The Supreme Court of South Carolina

In the Matter of Suzanne P. Ravenel, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 1974, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Chief Justice Jean Toal received April 4, 2005, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

May 19, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21

May 23, 2005

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

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Hattie
E. Boyce, Respondent.

Opinion No. 25985
Submitted April 26, 2005 – Filed May 23, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Hattie E. Boyce, of Spartanburg, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On or about July 9, 2004, respondent was the closing attorney in a real estate transaction. Respondent represented Borrower. Borrower and his wife had obtained approval for an equity credit line loan from Wells Fargo; the loan was to be secured by Borrower's

residence. Borrower had contacted respondent and requested she assist in a "witness only" closing of the line of credit from Wells Fargo.

Respondent did not prepare a deed, mortgage, note, or other legal instrument related to the closing of the real estate transaction; she did not ensure that another attorney did so. Neither respondent nor someone under her supervision conducted a title examination or prepared abstracts; respondent did not ensure another attorney or someone under another attorney's supervision did so. Neither respondent nor someone under her supervision recorded documents at the Register of Deeds; respondent did not ensure that another attorney or someone under another attorney's supervision did so.

Respondent signed the HUD-1 statement certifying thereon that she had prepared the statement, that it was a true and accurate account of the transaction, and that she had or would cause funds or be disbursed in accordance with the statement. Despite signing the HUD-1 statement that she had or would disburse the funds, respondent acknowledges she did not do so.

Despite certifying on the HUD-1 statement that her fee was $100.00 and that the HUD-1 statement was a true and accurate account of the transaction, respondent sought to collect $150.00. The $150.00 fee had been set by respondent's secretary.

Borrower told respondent that the attorney's fee was to be paid by Wells Fargo. When Wells Fargo did not pay the $150.00 fee, respondent faxed a letter to Borrower and to Borrower's employer at their place of business. The letter threatened to sue both Borrower individually and the employer's business and to send a copy of the lawsuit to both the Attorney General and the Better Business Bureau so as to gain an advantage in the collection of her civil debt. Respondent's letter threatened treble damages even though she would not be entitled to treble damages under South Carolina law.

Neither Borrower's employer nor the employer's business were a party to the loan. Neither Borrower's employer nor his business

were clients of respondent. Despite this fact, respondent revealed information relating to her representation of Borrower to his employer without Borrower's consent.

Respondent states she was under the mistaken impression that Borrower's place of employment was a party to the loan. Respondent's fee of $150.00 was ultimately paid by Wells Fargo Bank.

Respondent represents her practice is primarily devoted to family law. She submits this is the only real estate closing she has conducted in her thirteen years of practice and that she was unaware of the requirements imposed upon attorneys in the closing of real estate transactions. Respondent further submits she did not fully understand the concept of treble damages.

After discussing this matter and previous Court decisions with ODC, respondent now recognizes that participating in "witness only" closings when no other South Carolina licensed attorney is involved has the effect of assisting in the unauthorized practice of law and constitutes a failure to carry out the responsibilities of a closing attorney as provided by previous directives of this Court. She further recognizes she did not provide her client with competent representation. Respondent agrees that her actions constitute misconduct under the Rules of Professional Conduct, Rule 407, SCACR.

Respondent now recognizes that by signing the HUD-1 settlement statement, she represented that a licensed attorney had disbursed the funds and completed the other steps required of a closing attorney by published directives of the Court when in fact she did not do so. Respondent acknowledges this was misconduct. Respondent further recognizes that the threat of criminal prosecution and collection of civil damages not available under the circumstances constitutes misconduct.

Respondent states her misconduct was unintentional. She represents that, in the future, she will make every effort not to handle

matters without first making herself familiar with the applicable guidelines and law.

Respondent has no prior disciplinary history and submits that her conduct in this matter was uncharacteristic. ODC asserts respondent has been very cooperative and forthright during the course of its investigation.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.6 (lawyer shall not reveal information relating to representation of a client unless client consents after consultation); Rule 4.5 (lawyer shall not threaten to present criminal charges solely to obtain an advantage in a civil matter); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Processional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent acknowledges her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Owners Insurance Company, Appellant,

v.

Janette Clayton, Richard Johnston, Jr. a/k/a A. R. Johnston, Jr., Lands Inn, Inc., d/b/a Lands Inn and Comfort Inn, Johnston Company, Inc., Robert Bowen, a/k/a Robert Bowners, Linda Silver-Jones, R. C. McEntire, Jr., and Carol Stanley, Defendants, of whom Janette Clayton, Lands Inn, Inc. d/b/a Lands Inn and Comfort Inn are, Respondents.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 25986
Heard April 20, 2005 – Filed May 23, 2005

AFFIRMED

Charles R. Norris, John S. Slosson, and Robert W. Whelan, all of Nelson Mullins Riley & Scarborough, of Charleston, for Appellant.

Ervin Lindsay Blanks, of North Charleston, F. Barron Grier, III, of Grier Law Firm, LLC, of West Columbia, James Edward Bell, III, of Sumter, and John E. Parker, of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Hampton, for Respondents.

JUSTICE PLEICONES: This is an appeal from a circuit court order granting respondent Lands Inn and respondent Clayton summary judgment on an insurance policy coverage question, and holding Lands Inn was entitled to indemnification by appellant (Owners) for a $1.25 million judgment in Clayton's tort suit. Owners asserts the circuit court erred in finding that coverage was not precluded by the policy's employment-related practices (ERP) exclusion, and that several other statements in the order are incorrect. We hold that the ERP exclusion does not apply, and that the inaccuracies in the order have not prejudiced Owners. We therefore affirm.

FACTS

The underlying tort judgment was obtained by Clayton, a former manager of Lands Inn, a motel. Lands Inn fired Clayton for allegedly stealing and embezzling funds. After she was fired, two individuals who called the motel and asked to speak to Clayton were told by a Lands Inn employee that she had been terminated because she had stolen money or misappropriated funds. After a criminal charge against Clayton was nol prossed, she filed a civil suit against Lands Inn. The case was submitted to the jury on three causes of action: malicious prosecution, slander, and negligence. The jury returned a general verdict of $1.25 million, of which $500,000 was for compensatory damages and $750,000 for punitive damages.

Owners provided Commercial General Liability (CGL) coverage to Lands Inn. It defended the Clayton suit under a full reservation of rights, but prior to that trial commenced this declaratory judgment suit. Owners now appeals a circuit court order granting Lands Inn summary judgment on the

coverage issue and holding Lands Inn entitled to indemnification for the $1.25 million Clayton verdict.[1]

ISSUES

On appeal, Owners raises these issues:

1) Did the trial judge err in finding the policy language ambiguous?

2) Did the trial court err in holding the ERP exclusion did not apply?

3) Did the trial court err in holding that Owners must indemnify Lands Inn for $1.25 million when the policy limit is $1 million?

4) Did the trial court's order and judgment form contain other inaccuracies?

A. Ambiguous Policy

The trial court found the CGL policy "potentially" ambiguous since it purported first to cover malicious prosecution and slander, but then to exclude slander in the ERP exclusion. Relying on S.C. State Budget & Control Bd. v. Prince, 304 S.C. 241, 403 S.E.2d 643 (1991), the circuit court concluded that such an inclusion/exclusion situation creates an ambiguity. Owners argues that, logically, exclusions can only apply to otherwise covered items, for if the item is not covered it is by definition excluded. We agree with Owners that the trial court misread Prince.

[1] Only the malicious prosecution and defamation theories are involved in this appeal, and the only exclusion issue decided is that of the ERP exclusion. There remain unresolved issues concerning the negligence theory, the failure to cooperate exclusion, and equitable estoppel.

The policy provides this coverage:

> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement.
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY
>
> 1. Insuring Agreement
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" to which this coverage part applies.

The Definitions section of the policy then provides:

> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any one time.
>
> 10. "Personal injury" means, other than "bodily injury", arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
> b. **Malicious prosecution**;
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
> d. **Oral or written publication of material that slanders or libels a person** or organization or

disparages a person's or organization's goods, products or services; or

e. Oral or written publication of material that violates a person's right of privacy.

(emphasis supplied).

The purported "ambiguity" arises because the ERP exclusion provides:

EMPLOYMENT-RELATED PRACTICES EXCLUSION

1. The following exclusion is added to COVERAGE A (Section I):
   o. "Bodily injury" arising out of any:
      (1) Refusal to employ;
      (2) Termination of employment;
      (3) Coercion, demotion, evaluation, reassignment, discipline, **defamation**, harassment, humiliation, discrimination or other employment-related practices, policies, acts, or omissions; or
      (4) Consequential "bodily injury" as a result of (1) through (3) above.

   This exclusion applies whether the insured may be held liable as an employer or in any other capacity and to any obligation to share damages with or to repay someone else who must pay damages because of the injury.

2. The following exclusion is added to COVERAGE B (Section I):
   c. "Personal injury" arising out of any:
      (1) Refusal to employ;
      (2) Termination of employment;
      (3) Coercion, demotion, evaluation, reassignment, discipline, **defamation**, harassment, humiliation, discrimination or other employment-related practices, policies, acts, or omissions; or

(4) Consequential "personal injury" as a result of (1) through (3) above.

(emphasis supplied).

In Prince, the insurance policy defined "personal injuries" to include several intentional torts. The policy's definition of "occurrence," however, required "an accident…which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." The Prince court held that there was an ambiguity in this definitional section, in that the intentional torts defined as "personal injuries" were effectively eliminated by the definition of "occurrence." We agree with Owners that Prince is inapposite, as here the coverage "elimination" is found in one of the policy's exclusions, not in inconsistent definitions.

The trial court erred in finding the policy ambiguous.

B. Application of the ERP Exclusion

Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability. Boggs v. Aetna Cas. and Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979). In addition, since the Clayton jury returned a general verdict, a finding that any of the three claims submitted to that jury is not excluded answers the coverage question. See, e.g., Frazier v. Badger, 361 S.C. 94, 603 S.E.2d 587 (2004) (where general verdict is supported by at least one theory it will be upheld on appeal). As discussed below, we find that coverage for the Clayton defamation award is not precluded by the ERP exclusion.

The ERP exclusion specifically excludes coverage for "Bodily Injury" and "Personal Injury" "arising out of any…defamation…or other employment-related practices, policies, acts, or omissions…." In South Carolina, the term "arising out of" when used in an insurance policy exclusion should be narrowly construed to mean "caused by." McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 426 S.E.2d 770 (1993). Further, in determining whether post-termination defamations such as the ones here fall

within an ERP exclusion, courts generally inquire whether the statement was made in the context of employment, and whether the statement's content describes the employee's performance. HS Servs. v. Nationwide Mut. Ins. Co., 109 F.3d 642 (9th Cir. 1997) (defamation not clearly employment related because while statement's contents related to employment, the statements were not made in the context of employment, but rather to competitors to discourage business dealings with former employee); Adams v. Pro Source, 231 F.Supp.2d 499 (M.D. La. 2002); see also Frank and Freedus v. Allstate Ins. Co., 52 Cal. Rptr.2d 678 (Cal. Dist. Ct. App. 1996) (was post-termination statement directed to performance while employed and made in employment context).

In her tort suit, Clayton presented evidence of two separate defamations. One occurred when a former hotel guest called Lands Inn and asked to speak with Clayton. When told she "was no longer here," the caller asked whether she had quit and was told Clayton had been "let go." When the caller pressed for a reason, the receptionist replied, "Well, she misappropriated funds so we let her go." The second defamation occurred when a person with whom Clayton had a separate business relationship called the motel to speak with her and was told Clayton had been fired or let loose, and either that she had stolen or embezzled thousands of dollars.[2]

The trial court correctly held that these defamations were not "employment-related" and that therefore the ERP exclusion did not negate Owners' obligation to indemnify Lands Inn under the CGL policy. While the substance of the defamatory statement**s** was employment-related, that is, the fact that Clayton had been fired and the reason why, the context was not. The information was not being relayed to other employees to explain Clayton's termination nor was it conveyed to persons such as potential employers who were inquiring about Clayton's performance as an employee. Instead, the Lands Inn employee gratuitously relayed the information to Clayton's acquaintance and to her business associate. The employment context was not present here.

[2] The witness was unclear as to the exact words used.

We therefore affirm the finding that the defamation claim was covered by Owners' policy since it was not within the ERP exclusion. HS Servs., *supra*; Adams v. ProSource, *supra*; Frank and Freedus, *supra*. Our holding that the exclusion does not apply to the defamation claim means that Owners must indemnify Lands Inn for the Clayton general verdict. Frazier, *supra*. Accordingly, we need not address whether the malicious prosecution claim[3] is within the ERP exclusion. Id.

C. Error in Amount of Indemnification

The order refers to the CGI policy's $1 million limit several times. In the order's final paragraph, however, it requires that Owners indemnify Lands Inn for the full amount of the $1.25 million Clayton verdict. Owners contends this was error in light of the policy limit, and we agree that the $1.25 million reference appears to be a mere scrivener's error. We decline to revise this portion of the order on appeal, but do so without prejudice to Owners' right to file a Rule 60(a), SCRCP, motion for relief in the circuit court.

D. Other Scriveners' Errors

Owners complains that the appealed order and the accompanying judgment form contain several additional clerical errors. Respondents concede these errors exist, but contend that the errors have caused neither prejudice to Owners nor confusion in the circuit court. Owners does not contest respondents' contentions. Error without prejudice does not warrant reversal. E.g., Loftis v. SCE&G, 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004).

[3] Clayton was arrested, charged, and indicted for "Breach of Trust with Fraudulent Intent" in violation of S.C. Code Ann. § 16-13-230, based on allegations that Clayton took Lands Inn's money while serving as the business's manager.

CONCLUSION

We affirm the trial court order holding that Owners must indemnify Lands Inn for the Clayton verdict, without prejudice to Owners' right to move pursuant to Rule 60(a), SCRCP for the correction of the amount to be indemnified.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Appellant,

v.

Richard H. Crooks, M.D., Respondent.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 25987
Heard April 5, 2005 – Filed May 23, 2005

AFFIRMED

Gregg E. Meyers, of Charleston, and J. David Flowers, of Greenville, for Appellant.

Dewey Oxner and Moffatt McDonald, both of Haynsworth Sinkler, Boyd, of Greenville, for Respondent.

J. Graham Sturgis, Jr., of Charleston, for Amicus Curiae, Darkness to Light.

JUSTICE PLEICONES: In this sexual-abuse action, the circuit court granted summary judgment for Respondent Richard H. Crooks, M.D. (Crooks), holding that the action of Appellant John Doe (Doe) was barred under the statute of limitations. We certified the case pursuant to Rule 204(b), SCACR. We affirm.

FACTS

This action was commenced in 2002, when Doe was thirty-four years old. He asserts that in 1983, when he was fourteen or fifteen years old, Crooks molested him.

Doe acknowledges that he was aware of the alleged abuse while it was occurring; that he knew at the time that it was wrong; that he immediately began to feel shame; and that he has "dealt with this shame since the first time [the abuse] occurred." Doe claims, however, that he did not realize the full extent of his injuries until 2001, when he was thirty-three years old. Only then, he claims, did he understand that the molestation caused him to be obsessive about cleanliness, over-protective of his children, and distrustful of others.

The circuit court held that under the statute of limitations, the time for Doe to commence his action had expired. The court therefore granted summary judgment for Crooks.

ISSUE

Whether the circuit court erred in holding that Doe's action was barred under the statute of limitations.

ANALYSIS

South Carolina Code section 15-3-555,[1] the current statute of limitations for sexual-abuse actions, was adopted in 2001. See 2001 Act No. 102 (effective August 31, 2001). Prior to 2001, the limitations period was provided by sections 15-3-530(5)[2] and 15-3-535.[3]

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[1] S.C. Code Ann. § 15-3-555 (Supp. 2003).

[2] S.C. Code Ann. § 15-3-530(5) (1976 and Supp. 2003) (regarding actions arising from injury to the person, among other things).

Ordinarily, a new statute of limitations applies retroactively.[4] However, it cannot operate to revive an action for which the limitations period has already expired. Such a result would violate the defendant's rights under the Due Process Clause of the South Carolina Constitution.[5] Goff v. Mills, 279 S.C. 382, 386, 308 S.E.2d 778, 780 (1983); U.S. Rubber Co. v. McManus, 211 S.C. 342, 349, 45 S.E.2d 335, 338 (1947); Stoddard v. Owings, 42 S.C. 88, 92, 20 S.E. 25, 26 (1894).

The circuit court held that when section 15-3-555 became the statute of limitations governing sexual-abuse cases, Doe's cause of action had already lapsed under sections 15-3-530(5) and 15-3-535. We agree. Consequently, whether the action is barred under section 15-3-555 is irrelevant.

Under the discovery rule, the limitations period commences when the plaintiff "kn[o]w[s] or by the exercise of reasonable diligence should [know] that he ha[s] a cause of action." § 15-3-535. That the injured party may not at that time "comprehend the full extent of the damage is immaterial." Dean v. Ruson Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996).

As stated above, Doe acknowledges that he was aware of the alleged abuse when it occurred, when he was a fifteen-year-old minor; that he knew at the time that it was wrong; that he immediately felt shame; and that he has "dealt with this shame" ever since. Thus, discovery occurred in 1983, when

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[3] S.C. Code Ann. § 15-3-535 (1976 and Supp. 2003) (providing the discovery rule for "actions initiated under Section 15-3-530(5)").

[4] Statutes of limitations generally apply retroactively because they are remedial in nature. The General Assembly may, of course, express its intent that a new statute of limitations applies only prospectively. Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990); Goff v. Mills, 279 S.C. 382, 386, 308 S.E.2d 778, 780 (1983). No such intent is expressed in section 15-3-555.

[5] S.C. Const. art. I, § 5.

Doe was fifteen years old. See Doe v. R.D., 308 S.C. 139, 417 S.E.2d 541 (1992) (holding that a plaintiff who was aware of sexual abuse when it was occurring should have known at that time that he had a cause of action).

Under section 15-3-40(1),[6] the limitations period was tolled until Doe reached the age of majority, eighteen. Under section 15-3-535, Doe then had six years to file his action.[7] In other words, Doe needed to file by the time he turned twenty-four. Because he failed to do so, his cause of action lapsed in 1992, nine years before section 15-3-555 was adopted. We therefore need not address whether the action would be barred under section 15-3-555. The action is barred.

CONCLUSION

The statute of limitations prevents Doe from pursuing his action. The circuit court's grant of summary judgment for Crooks is

AFFIRMED.

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

[6] S.C. Code Ann. § 15-3-40(1) (Supp. 2003).

[7] For actions accruing prior to April 5, 1988, the limitations period is six years in duration. The three-year limitations period now found in the Code applies to actions accruing on or after April 5, 1988. 1988 Act No. 432.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Delbert L. Smalls, Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal from Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25988
Heard October 19, 2004 – Filed May 23, 2005

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Ralph E. Hoisington, of Charleston, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: We granted certiorari to review the court of appeals' decision in *State v. Smalls*, 354 S.C. 498, 581 S.E.2d 850 (Ct. App. 2003), in which the court held that the trial court lacked subject matter jurisdiction to enter a plea. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Delbert Smalls (Defendant) was indicted by a grand jury for second-degree lynching. Defendant pled guilty to assault and battery of a high and aggravated nature (ABHAN),[1] a charge for which he was never indicted. Defendant signed a sentencing sheet, which indicated that he waived presentment to the grand jury and pled guilty to the charge. The sentencing sheet also referenced the indictment for lynching but acknowledged that Defendant, "in disposition of said indictment," pled to ABHAN. He was sentenced as a youthful offender for a term not to exceed six years. Defendant appealed.

On appeal, Defendant contended that the circuit court lacked jurisdiction to enter the guilty plea for ABHAN because Defendant was never indicted for ABHAN. The court of appeals vacated Defendant's plea, holding that Defendant could not effectively waive the indictment for ABHAN because he was never indicted for that charge. The State's motion for rehearing was denied. This Court granted certiorari.

The issue before this Court is as follows:

> Does a court have subject matter jurisdiction to enter a guilty plea to a charge for which a defendant has not been indicted, and where the defendant signs a sentencing sheet acknowledging a waiver of presentment to the grand jury?

[1] Defendant also pled guilty to possession of crack cocaine and possession of a stolen vehicle, and he was sentenced as a youthful offender not to exceed five years. These charges are not at issue in this appeal.

LAW / ANALYSIS

Defendant argues that the trial court did not have subject matter jurisdiction to enter a guilty plea. We disagree.

We address this issue in light of this Court's recent decisions in *State v. Gentry*, Op. No. 25949 (S.C. Sup. Ct. filed March 7, 2005) (Shearouse Adv. Sh. No. 13 at 37) and *Evans v. State*, Op. No. 25963 (S.C. Sup. Ct. filed April 4, 2005) (Shearouse Adv. Sh. No. 15 at 52). In these cases, we abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid indictment. The court of general sessions has subject matter jurisdiction to try criminal cases. *Gentry* at 43 (citing S.C. Const. Art. V, § 11, which states that the circuit court is the general trial court with original jurisdiction in civil and criminal matters).

Although an indictment does not confer subject matter jurisdiction, due process requires that a criminal defendant be properly served with a valid indictment. The indictment is a notice document that is required by our state constitution and statutes. *Evans* at 60. "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to appraise him of the elements of the offense and to allow him to decide whether to pled guilty or stand trial." *Evans* at 60. Accordingly, challenges to the sufficiency of an indictment must be raised before a jury is sworn. *Gentry* at 43.

If the challenge is raised before the jury is sworn, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. *Gentry* at 44-45 (citing *State v. Wilkes*, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003)).

We hold that signing a sentencing sheet for a charge to which a defendant has pled guilty constitutes a written waiver of presentment.

Moreover, a signed document that informs a defendant of the charges against him, such as a sentencing sheet, gives rise to a presumed regularity in the proceedings and signifies that the defendant has been notified of the charges to which he has pled guilty.

In a criminal case, a defendant who chooses to plead guilty has ample opportunity to be fully notified of the charges he is pleading guilty to. First, a defendant may check a box on the sentencing sheet to indicate a waiver of presentment of the indictment to the grand jury. Second, a defendant may check a box to indicate that he wishes to plead guilty. In addition, a defendant may sign the sentencing sheet, indicating the defendant is informed of the choices and has selected the box that corresponds to the course of action the defendant wants to take in the case. As a result, we believe that all of these factors indicate that the Defendant had notice of the charges to which he chose to plead guilty.

In the present case, Defendant signed a sentencing sheet indicating that he waived presentment of the indictment to the grand jury. However, Defendant pled guilty to a charge for which an indictment was not prepared.[2] But, we believe that aforementioned factors were present to provide Defendant with proper notice. Therefore, we hold that Defendant had notice of the charges to which he pled guilty.

CONCLUSION

Accordingly, a defendant may waive presentment by signing a sentencing sheet that indicates the crime charged. Moreover, it is not necessary to prepare another indictment for the charge to which Defendant plead guilty. A signed document gives rise to a presumed regularity in the proceedings that the defendant was informed of the charges against him. The court of appeals' decision is REVERSED and the conviction and sentence are AFFIRMED.

[2] In the words of the circuit court judge, Defendant was "pleading down" to the charge.

MOORE, WALLER, and BURNETT, concur. PLEICONES, JJ., concurring in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that the Court of Appeals erred in vacating respondent's guilty plea, but write separately because I adhere to my dissenting position expressed in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In my opinion, the circuit court lacks subject matter jurisdiction to accept a guilty plea unless the Grand Jury has returned a True Bill, or unless the defendant executes a written waiver of presentment prior to the trial court's acceptance of the plea. S.C Const. art. I, § 11; S.C. Code Ann. §§ 17-23-130 and –140 (2003).

Here, the State relies upon respondent's signature on a sentencing sheet that contains all the information necessary for a valid waiver of presentment to meet the statutory requirements[3]. While there is nothing in the record that indicates when the sentencing sheet was signed, in the absence of evidence to the contrary, proceedings in the court of general sessions are presumed to have been regular. E.g., Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Applying this presumption, I conclude respondent failed to meet his burden of showing there was no valid waiver of presentment. For this reason, I concur in the majority's decision to reverse the Court of Appeals.

[3] I disagree with the Court of Appeals that the Constitution and the statutes require the preparation of an indictment as a prerequisite to a waiver of presentment.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James T. Cowburn, Appellant,

v.

Andrew P. Leventis, Jr. and
Fidelity National Bank, Respondents.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3990
Heard February 9, 2005 – Filed May 16, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Joe Mooneyham, of Greenville, for Appellant.

Donald R. Moorhead, Mason A. Goldsmith and John L. B. Kehl, all of Greenville and James Timothy White and P. Jay Pontrelli, both of Atlanta, for Respondents.

HEARN, C.J.: James Cowburn brought several causes of action against Andrew Leventis and Fidelity National Bank related to his investment in a Ponzi scheme.[1] Both Leventis and Fidelity made motions for summary judgment, which the trial court granted. We affirm in part, reverse in part, and remand.

FACTS

James Cowburn contributed financially to a series of investments collectively known as the "Cash 4 Titles Program" (the Program). The Program, as it was described to Cowburn, engaged in the business of issuing short-term, high interest rate notes and bonds for the purpose of funding the automobile title lending industry. Cowburn first learned of the Program from a former co-worker, Clyde Matkin. Matkin then referred Cowburn to Andrew Leventis, an attorney who Matkin stated could get him into the Program. During Cowburn's meeting with Leventis, Leventis provided further details about the Program. Subsequently, Leventis arranged to accompany Cowburn on a trip to Atlanta to meet with Michael Gause, a principal in the Program. Cowburn alleges he decided to invest in the Program based on his conversations with Leventis and Gause.

Cowburn used money from his individual retirement account (IRA) to invest in the Program. According to Cowburn, Leventis informed him that Gause chose Fidelity National Bank as the conduit through which investors could contribute to the Program. Cowburn opened a self-directed individual retirement account (SDIRA) with Fidelity and transferred money from his other accounts into this SDIRA. Cowburn then completed the necessary paperwork to enable Fidelity to invest the money from his SDIRA into various notes and bonds connected with the Program. Specifically, Cowburn's investments consisted of: (1) a 270-day promissory note from

[1] Black's Law Dictionary (8th ed. 2004) defines a Ponzi scheme as "[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments."

Bellwether Holdings for $150,000, dated September 1, 1998; (2) a 270-day promissory note from Bellwether holdings for $100,227, dated October 1, 1998 ; (3) a seven-year bond from Southwestern Holdings for $318,000, issued on February 1, 1999; (4) a seven-year bond from Southwestern Holdings for $12,000, issued on April 1, 1999; (5) a seven-year bond from Southwestern Holdings for $14,000, issued on June 1, 1999; (6) a 270-day promissory note from Southern Title Holdings for $15,000, dated August 1, 1999; and (7) a 270-day promissory note from Southern Title Holdings for $43,000, dated September 1, 1999.

The Program initially performed as expected, and Cowburn received the interest payments he anticipated. However, in October of 1999, Cowburn received a call from Leventis informing him that his money was gone. Leventis informed Cowburn the Program was actually an illegal Ponzi scheme and that Gause had been arrested in connection with it.

Cowburn filed suit against both Leventis and Fidelity, alleging the following causes of action: (1) legal negligence against Leventis; (2) breach of fiduciary duty against Leventis and Fidelity; (3) violation of the South Carolina Uniform Securities Act against Leventis and Fidelity; (4) violation of the South Carolina Unfair Trade Practices Act against Leventis; (5) fraud against Leventis and Fidelity; (6) negligence against Fidelity; and (7) civil conspiracy against Leventis and Fidelity. Leventis and Fidelity filed motions for summary judgment. The trial court issued an order granting both Leventis's and Fidelity's motions. Cowburn appeals.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. Trousdell v. Cannon, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002). Pursuant to Rule 56(c), SCRCP, summary judgment may be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Id. "On appeal from summary

judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party." Cantrell v. Green, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990).

LAW/ANALYSIS

I. Whether the trial court erred in granting summary judgment to Leventis?

a. Violation of the South Carolina Securities Act

Cowburn argues the trial court erred in finding there was no material issue of fact concerning his allegation that Leventis violated sections of the South Carolina Uniform Securities Act (the Act). We agree.

Initially, in order to determine whether the act was triggered, we must decide whether the investments made by Cowburn are securities. Section 35-1-20(15) of the South Carolina Code (Supp. 2004) provides the definition of "security" as "any note, stock, treasury stock, bond, debenture, [or] evidence of indebtedness, ..." Cowburn's investments, as indicated on the statements he received from Fidelity, consisted of promissory notes and bonds. Therefore, Cowburn's investments in the Program were securities pursuant to the Act. See McGaha v. Mosley, 283 S.C. 268, 273, 322 S.E.2d 461, 464 (Ct. App. 1984) ("An instrument may be included within any of the Act's definitions of a 'security,' if on its face it answers to the name or description contained therein.").

Because the investments were securities, the next issue we must resolve is whether Leventis's sale of those securities gave rise to a cause of action under the Act. "The South Carolina Uniform Securities Act . . . created public enforcement provisions as well as private civil remedies which are compensatory in nature. The Act authorizes the state Securities Commissioner to enforce its provisions, while giving private plaintiffs a limited civil right of action for securities fraud." Atlanta Skin & Cancer

Clinic, P.C. v. Hallmark Gen. Partners, Inc., 320 S.C. 113, 116-17, 463 S.E.2d 600, 602 (1995). Section 35-1-1490 provides a private right of action for buyers of securities against "[a]ny person who . . . offers or sells a security in violation of . . . Section 35-1-410 or Section 35-1-810 . . . ."[2] Cowburn argues the trial judge erred in granting summary judgment to Leventis because genuine issues of material fact existed as to whether Leventis violated the Act. Specifically, Cowburn asserts that (1) the securities were not registered pursuant to section 35-1-810, and (2) Leventis failed to register as a broker-dealer in violation of section 35-1-410. We agree.

Section 35-1-810 states: "It is unlawful for any person to offer or sell any security in this State unless (a) it is registered under this chapter, (b) the security or transaction is exempted under Section 35-1-310 or 35-1-320 . . . ." Leventis argues he did not act in violation of section 35-1-810 because (1) he did not offer to sell the securities, and (2) the securities were exempt under sections 35-1-310 and -320.

An "offer to sell" securities is defined in section 35-1-20(13)(b) as "every attempt or offer to dispose of, or solicitation of an offer to buy, a security interest in a security for value." In this case, Leventis's role in the Program went beyond simply recommending an investment to a friend; rather Leventis played an integral role in the Program. Leventis introduced investors, such as Cowburn and Matkin, to the Program. In his deposition, Leventis stated he referred people to the Program and received a referral fee

[2] Section 35-1-1490 states that any person buying a security from someone acting in violation of sections 35-1-410 or -810 may "recover the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition."

for doing so. Leventis confirmed he referred approximately twenty people to the Program. Leventis told potential investors about the Program and provided written information to them regarding the Program. Leventis persuaded potential investors to contribute to the program by telling them about other investors, including him and his mother, and their contributions. He also arranged trips for potential investors to meet with Gause and other principals of the Program. After individuals decided to invest in the Program, Leventis assisted them in making their investment by providing them with forms and information about how to set up a SDIRA. He even went further in some cases by filling out the forms for investors and assisting them with transactions. Additionally, Cowburn testified he viewed Leventis as selling the investments purchased under the Program. Thus, we find a genuine issue of material fact exists as to whether Leventis offered to sell securities.

Further, we find there is a genuine issue of material fact as to whether the securities were exempt under sections 35-1-310 and -320. Section 35-1-310(9) exempts short-term commercial paper from the registration requirements of section 35-1-810, stating:

> Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions and which evidences an obligation to pay cash within nine months of the date of issuance . . . or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal . . . .

In this case, Cowburn's initial investment consisted of short-term commercial paper exempted under section 35-1-310(9) because it was an investment in

270-day promissory notes,[3] which were obligated to be paid within nine months.

However, Cowburn's subsequent investments were funded in part by the redemption proceeds on those short-term notes and included several seven-year bonds. Leventis asserts that these transactions were similarly exempted from the securities registration requirement of section 35-1-810 because they were "rollover" transactions. Section 35-1-320(11) provides that "[a]ny transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, [is an exempt transaction], if (a) no commission or other remuneration, other than a standby commission, is paid or given directly or indirectly for soliciting any security holder in this State or (b) the issuer first files a notice specifying the terms of the offer and the securities commissioner does not . . . disallow the exemption . . . ."

In the present case, Cowburn did not invest with the same issuer for each transaction. His initial investments were with Bellwether Holdings, but subsequent transactions included investments with Southwestern Holdings. Further, Leventis's and Priority Advisors' tax returns reflect income from "referral fees" for the years 1998 and 1999 respectively. Because a material issue of fact exists as to whether the securities were exempt, the trial judge erred in granting summary judgment in favor of Leventis on Cowburn's allegation that he violated section 35-1-810 of the Act. See Gordon v. Drews, 358 S.C. 598, 606, 595 S.E.2d 864, 868 (Ct. App. 2004) (stating that exemptions from the Act must be narrowly construed to protect investors); Cantrell v. Green, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990) (stating that in reviewing a grant of summary judgment, a reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party).

[3] Black's Law Dictionary (8th 2004) defines "commercial paper" to include "a short-term unsecured promissory note, usu. issued and sold by one company to meet another company's immediate cash needs."

Moreover, we also find a genuine issue of material fact with respect to Cowburn's allegation that Leventis failed to register as a broker-dealer in violation of section 35-1-410. Section 35-1-410 states: "It is unlawful for any person to transact business in this State as a broker-dealer or agent unless he is registered under this chapter or exempt from licensing under this chapter." Section 35-1-20 defines a "broker-dealer" as "any person engaged in the business of effecting transactions in securities for the account of others or for his own account" and an "agent" as "any individual, other than a broker-dealer, who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities."

As set forth above, the evidence indicates that Leventis played an essential role in marketing and referring investors to the Program. Leventis also provided investors with forms to set up a SDIRA with Fidelity, and in some cases, completed the forms for customers. In 1998, Leventis's tax return reflected over $120,000 in referral fees from the Program. In addition, Leventis was the sole owner of Priority Advisors, which he described as being in the business of referring people to the Program. In 1999, the tax return for Priority Advisors reflected $297,367 in income from referrals. Priority Advisors also received an ownership interest in Southwestern Holdings, one of the entities under the Program, without purchasing it. The subscription agreement for Southwestern Holdings indicates Leventis served as its marketing manager at the time Cowburn made his investment in Southwestern Holdings.

This evidence indicates Leventis may have been "effecting transactions in securities" when he referred Cowburn to the program. S.C. Code Ann. § 35-1-20(2) and (3). Thus, evidence exists that Leventis acted as a broker-dealer or agent of Priority Advisors and Southwestern Holdings pursuant to section 35-1-20 of the South Carolina Code.

Leventis does not dispute that he was not registered as a broker-dealer or agent. Rather, Leventis argues even if he were a broker-dealer or agent, he was exempt from the registration requirement.

Leventis argues he was exempt from registering as a broker-dealer because the securities he dealt with were exempted securities pursuant to S.C. Code Ann. § 35-1-310(9) (providing that short-term commercial paper is a security exempt from the registration requirement of S.C. Code Ann. § 35-1-810). Section 35-1-415(3)(b) provides that agents acting for an issuer effecting transactions in securities that are exempt from registering under 35-1-310(9) are exempt from the registration requirements of section 35-1-410.

As stated above, we find there is a genuine issue of material fact as to whether the securities were exempt securities. Likewise, we find a genuine issue of material fact as to whether Leventis was exempt from registering as an agent of an issuer based on section 35-1-415(3)(b).

Leventis further asserts that South Carolina Attorney General Order Number 97003 exempts him from registration as an agent because it permits an officer or director of Southwestern to make sales of securities without registration. The relevant section of Order Number 97003 reads as follows:

> No principal, partner, officer, or director of an issuer offering its securities under a South Carolina registration, shall engage in the sale of securities in South Carolina without a Sales Permit or registration as a securities agent. Sales Permits will be deemed to have been issued unless notification of disallowance is provided to the issuer by the Securities Commissioner <u>following at least thirty (30) days prior notice to the Office of the Securities Commissioner, filed in duplicate with a return envelope, of the names and corporate titles of each principal, partner, officer and director of the issuer along with a signed statement from each of the individuals selling the securities indicating they: (1) perform or are intended to perform substantial duties</u>

> for or on behalf of the issuer otherwise than in connection with transactions in securities and (2) will not be compensated in connection with their participation by payment of commissions or other remuneration based either directly or indirectly on transactions in securities.

(emphasis added).

Nothing in the record, including the cover letter provided by the Attorney General, suggests that Leventis met the requirements of Order Number 97003 by giving thirty days notice, along with a sworn statement that he would perform duties "other than in connection with transactions in securities" or that he would not be compensated for his participation. We find genuine issues of fact exist as to whether Order Number 97003 exempts Leventis from registration as a broker-dealer or agent. See Gordon, 358 S.C. at 606, 595 S.E.2d at 868; Cantrell, 302 S.C. at 559, 397 S.E.2d at 778. Therefore, we reverse the trial court's grant of summary judgment as to Cowburn's private cause of action under section 35-1-410.[4]

[4] Leventis also argues that he was exempt from registration because as president of Priority Advisors, Inc., a company operating as director of Southwestern Holdings, he was not required to register by virtue of Southwestern's "Regulation D" filing, which exempts the company from registering its securities. See 17 C.F.R. §§ 230.501 to 230.508 (2004). This issue was not argued to the trial court in Leventis's motion for summary judgment or at the hearing on the motion.

This court may review additional sustaining grounds raised by a respondent, and "if convinced it is proper and fair to do so, rely on them or any other reason" raised on appeal and appearing in the record to affirm the lower court's judgment. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). In this case, we decline to review this potential additional sustaining ground because we are not convinced it is proper and fair to do so. This particular issue implicates complex state and

b. Fraud

Cowburn asserts the trial court erred in determining no genuine issue of material fact existed to show Leventis defrauded him. We disagree.

In order to establish a claim for fraud, a plaintiff must establish the following elements: "a representation; its falsity; its materiality; knowledge of its falsity or a reckless disregard of its truth or falsity; intent that the representation be acted upon; hearer's ignorance of its falsity; hearer's reliance on its truth; hearer's right to rely; and hearer's consequent and proximate injury." First State Sav. & Loan v. Phelps, 299 S.C. 441, 446-47, 385 S.E.2d 821, 824 (1989). "Each and every one of these elements must be proven by clear, cogent, and convincing evidence." Regions Bank v. Schmauch, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003).

First, Cowburn asserts Leventis misrepresented the status of the bonds issued by two of the entities affiliated with the program, Southwestern Holdings and Southwestern Title Holdings. However, Cowburn fails to specify the misrepresentation. In addition, Cowburn fails to assert evidence of the other necessary elements in order to establish his claim for fraud. Because Cowburn did not assert a representation or any of the other required elements of fraud, we find no genuine issue of material fact with regard to this claim.

The only other misrepresentation asserted by Cowburn was Leventis's statement that his mother invested $50,000 in the Program. Cowburn contends this statement is contradictory to a statement Leventis made at his deposition that he invested only $30,000 of his mother's money in the Program. We agree with the trial court's determination that Cowburn neither presented evidence of the falsity of Leventis's statement nor established that it was material to his decision to invest in the Program. In addition, Cowburn

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federal securities law, which were summarily addressed by Leventis in his brief on appeal. See also Gordon, 358 S.C. at 606, 595 S.E.2d at 868; Cantrell, 302 S.C. at 559, 397 S.E.2d at 778.

did not present evidence of Leventis's intent for him to rely on the statement. Therefore, we find the trial court properly granted summary judgment to Leventis on this issue.

c. Breach of Fiduciary Duty

Cowburn argues there was a material issue of fact regarding his claim that Leventis owed him a fiduciary duty, violated that duty, and acted negligently.[5] Cowburn maintains Leventis's duties to him arose because Leventis acted as a seller of securities, and Leventis breached this duty by failing to investigate investments under the Program. We disagree.

The determination of whether a fiduciary relationship exists is an equitable issue to be determined by the court. Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). Moreover, the evidence must show the entrusted party "'actually accepted or induced the confidence placed in him.'" State v. Parris, 353 S.C. 582, 593, 578 S.E.2d 736, 742 (Ct. App. 2003) (quoting Brown v. Pearson, 326 S.C. 409, 423, 483 S.E.2d 477, 484 (Ct. App. 1997)).

A broker or dealer of securities is an agent of the buyer, and therefore, generally owes the buyer fiduciary duties. These duties often include the duty to account for all funds and property belonging to the buyer, to refrain from acting adversely to the buyer's interest, to avoid engaging in fraudulent conduct, and to communicate any information he or she may acquire that would be to the buyer's advantage. See 12 Am. Jur. 2d Brokers § 109 (1997). However, Cowburn has not cited any case that imposes a fiduciary

[5]Although Cowburn asserted a cause of action for legal negligence/malpractice, that issue was abandoned at the hearing on summary judgment.

duty upon a broker to investigate for any unknown potential risks of investment. Cf., 12 Am. Jur. 2d Brokers § 128 (1997) (asserting that a loan broker, who has agreed to find a specific type and quality loan for the customer, has a duty to conduct a reasonable investigation to ensure the loans were of that specific type and quality); Regions Bank v. Schmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003) (stating that bank may be held to a fiduciary duty to disclose material facts if it undertakes to advise); Moore v. Moore, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) ("Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." (emphasis added)); Eaddy v. Dorn, 289 S.C. 356, 359, 345 S.E.2d 513, 514-15 (Ct. App. 1986) (finding term "broker" included any person hired to conduct an auction for a fee and reaffirming a broker's fiduciary duty to keep its principal "fully and promptly informed of all material facts that come to the broker's knowledge with respect to the transaction in which the broker is engaged, affect the principal's interest, and might influence the principal's action." (emphasis added)); Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc., 286 S.C. 261, 267-68, 332 S.E.2d 781, 785 (Ct. App. 1985) ("A [real estate] broker owes a duty to its principal to keep it fully and promptly informed of all material facts that come to the broker's knowledge with respect to the transaction in which the broker is engaged, affect the principal's interest, and might influence the principal's action." (emphasis added)). See also Jordan v. UBS AG, 782 N.Y.S.2d 722 (App. Div. 1st Dep't 2004) (finding customer's allegation of breach of fiduciary duty against bond broker precluded by agreements between customer and broker in which customer acknowledged his own responsibility for making investment decisions and investigations). Therefore, we find the trial court properly granted summary judgment as to the breach of fiduciary duty cause of action.

d. Negligence

Cowburn also alleges an issue of material fact exists regarding whether Leventis acted negligently in failing to investigate the Program before recommending it to him. We disagree.

"Ordinarily, the common law imposes no duty on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care." Hendricks, 353 S.C. at 456-57, 578 S.E.2d at 714 (citations omitted).

Here again, Cowburn cites no authority for the proposition that Leventis was under a duty to investigate, nor does the evidence indicate he undertook such a duty. The record indicates Leventis's role in the Program was to refer investors to the Program, and in that capacity, we do not find a duty to investigate. Therefore, the trial court acted appropriately in granting summary judgment on Cowburn's negligence cause of action.

II. Whether the trial court erred in granting summary judgment in favor of Fidelity?

a. Agency

Cowburn argues Fidelity established an agency relationship with Leventis by giving him apparent authority to act on its behalf. We disagree.

"The test to determine agency is whether or not the purported principal has the *right to control* the conduct of the alleged agent." Fernander v. Thigpen, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982) (emphasis in original). "An agency relationship may be established by evidence of actual or apparent authority." Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004) (citation omitted). "The elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Graves v. Serbin Farms, Inc., 306 S.C. 60, 62, 409 S.E.2d 769, 771 (1991) (citation omitted). "[A]n agency may not be established solely by the declarations and conduct of an alleged agent."

Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996) (citation omitted).

Cowburn contends Leventis's apparent authority is evidenced by Fidelity giving Leventis application packages for SDIRAs, forms, and business cards of Fidelity employees. In addition, Cowburn states Leventis bolstered his apparent agency by filling out the forms for investors and by dealing directly with Fidelity. We find these actions do not establish the elements necessary to form apparent authority. First, supplying forms and employee business cards to Leventis does not amount to a representation that Leventis was an agent of Fidelity nor suggest that Fidelity had the right to control Leventis. Second, given that supplying Leventis with forms and business cards was the only action taken by Fidelity to evidence apparent authority, this is not enough to produce reliance by Cowburn. Third, Cowburn does not argue how he relied on this action by Fidelity to his detriment. Furthermore, the actions by Leventis, which Cowburn asserts bolstered his perception of an agency relationship, should not be considered because they are actions by the purported agent, not the principal. See id. at 244-45, 473 S.E.2d at 868 ("Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." (emphasis in original)). Therefore, we find no genuine issue of material fact exists to support Cowburn's claim that Leventis was an agent of Fidelity.

b. Affidavit

Cowburn argues the trial court failed to consider the affidavit from his expert, Thomas Mason, in resolving the motion for summary judgment, asserting the affidavit creates an issue of material fact as to the duties Fidelity

owed to Cowburn.[6] We find Cowburn did not preserve this issue for our review.

In order for an issue to be preserved for appellate review, with few exceptions, it must be raised and ruled upon by the trial judge. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004). When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

Leventis and Fidelity objected at the summary judgment motion hearing to Mason's affidavit on the grounds that it did not establish Mason as an expert, was not timely, was not notarized, and contained legal conclusions. Although the record includes discussions during the motion hearing concerning Mason's affidavit and Cowburn's assertions that it should be considered, the trial court never indicated whether it would consider it. In addition, the trial court did not specifically address Mason's affidavit in its written order granting summary judgment. We find the trial court did not rule upon this issue, and thus, whether or not the court erred in failing to consider the affidavit is not preserved for appeal. See id.

c. Breach of Fiduciary Duty

Cowburn argues a genuine issue of material fact existed as to whether Fidelity owed him a fiduciary duty and whether Fidelity breached that duty. We disagree.

As stated previously: "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests

[6] The affidavit does not contain any allegations concerning the duties owed by Leventis.

of the one reposing confidence." O'Shea, 308 S.C. at 15, 416 S.E.2d at 631 (citation omitted).

> The term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him. As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship. The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.

Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) (citations omitted).

Generally, a bank-depositor relationship establishes a creditor-debtor relationship rather than a fiduciary relationship. Rush v. South Carolina Nat'l Bank, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct. App. 1986).

> In limited circumstances, however, a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers. Unless the funds are deposited into a special account or specifically designated to be kept separate, the relationship between a general depositor and the bank is that of creditor and debtor, and a trust is not created.

Id. (citations omitted).

In the instant case, we find no evidence Fidelity undertook to advise Cowburn about his investments. To the contrary, Fidelity's custodial agreement provides as follows:

> **11.1 Hold Harmless.** You agree to hold us harmless, to indemnify, and to defend us against any and all claims arising from and liabilities incurred by reason of any action taken by us in good faith pursuant to this agreement.
>
> **11.2 No Investment Discretion.** You agree that all contributions shall be invested according to your sole discretion. All investments in the IRA shall be in one or more of the following: (1) term investments of the Custodian; (2) Marketable securities (excluding securities issued by Custodian or any of its affiliates acquired through a current underwriting); and any other category or investment acceptable to the Custodian. We shall not be responsible or liable for any investment decisions or recommendations with respect to the investment, reinvestment, or sale of assets in the custodial account. We shall not be responsible for reviewing any assets held in the custodial account and shall not be responsible for questioning any of your investment decisions. We shall not be responsible for any loss resulting from any failure to act because of the absence of direction from you.
>
> . . . .
>
> **11.3 Transaction Responsibility.** We are not responsible for inquiring into the nature or amount of any contribution made by you, nor into the amount or timing of any distribution requested.

(emphasis added). This language in the custodial agreement specifically limits Fidelity's duties and emphasizes that Fidelity does not advise SDIRA customers on their investment decisions. Fidelity's counsel questioned Cowburn in his deposition about these provisions in the custodial agreement, and Cowburn indicated he understood them. Cowburn also stated he understood the contract limited Fidelity's duties, and that Fidelity was not responsible for reviewing his investments. Cowburn also testified he had invested in SDIRAs in the past. He stated he understood Fidelity's role to be that of a custodian, and that it was not Fidelity's role to provide him with investment advice. Cowburn confirmed he alone was responsible for his investment decisions.

Cowburn acknowledged Fidelity did not make any affirmative representations regarding whether he should make an investment and did not give him financial advice. However, Cowburn asserts a single statement made by a Fidelity employee, Loree Adams, amounted to Fidelity undertaking to advise him. Cowburn states this was the only statement made by a Fidelity employee that he considered a recommendation. In regard to his conversation with Adams about the Program, Cowburn testified:

> I asked her for her opinion on this - - this investment.
> . . . .
>
> She said, "Well," - - words to this effect, 'cause, you know, it's been three years ago; words to the effect, "I've been here two years, and these guys have never missed a payment, and they're always on time, and it seems good to me."

We find this statement does not amount to Fidelity undertaking to advise Cowburn as to his investments. The first part of the statement concerns only the timeliness of interest payments made by the Program. It does not offer any advice to Cowburn regarding the quality of his investment. In addition, the statement, "it seems good to me," does not amount to rendering advice such that Cowburn would rely on its authenticity for purposes of imposing a

fiduciary duty on a bank. See Burwell, 288 S.C. at 41, 340 S.E.2d at 790 (stating that mere respect for another's judgment or trust in her character is usually not sufficient to establish a fiduciary relationship). Neither has Cowburn presented any evidence that Adams knew he was placing her in a position of special trust. Regions Bank v. Schmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003) ("[N]o fiduciary relationship between a bank and its depositor exists when the bank is unaware of any special trust reposed in it.").

Cowburn also argues section 408 of the Internal Revenue Code (West 2005) equates IRAs to trusts, thereby making Fidelity a trustee and imposing fiduciary duties on Fidelity. We disagree with Cowburn's interpretation of this section.

Section 408 provides as follows:

> **(a) Individual retirement account.**--For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:
> . . . .
>
> **(h) Custodial accounts.**--For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection

> (a). For purposes of this title, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.

(emphais added). Treasury Regulation 1.408-2 (West 2005) clarifies section 408 as follows:

> (a) In general. An individual retirement account must be a trust or a custodial account (see paragraph (d) of this section).
> . . . .
>
> (b) Requirements. An individual retirement account must be a trust created or organized in the United States (as defined in section 7701(a)(9)) for the exclusive benefit of an individual or his beneficiaries. Such trust must be maintained at all times as a domestic trust in the United States. The instrument creating the trust must be in writing and the following requirements must be satisfied.
> . . . .
>
> (d) Custodial accounts. For purposes of this section and section 408(a), a custodial account is treated as a trust described in section 408(a) if such account satisfies the requirements of section 408(a) except that it is not a trust and if the assets of such account are held by a bank (as defined in section 401(d)(1) and the regulations thereunder) or such other person who satisfies the requirements of paragraph (b)(2)(ii) of this section. For purposes of this chapter, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account will be treated as the trustee thereof.

(emphasis added).

Our review of the plain language of the statute and the associated regulations persuades us to find that an IRA or custodial account is not a trust per se, but is treated as a trust for purposes of this particular provision of the Internal Revenue Code. In addition, we do not find section 408 imposes particular fiduciary duties on a custodian of an IRA. Therefore, we disagree with Cowburn that section 408 imposes fiduciary duties upon Fidelity sufficient to establish a breach of fiduciary duty claim.

Because we do not find evidence that Fidelity owed Cowburn a fiduciary duty under any of the theories asserted by Cowburn, the trial court properly granted summary judgment on this issue.

d. Negligence

Cowburn asserts a genuine issue of material fact exists to establish his claim of negligence against Fidelity. He contends Fidelity's negligence arose out of the violation of its own polices and the terms of the custodial agreement.

In order to establish a claim for negligence, Cowburn must present evidence of a legal duty owed by Fidelity, a breach of that duty by a negligent act or omission, and damages that were proximately caused by that breach. Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). "The Court must determine, as a matter of law, whether the law recognizes a particular duty. An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003) (citations omitted).

First, Cowburn argues Fidelity breached its duties pursuant to the custodial agreement because Fidelity did not require him to purchase assets

through its brokerage arm. We disagree with Cowburn's interpretation of this provision.

The provision referred to by Cowburn states: "Unless you give specific instructions to the contrary, we shall effect securities purchases or sales, when possible, through our affiliate, Fidelity National Capital Investors, Inc. at the brokerage commission rate charged for similar accounts." (emphasis added).

We find this provision does not impose a mandatory duty on Fidelity, but rather allows Fidelity to purchase securities through its brokerage arm, "when possible." In addition, Cowburn fails to argue how this alleged violation of the custodial agreement proximately caused his injury. Therefore, we find no factual issue exists with regard to this argument.

Second, Cowburn asserts Fidelity breached its duty to Cowburn by failing to keep adequate and complete records in accordance with Fidelity's internal policies and to annually determine the fair market value of his investments in accordance with its own internal policies and the requirements of the Internal Revenue Code. Further, Cowburn maintains if Fidelity had complied with its policies, and with section 408(i) of the Internal Revenue Code (West 2005), it would have discovered the Program was a Ponzi scheme.

Fidelity's internal policy states regulations require custodians of SDIRAs to report the fair market value of the IRA to the IRS and the IRA holder annually. The internal policy also provides if the IRA contains investments other than publicly traded securities, "the bank must ascertain that they are legitimate methods for determining the FMV [fair market value] available." Section 408(i) of the Internal Revenue Code provides:

> **(i) Reports.**--The trustee of an individual retirement account and the issuer of an endowment contract described in subsection (b) or an individual retirement annuity shall make such reports regarding

> such account, contract, or annuity to the Secretary and to the individuals for whom the account, contract, or annuity is, or is to be, maintained with respect to contributions (and the years to which they relate), distributions aggregating $10 or more in any calendar year, and such other matters as the Secretary may require. The reports required by this subsection--
>
> > **(1)** shall be filed at such time and in such manner as the Secretary prescribes, and
> >
> > **(2)** shall be furnished to individuals--
> >
> > > **(A)** not later than January 31 of the calendar year following the calendar year to which such reports relate, and
> > >
> > > **(B)** in such manner as the Secretary prescribes.

Initially, Cowburn fails to argue what records were not kept by Fidelity, resulting in the breach of its duty to Cowburn. Next, the record on appeal includes semi-annual statements issued by Fidelity to Cowburn for the years in which he invested in the Program. These statements indicate the market value of his investments at the end of each reporting period as well as contributions and distributions made during the year. Therefore, these statements comply with Fidelity's internal policies and section 408(i). In addition, the custodial agreement states:

> **Article XIII. Reports and Records.** We shall keep accurate and detailed records of all contributions, receipts, investments, distributions, disbursements, and other transactions relating to the custodial account. We shall provide reports to the IRS and to

> you as required by law and regulations. Unless you file a written statement with us within 60 days after you receive a statement, we shall be relieved and discharged from all liability to you (including your beneficiaries) with respect to all matters set forth in such report.

(emphasis added). The record does not contain any indication that Cowburn alerted Fidelity to any discrepancies on the statements provided. Finally, Cowburn fails to assert how Fidelity breached its duty under its internal policies and section 408(i). Therefore, we find no factual dispute to be determined on this issue.

Third, Cowburn argues Fidelity had a legal duty to comply with the provisions of section 408 of the Internal Revenue Code. He asserts Fidelity breached this duty by allowing Cowburn to invest in non-qualified investments.

Section 408 does not contain a provision stating investments must be "qualified." However, section 408(a) sets forth requirements for IRAs. These requirements must be met in order for a taxpayer to benefit from the tax advantages of IRAs. One of these requirements prohibits investments in life insurance contracts, thereby limiting the type of investments available to a taxpayer. I.R.C. § 408(a)(3). Therefore, contrary to Cowburn's assertion, "qualified" does not mean Fidelity has an obligation to investigate the quality of the investments selected by Cowburn. Rather, Fidelity must ensure the Code does not specifically prohibit a type of investment. Because Cowburn failed to establish a duty pursuant to section 408 of the Internal Revenue Code, we find no genuine issue of material fact.

Fourth, Cowburn asserts Fidelity had a duty under the Anunzio-Wylie Anti-Money Laundering Act to report to him any of his funds sent to offshore banks. Other than a vague reference to the name of the Act, Cowburn cites no authority to support this assertion. Thus, we deem it abandoned on appeal. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513,

514 (1994) (deeming an issue abandoned because the appellant failed to provide pertinent argument or supporting authority).

Fifth, Cowburn asserts Fidelity employees undertook a duty to advise him as to the quality of his investment, and therefore, owed him a duty of care in giving such advice. We disagree.

As previously discussed, in the custodial agreement Fidelity specifically limited its duty to advise Cowburn on his investments. We find no evidence in the record indicating any employees undertook the duty to advise Cowburn, nor any evidence of breach or causation. Because we find no genuine issue of material fact exists concerning Fidelity's purported negligence, the trial court properly granted summary judgment on this issue.

e. Civil Conspiracy against Fidelity and Leventis

Cowburn argues Fidelity provided Leventis with the means of opening SDIRAs for victims of the Ponzi scheme, and the opening of those SDIRAs was essential to the scheme. Therefore, he alleges Fidelity and Leventis acted in a civil conspiracy, which contributed to Cowburn's injury. We disagree.

"It is well-settled in South Carolina that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000). "In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." First Union Nat'l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998).

The record does not contain any evidence that Fidelity and Leventis had an agreement, or that they joined together for the purpose of injuring

Cowburn. Therefore, we find no genuine issue of material fact exists to establish a claim for civil conspiracy.

CONCLUSION

We find Cowburn's argument that the trial court improperly disregarded his expert's affidavit is not preserved for our review. Furthermore, we affirm the trial court's grant of summary judgment as to Fidelity on all Cowburn's causes of action. As to Cowburn's causes of action against Leventis, we find a genuine issue of material fact exists regarding his private cause of action for violations of S.C. Code Ann. § 35-1-410 and -810 (Supp. 2003) and reverse the grant of summary judgment on those causes of action. As to Cowburn's remaining causes of action, we affirm the trial court's grant of summary judgment.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S.C. Department of Motor Vehicles (formerly Public Safety), **Appellant,**

v.

Danny Joe Nelson, **Respondent.**

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 3991
Submitted May 1, 2005 – Filed May 23, 2005

REVERSED

Patrick M. Teague, and Frank L. Valenta, Jr., of Columbia, for Appellant.

Danny Joe Nelson, of Fountain Inn, Pro Se Respondent.

ANDERSON, J.: Danny Joe Nelson was arrested for driving under the influence. Nelson refused to consent to a breath test offered nearly five hours after his arrest. As a result, the South Carolina Department of

Motor Vehicles (the Department), formerly the Department of Public Safety, suspended Nelson's driver's license. The circuit court reversed, finding the Department failed to videotape Nelson's breath test within three hours of arrest as required by law. The Department appeals the circuit court's decision. We reverse.[1]

FACTUAL/PROCEDURAL BACKGROUND

On December 10, 2002, Deputy Jason Wilson of the Spartanburg County Sheriff's Department was on routine patrol in Duncan, South Carolina. He observed a vehicle driving erratically and crossing back and forth over the center line. The car, which Nelson was driving, turned left onto Berry Shoals Road and attempted to make a U-turn. Deputy Wilson stopped the vehicle. He found that Nelson's speech was slurred and he smelled of alcohol. Nelson admitted he had been drinking. Deputy Wilson asked Nelson to get out of the car, and he conducted several field sobriety tests, which Nelson failed.

Nelson was placed under arrest at 8:36 p.m. for driving under the influence. Deputy Wilson read Nelson his Miranda rights and his section 56-5-2934 advisement and placed him in the patrol car. Officer Piggins arrived at the scene at that time. Nelson began complaining of asthma and asked for his inhaler. Deputy Wilson was unable to locate an inhaler in Nelson's car, but he did find an open bottle of vodka and four other open bottles of liquor. An ambulance was called to the scene; the emergency medical technician checked Nelson and reported that he was fine.

Deputy Wilson took Nelson to the Detention Center, but had to leave him with Officer Piggins because Wilson's house was on fire. While Deputy Wilson was gone, Nelson again complained of asthma and asked to be taken to the hospital. Officer Piggins complied with Nelson's request.

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

When they returned to the Detention Center, Nelson was offered a DataMaster test. Officer K.D. Green advised Nelson of his implied consent rights both orally and in writing and told Nelson that the testing was being videotaped. The machine was working properly, and Officer Green followed procedure in preparing to administer the test. At 1:20 a.m., Nelson refused to give a sample.

Deputy Wilson returned to the Detention Center and found Nelson again complaining of asthma and requesting a blood test. Deputy Wilson transported Nelson to the hospital a second time, but the hospital refused to conduct a blood test because Nelson did not have cash to pay for it.

The Department suspended Nelson's driver's license. Nelson requested an administrative hearing pursuant to S.C. Code Ann. section 56-5-2951(B) (Supp. 2002). The hearing officer upheld the suspension in accordance with S.C. Code Ann. section 56-5-2951 (Supp. 2002) for failure to consent to drug and alcohol testing. The circuit court reversed, concluding the breath test was not offered within three hours of arrest as required by section 56-5-2953 (Supp. 2002).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act, S.C. Code Ann. sections 1-23-310 to –400 (2005), establishes the "substantial evidence" rule as the standard for judicial review of a decision of an administrative agency. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306-07 (1981). Section 1-23-380(A)(6) of the South Carolina Code (2005) provides as follows:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995); Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). "A court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Summersell v. South Carolina Dept. of Public Safety, 334 S.C. 357, 363, 513 S.E.2d 619, 622 (Ct. App. 1999), vacated in part on other grounds, 337 S.C. 19, 522 S.E.2d 144 (1999); accord Rodney v. Michelin Tire Corp., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996); Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610 (Ct. App. 2004). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994); Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991); see also Palmetto Alliance, Inc. v. South Carolina Public Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984) (declaring that substantial evidence is something less than weight of evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence). In reviewing a final decision of an administrative agency, the circuit court essentially sits as an appellate court to review alleged errors committed by the agency. Kiawah Resort Assocs. v. South Carolina Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995); see

also Byerly Hosp. v. South Carolina State Health and Human Servs. Finance Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385-86 (1995) (holding that a decision of an administrative agency must be affirmed if it is supported by substantial evidence, and a reviewing court may not substitute its judgment for that of the agency on questions of fact).

LAW/ANALYSIS

I. Implied Consent Statute

The issue in this case is whether the failure to comply with the videotaping requirements of section 56-5-2953 precludes the Department from suspending Nelson's license for his refusal to submit to a breath test under section 56-5-2950.

"Pursuant to § 56-5-2950, a person driving a motor vehicle in South Carolina is deemed to have consented to a chemical test of his breath, blood, or urine if arrested for an offense arising out of acts alleged to have been committed while under the influence of alcohol, drugs, or a combination of the two." State v. Long, Op. No. 25955 (S.C. Sup. Ct. filed March 21, 2005) (Shearouse Adv. Sh. No. 13, 68 at 70). South Carolina Code Annotated section 56-5-2950 (Supp. 2002)[2] provides:

> (a) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of both of them. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs,

[2] Act No. 61, 2003 S.C. Acts 674, amended sections 56-5-2950, –2951, and –2953. These amendments are not relevant to this case.

or a combination of them. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth or is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. If the officer has reasonable grounds to believe that the person is under the influence of drugs other than alcohol, the officer may order that a urine sample be taken for testing. If the alcohol concentration is ten one-hundredths of one percent or above, the officer may not require additional tests of the person as provided in this chapter. The breath test must be administered by a person trained and certified by the department, pursuant to SLED policies. The arresting officer may administer the tests if the person's conduct during the twenty-minute pre-test waiting period is videotaped pursuant to Section 56-5-2953(A)(2)(d). Before the breath test is administered, a ten one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.095 percent and 0.105 percent. Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

No test may be administered or samples obtained unless the person has been informed in writing that:

(1) he does not have to take the test or give the samples but that **his privilege to drive <u>must</u> be suspended or denied for at least ninety days if he refuses to submit to the tests** and that his refusal may be used against him in court;

(2) his privilege to drive must be suspended for at least thirty days if he takes the tests or gives the samples and has an

> alcohol concentration of fifteen one-hundredths of one percent or more;
>
> . . . .

(Emphasis added.)

Section 56-5-2951, S.C. Code Ann. (Supp. 2002), reads:

> (A) **The Department of Public Safety shall suspend the driver's license, permit, or nonresident operating privilege of or deny the issuance of a license or permit to a person who drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950** or has an alcohol concentration of fifteen one-hundredths of one percent or more. The arresting officer shall issue a notice of suspension which is effective beginning on the date of the alleged violation of Section 56-5-2930, 56-5-2933, or 56-5-2945.

(Emphasis added.)

Both section 56-5-2950 and –2951 use unqualified, mandatory language. An operator of a motor vehicle in South Carolina is not required to submit to alcohol or drug testing; however, our legislature has clearly mandated that should one choose not to consent to such testing, his or her license must and shall be suspended for at least ninety days.

The implied consent laws are driven by public policy considerations. The State has a strong interest in maintaining safe highways and roads. One way to accomplish this goal is to enact laws directed at minimizing drunk driving. By providing for implied consent testing, our legislature struck a balance, allowing law enforcement to test and prosecute suspected drunk drivers while protecting individuals from such tests, should they choose to refuse them. As stated by this Court in Sponar v. South Carolina Department of Public Safety, 361 S.C. 35, 603 S.E.2d 412 (Ct. App. 2004):

> The license to operate a motor vehicle upon the public highways of this state is not a property right, but is a mere privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. Such privilege is always subject to revocation or suspension for any cause relating to public safety.

Id. at 39, 603 S.E.2d at 415; accord State v. Collins, 253 S.C. 358, 361, 170 S.E.2d 667, 668 (1969); South Carolina State Hwy. Dep't v. Harbin, 226 S.C. 585, 595, 86 S.E.2d 466, 470 (1955). Were drivers free to refuse alcohol and drug testing without suffering penalty, the current system of detecting, testing, and prosecuting drunk drivers would simply fail. Consequently, the legislature imposed a minimum ninety-day suspension for refusal to consent to testing where the driver has no prior DUI-related convictions. This ninety-day suspension is substantially more severe than the thirty-day suspension imposed upon a person who takes a test and has an alcohol concentration of fifteen one-hundredths of one percent or more with no prior convictions. Compare S.C. Code Ann. § 56-5-2951(K)(1)(a) (Supp. 2002) with S.C. Code Ann. § 56-5-2951(K)(1)(b) (Supp. 2002). The disparity in suspensions demonstrates the legislative concern over an individual's refusal to consent to testing.

The requirements for suspension for refusal to consent are: (1) a person (2) operating a motor vehicle (3) in South Carolina (4) be arrested for an offense arising out of acts alleged to have been committed while the person was driving under the influence of alcohol, drugs, or both, and (5) refuse to submit to alcohol and drug testing. See S.C. Code §§ 56-5-2950 and –2951 (Supp. 2002). Those statutory predicates are present here. Therefore, the circuit court's reversal of Nelson's suspension was erroneous.

The circuit court correctly noted the Department did not comply with section 56-5-2953. That section provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 shall have his conduct at the incident site and the breath test site videotaped.

. . . .

(2) The videotaping at the breath site:

(a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;

. . . .

(B) Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances, nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape.

. . . .

S.C. Code Ann. § 56-5-2953 (Supp. 2002).

The Department concedes it did not comply with the requirements of section 56-5-2953. The breath test was not conducted within three hours of Nelson's arrest. Moreover, the arresting officer did not submit a sworn affidavit stating that the videotape equipment was inoperable, or that it was physically impossible to produce the videotape because of the need for medical treatment or other exigent circumstances. However, nothing in the code instructs that a failure to comply with section 56-5-2953 warrants the dismissal of prosecution for failure to submit to testing pursuant to section 56-5-2950.

Had Nelson consented to the breath test, the efficacy of a conviction for violation of section 56-5-2930 or 56-5-2933 would have been called into question. Although the test was offered after the required three hours and no affidavit was offered, the hearing officer might still have considered the totality of the circumstances and found valid reasons for the Department's failure to comply with the statute. See S.C. Code Ann. § 56-5-2953(B) (Supp. 2002) ("Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances[.]"). In the instant case, the hearing officer may have found that Nelson himself created the dilemma by repeatedly requesting treatment—especially because medical personnel apparently found Nelson did not need assistance. However, as Nelson withheld his consent under section 56-5-2950, the Department's noncompliance under section 56-5-2953 has no application to this case.

II. Scope of the Administrative Hearing

The Department argues the circuit court erred by failing to adhere to the scope of the implied consent hearing as dictated by section 56-5-2951. We agree.

The implied consent statute provides that a person must be informed in writing that "he has the right to request an administrative hearing within

thirty days of the issuance of the notice of suspension[.]" S.C. Code Ann. § 56-5-2950(a)(4) (Supp. 2002). This hearing is limited in its scope. Pursuant to the 2002 version of section 56-5-2951(H), the scope of the hearing must be limited to whether the person:

> (1) was lawfully arrested or detained;
> (2) was advised in writing of the rights enumerated in Section 56-5-2950;
> (3) refused to submit to a test pursuant to Section 56-5-2950; or
> (4) consented to taking the test pursuant to Section 56-5-2950, and the:
> (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
> (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
> (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
> (d) the machine was working properly.

S.C. Code Ann. § 56-5-2951(H) (Supp. 2002). This limitation has been explained as follows:

> [T]he question before the hearing officer was not whether the state had proved its case, but whether the arresting officer had probable cause to believe [the driver] had committed the offense of driving under the influence. This is not a trial in regard to the guilt or innocence of the defendant on a DUI charge. Rather, the gravamen of the administrative hearing is a determination of the efficacy and applicability of the implied consent law. The query posited to the administrative hearing officer is: did the person violate the implied consent law.

Summersell v. Dept. of Public Safety, 334 S.C. 357, 368-369, 513 S.E.2d 619, 625 (Ct. App. 1999), vacated in part on other ground, 337 S.C. 19, 522 S.E.2d 177 (1999).

Because Nelson did not consent to testing, the scope of the hearing was limited to whether Nelson (1) was lawfully arrested, (2) was advised in writing of his section 56-5-2950 rights, and (3) refused to submit to a test. The hearing officer determined that Nelson had been lawfully arrested, had been advised of his rights, and had refused to submit to the test offered in accordance with section 56-5-2950. The circuit court's reversal of the hearing officer was outside the purview of the proper scope of review. Accordingly, we find the only relevant issues at the administrative hearing were not in dispute. The circuit court erred in considering the violation of the three-hour videotaping requirement. We reverse the order of the circuit court and reinstate the suspension.

CONCLUSION

The order of the circuit court is hereby

REVERSED.

STILWELL and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Patrick, Respondent,

v.

Keith E. Britt, Appellant.

Appeal From Dorchester County
William J. Wylie, Jr., Family Court Judge

Opinion No. 3992
Submitted March 1, 2005 – Filed May 23, 2005

AFFIRMED

Mark Alan Leiendecker, of Summerville, for Appellant.

James B. Richardson, of Columbia; and John Witherspoon and James A. Bell, both of St. George, for Respondent.

WILLIAMS, J.: In this child support action, Keith Britt appeals a family court order awarding Jane Patrick an increase in child support and attorney's fees. We affirm.

FACTS

Keith Britt and Jane Patrick were divorced by order of the Dorchester County Family Court on April 16, 1991. Patrick was awarded custody of the couple's two children. The divorce decree ordered Britt to pay child support in the amount of $450 a month and contained a provision which stipulated that the child support would continue until the oldest child reached eighteen years of age. Upon that child's emancipation, the payments would be reduced to $225 a month.

Approximately three months after the oldest child turned eighteen in June 2002, Patrick commenced the current action seeking an increase in child support to better provide for the parties' youngest child. The parties submitted financial declarations and a final hearing was held on June 4, 2003.

The primary dispute at the hearing concerned the amount of income attributable to Britt. Britt is the owner and operator of Keith Britt Trucking and Construction, an incorporated business that he began in 1995. Although Britt's business took in over $430,000 in 2002, Britt submitted on his financial declaration that he personally received only $66.01 a month. Britt attributed his low income to high overhead costs of running the business, including the purchase and maintenance of heavy machinery. He further testified that he took out several loans to provide the company with operating capital.

Britt also testified, however, that numerous personal expenses were paid by his business. For example, and this is by no means an exhaustive list of personal expenses, previous child support payments were paid through the business, as were church tithes, private school tuition for a step child, payments for the truck he used, gas, work clothes, and telephone bills. Britt's current wife also worked for the business and received a salary, which Britt testified she used to pay certain household expenses.[1]

[1] When asked by the court how much money his current wife made in salary, Britt claimed to not know because "[s]he does all the paying of

Although Britt submitted monthly disbursement summaries outlining the business' expenses for 2002, he was unable to tell exactly how much company money was used to pay personal expenses. Britt's accountant was also unable to provide an exact figure in this regard. Although the accountant was in the process of trying to complete the company's 2002 tax returns, he was unable to complete them before trial. Nevertheless, as of the date of trial, the accountant identified at least $17,000 of company money spent on Britt's personal expenses.

The accountant also testified concerning tax deductions the company received for depreciation on business equipment such as bulldozers and trucks. The accountant testified the company spent approximately $100,000 a year on such equipment and that it was able to take depreciation of an equal amount.

Upon conclusion of the hearing, the court took the matter under advisement. On June 20, 2003, the court issued an order finding that Britt "purposefully arranged his finances in a manner that would make it difficult to determine his actual income." It then held that the only reasonable measure of Britt's income was the $100,000 of depreciation that the accountant testified Britt would have for 2002. Accordingly, the family court determined Patrick was entitled to an increase in child support and calculated Britt's obligation based on that income. The order compels Britt to pay child support in the amount of $987.00 a month, and requires payment retroactively to the date Patrick filed the complaint.

In addition to the child support award, the family court ordered Britt to pay Patrick's attorney's fees of $4,375 based in part on its finding that Britt deliberately misrepresented his income and thus caused the litigation to be unnecessarily complicated and expensive.

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the bills." Because of the difficulty in computing Britt's actual income, the court also asked Britt what amount of income he thought the court should use to determine child support. Britt offered no suggestions other than "I will leave that up to you."

STANDARD OF REVIEW

In appeals from the family court, this Court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard the factual findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we 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. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

LAW/ANALYSIS

I. Child Support and Income Determination

Britt first asserts the family court abused its discretion in increasing his child support obligation by imputing income to him based on taxable depreciation of equipment used in his business. We disagree.

Child support awards are addressed to the sound discretion of the trial judge and, absent an abuse of discretion, will not be disturbed on appeal. Mitchell v. Mitchell, 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). Income for determining child support awards is defined in the Child Support Guidelines as "the actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." 27 S.C. Code Ann. Regs. 114-4720(A)(1) (Supp. 2004). The Guidelines specifically address how to determine income from someone who is self employed:

> For income from self-employment . . . gross income is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation . . . .

> However, the court should exclude from those expenses amounts allowed by the Internal Revenue Service for accelerated depreciation or investment tax credits for the purposes of the guidelines and add those amounts back in to determine gross income. In general, the court should carefully review income and expenses from self-employment . . . to determine actual levels of gross income available to the parent to satisfy a child support obligation. As may be apparent, this amount may differ from a determination of business income for tax purposes.

27 S.C. Code Ann. Regs. 114-4720(A)(4) (Supp. 2004).

In the current case, Britt testified that although his business brought in over $430,000 in gross income, he personally made a mere $66.01 a month. He admitted, however, that the company paid a plethora of personal expenses, including his step-child's private school tuition, church tithes, child support payments, and various other expenses.

Although Britt's accountant had not completed his analysis, as of the date of trial he identified over $17,000 worth of personal expenses paid by the company. The accountant further testified that the company spent approximately $100,000 on equipment and was able to take a tax depreciation that essentially made these expenses "a wash." Based on this evidence, the applicable law, and the fact that Britt refused to assist the court in resolving the issue, we find no abuse of discretion by the family court in its determination of income and subsequent calculation of child support. See Robinson v. Tyson, 319 S.C. 360, 364, 461 S.E.2d 397, 399 (Ct. App. 1995) (affirming family court's imputation of income based partially on husband's refusal to make an effort to show his earning potential).

We find this holding to be especially appropriate considering Britt's stubborn refusal to provide any assistance whatsoever to the family court in resolving the issue of his income. Thus, having failed to provide the court with any meaningful representation of his actual income, and failing to respond to the court's requests for direction with anything other than patronizing remarks, we find Britt would be hard pressed to complain of the family court's ruling. See Rish v. Rish by and Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring) (stating that the court of appeals does not sit to relieve self-inflicted wounds); Gore v. Gore, 288 S.C. 438, 440-41, 343 S.E.2d 51, 52 (Ct. App. 1986) (denying relief when husband's conduct was to blame for the predicament in which he found himself).

II. Attorney's Fees

Britt next asserts the trial court erred in awarding Patrick $4,375 in attorney's fees. We disagree.

"An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court." Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). In order to award attorney's fees a court should consider several factors including: (1) ability of the party to pay the fees; (2) beneficial results obtained; (3) financial conditions of the parties; and (4) effect a fee award will have on the party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992); see also Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In its order, the family court concluded, "[Britt's] deliberate misrepresentation of his income has caused this litigation to be complicated and expensive and [Patrick] is entitled to payment of her attorney's fees and costs." A review of the record supports this determination. In addition, in light of the family court's calculation of Britt's income at $100,000 per year, we do not find the award would unduly impact his financial condition. Considering this along with the fact that Patrick's attorney obtained beneficial results by obtaining an

increase in child support, we find the award to have been well within the discretion of the family court judge.

AFFIRMED [2]

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

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

IN THE MATTER OF: ESTATE OF NILES STEVENS J. Jackson Thomas and Claude M. Epps, Jr., in their capacities as co-executors of the Estate of Niles Stevens and as co-trustees of the Niles Stevens Trust, Respondents,

v.

Laura Stevens Lutch, Paul Stevens, II, individually, Paul Stevens, II, as parent and guardian of Sunni Stevens and Grace Stevens (who are minors), and any and all unknown and unborn heirs of Niles Stevens, of whom Paul Stevens, II, individually, and Paul Stevens, II, as parent and guardian of Sunni Stevens and Grace Stevens (who are minors) are Appellants,

and Laura Stevens Lutch and any and all unknown and unborn heirs of Niles Stevens are Respondents.

Appeal From Horry County
J. Stanton Cross, Jr., Master-In-Equity

Opinion No. 3993
Heard March 9, 2005 – Filed May 23, 2005

REVERSED

Clifford Heywood Tall, of Myrtle Beach, for Appellant.

Glenn V. Ohanesian, James F. McCrackin, Dominic A. Starr, J. Christopher Clark, and Mary Anna Neill, all of Myrtle Beach, for Respondents.

WILLIAMS, J.: Paul Stevens, II, appeals a master-in-equity's decision, which declared that the trustees of the Niles Stevens Trust, of which Paul is a named beneficiary, were barred under the trust's terms from making certain discretionary payments. Specifically, the master held the trustees were prohibited from considering the educational needs of Paul's children when determining what constitutes a proper payment under the trust for Paul's "support." We reverse.

FACTS

Niles Stevens died on February 24, 1984, leaving a will that established the testamentary trust in question. The trust contains the following language pertinent to this appeal:

> [M]y trustee may pay to or apply for the benefit of my said children, LAURA STEVENS and PAUL STEVENS, such sums from the principal or accumulated income of this trust as in his sole discretion shall be necessary or advisable from time to time for the health, education, support and maintenance of my said children, LAURA STEVENS and PAUL STEVENS, taking into consideration to the extent my trustee deems advisable any other income or resources of my said children . . . known to my trustee.

At the time of the litigation, the trust had an approximate value of six million dollars.

Laura Stevens Lutch and Paul Stevens are presently the trust's only named beneficiaries. Upon the death of either, the trust directs that the decedent's one-half interest shall be distributed to the issue of the deceased beneficiary. Should either die leaving no issue, the trust would remain intact for the benefit of the survivor and ultimately distributed to the issue of the surviving beneficiary. Paul presently has two minor children, Sunni and Grace Stevens. Laura has no children at this time.

Paul requested that the trustees exercise their discretionary authority by distributing trust funds for the purpose of funding the private school education of his two children, remainder beneficiaries of the trust. Unsure of their authority in this regard, the trustees, J. Jackson Thomas and Claude M. Epps, Jr., petitioned the probate court for a declaratory judgment on whether such payments fell within their discretionary powers as trustees. Pursuant to a motion filed by Paul, the case was removed to the circuit court and subsequently referred to the master-in-equity by consent of the parties.

Following a hearing on the matter, the master held that "[b]ased on the ordinary meaning of the language used in the Will, the Trustees are not authorized to make distributions to the Respondent Stevens or Respondent Lutch for the health, support, maintenance and education of their current or future children." This appeal followed.

STANDARD OF REVIEW

The standard of review for a declaratory judgment action is determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). This case involves the construction of a will, which is an action at law. See NationsBank of South Carolina v. Greenwood, 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App. 1996). This court's review is therefore limited to the correction of errors of law. Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003).

LAW / ANALYSIS

The court-appointed guardian of Niles Stevens' unborn heirs, the trustees, and beneficiary Paul Stevens all argue, in some fashion or another, that it is permissible under the terms of the trust for the trustees to consider the educational needs of Paul's children when determining what constitutes a proper distribution for Paul's "support." We agree.

It is self-evident that the establishment of a trust involves some degree of confidence in the integrity, ability, and genuineness of another individual or entity, the trustee. This truism is given increased credence when the trustee is bestowed a discretionary power, which the trustee "may either exercise or refrain from exercising." Page v. Page, 243 S.C. 312, 315, 133 S.E.2d 829, 831 (1963). When determining the extent of a trustee's discretionary power, courts should keep in mind that the allocation of discretionary authority "is done out of a desire to obtain the trustee's honest judgment, perhaps even to the exclusion of the judgment of the court." 76 Am. Jur. 2d Trusts § 346 (1992). The mere fact that "if the discretion had been conferred upon the court, [it] would have exercised the power differently is not a sufficient reason for interfering with the exercise of the power by the trustee." Page, 243 S.C. at 316, 133 S.E.2d at 832. The trust in question is replete with language reflecting this intent on the part of the grantor, the most persuasive being the language of the clause in question:

"my trustee may pay . . . such sums from the principal or accumulated income of this trust as in his sole discretion shall be necessary or advisable."[1]

Keeping in mind the general notion that the grantor intended to give the trustees' judgment much consequence, we move now to the issue at the heart of this appeal, namely, what considerations are appropriate under the trust's terms when determining whether to make a distribution for a beneficiary's "support." It was the position of the master, deciding the case in the absence of any South Carolina case law directly on point, that because the trust only granted the trustees the power to make trust distributions for the support of the named beneficiaries, it was improper for them to make distributions that would chiefly benefit the beneficiaries' children. We appreciate the master's thorough analysis in this matter, especially considering the issue's novelty in this state, but conclude that the questioned distributions fall within the discretionary authority of the trustees, subject of course to traditional judicial oversight of possible abuse of trustee discretion.

In reaching this conclusion, we are persuaded by the rationale of several other jurisdictions deciding similar, if not identical, matters. In Robinson v. Elston Bank & Trust Co., 48 N.E.2d 181 (Ind. Ct. App. 1943), the Indiana Court of Appeals, interpreting a trust for the support, maintenance, and enjoyment of a beneficiary, approved distributions to the beneficiary even though they predominately benefited his wife and children. Explaining its conclusions, the court held, "[t]he needs of a married man include not only needs personal to him, but also the needs of his family living with him and entitled to his support." Id. at 189. Analyzing a similar situation, the Supreme Court of New Hampshire held that a beneficiary's needs included "not only his needs, but also the needs of his family." Eaton v. Lovering, 125 A. 433, 433 (N.H. 1924); see also Finch v. Wachovia Bank

[1] See also Trust Article IV ("using so much of the net income and principal of such share as my trustee deems necessary," "amounts shall be paid out by my trustee in such of the following ways as my trustee may deem best"); Trust Article V ("my trustee[s] . . . are authorized in their absolute discretion" to take any one of nineteen listed actions regarding the management of trust property) (emphasis added).

& Trust Co., N.A., 577 S.E.2d 306, 348 (N.C. Ct. App. 2003) (interpreting a trust established for the "reasonable needs" of a beneficiary, the court concluded the trustee erred in determining that the invasion of trust funds for the purpose of funding beneficiary's familial gift giving was beyond its discretion); First Nat'l Bank of Beaumont v. Howard, 229 S.W.2d 781, 785-86 (Tex. 1950) (finding trust distributions for the purpose of funding the college education of beneficiary's children fell within the trustee's discretionary authority when the trust was established for the beneficiary's "support.").[2] We likewise hold, in recognition of the grantor's intent to vest broad discretionary authority in the trustees, that a trustee may consider the needs of a beneficiary's family when determining what distributions would be "necessary and advisable" for the beneficiary's "support."

Respondent Laura Stevens' most compelling argument against interpreting the term "support" broadly when determining the metes and bounds of trustee discretion relates to another broad aim of establishing many trusts, spendthrift protection. It is her position that our interpretation would allow meddlesome invasions into the trust funds by non-beneficiaries and creditors, despite the clear trust language that the trust shall not "be liable for or subject to the debts, contracts, obligations, liabilities or torts of any beneficiary." After due consideration of this argument, we are not persuaded of its merit.

First, nothing in the present decision speaks to trust claims asserted by non-beneficiaries. We hold merely that consideration of a beneficiary's

[2] The master based his decision on the rationale of Cavett v. Buck, 397 P.2d 901 (Okla. 1964), an Oklahoma case deciding a similar trust issue. Although at first glance this decision seems to run contrary to our conclusions in the present case, we are not convinced the Oklahoma Supreme Court would necessarily decide the present appeal differently than we do here. The court in Cavett acknowledged that other jurisdictions included the needs of a beneficiary's family in interpreting the term "support," but distinguished the case before it based on trust language specifically limiting distributions to those made for the "individual support" of the beneficiary. Id. at 904-05. Such limiting language was not employed in the trust presently before us.

familial obligations falls within a trustee's discretion when determining what constitutes a proper distribution for the beneficiary's "support." There would be nothing inconsistent with this opinion in barring a claim asserted by a non-beneficiary, even if that claim was based on a beneficiary's familial obligations, on the basis that the trust does not authorize distributions to non-beneficiaries. See e.g., First Nat'l Bank of Beaumont, 299 S.W.2d at 785-86 (holding that beneficiaries' children were absolutely barred under the terms of the trust from claiming through the trust because they were not beneficiaries; however, consideration of their educational needs was within trustee discretion in determining the propriety of distributions to the beneficiaries [the parents]); see also Burrage v. Bucknam 16 N.E.2d 705, 706-07 (Mass. 1938) (holding that wife and child of beneficiary were barred from collecting judgment [based on husband's failure to support] from trust funds because the trust's terms unambiguously authorized payments to husband only). Such a situation is not presently before this court and this opinion should not be interpreted as authority, persuasive or otherwise, in regard to such matters.

Second, as in all matters involving trustee discretion, the considerations approved by this opinion remain subject to the traditional oversight and supervisory control of the courts. "[A] trustee does not have absolute and uncontrolled discretion in disbursing trust funds." Page, 243 S.C. at 316, 133 S.E.2d at 831. In any discretionary action, a trustee must eliminate all selfish interest and "exercise the reasonable care, prudence and diligence in the management of trust assets as a reasonably prudent man would do with relation to his own affairs." Cartee v. Lesley, 290 S.C. 333, 336, 350 S.E.2d 388, 390 (1986). "Punitive damages may be imposed upon a trustee where there is evidence his management of the [trust] was in bad faith or conscious indifference to the rights of the beneficiaries." Id. The considerations we hold today fall within a trustee's discretion must still be made with this requisite degree of care and prudence, and any alleged abuse of that discretion remains subject to court review.

For the foregoing reasons, the master-in-equity's decision is

REVERSED.

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