of February 9, 1999, because she wrote a check to Cheatham's employer as a loan to help expand his catering business. Later that day, Cynthia came home from her job at 4:00 p.m. and relaxed with Cheatham. The couple then discussed dinner and decided Cynthia should make spaghetti. At 6:00 p.m., the couple went to a Blockbuster video store to return movies they had rented and then traveled to a Publix grocery store to buy the ingredients to make spaghetti. According to Cynthia, she and Cheatham then traveled across town to her mother's house to help tutor her nephew. After leaving Cynthia's mother's house, Cheatham and Cynthia decided they also wanted garlic bread to go with the spaghetti they were going to make for dinner. They went to the Bi-Lo near Cynthia's mother's house, where they encountered Brown at approximately 8:15 p.m. Cynthia testified Cheatham was with her the entire evening.

ISSUES

I. Did the trial court err in admitting Cheatham's prior burglary and housebreaking convictions?

II. Did the trial judge err in refusing to recuse himself?

III. Did the trial court err in refusing Cheatham's motion for a pretrial hearing on matters of identification?

LAW/ANALYSIS

I. Admission of Prior Burglary Convictions

Cheatham argues the trial court erred in allowing the admission of his prior burglary and housebreaking convictions when he stipulated to one of the elements of first degree burglary. We disagree.

Prior to being charged with burglary in the underlying case, Cheatham was convicted of housebreaking in 1978, second degree burglary in 1987, and second degree burglary in 1991. The indictment for first degree burglary in this action alleged Cheatham: (1) entered into Patel's dwelling in the nighttime; and (2) had a prior record of two or more convictions for housebreaking or burglary. Cheatham filed a motion in limine requesting the State be prohibited from introducing his prior convictions because it would be unfairly prejudicial and he would stipulate the burglary occurred in the nighttime. The State refused to stipulate the burglary occurred at the nighttime and the trial court denied the motion. The trial judge instructed the jury that the prior convictions must only be considered to determine whether an element of first degree burglary was satisfied and they could not consider the prior convictions as evidence that Cheatham committed the burglary of Patel's home.

The trial court has great discretion in ruling on the admissibility of evidence in a criminal case. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001). A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent a prejudicial abuse of discretion amounting to an error of law. Id.

The General Assembly has defined first degree burglary, in part, as follows:

> (A) A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:

. . . .

(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

(3) the entering … occurs in the nighttime.

S.C. Code Ann. § 16-11-311 (Supp. 2001).

Evidence of other crimes is admissible to establish a material fact or element of the crime charged. State v. Benton, 338 S.C. 151, 526 S.E.2d 228, cert. denied sub nom., Benton v. South Carolina, 530 U.S. 1209, 120 S. Ct. 2209, 147 L. Ed. 2d 242 (2000); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987).

Our courts have repeatedly considered the admission of prior burglary convictions to support an element of first degree burglary.

In State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997), this Court held that under § 16-11-311(A)(2), "prior burglary or housebreaking convictions are clearly an element of burglary in the first degree." Id. at 446, 486 S.E.2d at 515. As such, the prosecution in Hamilton was entitled to present evidence relevant and material to that element of the offense, despite our "well-established rule that evidence that an accused has committed other crimes is not admissible in the prosecution for the crime charged." Id. at 447, 486 S.E.2d at 515 (citation omitted). The Court reasoned that the prosecution could not be forced to stipulate generally to the prior offenses or to the fact that the defendant had the legal status to be charged with first degree burglary because such stipulation might cause a substantial gap in the evidence needed for the jury to find the defendant guilty of the offense. Id. at 446, 486 S.E.2d at 515.

The Hamilton Court analyzed the prejudicial impact of the evidence:

[H]ad the South Carolina General Assembly wished to use the prior

> convictions as merely a sentence enhancer rather than as an element of the crime, it could have done so.… Certainly, a cogent argument can be made that the statute contravenes the well-established rule that evidence that an accused has committed other crimes is not admissible in the prosecution for the crime charged. Rule 404(b), SCRE; State v. Gregory, 191 S.C. 212, 220, 4 S.E.2d 1, 4 (1939); State v. Williams, 31 S.C.L. (2 Rich.) 418, 421-22 (1845). It is not this court's province, however, to question the wisdom of a legislative enactment.
>
> Finally, Appellant asserts it was error to allow proof of the prior burglary offenses because the evidence was not admissible under any of the exceptions recognized in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Appellant's argument is misplaced, however, since the State did not offer proof of his prior burglary convictions to establish motive, intent, identity, or common scheme or plan. Here, Appellant's prior burglary convictions were presented solely to prove an element of the crime for which he was charged. Evidence which is logically relevant to a material element of the offense charged should not be excluded merely because it may also show guilt of another crime. See State v. Tillman, 304 S.C. 512, 518, 405 S.E.2d 607, 611 (Ct. App. [1991]), cert. denied, (Sept. 5, 1991).

Id. at 447, 486 S.E.2d at 515-16 (footnote omitted).

Our Supreme Court recently discussed this issue in State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). The Court rejected a claim that "'§ 16-11-311(A)(2), as interpreted in State v. Hamilton,'" unconstitutionally deprives defendants of due process of law "'because evidence required to prove the status element of prior convictions dilutes the State's burden of proof with respect to the remaining elements of the offense.'" Id. at 154, 526 S.E.2d at 229. In concluding the statute did not facially violate due process, the Court explained:

> To deter repeat offenders, the General Assembly chose to

> include two or more prior burglary and/or housebreaking convictions as an element of first degree burglary. The United States Supreme Court has held this is a valid state purpose which does not violate due process. We agree.

Id. at 154, 526 S.E.2d at 230 (internal citation omitted).

Cheatham contends that a Rule 403 analysis negates the admissibility of his previous convictions. Benton states:

> [W]e note evidence of other crimes is admissible to establish a material fact or element of the crime charged. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987).… For purposes of an element of first degree burglary under § 16-11-311(A)(2), we conclude the probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect. Rule 403, SCRE.
>
> Further, while generally inadmissible, propensity evidence is not prohibited. Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions. Rule 404, SCRE (evidence of other crimes is not admissible to prove character to show action in conformity but to show motive, absence of mistake or accident, intent, identity, the existence of common scheme or plan). Here, appellant's two prior burglary convictions were offered to prove a statutory element of the current first degree burglary charge, not to suggest appellant was a bad person or committed the present burglary because he had committed prior burglaries.

Id. at 155-56, 526 S.E.2d at 230 (footnote omitted).

More recently in State v. James, 346 S.C. 303, 551 S.E.2d 591 (Ct. App. 2001), cert. granted, this Court considered whether the introduction of the

defendant's seven prior burglary convictions to satisfy the "two or more prior convictions" element of first degree burglary was error. We noted the State cannot be forced to "stipulate generally to the prior offenses or to the fact that the defendant had the legal status to be charged with first degree burglary because such a stipulation might cause a substantial gap in the evidence needed for the jury to find the defendant guilty of the offense." Id. at 307, 551 S.E.2d at 592 (citing Hamilton, 327 S.C. at 446, 486 S.E.2d at 515). Because the State must prove all the elements of first degree burglary and the statute did not limit the number of prior burglary convictions admitted to two, we held there was no error in admitting seven of the defendant's prior burglary convictions. Id. at 307-09, 551 S.E.2d at 592-94.

Cheatham argues evidence of his prior burglary and housebreaking convictions was unduly prejudicial and should not have been admitted to show an element of first degree burglary because he was willing to stipulate to the alternate "nighttime" element. It is well settled the admission of prior burglary or housebreaking convictions for limited consideration as an element of first degree burglary does not constitute undue prejudice. Thus, the admission of Cheatham's prior burglary and housebreaking convictions as an element of first degree burglary does not constitute unfair prejudice in this case. Further, the trial judge specifically instructed the jury not to consider Cheatham's prior convictions as evidence of the Patel burglary and to limit their consideration of the prior convictions to whether an element of first degree burglary was proven. We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice.

Moreover, we find no merit to Cheatham's assertion that because he was willing to stipulate to the "nighttime" element of first degree burglary, the State should have been limited to proving only the "nighttime" element and it was unnecessary for the State to present any evidence of the "two or more convictions of burglary or housebreaking" element. As previously discussed, the State is not required to accept a defendant's stipulation of proof because the State still bears the burden of proving every element of a crime beyond a reasonable doubt. See id. at 307, 551 S.E.2d at 592. Despite Cheatham's

attempt to stipulate that he met the legal status to be charged with first degree burglary, we believe the trial court did not err in denying his request to limit the State to proof of only the "nighttime" element.

II. Recusal of the Trial Judge

Cheatham contends the trial judge erred by failing to recuse himself from presiding over the trial where a previous circuit judge had made rulings in Cheatham's favor. We disagree.

Cheatham's trial was originally scheduled for the week of October 11, 1999, before the Honorable Markley Dennis, but the case was not called.

Prior to the commencement of Cheatham's trial on November 10, 1999, before the Honorable Luke Brown, Cheatham complained the solicitor was "judge shopping" and moved to have the case heard before Judge Dennis. Cheatham asserted that an informal conference was held on October 12, 1999, before Judge Dennis. Judge Dennis had agreed to suppress the introduction of Cheatham's prior burglary and housebreaking convictions because Cheatham was willing to stipulate the burglary occurred in the nighttime. According to Cheatham, the solicitor then informed Judge Dennis the State would not call Cheatham's case to trial before the judge based on the judge's announced intention to exclude the prior convictions. Cheatham submitted the affidavit of one of his attorneys recounting the discussion before Judge Dennis.

The State did not deny that Judge Dennis' off-the-record intimations that he would bar the admission of the prior convictions influenced its decision not to call the case in front of Judge Dennis. However, the State refuted Cheatham's contention that it was "judge shopping" and noted the case was placed on the next docket. Judge Brown denied Cheatham's motion to postpone the trial until it could be heard before Judge Dennis.

Cheatham argues Judge Brown erred in refusing to recuse himself because the solicitor's actions violated due process and amounted to an abuse of his

prosecutorial discretion. We disagree.

It is well settled judges should recuse themselves where questions of impartiality or impropriety are raised. This Court recently addressed the disqualification of judges in Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), cert. granted:

> The Code of Judicial Conduct requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. Christy v. Christy, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994). Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 433 S.E.2d 856 (1993). It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. Christensen v. Mikell, 324 S.C. 70, 476 S.E.2d 692 (1996); Mallett v. Mallett, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature.

Id. at 497, 531 S.E.2d at 566.

Cheatham's case was never called before Judge Dennis and the informal discussion with the judge concerning evidentiary matters was not on the record. We find Judge Dennis' comments regarding the evidence merely amounted to his initial impressions and did not constitute an order. Further, if Judge Dennis had issued a pretrial order granting the suppression of Cheatham's prior burglary convictions, the State had the remedy of immediately appealing the decision. See State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) (holding appellate courts may immediately review a pretrial order granting the suppression of evidence that significantly impairs the prosecution of a criminal case), cited in State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991). However, because Judge Dennis did not issue any order in the case and merely indicated

his inclinations on the admission of evidence, there was nothing for the State to appeal.

Further, Cheatham does not assert Judge Brown was partial, biased, or acted improperly in presiding over his trial. Cheatham has not provided any evidence that would support his allegation that Judge Brown should have recused himself. The only person Cheatham accuses of impropriety is the solicitor for refusing to call the case before Judge Dennis. Whether the solicitor acted improperly in choosing not to call the case before Judge Dennis did not affect Judge Brown's ability to preside over Cheatham's case. Accordingly, we find no error in the failure of Judge Brown to recuse himself.

III. Right to Pretrial Hearing on Identification

Cheatham asserts the trial court erred in refusing to grant him a pretrial hearing on identification matters. We agree.

During pretrial motions, Cheatham moved for a hearing concerning his identification outside the presence of the jury, pursuant to Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996), and Rule 104(c), SCRE. The trial judge responded to Cheatham's request by declaring: "Well, as I stated on yesterday, you've got to give me something a little more because I don't want to try this case twice. Have you got me something that you know of that makes the lineup unfair and prejudice [sic]?" Cheatham pointed out problems with the witness identifications because Cheatham was a 40-year-old black male, not a 20- to 30-year-old Hispanic male as described in the police report. Cheatham further argued the photographic lineup shown to Patel and Nates was suggestive. The trial court denied Cheatham's motion for a hearing:

> Cheatham's Counsel: Your Honor, is it my understanding then that you're going to let the ID issue be resolved by the jury?
>
> The Court: I am unless I change my mind during the

examination. I just don't want to go through it twice.

Cheatham's Counsel: I understand.

The Court: But you can make your motion afterwards. You can make another motion. I'm just going to hold it in abeyance. I'm going to deny it at this time, but I'll let you remake your motion after that at any time.

Cheatham's Counsel: I understand that's your ruling, Your Honor, but I would — I believe that Rule 104(c) would actually give me the right to a pre-trial hearing on the issue.

The Court: No, sir. In the discretion of the Court.

During Patel's testimony, Cheatham renewed his objections regarding Patel's identification of Cheatham and the photographic lineup and noted he was never informed Patel had been shown a total of three photo lineups. A bench conference was held and Cheatham was later permitted to place his arguments on the record outside the presence of the jury. Cheatham averred the photographic lineup was unreliable because it was suggestive. The trial court held the photographic lineup was not suggestive. Cheatham continued to object throughout the trial to testimony regarding identification. Finally, after hearing all the testimony regarding the photographic lineup and identification of Cheatham, the trial judge informed the parties he found neither the "the conduction of the lineup" nor "the pictures themselves" suggested Cheatham was the suspect.

Our courts have repeatedly addressed a defendant's right to have evidentiary hearings outside the presence of the jury. In State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971), the defendant was charged with burglary and

objected to testimony regarding the identification of him as the perpetrator. The Cash Court held:

> When the State offers witnesses whose testimony tends to identify the appellants as the persons who committed the crime charged in the indictment and they interpose timely objections challenging that the in court identification by the witness is tainted by an illegal line-up, **the trial judge should conduct a hearing in the absence of the jury and the competency of the evidence should be evaluated**. In such a hearing, the testimony should be taken and all factual questions determined including those involving the appellant's constitutional rights pertinent to the admissibility of the proffered evidence.

Id. at 253, 185 S.E.2d at 526-27 (emphasis added).

In State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992), the defendant argued a witness' identification of him was tainted because the witness was present at the defendant's prior bond hearing. The defendant requested an in camera hearing to determine whether the witness' identification testimony was admissible. The trial judge denied the motion for an in camera hearing. Citing Cash for the notion that a defendant is entitled to an in camera hearing, if requested, when he or she challenges the "in-court identification as being tainted by a previous illegal identification," the Simmons Court held:

> In State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971), this Court adopted a per se rule requiring the court to hold an in camera hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification. Contra Watkins v. [Sowders], 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981). The lower court refused to hold a hearing. This error warrants reversal.
>
> We hold that the denial of the motion to suppress was error.

> **It does not follow, however, that Simmons is entitled to a new trial. We remand the case in order for the trial judge to hold a hearing to determine whether, under the circumstances of this case, [the witness'] identification of Simmons was so tainted as to require its suppression at trial.** Should it be determined upon an in camera hearing, that the in-court identification of Simmons was not of independent origin but was the tainted product of the
>
> circumstances surrounding the bond hearing, it will follow as a matter of course that Simmons is entitled to a new trial.

Id. at 82-83, 417 S.E.2d at 93-94 (emphasis added) (internal citation omitted).

Effective September 3, 1995, preliminary questions of evidence in South Carolina are governed by Rule 104, SCRE. Rule 104 provides:

> **(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> **(b) Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> **(c) Hearing of Jury.** Hearings on the admissibility of confessions or statements by an accused, and **pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury**. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

> **(d) Testimony by Accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
>
> **(e) Weight and Credibility**. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(emphasis added).

The Note following Rule 104 states:

> Subsection (c) modifies the federal rule by adding the phrase "or statements made by an accused, and pretrial identifications of an accused." This addition is made to emphasize the fact that hearings on the admissibility of all statements made by a criminal defendant, whether inculpatory or exculpatory, must be made outside the presence of the jury. State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971). The addition also requires all hearings regarding the admissibility of pretrial identifications (to include any assertion that an in-court identification should be excluded as a result of a pretrial identification) to be heard outside the presence of the jury. State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992).

Our courts have further addressed this issue since the enactment of the South Carolina Rules of Evidence. In State v. Smith, 336 S.C. 39, 518 S.E.2d 294 (Ct. App. 1999), this Court noted:

> Where there is an issue as to whether or not an in-court identification by a witness is of independent origin and based upon observations of a suspect other than in the course of any improper confrontation or line-up, the defendant is entitled to an in camera hearing. State v. Williams, 258 S.C. 482, 485, 189 S.E.2d 299, 300 (1972). Thus, our supreme court has "adopted a per se rule

> requiring the court to hold an in camera hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification." State v. Simmons, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992) (citing State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971)).

Id. at 43, 518 S.E.2d at 296.

More recently in State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), the defendant was charged with murder. Evidence linking him to the crime included: (1) the defendant's sweater, which was similar to the one witnesses claimed the murderer was wearing; (2) the victim's blood found on the defendant's boots and sweater; (3) tire impressions taken from the crime scene; and (4) witness identification of the defendant from a photographic lineup. The defendant requested, but was denied an in camera hearing regarding the photographic lineup. On appeal, the Supreme Court ruled:

> Where identification is concerned, the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.

Id. at 613, 550 S.E.2d at 297 (citation omitted).

Noting the defendant did not object to other identification testimony, the Supreme Court held the error in failing to hold the in camera hearing was harmless. Id. at 613-14, 550 S.E.2d at 297-98.

Rule 104(c) unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury. The adoption of Rule 104 did not abrogate the viability of

the rulings in the pre-Rules of Evidence cases. The in camera hearing required by Rule 104(c) allows a defendant to question a witness more stringently regarding possible misidentification or bias outside the presence of the jury. If the defendant is required to question a victim/witness regarding photographic identification only in the jury's presence, the defendant may be required to severely curtail the questioning so as not to inflame the jury. The trial court erred by denying Cheatham an in camera hearing on the admissibility of the identification from the photographic lineup.

In State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992), the Supreme Court noted that "under certain circumstances, if the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable." Id. at 83, 417 S.E.2d at 94 (citation omitted). Under the circumstances of this case, we find the error was not harmless. Cheatham's defense included an alibi. Unlike the defendant in Ramsey, the only evidence linking Cheatham to the crime was witness identification. Thus, it was imperative to establish the validity of the witness identification and the photographic line up. Accordingly, we find where, as here, the identification of the defendant is not corroborated by circumstantial or direct evidence, the error in failing to grant the defendant a full in camera hearing on the admissibility of identification evidence is not harmless.

CONCLUSION

We reaffirm the per se rule requiring the court to hold an in camera hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification.

Pursuant to State v. Simmons, we remand the case for a circuit judge to hold an in camera hearing to determine: (1) whether, under the circumstances of this case, the identification evidence identifying Cheatham as the perpetrator under the photographic lineup procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification; and (2) whether the resulting in-court identification testimony was so tainted by a previous

illegal identification as to require its suppression at trial.

Should it be determined upon an in camera hearing, that: (1) the pretrial photographic lineup identification was unduly suggestive; and/or (2) the in-court identification of Cheatham was the tainted product of the circumstances, it will follow as a matter of course that Cheatham is entitled to a new trial.

REMANDED.

CURETON and GOOLSBY, JJ., concur.