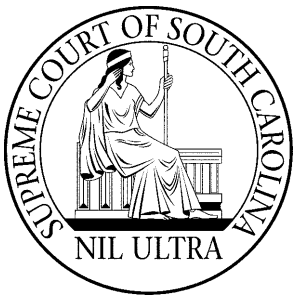

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
June 27, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: James A. Brown, Jr.,
Attorney, Appellant,

In Re: State of South Carolina, Respondent,

v.

Alfonzo J. Howard, Defendant.

Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 26991
Heard December 1, 2010 – Filed June 21, 2011

AFFIRMED

Derek J. Enderlin, of Greenville, and James Arthur Brown, Jr., of Beaufort, for Appellant.

Attorney General Alan Wilson and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Respondent.

John S. Nichols and Blake A. Hewitt, both of Bluestein, Nichols, Thompson and Delgado, of Columbia, for Amicus Curiae the South Carolina Bar.

JUSTICE KITTREDGE: In this direct appeal we review the trial court's denial of Appellant James A. Brown, Jr.'s request for an award of attorney's fees in excess of the $3,500 statutory limit in S.C. Code Ann. section 17-3-50 (2003). We find no abuse of discretion under the unique facts and circumstances presented and affirm.

During the pendency of the appeal, the Court accepted an amicus curiae brief on behalf of the South Carolina Bar concerning the potential constitutional implications arising from the court appointment of attorneys to represent indigent clients. We elect to address this matter of significant public interest. We hold today that the Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation.

I.

Appellant was appointed on March 1, 2007, pursuant to Rule 608, SCACR, to represent Alfonzo J. Howard, an indigent. Howard was charged with multiple crimes, including first degree criminal sexual conduct, two counts of kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a crime.

From the beginning, Appellant complained about the appointment to represent Howard, first to the circuit's chief administrative judge, Perry M. Buckner, and then to the trial judge, Carmen T. Mullen. Appellant asked to be relieved as counsel, stating that his obligations to an appointed capital case

were taking up substantial amounts of time. Judge Buckner's involvement was minimal, as he refused to relieve Appellant, noting that Appellant had not been denied payment. Appellant even filed a motion to "halt prosecution."

Appellant wrote the trial judge, Judge Mullen, stating, "[T]he failure to [exceed the fee cap] now leaves me with no choice but to discontinue working on [Howard's case]." Judge Mullen indicated that she would consider awarding attorney's fees beyond the "cap" ($3,500) after trial, upon submission of affidavits as to time, hourly rates, and overhead. She stated, "I think it's best to do after the trial is over, so we know exactly how much time has, in fact been expended . . . ."

Judge Mullen's preferred timeline did not suit Appellant, however. At a pretrial hearing, the following exchange took place:

Appellant:	Well, Your Honor, I respectfully no longer desire to do any work in this case, and I'll stop.
Court:	Well, respectfully, Mr. Brown, that's not your choice.
Appellant:	I'm not doing anymore work, I'm sorry.
Court:	Mr. Brown ---
Appellant:	I'm not going to do anymore work.
Court:	--- if you're going to speak to the Court, you're going to stand up.
	. . . .
Court:	--- Mr. Brown, stop. Sir, I'm going to repeat something to you . . . . Respectfully sir you are going to continue on this case.

After the judge explained her decision and began to continue with the hearing, Brown again refused to move forward on the case:

Appellant: Your Honor, I'm not going to proceed on these motions. I move to withdraw.

Court: Respectfully, I'm denying your motion to withdraw. . . .

. . . .

Court: Mr. Brown, you are an officer of this Court, sir. I am telling you that you are going forward. I am ordering you to go forward.

Appellant: I can't ---

Court: You have one choice, as you understand ---

Appellant: I cannot do it.

Court: --- I can hold you in contempt.

Appellant: I just can't.

. . . .

Court: Sir, you're gonna have two choices right now. You're either going to go forward or I'm going to take you into custody. One of two things, that's what we're doing here, Mr. Brown.

Appellant: I will say this, I'm not going to be able to go forward . . . .

Court: This Court is telling you to go forward

. . . .

The charges against Howard proceeded to trial. During the trial, Appellant's belligerent unwillingness to comply with the court's order continued:

Appellant: I'm going to ask to withdraw. I cannot be an effective lawyer for my client.

Court: Motion denied.

Appellant: I cannot go forward . . . . I cannot go forward . . . . I cannot go forward.

The trial court, displaying remarkable patience, only threatened Appellant with contempt and instructed Appellant to proceed. Appellant then invoked *his* right to counsel. The trial against Howard was briefly continued to allow Appellant's attorney to appear. Addressing Appellant's attorney, Judge Mullen said,

> [W]hat I can't have . . . is when I rule against [Appellant] [he is] saying he is going to withdraw as counsel. [Appellant has] done that three times, and he's sat down and refused to proceed with the case. That is simply not professional. It is not consistent with his oath.
>
> . . . .
>
> [Appellant] has consistently refused at different points throughout the pre-hearing trial and now during the trial of this case to continue and has sat down . . . .

After consulting with his attorney, Appellant finally decided to continue with representation of the indigent defendant.

Judge Mullen awarded $17,268.03 as costs for investigative work and expert fees, which was substantially in excess of the statutory cap of $500. S.C. Code Ann. §17-3-50(B). However, Judge Mullen denied Appellant's motion to award attorney's fees in excess of the statutory amount, $3,500. §17-3-50(A). The sole basis for denying Appellant an award of fees in excess of the statutory cap was his unprofessional conduct. Judge Mullen stated:

> Because of Mr. Brown's actions and antics during the trial of this matter, I find his efforts do not demand nor justify exceeding the statutory maximum fee of $3,500 as provided by our legislature, and therefore, order attorney's fees of $3,500 to be paid to Mr. Brown for his services in this case.
>
> . . . While I should have held Mr. Brown in contempt of Court for his unprofessional behavior - this Court knows all too well that to do so would require at the least, a mistrial, which would be unfair to both the Defendant and the victims.

II.

Section 17-3-50 provides:

> (A) *When private counsel is appointed* pursuant to this chapter, *he must be paid a reasonable fee* to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court. The same hourly rates apply in post-conviction proceedings. *Compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies is charged* and one thousand dollars in a case in which only misdemeanors are charged. Compensation must be paid from funds available to the Office of Indigent Defense for the

> defense of indigents represented by court-appointed, private counsel. The same basis must be employed to determine the value of services provided by the office of the public defender for purposes of Section 17-3-40.
>
> (B) Upon a finding in ex parte proceedings that *investigative, expert, or other services are reasonably necessary for the representation of the defendant*, *the court shall authorize* the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of *fees and expenses not to exceed five hundred dollars* as the court considers appropriate.
>
> (C) *Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred*.

(Emphasis added).

An award of attorney's fees in excess of the section 17-3-50 statutory cap is "within the sound discretion of the trial judge." Bailey v. State, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004).

Appellant presents the issue as one of law: may a trial court properly deny a request to exceed the statutory cap for attorney's fees based on the attorney's unprofessional conduct? We answer that question "yes" under the unique and compelling circumstances presented. Given the egregious level

of Appellant's inexcusable conduct and persistent disregard of the trial court's orders, we find the trial court did not abuse its discretion in refusing to award fees in excess of the statutory cap.

III.

The South Carolina Bar appears Amicus Curiae. The Bar contends that the appointment of attorneys to represent indigent litigants implicates the Takings Clause of the Fifth Amendment to the United States Constitution. See U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation.").[1] We agree and hold today that the Fifth Amendment Takings Clause is implicated when an attorney is appointed to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation.

Our willingness to consider the Bar's request and our ruling today in no manner changes the nature of the practice of law in this state. Our holding is a narrow one, limited to an attorney's constitutional entitlement to compensation in appointed cases. We continue to adhere to the view that the license to practice law is a privilege and not a right. As such, the practice of law remains subject to control, regulation, and discipline—all as this Court directs.

A.

The Sixth and Fourteenth Amendments to the United States Constitution compel states to provide counsel to indigent criminal defendants. Gideon v. Wainwright, 372 U.S. 335 (1963); see also United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965) (stating "the obligation of

[1] Although not cited by the Bar, the South Carolina Constitution has a Takings Clause. S.C. Const. art. I, § 13(A) ("Except as otherwise provided in this Constitution, private property shall not be taken . . . for public use without just compensation being first made for the property."). Our analysis and holding comports with the Takings Clause in our constitution.

the legal profession to serve indigents on court order is an ancient and established tradition . . . ."). In South Carolina, this historic obligation of the legal profession is largely administered through Rule 608, SCACR.

Rule 608(a) requires members of the South Carolina Bar to "serve as counsel for indigent persons in the circuit and family courts pursuant to statutory and constitutional mandates." The vast majority of attorneys have commendably discharged this responsibility in a manner reflecting the highest and noblest traditions of the legal profession. Such laudable service is woven into the fabric of the legal profession, as exemplified in the lawyer's oath, in which an attorney affirms that "I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice." Rule 402(k)(3), SCACR.

We believe the South Carolina General Assembly recognizes the inherent fairness in providing for an award of attorney's fees and costs in appointed cases, as evidenced by section 17-3-50. Section 17-3-50 addresses appointment in criminal cases and post-conviction relief proceedings. Moreover, section 17-3-100 speaks more broadly to our legislature's policy favoring the payment of fees to appointed counsel: "Nothing herein contained is designed to limit the *discretionary authority of a judge to appoint counsel in any case and any such counsel shall be entitled to remuneration and reimbursement* as provided in Sections 17-3-50 and 17-3-80 hereof, so long as funds appropriated herein are available therefor." (Emphasis added.) What the legislature has recognized for statutorily authorized appointments, we now find is additionally entitled to constitutional protection. We extend the constitutional protection to all court-ordered appointments.

The Supreme Court of Kansas spoke directly to this issue:

> Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation. When attorneys' services are conscripted for the public good,

> such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. And certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money. We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection.

State v. Smith, 747 P.2d 816, 842 (Kan. 1987); see also Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). We agree with the Kansas Supreme Court, with one significant caveat. A lawyer is not a merchant; the law is a regulated public service profession. While the merchant and lawyer both seek gain, "the difference between a business and a profession is essentially that while the chief end of a trade or business is personal gain, the chief end of a profession is public service." In Re Jacobson, 240 S.C. 436, 448, 126 S.E.2d 346, 353 (1962).

In holding that the Takings Clause is implicated in appointed cases, we revisit two cases in this state's jurisprudence. First, in Ex parte Dibble, 279 S.C. 592, 596, 310 S.E.2d 440, 443 (Ct. App. 1983), the court of appeals understood well the Bar's concerns, acknowledging that "it is unfair to cast on [lawyers], alone, the burden of serving the needs of the whole society without compensation." While Dibble suggested that "[c]ourts may have the inherent power to order that appointed lawyers be compensated from public funds, thus transferring [the burden of appointed representation] to the state where it properly belongs[,]" id., the court ultimately dismissed the lawyers' claim for compensation.

The lawyers in Dibble were appointed in a civil case to represent an indigent client who had no right to counsel. The court of appeals articulated well the role of the legal profession in society and noted that courts "have the inherent power . . . to appoint lawyers to serve without compensation where it appears reasonably necessary for the court to do justice." Id. at 595, 310

S.E.2d at 442. Today, we hold that a court's inherent power to appoint a lawyer to serve is subject to the lawyer's entitlement to just compensation. In recognition of the burden imposed in uncompensated and discretionary appointments, Dibble appropriately indicated that counsel should be appointed only in "extraordinary" circumstances when "necessary to render justice." Id. at 597, 310 S.E.2d at 443. The appointment of counsel only when "necessary to render justice" should serve to protect the public fisc.

Next, we addressed this underlying tension in Bailey v. State, 309 S.C. 455, 424 S.E.2d 503 (1992). Bailey dealt with adequate funding in the context of capital litigation. In Bailey, the Court echoed Dibble and spoke to the legal profession's "traditional and historic role" in society. The Court then acknowledged the financial burden imposed on appointed attorneys in capital cases: "It is an understatement that the very livelihood of many attorneys appointed to death penalty trials is threatened by this burden, a result fundamentally unfair to those so impacted." Id. at 457, 424 S.E.2d at 505. This "burden" may well be greater in a death penalty case, but the same burden (flowing from compelled representation) exists in all appointed cases. It is a matter of degree. The Bailey Court avoided the takings issue by ordering compensation pursuant to statute.

Today we address the constitutional issue sidestepped in Bailey and hold that a court-appointed attorney's service is property for purposes of the Takings Clause.

B.

The Bar requests that we establish formulaic guidelines for the trial courts and practicing Bar in handling "the challenges of complex appointed cases." We decline to set bright-line rules, as we believe the better approach is to defer to the broad discretion of our able trial courts in addressing such claims on a case-by-case basis. The question of a taking is one of law. The question of what constitutes a fair attorney's fee under the circumstances would be one of fact, subject to an abuse of discretion standard of review. Take the case before us—Appellant's takings argument would be resolved by

the payment of *some* amount as attorney's fees; whether the amount awarded is constitutionally appropriate or just under the circumstances is a question of fact, subject to an abuse of discretion standard.

We believe the case-by-case approach is in accord with the amicus curiae brief. Consider the following excerpt from the Bar's brief: "This does not mean that a lawyer is entitled to a fee which exceeds the statutory cap in *all* cases. Since takings analysis is a sliding scale, it is possible that an appointed case might require so small an allocation of a lawyer's time that a lawyer is entitled to no fee for his services." (Br. for South Carolina Bar as Amicus Curiae 4).[2]

The Bar's position reflects its recognition of the unique nature and role of the legal profession in society, thus explaining its preference for a "sliding scale" approach. Bailey spoke to this in the statutory context, and we agree with the Bar that it applies in the constitutional context: "[an] appointed attorney should not expect to be compensated at *market rate*, rather, at a reasonable, but lesser rate, which reflects the unique difficulty these cases present as balanced with the attorney's obligation to defend the indigent." 309 S.C. at 464, 424 S.E.2d at 508.

C.

We thus recognize the historic obligation of an attorney to honor court-ordered appointments for the representation of indigents, while also recognizing that the attorney's service constitutes property for Fifth

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[2] One area of particular concern to the Bar is the general practice in our trial courts of prohibiting interim payments. As advocated in the Bar's brief, appointed attorneys should be able to request "that lower courts take an early look at the question of attorney's fees . . . as opposed to postponing the decision until the end of trial." We do not foreclose a partial award of fees and costs prior to the conclusion of the appointed representation, but interim awards should be granted sparingly and only under compelling circumstances.

Amendment purposes where there is a right to counsel. We do not view these principles as mutually exclusive. In harmonizing these positions, a trial court should be guided by Bailey's approach to just compensation assessed in light of the public service foundation associated with membership in the legal profession.

The Court's holding applies to all court-appointed representations commenced on or after July 1, 2012.[3]

IV.

We find no abuse of discretion in the trial court's decision to deny Appellant's motion to exceed the $3,500 statutory cap for attorney's fees. Because of the significant public interest involved, we accept the South Carolina Bar's amicus curiae brief and hold that a court-appointed attorney's service on behalf of an indigent litigant is property for purposes of the Takings Clause of the Fifth Amendment.

AFFIRMED.

TOAL, C.J., BEATTY and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion

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[3] The budgeting process for the fiscal year beginning July 1, 2011, has been completed, and this opinion comes too late for legislative action this year. As a result, we defer to the 2012 legislative session and the fiscal year beginning July 1, 2012.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the trial court abused its discretion in denying Appellant's request for an award of attorney's fees in excess of the statutory limit.

Section 17-3-50 provides:

> (C) Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, *that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred.*

(Emphasis added).

As noted by the majority, the sole basis for denying Appellant an award of fees in excess of the statutory limit was his unprofessional conduct. In my opinion, the trial court abused its discretion in failing to consider, as required by the statute, whether the requested payment in excess of the limit was necessary to provide effective assistance of counsel or whether the services provided were reasonably and necessarily incurred. In my opinion, the trial court should have allowed Appellant to submit evidence as to the reasonableness of his fees, and reviewed it accordingly. Even in light of Appellant's undeniably petulant behavior, I would find the trial court abused its discretion and would remand the matter with instructions to evaluate the necessity for and worth of Appellant's services.

As I would find the trial court abused its discretion, I would decline to address the Takings Clause issue submitted by the South Carolina Bar. See Morris v. Anderson County, 349 S.C. 608, 564 S.E.2d 649 (2002) (Court will not unnecessarily reach constitutional questions); see also Rule 213, SCACR (an amicus brief is limited to the issues raised by the parties).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sammyeil B. Barber, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

ON WRIT OF CERTIORARI

Appeal from York County
Lee S. Alford, Trial Judge
John C. Hayes III, Post-Conviction Relief Judge

Opinion No. 26992
Heard May 3, 2011 – Filed June 27, 2011

AFFIRMED

Tara Dawn Shurling, of Columbia, for Respondent-Petitioner.

Alan M. Wilson, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Salley W. Elliott, Assistant Deputy Attorney General, and Ashley A. McMahan, Assistant Attorney General, all of Columbia, for Petitioner-Respondent.

CHIEF JUSTICE TOAL: In this post-conviction relief (PCR) case, we granted a writ of certiorari to provide Sammyeil B. Barber, the criminal defendant, with a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).[1] The direct appeal concerns the circuit court judge's jury charge on accomplice liability. Sammyeil B. Barber, the criminal defendant, argues the charge was improper because it was unsupported by the evidence presented at trial. We agree with the State that the charge was properly supported by the evidence presented at trial.

FACTS/PROCEDURAL BACKGROUND

The State alleged Barber and three others (Blake Kimbrell, Kenneth Walker, and Marcus Kiser) conspired to rob a minor drug dealer, Alan Heintz. The men gathered together and discussed the plans for the robbery, procured a semi-automatic handgun, and then drove to Heintz's house. Upon discovering more people than expected at the house, they left to procure a second firearm, a rifle. The men returned to Heintz's house and Kimbrell waited in the car while Barber, Walker, and Kiser went in to rob Heintz.

After entering the house and waking the occupants, the men demanded money and drugs. Heintz was dragged from the bedroom and ultimately drew a shotgun on the robbers. One of the suspects armed with a semi-automatic handgun shot and killed Heintz, and shot and wounded another man who was sleeping on the couch. The three men fled the premises, stealing only $30 and leaving their rifle behind.

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[1] We also granted the State's petition for a writ of certiorari. Because we find there is probative evidence to support the PCR judge's determination that Barber was denied his right to a direct appeal, we dismiss that writ of certiorari as improvidently granted.

Eventually, police located the four men in connection with the crime. Kimbrell, Walker, and Kiser all implicated Barber in the planning and execution of the robbery, and said he was the gunman who shot Heintz. They pled guilty and testified against Barber, each receiving 15–30 years. At Barber's trial, Kimbrell, Walker, and Kiser all testified Barber was armed with the semi-automatic handgun and had shot both victims. The State presented testimony that only two weapons were brought to the robbery—the semi-automatic handgun allegedly carried by Barber, who was described as the robber of middle height, and a rifle, carried by Kiser, the shortest. Barber did not testify at trial, but his defense counsel elicited testimony on cross-examination that Walker, the tallest of the three men and the first to enter the house, was also in possession of a semi-automatic handgun. Barber primarily asserted in his defense that he did not participate in the crime and that the other three men lied to the police, framing him for the murder, to obtain lessened sentences. Barber claimed Walker was the gunman.

The circuit court judge instructed the jury on accomplice liability over defense counsel's objection. Defense counsel argued the charge was improper because the evidence presented at trial did not support the charge, the State did not base its prosecution on a theory of accomplice liability, and the indictment alleged Barber was the gunman. The judge noted the objection and stated on the record:

> . . . I think that the charge is correct in this case. Even if the intimation of the defense that these persons are basically conspiring to make [Barber] the shooter, if [the jury] believe[s] that, but they also believe he was present, someone else did the shooting, but they're not sure who did the shooting, but it was done when all four were present, there with that intended purpose of robbery, he would still be liable under the theory of the hand of one is the hand of all in the case or accomplice liability, whatever you want to call it.

The jury deliberated for nearly three hours, then asked for an explanation of "the hand of one, the hand of all" charge and to what charges

that rule applied. After receiving that instruction again, the jury deliberated further before returning with guilty verdicts on all charges: criminal conspiracy, possession of a pistol by a person under twenty-one, possession of a firearm during the commission of a violent crime, attempted armed robbery, armed robbery, first degree burglary, assault and battery with the intent to kill, and murder.

ISSUE

Did the circuit court judge err in charging the jury on accomplice liability?

STANDARD OF REVIEW

The trial court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Mattison*, 388 S.C. 469, 478–79, 697 S.E.2d 578, 583 (2010).

ANALYSIS

Barber argues the evidence presented at trial did not support a jury charge on accomplice liability as to the murder charge. We disagree.

In *State v. Funchess*, 276 S.C. 427, 229 S.E.2d 331 (1976), and other cases, this Court has held that a lesser-included offense may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence. Barber relies upon this reasoning to support his argument that similar speculation is insufficient to warrant a jury charge on an alternate theory of liability. Barber's proposition is correct. Like a lesser-included offense, an alternate theory of liability may only be charged when

the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. We find the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter. Thus, the charge on accomplice liability was warranted.

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Mattison*, 388 S.C. at 479, 697 S.E.2d at 584. To support an accomplice liability charge in this case, the question is whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him when the robbery took place. *See State v. Dickman*, 341 S.C. 293, 295–96, 534 S.E.2d 286, 269 (2000).

We find evidence to support the conclusion that Barber was acting with the other men during the robbery. Because all of the men clothed themselves all in black and wrapped shirts around their heads so only their eyes were visible, the witnesses could only describe and differentiate the men based on physical build, height, and the weapon carried. Kimbrell, Kiser, and Walker, however, all testified to substantially the same version of the planning and execution of the robbery—that Barber was involved and was the shooter.

The evidence presented at trial could also support a finding that one of the other robbers was the shooter. The State presented evidence that Kiser was the shortest of the three men and carried the rifle, Barber was of middle height and carried a semi-automatic handgun, and Walker was the tallest and carried no weapon. However, defense counsel elicited testimony that all three robbers were armed—one with a rifle and two with .380 handguns, the type weapon forensic experts testified fired all the shots in Heintz's home that evening. Defense counsel's cross of Coleman Robinson, the witness who had been sleeping on the couch when the robbery began, indicates all three men were armed:

Q: [quoting from Mr. Robinson's statement to the police days after the incident] After the door was open, first they pushed it wide and hit the wall. As soon as that happened, that person turned the lights on.

A: Yes.

Q: Without having to look for the switch. I just laid on the couch until this same person walked up to me and I noticed he was holding a gun in his left hand.

A: Yes.

Q: And that's the truth?

A: Yes.

. . .

Q: All right. And then later on you talk about the second guy. The second guy was a little shorter and looked younger. He was carrying a rifle.

A: Yes, sir.

. . .

Q: Then you say the third guy was taller, about six feet, 160. He had a bunched up T-shirt around his head, too. He looked to be in his early twenties. He was carrying a pistol also.

A: Yes.

Kyle Robinson, Coleman's brother who was asleep in a bedroom when the robbery began, also testified that the tallest of the three, which would be Walker, was armed:

> A: [On direct examination] Well, as I went to the [bedroom] door to see what was going on, my door was like halfway shut, so I looked through the little space and that's when I saw the guy go back there to Alan's room and he had a black pistol in his hand.[2]
>
> . . .
>
> A: And then by that time I kind of opened the door and I looked and I saw the gun at Coleman's head, my brother, and I saw him give his wallet up . . . .
>
> . . .
>
> Q: Were you able to tell anything about the other two as far as size goes?
>
> A: I remember seeing the guy that went in the back. He seemed to be the biggest of all of them.
>
> Q: Okay. When you say big—
>
> A: You know, tall. Just the tallest of all of them.
>
> . . .

[2] All the witnesses at trial, through their testimony, corroborated that the tallest of the three robbers went into the bedroom to retrieve Heintz. Walker is the tallest of the three men, and he and Kiser testified that Walker went to get Heintz.

Q: [On cross-examination] And you saw a black guy holding a small semi-automatic handgun to [your] brother's head; is that right?

A: Right.

Q: He was a black guy about six feet tall, weighing 150 to 160; is that right?

A: That's what I said, but I was actually kind of wrong about that.

Q: So when you made this statement on the 15th, the day after it happened, you said he was six feet tall?

A: That's what he appeared to be, but the other guy was bigger.

. . .

Q: There was a shorter black guy pointing a rifle at [you]?

A: Yeah.

Q: And a third black guy went to the other bedroom and pulled Alan out. He was about six feet tall and weighed 180 pounds, and today you said he had a gun also?

A: Yes.

Further, defense counsel outright argued that Walker was armed with a .380, the type of gun that fired the shots at Heintz's house, suggesting that Walker was the shooter. Thus, the testimony offered at trial indicating there may have been two robbers armed with handguns is sufficient to warrant the jury charge.

CONCLUSION

Therefore, the testimony is equivocal as to whether or not Barber was the only person armed with the type of gun the forensic experts say fired all the shots that night. The circuit court judge did not err in instructing the jury on "the hand of one, the hand of all" theory of accomplice liability. Accordingly, the convictions and sentences are

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

J. Doe, by and through his Guardian ad Litem, F. Doe, Appellant,

v.

Wal-Mart Stores, Inc. and Dorchester County Department of Social Services, Defendants,

of which Wal-Mart Stores, Inc. is the Respondent.

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 26993
Heard February 15, 2011 – Filed June 27, 2011

AFFIRMED

Russell S. Stemke, of Isle of Palms, for Appellant.

Regina H. Lewis, of Gaffney, Lewis & Edwards, of Columbia, for Respondent.

JUSTICE PLEICONES: Appellant brought an action against respondent Wal-Mart Stores, Inc. ("Wal-Mart") alleging various theories of negligence. The circuit court granted summary judgment in favor of Wal-Mart. We affirm.

FACTS

This case arises from the physical and sexual abuse of then three-year-old J. Doe ("the victim"). The facts, in the light most favorable to appellant, are as follows. Appellant, F. Doe, is the victim's guardian ad litem and great uncle. F. Doe and his wife ("the aunt") often kept the victim for months at a time. According to the aunt, both of the victim's parents physically abused him beginning when he was three months old. She claimed she had seen bruising on the victim's legs and buttocks, and had observed the father "thump" the victim in the mouth and hit the child with a fly swatter. She did not, however, report the abuse to DSS or the police or seek medical attention for the victim. The aunt did not report the abuse because she feared DSS would remove the victim from his parents' home and she would not be allowed to see him.

In August 1997, upon picking up the victim from his parents' house, the aunt was informed by the victim's mother that the victim had bruises on his buttocks because he had fallen down the steps. After arriving at her house, the aunt examined the victim and found two "wide strips" of bruising on his buttocks. Again, she did not contact the police or DSS or seek medical treatment. Instead, she took two photographs of the victim's buttocks.

After the victim had been in the aunt's custody for several hours, the victim's father called her and told her to bring the victim home because DSS was there. The aunt took the victim home as requested, but did not attempt to speak with the DSS worker who was investigating the abuse allegations. This investigation did not result in the victim's removal from the home.

Several days later, the aunt took the roll of film, which included other unrelated photographs, to Wal-Mart to be developed. When the aunt retrieved the photos, a photo technician informed her she had destroyed some of the photos because of a store policy requiring the destruction of photos depicting nudity. The aunt explained to the employee she needed the photos to give to DSS and pleaded with her to provide the photos. The aunt claimed the employee refused and told her she was required to "destroy them," which the aunt believed meant the employee had destroyed the photos and the negatives. The employee did not, however, destroy the negatives. The aunt left the store with the remainder of the photos and all of the negatives, but erroneously believed the negatives depicting the victim's buttocks had been destroyed.

According to the aunt, the victim's father began sexually abusing him in September 1997, approximately one month after the incident that had caused the aunt to take the photos and DSS to investigate. In December 1997, while giving the victim a bath, the aunt noticed signs of sexual abuse. The aunt took the victim to a doctor who examined the victim and determined he had been sexually abused. The aunt and the doctor contacted DSS, and the victim was placed in the aunt's custody.

Father pled guilty to first degree criminal sexual conduct and was sentenced to twenty-five years' imprisonment.

In 2003, appellant instituted this action, arguing the victim's injuries from the sexual abuse were a result of (1) Wal-Mart's failure to report the suspected physical abuse depicted in the photos as required by the Reporter's Statute;[1] and/or (2) Wal-Mart's negligent hiring and supervision of its employees and its violations of approximately twenty internal company policies. The circuit court granted Wal-Mart's motion for summary judgment.

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[1] S.C. Code Ann. § 63-7-310 (Supp. 2010).

ISSUE

Did the circuit court err in granting summary judgment in favor of Wal-Mart?

STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860.

LAW/ANALYSIS

The circuit court granted summary judgment in favor of respondent, finding Wal-Mart incurred no civil liability for failing to report the suspected child abuse as required by the Reporter's Statute. The circuit court also found Wal-Mart had no common law duty to warn or protect the victim, and that Wal-Mart's internal policies did not create such a duty.

I. Civil Liability Under the Reporter's Statute

Appellant first argues the circuit court erred in finding Wal-Mart did not have any civil liability for failing to report the suspected child abuse as required by the South Carolina Reporter's Statute. We disagree.

The Reporter's Statute provides, in pertinent part:

> . . . [P]ersons responsible for processing films . . . must report in accordance with this section when in the person's professional

> capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 63-7-20.[2]

S.C. Code Ann. § 63-7-310(A) (Supp. 2010).

In Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007), the Court found there could be no private right of action for failing to report suspected or known child abuse in accordance with § 63-7-310. In deciding whether § 63-7-310 gives rise to a private cause of action for negligence *per se*, the Court noted the main factor in determining whether a statute creates a private cause of action is legislative intent:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute . . . . In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing civil liability.

Id. at 396, 645 S.E.2d at 248 (quoting Dorman v. Aiken Communications, Inc., 303 S.C. 63, 67, 398 S.E.2d 687,689 (1990)).

The Court first observed § 63-7-310 is silent as to civil liability for failure to report. Noting other provisions in the Reporter's Statute do impose civil liability,[3] the Court found the legislature's silence as to civil liability in § 63-7-310 indicated its intent not to create civil liability for failing to report as required. Id. at 397, 645 S.E.2d at 249 (citing Byrd v. Irmo High Sch.,

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[2] Section 63-7-20 defines "child abuse or neglect" as a number of actions carried out expressly by "the parent, guardian, or other person responsible for the child's welfare."

[3] Namely, §§20-7-567 and -570 (now §§ 63-7-440 and -430) impose civil liability for making a false report.

321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (finding when one provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist)).

Further, the Court looked to the purpose of the Children's Code and determined § 63-7-310 is concerned with the protection of the public and not with the protection of an individual's private right. Id. at 398, 645 S.E.2d at 249. The Court also noted other jurisdictions have interpreted similar statutes and reached the same conclusion. Id. n.4.

Because, consonant with Doe v. Marion, there can be no private cause of action under § 63-7-310, we find the circuit court properly granted summary judgment in favor of respondent as to this claim.

II. Other Causes of Action

Appellant also asserts the circuit court erred in granting summary judgment in favor of Wal-Mart on various other theories of common law negligence. We disagree.

Respondent has an internal policy against developing photos depicting nudity. The policy requires employees to bring to the attention of the store manager pornographic pictures of children where child abuse is suspected. It also prohibits the printing of pictures depicting nudity and requires they be shredded if printed in error. There is an exception for cases of suspected child abuse, where the developed photos must be kept as evidence. However, the policy requires processed negatives be returned to the customer.

In order to establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Doe v. Marion, 373 S.C. at 400, 645 S.E.2d at 250. Whether a defendant has acted negligently is a mixed question of law and fact. Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct.App.2007). First,

the court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, the defendant is entitled to a judgment as a matter of law. Id. (internal citations omitted).

"Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). We recognize five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant. Id.

The defendant may have a common law duty to warn potential victims under the "special relationship" exception when the defendant "has the ability to monitor, supervise, and control an individual's conduct" and when "the individual has made a specific threat of harm directed at a specific individual." Doe v. Marion, supra (quoting Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998)).

Once a duty has been established, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform. 57A Am. Jur. 2d Negligence § 132. "The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case." Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." Id. (citing Peterson v. Natl. R.R. Passenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005). It follows that, if no duty has been established, evidence as to the standard of care is irrelevant. Only when there is a duty would a standard of care need to be established.

The circuit court found Wal-Mart neither owed any common law duty to the victim, nor did it create or undertake any duty when its employees failed to follow Wal-Mart's internal policies.

We find the circuit court properly granted summary judgment as to these alternative causes of action because Wal-Mart owed no duty to the victim. It is clear Wal-Mart had no general duty to control the conduct of the victim's father or warn the victim of the danger of the sexual abuse. Further, none of the exceptions enumerated in Faile apply here. Wal-Mart had no special relationship with either the victim or his father because it did not have the ability to monitor, supervise, or control either. Doe v. Marion, supra. Wal-Mart did not negligently or intentionally create the risk of the father's sexual abuse. Lastly, as discussed above, Wal-Mart's duty to report under the Reporter's Statute cannot give rise to civil liability.

We also hold Wal-Mart did not voluntarily undertake a duty. It is undisputed that Wal-Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence. However, this internal policy cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law. See Madison, supra.

CONCLUSION

We find the circuit court's grant of summary judgment in favor of Wal-Mart was proper because there can be no civil liability under the Reporter's Statute and Wal-Mart owed no duty to the victim. Accordingly, the order of the circuit court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Amaurys C. Fonseca, Respondent.

ON WRIT OF CERTIORARI TO COURT OF APPEALS

Appeal from McCormick County
R. Knox McMahon, Circuit Court Judge

Opinion No. 26994
Heard February 1, 2011 – Filed June 27, 2011

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Petitioner.

Appellate Defender Tristan M. Shaffer, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the decision of the Court of Appeals and now affirm that well-reasoned opinion. State v. Fonseca, 383 S.C. 640, 681 S.E.2d 1 (Ct. App. 2009). The Court of Appeals properly held that the circuit court erred in permitting the State to introduce evidence of the 2001 incident, and properly summarily disposed of the State's additional sustaining ground[1], and in so doing anticipated our decision in State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Finding no error in the Court of Appeals' decision, we adopt it as our own and therefore

AFFIRM.

BEATTY, KITTREDGE and HEARN, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

[1] The dissent would rely upon Rule 220 (c), SCACR, which allows this Court to affirm an appeal for any reason appearing in the record, to reverse the decision which we are reviewing.

CHIEF JUSTICE TOAL: I respectfully dissent. I would reverse the court of appeals and affirm the circuit court's ruling allowing the victim's testimony regarding the 2001 incident.

Amaurys C. Fonseca (Respondent) was married to the minor victim's older sister. The minor victim often went to Respondent's house after school to babysit for her sister. Respondent was indicted for lewd act with a minor in an indictment covering the dates of August 1, 2001 to October 31, 2003, and alleging two separate incidents of abuse. The State elected to proceed on the 2003 allegation. During the trial, the victim testified about both the 2003 incident and the 2001 incident. Over defense counsel's objections, the circuit court judge allowed the victim to testify as to the 2001 incident, ruling her testimony was admissible under Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), as evidence of motive, intent, and lack of accident or mistake. Respondent was found guilty for committing a lewd act upon a child under the age of 16, and was sentenced to incarceration for a period of 15 years.

The court of appeals reversed his conviction, reasoning the circuit court erred in allowing the victim's testimony because under *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998), testimony to show motive or intent in a sex offense prosecution is only admissible when the defendant denies touching the victim and the act alleged is subject to varying interpretations. *State v. Fonseca*, 383 S.C. 640, 647–49, 681 S.E.2d 1, 4–5 (Ct. App. 2007). Further, the court of appeals found the error not to be harmless. *Id.* at 650, 681 S.E.2d at 6.

The court of appeals also rejected as an additional sustaining ground the State's contention that the testimony was admissible as evidence of the existence of a common scheme or plan. *Id.* at 649–50, 681 S.E.2d at 5–6. The court of appeals disposed of this argument, stating, "The State provides no compelling argument of any similarities between the two occurrences, or any argument to overcome the fact that the incidents are remote in time." *Id.* at 649, 681 S.E.2d at 5. I disagree and would hold the facts are sufficient to

support the introduction of the victim's testimony under the common scheme or plan exception.

"Evidence of other crime, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. However, such evidence may be admissible to show: (1) motive, (2) identity, (3) the existence of a common scheme or plan, (4) the absence of mistake or accident, or (5) intent. *Id.*; *Lyle*, 125 S.C. at 415, 118 S.E. at 807. "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277–78 (2009). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." *Id.* at 433, 683 S.E.2d at 278. The following factors should be considered when determining whether a close degree of similarity exists: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. *Id.* at 433–34, 683 S.E.2d at 278. The above list is not exhaustive and other factors may be relevant in determining whether the similarities outweigh the dissimilarities. *Id.*

The facts of this case, to my mind, are a compelling example of the type of continuous illicit conduct the common scheme or plan exception is intended to cover. The two instances of sexual battery in this case involved the same victim, occurred at Respondent's home when the victim was helping her sister, occurred after Respondent followed victim into another room where he could be alone with her, and involved similar acts of touching the victim's genital area in a sexual manner.

Although the 2001 incident was arguably more severe than the 2003 incident, I do not find this dissimilarity dispositive. The fact that the victim interrupted and terminated the 2003 incident by threatening to scream for help should not prevent this Court from recognizing the overwhelming

similarities between these two incidents. *See State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) (recognizing that an interruption of the abuse before it could escalate does not diminish the similarities between the incidents). Additionally, I am not persuaded the "remoteness in time" of the two incidents operates in any way to make the victim's testimony inadmissible. The testimony at trial, elicited by both the prosecution and the defense, established that Respondent very seldom was alone around the victim and had very few opportunities to assault her. In fact, it is undisputed that Respondent's wife, the victim's sister, was in another room of the house on each occasion and never left Respondent and the minor victim completely alone in their house.

For these reasons, I dissent from the majority's opinion and would reverse the court of appeals. Because this Court can affirm for any ground appearing in the record, Rule 220(c), SCACR, I would affirm the circuit court's ruling that the testimony was admissible, but clarify the admissibility is proper under the common scheme or plan exception rather than the motive or intent exceptions.

The Supreme Court of South Carolina

In the Matter of William Gary White, III, Respondent

ORDER

Respondent was suspended on March 7, 2011, for a period of ninety (90) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

s/ Jean H. Toal C.J.
For the Court

Hearn, J., not participating

Columbia, South Carolina

June 22, 2011

The Supreme Court of South Carolina

In the Matter of
Derwin Thomas Brannon, Petitioner.

ORDER

On July 13, 2009, the Court definitely suspended petitioner from the practice of law for one (1) year, retroactive to April 30, 2008, the date of his interim suspension.[1] In the Matter of Brannon, 383 S.C. 374, 680 S.E.2d 776 (2009). Petitioner filed a Petition for Reinstatement and the matter was referred to the Committee on Character and Fitness (the Committee). The Committee has filed a Report and Recommendation recommending the Court reinstate petitioner subject to certain conditions. Neither petitioner nor the Office of Disciplinary Counsel (ODC) filed exceptions to the Committee's Report and Recommendation.

The Court grants the Petition for Reinstatement subject to the following conditions:

1) at least ten (10) days prior to his return to the practice of law, petitioner shall provide the Commission on Lawyer Conduct (the Commission) with documentation establishing malpractice insurance coverage;

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[1] In the Matter of Brannon, 377 S.C. 474, 661 S.E.2d 98 (2008).

2) within one (1) year of the date of this order, petitioner shall attend and complete the South Carolina Bar's Advertising and Trust Account School and Legal Ethics and Practice Program School and provide the Commission with evidence of completion of the programs;

3) within one year of the date of this order, petitioner shall repay $11,000.00 to former client Lisa G. Lewis; and

4) within sixty (60) days of the date of this order, petitioner shall enter into a restitution agreement with the Commission agreeing to repay the Lawyers' Fund for Client Protection $7,792.24 for claims paid on his behalf.

Petitioner is hereby reinstated to the practice of law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Hearn, J., not participating

Columbia, South Carolina

June 23, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

C-Sculptures, LLC, Respondent,

v.

Gregory A. Brown and Kerry W. Brown, Appellants.

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 4826
Heard December 8, 2010 – Filed April 27, 2011
Withdrawn, Substituted and Refiled June 23, 2011

AFFIRMED

John S. Nichols and William D. Robertson, III, both of Columbia, for Appellants.

Donald Ryan McCabe, Jr., of Columbia, for Respondent.

KONDUROS, J.: Gregory and Kerry Brown (the Browns) appeal the circuit court's confirmation of an arbitration award arising out of a dispute over money owed to C-Sculptures, LLC as general contractor in the construction of the their home. The Browns claimed C-Sculptures was precluded from seeking to enforce the contract because its contractor's license was for performing work valued at no more than $100,000, while the construction of their home cost over $800,000. They argue because the arbitrator manifestly disregarded the law on this point, the circuit court should have vacated the arbitration award. The Browns further appeal the award of attorney's fees to C-Sculptures arguing C-Sculptures improperly manipulated its pleadings and prayer for relief to position itself as the prevailing party. We affirm.

FACTS

C-Sculptures served as the general contractor for the construction of the Browns' home. At the time of contracting, C-Sculptures was licensed to perform work within Group Two as defined by section 40-11-260(A)(2) of the South Carolina Code (2001). Group Two license holders are limited to performing work not valued in excess of $100,000. None of the parties dispute initial estimates for construction of the home were over $700,000. As construction progressed, disagreements about the work, costs, and payments developed until C-Sculptures stopped work on the house claiming it was due $39,357.48. C-Sculptures filed a mechanic's lien in September of 2005 and filed an amended mechanic's lien in January of 2006 claiming it was owed $150,092.69 for work performed. C-Sculptures then filed a complaint seeking foreclosure of its lien, and the Browns moved to dismiss the complaint and submit the matter to arbitration pursuant to the contract between the parties. On July 26, C-Sculptures amended its complaint adding claims for unfair trade practices, quantum meruit, and breach of contract. The arbitrator, upon the Browns' motion, dismissed the quantum meruit claim. In November 2006, C-Sculptures submitted its pre-arbitration brief and the Browns submitted their brief detailing over $60,000 to which they were entitled in set-offs. The Browns also submitted a motion to dismiss C-

Sculptures claims based on the fact that it did not have a valid license to perform work of this value thereby making the contract void and unenforceable. On the first day of arbitration, C-Sculptures filed a motion to amend its pleadings to recognize credits claimed by the Browns totaling $59,854.

After a five-day hearing, the arbitrator entered its order (1) permitting C-Sculptures to amend its claim to reflect credits claimed by the Browns totaling $59,845.00 thereby reducing the amount claimed in arbitration to $90,155.00; (2) denying the Browns' motion to dismiss under the licensing statutes; (3) finding the balance due to be $85,863.00; (4) denying C-Sculptures' unfair trade practices claim; (5) finding in favor of the Browns for credits of $34,132.50.00; (6) finding C-Sculptures was due $51,730.50 under the contract; (7) awarding C-Sculptures interest of $10,484.74 under the contract; and (8) finding C-Sculptures was the prevailing party under the mechanic's lien statutes and contract supporting an attorney's fees award to it of $24,707.00.

The Browns petitioned the circuit court to vacate the arbitration award, but the circuit court denied their request and confirmed the arbitrator's award. This appeal followed.

LAW/ANALYSIS

I. Licensure

The Browns maintain the circuit court erred in confirming the arbitration award because the arbitrator showed a manifest disregard for the law in failing to find C-Sculptures held an invalid license and therefore could not enforce the contract pursuant to section 40-11-370(C) of the South Carolina Code (2011). We disagree.

"When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances." Gissel v. Hart, 382 S.C.

235, 241, 676 S.E.2d 320, 323 (2009). A reviewing court should vacate an arbitrator's decision only when the arbitrator has exceeded his or her authority or has manifestly disregarded or perversely misconstrued the law. Id. "[F]or a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." Id. "[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), vacated and remanded on other grounds, 539 U.S. 444 (2003). "The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law." Gissel, 382 S.C. at 241, 676 S.E.2d at 323. An arbitrator manifestly disregards the law when he or she appreciates the existence of a clearly governing legal principle and decides to ignore it. Harris v. Bennett, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (Ct. App. 1998).

Pursuant to section 40-11-30 of the South Carolina Code (2011), a person or entity acting as a general contractor is required to obtain a license if the work to be performed will be of a greater value than $5,000. The statute states:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

Id. The chapter governing licensing also contains provisions regarding net worth requirements for general contractors who intend to do work within different cost ranges. The relevant statute states:

> (A) An applicant for a general contractor's license or a general contractor's license renewal who performs or offers to perform contracting work for which the total cost of construction is greater than $5,000.00, and an applicant for license group revisions must provide an acceptable financial statement with a balance sheet date no more than twelve months before the date of the relevant application showing a minimum net worth for each license group as follows: . . .
>
> (2) Group Two
> (a) bids and jobs not to exceed $100,000.00 per job;
> (b) required net worth of $20,000.00;
> (c) on initial application, an owner-prepared financial statement with an affidavit of accuracy;
> (d) on renewal, an owner-prepared financial statement with an affidavit of accuracy; . . .
>
> (5) Group Five
> (a) bids and jobs unlimited;
> (b) required net worth of $250,000.00;
> (c) on initial application, a financial statement audited by a licensed certified public accountant or a licensed public accountant in accordance with GAAP, including all disclosures required by GAAP;
> (d) on renewal, a financial statement reviewed by a licensed certified public accountant or a licensed public accountant in accordance with GAAP, including all disclosures required by GAAP.

S.C. Code Ann. § 40-11-260 (2011).

"A licensee is confined to the limitations of the licensee's license group and license classifications or subclassifcations as provided in this chapter."

S.C. Code Ann. § 40-11-270(A) (2011). "The board may assess a penalty authorized by law against a licensee who undertakes or offers to undertake an improvement exceeding the limitations of the licensee's group." S.C. Code Ann. § 40-11-280 (2001). The chapter defines an "unlicensed contractor" as "an entity performing or overseeing general or mechanical construction without a license." S.C. Code Ann. § 40-11-20(24) (2011). The chapter also addresses the limitation on the right of a general contractor to enforce a contract.

> An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

§ 40-11-370(C).

In Columbia Pools, Inc. v. Moon, 284 S.C. 145, 146-47, 325 S.E.2d 540, 541 (1985), the supreme court held a general contractor licensed in Michigan, but not licensed in South Carolina at the time he entered into a contract, could not enforce the contract pursuant to section 40-59-10 of the South Carolina Code (2009), which prevents unlicensed residential homebuilders from enforcing a contract.[1] In W & N Construction Co. v.

[1] S.C. Code Ann. § 40-59-30(B) (2011) provides:

> Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the

Williams, 322 S.C. 448, 472 S.E.2d 622 (1996), the supreme court determined a general contractor whose license had been revoked for failure to pay taxes could not enforce a contract because contractors were required to be licensed. However, the opinion does not address the contractor classifications and does not reference section 40-11-370(C) because it was not enacted at the time.[2]

The present case revolves around the appellate court's standard of review in arbitration cases. While the Browns' contention that the contract entered into was invalid because C-Sculptures was underlicensed may be correct, no cases are directly on point and the enforcement provision in section 40-11-370(C) does not make the issue perfectly clear. The arbitrator's award indicated he considered all the applicable law and arguments in reaching his decision and the issue was sufficiently briefed and argued so as to bring it to his attention. Under our standard of review, we cannot conclude the arbitrator showed a manifest disregard for the law as the law on this issue is not well defined, explicit, and clearly applicable. Therefore, we affirm the circuit court's confirmation of the arbitration award.

II. Attorney's Fees

The Browns maintain the circuit court erred in not finding the arbitrator's award of attorney's fees to C-Sculptures was arbitrary and capricious or in manifest disregard of the law.[3] We disagree.

> person or firm entered into in violation of this chapter.

[2] It appears the enactment of section 40-11-370(C) was in response to W & N Construction.

[3] The Browns also claim the circuit court erred in confirming the award pursuant to the parties' contract. However, because this analysis finds C-Sculptures was the prevailing party under the statute, which the Browns maintain is the controlling law, we need not address the issue of whether the contract supported an award of attorney's fees. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)

The mechanic's lien statute provides a method for determining the prevailing party in mechanic's lien cases and thereby is entitled to attorney's fees under the statute.

> For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees.
>
> If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.
>
> If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code Ann. § 29-5-10(b) (2007).

Here, C-Sculptures moved to amend its pleadings on the first day of the five-day arbitration. While this was late in the proceedings, the Browns took no action to indicate they were willing to settle the case based on that concession. The arbitrator's award was then closer to C-Sculptures' request

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(holding an appellate court need not address remaining issues when the determination of a prior issue is dispositive of the appeal).

than the Browns' settlement offer, which was zero under the terms of the statute.

The arbitrator followed the statutory scheme. The Browns' argument is really that the arbitrator should not have allowed C-Sculptures to amend its pleadings at that stage of the arbitration because that manipulated the range of the possible award to increase C-Sculptures' odds of "being closest to the pin" and therefore the prevailing party. However, whether to allow amendment of the pleadings is within the arbitrator's discretion. The attorney's fees award was neither arbitrary nor capricious and did not demonstrate a manifest disregard for the law. Consequently, the circuit court's confirmation of the arbitration award is

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Crystal Pines Homeowners Association, Inc., Respondent,

v.

Don E. Phillips, Crystal Lake Land Developers, Inc., and Crystal Pines Yacht Club, LLC, Appellants.

Appeal From Lexington County
James Spence, Master-In-Equity

Opinion No. 4832
Heard December 9, 2010 – Filed May 4, 2011
Withdrawn, Substituted and Refiled June 23, 2011

AFFIRMED IN PART AND REVERSED IN PART

John D. Hudson and Shaun Blake, both of Columbia, for Appellants.

Harry Clayton Walker, Jr., of Columbia, for Respondent.

KONDUROS, J: Don E. Phillips appeals the master-in-equity's finding that Phillips, as successor in interest to Crystal Lake Land Developers, Inc. (CLLD), is responsible for maintaining roads in the Crystal Pines subdivision (Crystal Pines). Phillips and the Crystal Pines Yacht Club, LLC (the Yacht Club) appeal the master's ruling that residents of Crystal Pines had either acquired or were granted an easement for use of a boat ramp in the subdivision. We affirm in part and reverse in part.

FACTS

Phillips was the sole shareholder and officer in CLLD. In 1979, CLLD began developing Crystal Pines. In 1981, CLLD deeded the roads in Crystal Pines to the Crystal Lake Road Company (the Road Company). All homeowners in Crystal Pines were members of the Road Company. The deed contained the following provision:

> The undersigned [CLLD] by execution of this instrument hereby agrees at its own personal cost and expense to open the unopened portion as may be necessary for development, of Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane as described on Exhibit "A" hereto and to pave the same; determine and carry out or cause to be performed all improvements, maintenance and repair of the said roads as nearly as may be practicable in the same condition and repair as originally paved. The said roads shall be kept free of all obstructions so as to be open for the passage of fire, police, and other emergency vehicle personnel and equipment at all times and by the owners of portion of the real property described in Exhibit "B" hereto and their agents, guests, invitees and employees; . . . .

From 1981 through 1986, the Road Company operated as an unincorporated association and simple homeowner's association. In 1987, the Road Company changed its name to the Crystal Pines Homeowners Association (HOA), although it was not technically incorporated until 1997. Beginning in 1996, CLLD drafted a proposed deed granting title to the road to the HOA instead of the Road Company. The deed contained an attachment that placed road maintenance obligations on the HOA. In 1997, CLLD conveyed its remaining interest in Crystal Pines to Phillips with Phillips paying CLLD $392,679 and assuming CLLD's mortgage debt. CLLD was then dissolved.

Phillips unsuccessfully tried to have the second deed and attachment executed. In 1998, Phillips filed an amendment to the restrictions governing certain sections of Crystal Pines. The amendment stated the HOA was responsible for road maintenance in Crystal Pines. Phillips repaired the roads in Crystal Pines in the early 1990s, but further maintenance is now required. Phillips has refused to perform any additional work.

Additionally, in 1980, CLLD constructed a boat ramp in Crystal Pines. George Bugenske, a Crystal Pines resident, testified homeowners regularly used the boat ramp. Phillips also testified Crystal Pines residents regularly used the boat ramp, but with his permission. In 2004, Phillips installed a locked gate prohibiting access to the boat ramp and later conveyed title to his son. His son then transferred title to the Yacht Club, which has maintained the locked access.

The HOA filed suit against Phillips, CLLD, and the Yacht Club alleging CLLD and Phillips, as CLLD's successor, were responsible for maintaining the roads in Crystal Pines and claiming an easement to use the boat ramp. The master found in favor of the HOA on both claims, and this appeal followed.

LAW/ANALYSIS

I. Construction of the 1981 Deed

Phillips maintains the master erred in determining the deed placed maintenance responsibilities for all the roads in Crystal Pines on CLLD.[1] We agree.

A reviewing court determines, as a matter of law, whether the language in a deed is ambiguous. Santoro v. Schulthess, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009). A reviewing court considers questions of law de novo. Id. "A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one, i.e., when it is obscure in meaning through indefiniteness of expression, or containing words having a double meaning." 30 S.C. Jur. Contracts § 32 Ambiguity (1999) (footnote omitted).

If the reviewing court determines a deed is ambiguous, it must interpret the deed. "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts

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[1] The HOA contends Phillips's argument regarding construction of the deed is unpreserved because it was not raised to and ruled upon by the master. We disagree. At the beginning of trial, when discussing the exhibits to be submitted, counsel for Phillips stated both sides "have the same documents, and we agree our interpretation is correct, or I should say that I agree, that the Homeowners' Association is responsible for the roads and not Mr. Phillips." Witnesses for both sides were asked to look at the deed and determine who bore road maintenance responsibilities under the document. Phillips testified regarding his belief the deed did not place road maintenance obligations on CLLD. The master clearly ruled against Phillips's construction of the deed when it stated in the order that "CLLD contracted with [the Road Company] to maintain the [r]oads according to the terms of the [d]eed." Because this issue was raised to and ruled upon by the master, it is adequately preserved for our review.

in accordance with the court's view of the preponderance of the evidence." Slear v. Hanna, 329 S.C. 407, 410-11, 496 S.E.2d 633, 635 (1998).

> In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.

K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (internal quotation marks and citations omitted). "The intention of the grantor must be found within the four corners of the deed. When intention is not expressed accurately in the deed evidence aliunde may be admitted to supply or explain it. The instrument is not thereby varied or contradicted but is explained or corrected." Id. (citations omitted).

We find the deed is ambiguous with respect to road maintenance obligations. Paragraph 11 of the deed discusses the further development of Crystal Pines by CLLD and how that development relates to roads in the subdivision. The deed indicates CLLD will pay to open unopened portions necessary for development and will maintain or repair "said roads as nearly as may be practicable in the same condition and repair as originally paved." Paragraph 11 then discusses the obligation of CLLD to ensure the roads are kept free of obstruction to allow emergency vehicles access to the neighborhood.

The HOA contends Paragraph 11 unambiguously places the burden for road maintenance in Crystal Pines on CLLD. However, the placement of such an important obligation in a paragraph solely discussing the process of opening new roads casts doubt upon the clarity of this obligation. Additionally, "said roads" is not a defined term and Paragraph 13 of the deed seems to indicate the Road Company is responsible for road repair in the subdivision. It states:

> Notwithstanding anything to the contrary in this instrument contained, if [the Road Company] shall incur any cost or expense for or on account of any item of maintenance, repair or other matter directly or indirectly occasioned or made necessary by any wrongful or negligent act or omission of any owner . . . such cost or expense shall not be borne by [the Road Company] but by such owner and if paid out the [Road Company] shall be paid or reimbursed to the [Road Company] by such owner forthwith

This paragraph indicates either the Road Company or a particular resident would be responsible for repairing damage to roads. There is no mention of CLLD. Based on the lack of clarity and the seeming inconsistency in the deed, we conclude the deed is ambiguous, and we must therefore look to the intent of the parties.

Viewing the deed as a whole, its purpose was to convey ownership of the roads in Crystal Pines to the Road Company. Paragraph 10 states the Road Company "shall receive title to Crystal Pines Drive, Knob Cone Road, Red Fox Trail, Whippoor Will Court, and Torrey Pine Lane and shall hold and deal with the same and such other assets as it may receive from time to time . . . ." The Road Company also had the right to dedicate the roadways to a government entity for perpetual maintenance under Paragraph 22. To place ownership and essentially all control of the roads with the Road Company and leave the responsibility for maintenance with CLLD would be inconsistent.

Because the deed is ambiguous, we may also consider extrinsic evidence to ascertain the intent of the parties. The general rule, as evidenced by Lexington County Development Guidelines, was for homeowners to take over maintenance of private roads once the final plat of a development was approved. According to Phillips's testimony at trial, the deed states CLLD would repair and maintain the roads being conveyed if they were damaged during the process of constructing the new portions of road. He testified:

> Q. Is it your position that paragraph 11 doesn't obligate the developer to maintain and repair the roads mentioned here?
>
> A. If you read the whole sentence, it says that if you cause damage, you will repair it; if you don't read the whole sentence, you can take portions of it and put together an entirely different notion, and that is what you have done. . . .
>
> Q. I'm going to borrow Mr. Lapine's pen and ask you, on Exhibit #1, paragraph 11, to circle the words that you contend limit the developer's obligation to repair damage it causes.
>
> A. It would be the whole paragraph.
>
> Q. Then circle the whole paragraph. So you can't point to specific words in the paragraph that limit the developer's liability to repairing damages it causes?
>
> A. You would have to assume that a road was opened, an unpaved portion was opened, and that there was damage done.

The fact that the only mention of maintaining the roads immediately follows the clause concerning the opening of new roads is consistent with Phillips's explanation of CLLD's intent in Paragraph 11.

The HOA argues Phillips's efforts beginning in 1996 to execute a corrected deed with Exhibit B attached evidenced his understanding that CLLD had the obligation to maintain the roads pursuant to the original deed. We disagree. Phillips testified that his purpose in drafting the corrected deed was to ensure the conveyance of the roads to the HOA as an incorporated entity was proper. The inclusion of Exhibit B and Phillips's amendments to

the restrictions governing certain sections of Crystal Pines likely reflects his desire to clear up any ambiguity in the original deed. Additionally, the master found that Phillips made some road repairs in the late 1990s. The record contains no testimony regarding this particular point, but the master's order indicates the repairs were made when Phillips "extended the Roads to open new areas of Crystal Pines." That action is consistent with Phillips's construction of the deed. Other than that instance, the testimony indicates Phillips consistently disclaimed personal responsibility for repairing or maintaining the roads in Crystal Pines.

Because we have a broad standard of review in this case and considerable evidence supports Phillips's construction of the deed, we find the CLLD and Phillips are not responsible for repairing or maintaining the roads in Crystal Pines, except to the extent of damage that occurs during further development of the subdivision. Therefore, we reverse the master's finding CLLD is responsible generally responsible for all road maintenance in Crystal Pines. Accordingly, we decline to address two additional issues raised by Phillips regarding the amount of damages awarded to Crystal Pines or whether Phillips was successor to CLLD. See Whiteside v. Cherokee Cnty. Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (declining to address remaining issues when determination of prior issue is dispositive).

II. The Boat Ramp

Phillips argues the master erred in determining the HOA was entitled to an easement for use of the community's boat ramp. We disagree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear, 329 S.C. at 410, 496 S.E.2d at 635. To establish a prescriptive easement, a party must demonstrate (1) continued and uninterrupted use or enjoyment of the right for a period of 20 years, (2) proof of the identity of the thing enjoyed, and (3) adverse use or use under a claim

of right. Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App. 2005).

According to the testimony in the record from Phillips and Bugenske, the ramp was constructed in 1980 and homeowners used it until 2004, when the Yacht Club restricted access.[2] Phillips claims the homeowners used the boat ramp with his permission. However, some evidence demonstrates the use was under a claim of right, not just with permission. According to Bugenske, homeowners were told when they purchased their lots they had access to the boat ramp and they used the ramp frequently throughout the years with no indication they sought Phillips's permission to do so. Marketing brochures for the subdivision indicated deep-water access was available to residents.

Detrimental to HOA's case is that Bugenske's testimony only affects the period of time after he purchased his home in 1994, short of the required twenty years. The only evidence in the record from the 1984 to 1994 period is from Phillips himself. Phillips acknowledged homeowners used the ramp, but he claims they did so with his permission. However, in a letter to the HOA in 2002, Phillips indicates the original 1981 deed transferring ownership of the roads also included the transfer of ownership of the boat ramp. The letter states: "Although not specifically mentioned in the deed, the entrance gates and Parcel A including the boat ramp are included in property turned over with the roads." Furthermore, a plat filed in 1986 indicates the location of the boat ramp is in an area designated "community common area."[3] Phillips's testimony regarding actual use, coupled with the

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[2] Phillips argues the Road Company and the HOA are not the same entity for purposes of establishing the twenty-year prescriptive period. However, even if the entities are not the same, a claimant is permitted to tack the time period of a prior owner to his own to establish the required prescriptive period. See Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("A party may 'tack' the period of use of prior owners in order to establish the 20-year requirement.").

[3] Although the year 1986 cannot be used to establish the beginning of the twenty-year prescriptive period, the plat is some evidence demonstrating

letter and plat, is at least some evidence the residents were using the boat ramp based on a claim of right during the 1984 to 1994 period. Therefore, we find the master did not err in finding a prescriptive easement in favor of the HOA.

Because we affirm the master's finding the HOA established a prescriptive easement to use the boat ramp, we need not address Phillips's remaining argument regarding an easement by implication in favor of Section IV of Crystal Pines. See Whiteside, 311 S.C. at 340, 428 S.E.2d at 889 (declining to address remaining issues when determination of prior issue was dispositive).

Based on the foregoing, the judgment of the master is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and LOCKEMY, JJ., concur.

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residents would have understood their use to be a matter of right. The plat and the contents of the letter also discredit Phillips's testimony that residents only used the boat ramp with his permission.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Southeastern Site Prep, LLC, Southeastern Property Development, LLC, Steve Desimone, and Thomas Viljac, Respondents,

v.

Atlantic Coast Builders and Contractors, LLC and James N. Richardson, Jr., Appellants.

Appeal From Beaufort County
Thomas Kemmerlin, Circuit Court Judge

Opinion No. 4845
Submitted March 1, 2011 – Filed June 22, 2011

AFFIRMED

W.H. Bundy, Jr. and M. Brent McDonald, of Mt. Pleasant, for Appellants.

Robert Vaux, Antonia Lucia, and Mark S. Berglind, of Bluffton, for Respondents.

SHORT, J.: Atlantic Coast Builders and Contractors, LLC (Atlantic) and James N. Richardson, Jr. (collectively, Appellants) appeal the special referee's denial of their motion for sanctions. We affirm.[1]

FACTS

Southeastern Site Prep, LLC (Southeastern), Southeastern Property Development, LLC (SPD), Steve Desimone, and Thomas Viljac (collectively, Respondents) filed this action alleging nine causes of action against Atlantic: (1) breach of contract accompanied by fraudulent act; (2) breach of contract; (3) quantum meruit/unjust enrichment; (4) conversion; (5) fraud and deceit/intentional misrepresentation; (6) breach of fiduciary duty; (7) Unfair Trade Practices Act violation; (8) misappropriation of a trade secret; and (9) tortious interference with contracts.

Respondents alleged that during 2001 and 2002, the parties entered into negotiations for a merger and for Richardson[2] to lease or purchase real property owned by SPD, which was owned by Desimone. Southeastern and Atlantic were both suffering from an economic downturn in the construction industry and were in poor financial condition. Southeastern owned dirt pits, which according to Desimone, are "very critical in a site business, which Atlantic didn't have." Southeastern also owned its own extensive facility and was "fully manned and ready to go for a heavy construction company," whereas Atlantic rented a facility on a month-to-month basis, and its lease was ending. Southeastern had engineering staff, computer technology, and survey skills, but lacked financial savvy. Also, Southeastern had bond capability of $2 million to $3 million and had been bonded for $1.8 million in the past, whereas Atlantic had bond capability of only $750,000. Desimone testified: "We kind of did the same things, although they were much smaller and they wanted to move into the market. They had something that we needed; we had something that they needed and it just only made sense."

For five to six months beginning mid-2001, the companies' principals discussed the merger. During the negotiations, Southeastern disclosed

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

[2] Richardson owned the Richardson Group, which owned Atlantic.

"confidential and proprietary business information, including but not limited to, customer lists, notes payable, pending and future contracts, and financial statements." Southeastern also provided information on its equipment, existing contracts, and possible future contracts.

George J. Akmon, the chief operating officer of the Richardson Group, was responsible for budgets, business plans, personnel, and cash planning for Atlantic. There were between thirty and fifty meetings between Southeastern and Atlantic, and the parties produced numerous memoranda memorializing the agreement. Most of the meetings were between Desimone and Akmon, with Richardson being involved in about ten of the meetings. In January or early February 2002, Akmon, with the knowledge and consent of Richardson, prepared a document embodying the terms of the agreement and an extensive business plan incorporating the merger. According to Southeastern, the parties reached an agreement by January 30, 2002.

Pursuant to the alleged agreement, Richardson, individually, was to lease the property for $15,290.43 per month with an option to purchase for $1.6 million. Southeastern was to contribute approximately $600,000 in equipment equity to Atlantic. Atlantic was to assume the notes payable on the equipment, hire Thomas Viljac of Southeastern as the chief of engineering, and hire Desimone as CEO for $6,000 per month, and eventually, a twenty percent equity interest in the merged company. Respondents maintain the closing documents were scheduled to be completed on February 14, 2002. No documents were ever signed.

On February 6, 2002, Richardson called a meeting of the employees of both companies, announced the merger, and directed the employees of Southeastern to fill out payroll paperwork for Atlantic. Atlantic began paying the employees and met with a bonding company to get a performance bond. Atlantic sent a facsimile to BB&T Bank and requested a draw using two pieces of Southeastern's equipment as collateral. In the days following the February 6 meeting, Atlantic cut locks on the fences located at the property, replaced the Southeastern signs on the property and equipment with Atlantic signs, and moved in. The companies performed business as one during the following two weeks.

On February 13, 2002, Desimone went to the office and Atlantic's employee, Paul Fullmore, attacked him, hitting him twice in the head with a radio and grabbing a gun from a truck. Thereafter, Akmon informed Desimone the "deal was on hold." Richardson, per Akmon, then set a "new deal" requiring Desimone to forego his job and his twenty percent equity interest. Desimone initially refused, but Akmon presented a second revision, and Desimone agreed because he had "held off" creditors based on the merger.

On February 18 and 19, 2002, Atlantic moved out. Shortly thereafter, Southeastern's past-due obligations, allegedly renegotiated based on the merger, became due. Creditors seized Southeastern's computers, and equipment with equity valued at between $400,000 and $856,000. These assets were allegedly resold at low auction prices. Atlantic's actions allegedly prevented Southeastern from servicing existing customers, attracting new customers, and continuing as a viable concern. Respondents alleged other damages including: (1) loss of future jobs; (2) missing equipment; (3) increased interest and attorney's fees on debts; (4) damaged reputation in the community; (5) loss of employees; (6) foregone opportunities to pay off its debt by open market sales, debt consolidation, or other partnerships; (7) personal judgments against Desimone and Viljac; (8) loss of profits on current and future contracts Southeastern had been negotiating, some of which Atlantic performed; and (9) loss of goodwill. Southeastern ceased doing business by August 2002, and Viljac and Desimone faced hundreds of thousands of dollars in judgments. Respondents filed this action in October 2003.

The parties engaged in lengthy and extensive discovery. Appellants filed a motion for summary judgment on May 31, 2005. At the March 7, 2006 hearing on the motion before the Honorable Jackson V. Gregory, Respondents withdrew several causes of action. Respondents' counsel stated: "Your Honor, there are a number of causes of action which I would be willing to withdraw at this point . . . . [W]e have now gone through a number of depositions and I am willing to . . . withdraw . . . a number of the causes of action." Respondents withdrew the actions for quantum meruit/unjust enrichment, conversion, breach of fiduciary duty, Unfair Trade Practices Act violation, and misappropriation of a trade secret. Judge Gregory granted

summary judgment to Appellants on the cause of action for tortious interference with contracts and on all causes of action as to the plaintiff Viljac. Respondents moved to amend their complaint. Judge Gregory ruled they could file a subsequent motion with an attached amended complaint.

Respondents also conceded the original individual defendants, James N. Richardson, Jr. and George J. Akmon, were entitled to summary judgment on the breach of contract cause of action. Judge Gregory denied summary judgment as to the remaining causes of action by order dated September 26, 2006. In denying summary judgment, Judge Gregory found "a pretty good question of fact [as to] partial performance . . . to take it out of the statute of frauds . . . ." The order also denied Respondents' motion to amend their complaint. However, the order granted leave to proceed in the future on a motion to amend to include the issue of piercing the corporate veil, "at a later time when it would be more appropriate . . . ."

On March 19, 2007, Judge Mullen presided over the hearing on Respondents' motion to amend the complaint, demand a jury trial, and compel Richardson to respond to discovery requests for financial disclosures. Atlantic agreed to the amendment, but objected to the request for a jury trial. Judge Mullen denied the request for a jury trial and granted the motion to amend the complaint.

The Honorable Thomas Kemmerlin, Jr. presided over the bench trial. At the start of the trial, Judge Kemmerlin refused to grant Appellants' renewed motion for summary judgment. After Respondents presented their case, Appellants moved for summary disposition. Judge Kemmerlin took the voluminous record of depositions under advisement. By order dated April 8, 2009, Judge Kemmerlin dismissed the three remaining causes of action, finding the breach of contract causes of action were barred by the statute of frauds, and Respondents failed to prove fraud.

Appellants moved for sanctions under Rule 11, SCRCP, or the South Carolina Frivolous Civil Proceedings Sanctions Act (the Act). In his order denying the motion, Judge Kemmerlin found:

> Obviously the mere loss of a case does not subject a party . . . to a suit by the winner for Sanctions; if it did, the Court System could not function. And no lawyer should be held to a standard of brilliance in the prediction of the outcome of a lawsuit. Fortunately, the law does not require an attorney to be brilliant; it merely requires him to be competent. Did the Plaintiffs' Attorneys fail to meet this standard? I say "No."
>
> The case was complicated . . . [and the parties] at the early stages of the litigations referred to the result they sought as a "merger." What was sought was not a merger but some form of sale of real and personal properties – which brought into play the statute of frauds and under that statute [Plaintiffs were] required to have a writing sufficient to satisfy the statute, and what would be sufficient part performance if there was no writing. I find that while the Plaintiffs' Attorneys could not get "around" the statute of frauds, I do not regard them as incompetent because they were not successful.

Judge Kemmerlin denied the motion for sanctions, concluding: "Both sides fought the good fight." This appeal followed.

STANDARD OF REVIEW

The determination of whether attorney's fees should be awarded under Rule 11 or under the Act is treated as one in equity. In re Beard, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11 and the Act). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Id. "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). Where the appellate

court agrees with the trial court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard. Id. Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. Id.

LAW/ANALYSIS

Appellants argue the trial court erred in denying their motion for sanctions because (1) there were no good and reasonable grounds for the claims the Respondents withdrew; (2) the remaining claims had no reasonable legal or factual basis; (3) Respondents failed to provide competent evidence of damages; (4) Respondents failed to provide any evidence of fraud; and (5) Respondents pursued the claim as one for breach of a merger for six years before abandoning that position at trial.[3] We disagree.

Appellants sought sanctions under Rule 11, SCRCP, and under the Act. The parties dispute the version of the Act that applies to this case. The Act was substantially revised by 2005 S.C. Laws Act 27, effective July 1, 2005. Under the former version of the Act, the party seeking sanctions had to prove the party sought to be sanctioned acted frivolously. See Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 259, 578 S.E.2d 11, 13 (2003) (interpreting the Act as requiring frivolity to impose sanctions). The revisions to the Act created a "reasonable attorney" standard to determine whether sanctions are warranted. S.C. Code Ann. § 15-36-10 (Supp. 2010). The revised Act states the revisions apply to causes of action arising on or after July 1, 2005. 2005 S.C. Laws Act No. 27, § 5.

This action was filed in 2003, and Appellants moved for summary judgment on May 31, 2005. These activities pre-date the revisions to the Act. Respondents withdrew several causes of action on March 7, 2006; Judge Kemmerlin issued his order dismissing the remaining causes of action on

[3] We combine Appellants' arguments, finding that all relate to the issue on appeal argued as Appellants' sixth issue: Whether Judge Kemmerlin erred in denying sanctions.

April 8, 2009; and Appellants filed their motion for sanctions on April 17, 2009. These activities occurred after the revisions to the Act.

Appellants argue the revised Act applies in this case because their motion was filed after the revisions, and it is a violation of the Act to participate in the continuation of frivolous proceedings. See S.C. Code Ann. § 15-36-10(A)(4)(a)(iii) (Supp. 2010) (providing an attorney may be sanctioned for filing a frivolous pleading, motion, or document if "a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party"). Appellants rely on a footnote in Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 637 S.E.2d 316 (Ct. App. 2006), to support their argument.

In Rutland, the trial court granted the defendants' motion to dismiss in a legal malpractice, breach of contract, and fraud action on August 9, 2004. Id. at 95, 637 S.E.2d at 318. On September 1, 2004, the defendants moved for attorney's fees and costs under the Act. Id. The trial court granted fees and costs by order dated September 20, 2005. Id. On appeal, this court noted the revisions to the Act became effective July 1, 2005, and stated: "Because [defendants] filed their motion on September 1, 2004, we believe the original Act still governed . . . . Moreover, [the plaintiff] does not challenge the applicability of the former Act." Id. at 95 n.2, 637 S.E.2d at 318 n.2.

Our supreme court has also recognized the revisions to the Act and applied "the law as it existed at the time judgment was entered" in utilizing the former version of the Act. Russell v. Wachovia Bank, N.A., 370 S.C. 5, 17 n.8, 633 S.E.2d 722, 728 n.8 (2006); but see Ex parte Gregory, 378 S.C. 430, 432 n.1, 663 S.E.2d 46, 48 n.1 (2008) (finding the cause of action arose under the previous version of the Act without identifying the triggering event). However, the issue of the retroactive or prospective application of the Act was not litigated in either Russell or Rutland.

We, therefore, look to the general rules regarding the retroactive or prospective application of a statute. Absent a specific provision or clear legislative intent to the contract, the general rule is that statutes are to be

construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature. Bartley v. Bartley Logging Co., 293 S.C. 88, 90, 359 S.E.2d 55, 56 (1987). A statute is remedial where it creates new remedies for existing rights unless it violates a contractual obligation, creates a new right, or divests a vested right. Smith v. Eagle Constr. Co., 282 S.C. 140, 143, 318 S.E.2d 8, 9 (1984). "[W]here a statute . . . creates new obligations [or] imposes a new duty . . . it will be construed as prospective only." 82 C.J.S. Statutes § 585 (2009).

We find guidance from the analysis employed by the District Court of Appeals of Florida in Mullins v. Kennelly, 847 So.2d 1151 (Fla. Dist. Ct. App. 2003). In determining whether a newly enacted portion of Florida's sanctions act applied retrospectively or prospectively, the court followed the federal courts' view "that whether conduct should be sanctioned should be measured by the standard in effect at the time of the conduct to be sanctioned." Id. at 1154. The court opined: "We endorse that view because such an interpretation helps achieve the prophylactic goal of the statute, while not retroactively penalizing a party for actions that occurred, or papers that were filed, when the earlier version of [the statute] controlled." Id. at 1154-55.

We conclude the Act creates substantive rights and imposes new obligations by effectively changing the standard for imposing sanctions to a "reasonable attorney" standard. Therefore, the Act will apply prospectively absent clear indication to the contrary by the Legislature. In this case, the Legislature provided the revisions in the Act were to apply to causes of action arising on or after the effective date of the statute, July 1, 2005, and we find this indicates the Legislature did not intend retrospective application. Accordingly, we apply the Act as it existed prior to the revisions. See generally Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) (stating judicial decisions which create liability where none previously existed must be given prospective application).

The Act provided for liability for attorney's fees and costs of frivolous suits. Section 15-36-10 of the Act provided:

> Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if: (1) he does so primarily for a purpose other than that of securing the proper . . . adjudication of the claim upon which the proceedings are based; and (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (2005) (current version at Supp. 2010). Section 15-36-20[4] provided:

> Any person who takes part in the procurement, initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 if he reasonably believes in the existence of the facts upon which his claim is based and
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> (1) reasonably believes that under those facts his claim may be valid under the existing or developing law; or
>
> . . .
>
> (3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party.

S.C. Code Ann. § 15-36-20 (2005) (repealed 2005).

[4] Sections 15-36-20 through -50 of the Act were repealed by 2005 S.C. Laws Act No. 27, § 12.

Rule 11 of the South Carolina Rules of Civil Procedure also provides for sanctions and states in part:

> (a) Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Rule 11(a), SCRCP.

Prior to the revisions to the Act, the standard for sanctions under Rule 11 was essentially the same as that under the Act. Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 262, 578 S.E.2d 11, 15 (2003) (comparing the standard for a Rule 11 sanction - a frivolous filing or argument, or bad faith filing - with the Act's standard of frivolity). To be entitled to sanctions, the aggrieved party had to show that the party sought to be sanctioned acted frivolously. Id.

With the standard of frivolity in mind, we consider Respondents' argument that this court must affirm under Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997). In Hanahan, our supreme court reversed an award of sanctions under the previous version of the Act. Id. at 158, 485 S.E.2d at 913. The court stated: "[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the

surviving claims." Id. The court considered that there is a split of authority as to whether sanctions may be awarded notwithstanding the denial of summary judgment. Id. at 157, 485 S.E.2d at 912. The court concurred with the view that "a party who survives pre-trial motions to dismiss and for summary judgment [is] not subject to sanctions after a trial on the surviving claims. The theory behind these cases is that if a case is submitted to the jury, it cannot be deemed frivolous." Id. (internal citations omitted).

Appellants argue Hanahan does not apply in this instance, despite the denial of summary judgment by two trial court judges, because the action was dismissed after the Respondents presented their case rather than going to the jury or trial judge after a full trial. We find Hanahan applies in this case. In denying summary judgment as to breach of contract, breach of contract accompanied by fraudulent act, and fraud, Judge Gregory found "a pretty good question of fact [as to] partial performance . . . to take it out of the statute of frauds . . . ." Judge Kemmerlin likewise refused to grant Appellants summary judgment before the start of trial. Judge Kemmerlin conducted the bench trial. After Respondents presented their case, Appellants requested the court allow them to get the transcript printed, and consider their motion to dismiss before presenting their case. The court granted the request. The court took the case under advisement and subsequently ruled. We find the rule in Hanahan applies in this case. Because Respondents survived summary judgment motions, they are not subject to sanctions. Furthermore, we find even if Hanahan did not apply in this case, because the trial court in essence granted a directed verdict after Respondents presented their case, Appellants have failed to show Respondents acted frivolously.

CONCLUSION

Based on the foregoing analysis, the order on appeal is

AFFIRMED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Regions Bank, Appellant,

v.

Wingard Properties, Inc., James T. Wingard, III, Deborah G. Wingard, Klassic Kitchen Design, Inc., Coastal Closets, LLC, Dean Pappas, and Best-Way Insulation of Fairmont, Inc., Defendants,

v.

Ray Covington, Intervenor, Respondent.

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 4846
Submitted April 1, 2011 – Filed June 22, 2011

AFFIRMED

Demetri K. Koutrakos, Stanley H. McGuffin, Louise M. Johnson, and Lindsey Carlberg Livingston, all of Columbia, for Appellant.

Daryl G. Hawkins and Charles E. Usry, both of Columbia, for Respondent.

PIEPER, J.: This appeal arises out of a nonjury trial resulting in an order awarding Respondent Ray Covington a first priority equitable lien superior to the mortgage of Appellant Regions Bank. On appeal, Regions Bank argues it should have priority because Covington's deposit check on his contract with Wingard Properties, Inc. (Wingard) was not cashed prior to the recording of Regions Bank's mortgage. We affirm.[1]

FACTS

Regions Bank filed a complaint in the circuit court, seeking foreclosure of three different mortgages with Wingard.[2] As collateral for a $7,000,000 revolving construction loan, Wingard mortgaged Lot 38 at the Village at Grande Dunes in Myrtle Beach to Regions Bank on November 9, 2006. Regions Bank recorded its mortgage on Lot 38 in the Horry County Register of Deeds on November 13, 2006.

Prior to Wingard's mortgage with Regions Bank, Covington entered into a residential home purchase agreement with Wingard for the sale of Lot 38 on September 12, 2006. Covington wrote a check to Wingard for $276,700 on October 20, 2006, as a down payment according to the terms of the purchase agreement. Wingard did not deposit this check in its bank account until November 14, 2006, the day after Regions Bank recorded its mortgage. Covington also wrote a $10,000 check to Grande Dunes Properties on September 3, 2006, which cleared the drawee bank on September 15, 2006. Regions Bank conceded at trial that Covington has an equitable lien with priority over its mortgage as to this $10,000.

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

[2] Wingard is not a party to the appeal.

Regions Bank required Wingard to sell the unit for each lot as a precondition for the construction loan. According to testimony from Regions Bank employee Stephanie Gates, the bank was aware of the sales contract with Covington before it advanced any funds to Wingard under the construction loan. Further, Regions Bank required Wingard to produce evidence that Covington was qualified to purchase the home. In an undisputed ruling, the trial court found Regions Bank admitted it would not have made the loan without Covington's purchase agreement and $286,700 deposit.

Regions Bank disputes the findings of fact by the trial court concerning the lag between Wingard's receipt of Covington's deposit check on October 20th and deposit of the check on November 14th. Tom Wingard testified he did not recall that Covington's check was not deposited until November 14, 2006, until he reviewed documentation later. Covington testified that he met with Bobby Roberson at BB&T, who represented to him that BB&T would cover the down payment on Lot 38. Covington believed at the time he presented the check to Wingard that the check would be good. Regions Bank presented Covington's bank records from Bank of America, which showed that the account was not adequately funded until November 14, 2006. Covington wrote the check from his Bank of America account, although BB&T was the bank Covington chose to finance his loan.

Regions Bank also disputes that it had full knowledge of the terms of the purchase agreement between Wingard and Covington. Finally, Regions Bank disputes the trial court's finding that the failure to grant Covington a first priority equitable lien would result in a forfeiture. Ultimately, the court found that Covington was entitled to a $286,700 first priority equitable lien superior to Regions Bank's mortgage on Lot 38. Regions Bank filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. The court denied the motion in a written order following a hearing. This appeal followed.

STANDARD OF REVIEW

A mortgage foreclosure is an action in equity. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). We review factual findings and legal conclusions in an equitable action de novo. Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 41, 47). However, this de novo review does not require an appellate court to disregard the findings of the trial court or to ignore the fact that the trial court is in the better position to assess the credibility of the witnesses. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of convincing the appellate court that the trial court committed error in its findings. Id. at 387-88, 544 S.E.2d at 623. Consequently, we will affirm the findings of the trial court in an equity case unless the appellant satisfies this court that the preponderance of the evidence is against the findings of the trial court. Lewis at 47.

ANALYSIS

Equitable maxims are not binding legal precedent but represent notions and concepts of equity in various situations. See Russell L. Weaver, et al., Principles of Remedies Law 8 (2007) ("[Equity courts] . . . began to develop 'rules' or 'maxims' governing equitable relief. Although these 'maxims' were generalizations of experience based on the results of prior cases, they eventually developed into a loose set of 'rules' designed to bring some coherency to the body of decided cases and some consistency to future decisions."). Maxims developed, at least in part, to reflect the attempt by the courts of equity to create guiding principles, in the same way that the legal courts developed binding precedent. See, e.g., Swetland v. Curtiss Airports Corp., 41 F.2d 929, 936 (D. Ohio 1930) ("Maxims are but attempted general statements of rules of law. The judicial process is the continuous effort on the part of the courts to state accurately these general rules, with their proper and necessary limitations and exceptions."). "Even today, it is not unusual to find judges citing and applying these ancient maxims (much like modern

courts use cases as precedent) in deciding whether or not to grant equitable relief." Russell L. Weaver, et al., Remedies: Cases, Practical Problems, & Exercises 10 (2004). Thus, we view maxims only as offers of guidance in equitable cases. See, e.g., Brown v. Plata, No. 09-1233, 2011 WL 1936074, at *28 (U.S. May 23, 2011) (discussing courts' substantial flexibility when deciding cases in equity, stating "[o]nce invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies.") (internal citation and quotation marks omitted).

In deciding whether a party is entitled to a first priority equitable lien, courts are confronted with the interplay between equitable maxims and principles. This case involves the consideration and balancing of several equitable maxims: equity regards as done that which ought to have been done; equity applies substance over form; equity abhors a forfeiture; equity follows the law; and one who seeks equity must do equity. The trial court reviewed substance over form in determining what ought to be done in this case by awarding Covington priority over Regions Bank's mortgage because the bank had knowledge of Covington's interest in Lot 38 before it recorded its mortgage.

On the other hand, Regions Bank argues Covington should not be allowed to claim an equitable lien superior to its own mortgage, even though Covington tendered a check prior to the date Regions Bank recorded its mortgage, because Covington knew that his account did not contain sufficient funds. Regions Bank asks the court to distinguish Covington's claim from the facts in South Carolina Federal Savings Bank v. San-A-Bel Corporation, 307 S.C. 76, 413 S.E.2d 852 (Ct. App. 1992), because Covington is an experienced real estate broker who should have known his account did not contain sufficient funds to cover his down payment check. Covington claims Regions Bank's mortgage is subject to Covington's known equity in the property.

"For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt." First Fed. Sav. & Loan Ass'n of

S.C. v. Finn, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989). An equitable lien is a "mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered." Horry Cnty. v. Ray, 382 S.C. 76, 83-84, 674 S.E.2d 519, 524 (Ct. App. 2009) (internal citation and quotation marks omitted). Even though an equitable lien is not judicially recognized until a judgment is entered declaring its existence, the lien relates back to the time it was created by the conduct of the parties. Id. at 84, 674 S.E.2d at 524. Whether an equitable lien exists that would take priority over a mortgage must be considered in conjunction with other well-recognized equitable principles. Id. Equitable liens must rest on an express or implied contract; moral obligations do not sustain equitable liens. Carolina Attractions, Inc. v. Courtney, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985).

One of the cases relied upon by the trial court in awarding an equitable lien, San-A-Bel, is factually similar to the matter at hand. In San-A-Bel, this court found that purchasers of existing contracts for as yet unconstructed condominium units in a residential development project defeated the mortgage lien priority of the bank because the contracts of sale between the developer and the purchasers existed before the bank made a construction loan. 307 S.C. 76, 79, 413 S.E.2d 852, 854. The court reasoned that the bank had notice of the equitable interest that the purchasers had in the property. Id. at 79-80, 413 S.E.2d at 854-55. There are many factual similarities between San-A-Bel and this case: the purchasers executed preconstruction sales contracts with the developer; the bank knew about the preconstruction sales contracts at the time it made the construction loan; and neither the sales contracts nor the bank's note and mortgage contained a provision subordinating the purchasers' rights to the rights of the bank. See id. at 77-78, 413 S.E.2d at 853-54. The bank in both San-A-Bel and in the case at hand required the developer to sell the property before it would make a construction loan. See id. at 79, 413 S.E.2d at 854.

There is, however, one very important factual difference between San-A-Bel and this case. The purchasers in San-A-Bel deposited a cash down payment at the same time as the execution of the contracts for sale. Id. at 77,

413 S.E.2d at 853. Covington, on the other hand, executed the contract on September 14, 2006, and then modified the agreement with Wingard on October 20, 2006. Covington delivered a check for his 10% down payment pursuant to the terms of the contract on October 20, 2006. However, for reasons that are not entirely clear, Wingard did not present the check for deposit until November 14, 2006, the day after Regions Bank recorded its mortgage.

Regions Bank claims there is evidence to support a finding that Covington and Wingard colluded to hold the deposit check until there were enough funds in Covington's Bank of America account to cover the check. Regions Bank points to an email from Tom Wingard to Covington dated Wednesday, November 1, 2006, indicating that Bobby Roberson with BB&T (the bank covering Covington's financing for Lot 38) told Wingard the check "should be good by Friday." Regions Bank interprets these actions, along with Tom Wingard's testimony that he often held checks by request, as evidence that Covington intentionally waited until after Regions Bank recorded its mortgage to fund the account and make his down payment. Given the respective knowledge and positions of the parties at the time Regions Bank acquired its interest, Regions Bank contends the equities tip in its favor because any other result would reward Covington's efforts to "game the system" by tendering his check prior to the closing to help Wingard secure financing, but not putting any funds at risk until after the deal had closed.

In considering whether to award a first priority equitable lien to Covington, we also consider the equities involved. Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. Buckley v. Shealey, 370 S.C. 317, 323-24, 635 S.E.2d 76, 79 (2006) (citing Ex Parte Dibble, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983)). "For one to have notice of an outstanding equitable interest, [one need not] know the identity of the third party or the extent of his interest. It is sufficient that one either knows or ought to know that some third party interest exists." San-A-Bel at 79, 413 S.E.2d at 854. Even though Regions Bank may not have had knowledge that Wingard had

not deposited Covington's down payment at the time it gave Wingard a mortgage, Regions Bank was fully aware of Covington's interest in Lot 38. Further, as noted by the trial court, Regions Bank had full knowledge of the amount of Covington's down payment and was not prejudiced by the timing of the deposit of Covington's check. Covington complied with the terms of his purchase agreement and played no role in Wingard's default. Our analysis is not controlled by whether Covington withheld his deposit until after Regions Bank recorded its mortgage because the most important factor in balancing the equities in this matter is Regions Bank's knowledge of Covington's interest. As to this knowledge factor, Regions Bank does not dispute that it: (1) knew Covington entered into a contract for the home and (2) knew the amount of Covington's down payment. If Regions Bank intended for receipt of the down payment by Wingard to be a prerequisite for giving the loan, Regions Bank could have included a contractual provision in its agreement with Wingard and it did not do so. Moreover, the trial court rejected any finding of collusion. While there is conflicting evidence on this issue, we are not prepared to find that the preponderance of the evidence is contrary to the finding of the trial court.

Courts should also balance other equitable concerns when deciding whether a party is entitled to an equitable lien. Regions Bank claims the trial court erroneously relied on the equitable maxims "equity treats as done that which ought to be done" and "equity looks to substance rather than form." Rather, Regions Bank claims equity should follow the law and reward the party who filed first according to section 30-7-10 of the South Carolina Code (2007). Covington argues the trial court did not rely solely on these maxims and correctly balanced these equitable considerations with the rule set forth in San-A-Bel.

As previously indicated, equitable maxims are not binding legal doctrines. Instead, these maxims have evolved over a long period of time from prior cases to assist a court in applying and balancing equitable considerations. The principle "equity regards as done that which ought to be done" applies in cases where the party seeking equitable relief establishes "a clear obligation based upon a valuable consideration that another do some act

which he has failed to perform." Wilkie v. Phila. Life Ins. Co., 187 S.C. 382, 393-94, 197 S.E. 375, 380 (1938). The notion "equity looks to substance rather than form" evolved out of judicial regard for that which ought to be done. Id. at 393, 197 S.E. at 380. This maxim applies by "dispensing with pure formalities which would otherwise defeat the equity." Id.; see also Kerr v. City of Columbia, 232 S.C. 405, 410, 102 S.E.2d 364, 366 (1958) (finding the court must consider the controversy as though town council had issued a business permit, even though the town claimed the area was a residential zone, because town officials told the owner his property was in a commercial zone). When applying this principle, courts look to the substance and intent of the parties, and give a construction consistent with such intent. Harpending v. Reformed Protestant Dutch Church of City of N.Y., 41 U.S. 455, 480 (1842). After a party establishes an equitable right, the court may dispense with pure formalities which would otherwise defeat the equity. Wilkie, 187 S.C. at 393, 197 S.E. at 380. A court of equity should scrutinize the conduct of the plaintiff with the utmost care, to ascertain he has done everything which ought to have been done to secure the action requested. Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455, 465 (1903). This maxim has at times guided a court to relieve a party from the consequences of accident, mistake, and fraud. Camp v. Boyd, 229 U.S. 530, 559 (1913). "The rule that equity considers as done that which should be done cannot be invoked to create a right contrary to the agreement of the parties." Good v. Jarrard, 93 S.C. 229, 239, 76 S.E. 698, 702 (1912).

Utilizing the above equitable principles for guidance, the trial court noted Regions Bank made its loan to Wingard in reliance on the purchase contract and down payment made by Covington. Regions Bank did not know Covington's check had not been deposited by Wingard before it recorded its mortgage. The court also noted that Wingard used Covington's funds in the construction of other homes financed by Regions Bank, such that Regions Bank benefitted from Covington's down payment. We agree with the trial court that Regions Bank was not prejudiced by the timing of the deposit of Covington's check. Therefore, the trial court appropriately looked at substance over form in awarding Covington a first priority equitable lien based on Regions Bank's knowledge of his interest in Lot 38.

Regions Bank argues that equity should follow the law and reward the party who filed first. "It is well known that equity follows the law." Smith v. Barr, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007). Utilizing this maxim, courts have denied equitable relief. See Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 319-20, 659 S.E.2d 263, 267 (Ct. App. 2008). However, where a substantive right exists, an equitable remedy may be fashioned to give effect to that right. E. Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 823 (4th Cir. 2004). When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent. Lonchar v. Thomas, 517 U.S. 314, 323 (1996). "[T]he court's equitable powers must yield in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); see also Key Corporate Capital, Inc. v. Cnty. of Beaufort, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) (finding error in fashioning an equitable remedy).

The recording statute found in section 30-7-10 of the South Carolina Code provides that all mortgages are valid, without notice, from the day they are recorded in the register of deeds for the county where the real property is located. Deeds are valid as to subsequent purchasers without notice when they are recorded. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 232-33, 662 S.E.2d 452, 455 (Ct. App. 2008). The purpose of the recording statute is to protect a subsequent buyer without notice. Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). In the common law and in equity, a purchase money mortgage will ordinarily be given priority over other security instruments in realty. Citizens & S. Nat'l Bank of S.C. v. Smith, 277 S.C. 162, 164, 284 S.E.2d 770, 771 (1981). However, if the mortgage holder has notice of a prior purchase money mortgage, then it cannot prevail under the recording statute by virtue of filing first. Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 308, 257 S.E.2d 496, 497 (1979).

Here, Covington's equitable interest is not defeated by Regions Bank's mortgage because Covington entered into his purchase contract before Regions Bank filed its mortgage with the register of deeds and Regions Bank

was aware of this interest. See S.C. Code Ann. § 30-7-10 ("[A]ll mortgages . . . are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice . . . ."). The intervention of equity does not impugn the integrity of the recording statute in this case. See Crystal Ice Co., 273 S.C. at 308, 257 S.E.2d at 497 (finding a first-to-file mortgage holder not entitled to the protection of the recording statute where that mortgage holder had knowledge of the existence of a prior purchase money mortgage). The trial court was presented with the question of whether equity should intervene only as between Regions Bank and Covington, not any other person or creditor potentially impacted by the recording statute. The trial court appropriately looked at the substance of the issue, namely Regions Bank's knowledge of Covington's prior interest, over Covington's failure to ensure that his down payment was received by Wingard prior to closing. In fact, Regions Bank would not have given Wingard a construction loan if Wingard had not already sold the lot to a purchaser. Therefore, just as equity was allowed to intervene in San-A-Bel and Crystal Ice, we conclude the record herein supports the trial court's award to Covington of priority on his equitable lien over Regions Bank's mortgage.

We next turn to the trial court's consideration of the possibility of forfeiture by Covington. Regions Bank argues the trial court erred in finding Covington would forfeit his deposit if not given a first priority equitable lien because Covington would still be able to assert a claim against Wingard to recover his $276,700 deposit. Covington asserts the trial court properly applied the equitable principle that equity disfavors a forfeiture.

"A court of equity abhors forfeitures, and will not lend its aid to enforce them." Jones v. N.Y. Guar. & Indem. Co., 101 U.S. 622, 628 (1879). "Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." Lane v. N.Y. Life Ins. Co., 147 S.C. 333, 374, 145 S.E. 196, 209 (1928). The court has the power in equity to deny or delay forfeiture when fairness demands. Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 364 (2002). In Lewis, the court found it would be inequitable to enforce the forfeiture provision without first

allowing the purchaser an opportunity to redeem the contract by paying the entire purchase price. Id. The court looked at case-specific factors in making this determination, specifically the amount of equity the purchaser had accumulated, the length and number of defaults, the amount of forfeiture, the speed in which equity was sought, and the amount of money the purchaser would forfeit in relation to the purchase price of the property. Id.

Covington also claims Regions Bank will be unjustly enriched if the bank's mortgage is given priority over Covington's $276,700 equitable lien. Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff. Dema v. Tenet Physician Servs. Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009); Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct. App. 1988). The elements to recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, are: "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

The trial court did not expressly find that Regions Bank would be unjustly enriched or that Covington had suffered a forfeiture as a certainty; rather, the trial court found a substantial likelihood of forfeiture and noted the equitable considerations in Elliott v. Snyder, 246 S.C. 186, 143 S.E.2d 374 (1965), were identical to those presented in the present matter.[3] In Elliott, the seller sought rescission and cancellation of a contract for the sale of land. Id. at 189, 143 S.E.2d at 375. Pursuant to the contract, the purchaser was required to make annual installment payments. Id. The purchaser's check

[3] In light of our disposition herein, we decline to address whether unjust enrichment may serve as an additional sustaining ground. See Futch v. McAllister Towing of Georgetown, Inc., 355 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues where disposition of prior issues was dispositive).

dated December 31st was returned to the seller marked "drawn against uncollected funds." Id. at 190, 143 S.E.2d at 375. The check was presented for deposit on January 4th, one day after the purchaser had deposited sufficient funds to cover the check on January 3rd; however, the purchaser's bank did not release the funds until January 9th. Id. Although the contract provided that the property would revert to the seller without recourse in the event of default, the court found the purchaser substantially complied with the contract. Id. at 191, 143 S.E.2d at 376. In doing so, the court declined to rescind the contract and noted "[f]orfeitures are not favored in law and [c]ourts will seize upon even slight evidence to prevent one . . . ." Id. at 191, 143 S.E.2d at 375-76.

In its order denying Regions Bank's motion to alter or amend, the trial court clarified:

> Although the Court's Order notes that there is a substantial likelihood that Covington will forfeit $276,700.00 of his investment if the Court does not rule in his favor, the Court's decision does not rest on a finding that Covington will in fact forfeit $276,700 of his investment. There is no need for the Court to make a finding that forfeiture is certain to result in order to rule in favor of Covington, as the Court's Order does not rest entirely upon the holding in Elliott. Nonetheless, it is inescapable that in the current economic climate, with a partially constructed home, there is a substantial likelihood that Covington will forfeit some or all of his $276,700.00 investment, and there is ample evidence that a risk of forfeiture exists.

Regions Bank advanced over $1 million to Wingard towards the purchase of and construction on Lot 38.[4] As the trial court noted, there was a substantial likelihood that the lot, which Wingard purchased for $965,000, would sell for an amount less than Covington's first priority $10,000 lien and Regions Bank's mortgage lien. The trial court concluded it need not decide this case based solely on whether or not Covington was "certain" to suffer a forfeiture. Instead, the trial court properly considered the substantial likelihood of forfeiture in balancing the equities to find Covington was entitled to a first priority equitable lien. We also note Regions Bank has already obtained a judgment, including interest, against Wingard, Tom Wingard, and Deborah Wingard; however, Regions Bank voluntarily waived its right to a deficiency judgment against Tom and Deborah Wingard but maintained its right to obtain a deficiency against Wingard, the corporate entity. In reviewing the record de novo, we find Regions Bank has not carried its burden of convincing us that the trial court committed error in its findings regarding this forfeiture issue. See Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 41, 47) (applying de novo review).

As an additional sustaining ground, Covington claims Regions Bank, as a plaintiff coming to court seeking relief in equity, must also do equity in order that justice might be done between the parties. Regions Bank knew Covington had made a down payment under his purchase contract at the time it filed its foreclosure action and does not dispute Covington's $10,000 first priority equitable lien. Despite this knowledge, Regions Bank failed to name Covington as a defendant in the foreclosure action, forcing Covington to intervene. Covington claims Regions Bank sought a windfall by failing to name Covington in the lawsuit, even though it was aware of Covington's interest.

This equitable maxim is commonly phrased as "[h]e who seeks equity must do equity." Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471,

[4] As of the date of trial, the principal balance owed by Wingard to Regions Bank was $1,866,664.92. With interest and fees, Regions Bank claimed Wingard owed $2,082,859.85.

479, 451 S.E.2d 924, 929 (1994). This principle applies to one who affirmatively seeks equitable relief. City of Columbus v. Mercantile Trust & Deposit Co., 218 U.S. 645, 662 (1910). In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity. See Ingram v. Kasey's Assocs., 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (declining to grant a plaintiff's request for specific performance where the plaintiff misled the defendants); Anderson v. Marion, 274 S.C. 40, 43, 260 S.E.2d 715, 716 (1979) (finding defendants who sought equity against the plaintiffs for specific performance were required to do equity and pay plaintiffs money they asserted they were willing and able to pay); Shumaker v. Shumaker, 234 S.C. 421, 427, 108 S.E.2d 682, 686 (1959) ("Plaintiffs who come into Court invoking the aid of equity should be required to do equity in order that justice might be done between the parties."); Anderson v. Purvis, 211 S.C. 255, 266, 44 S.E.2d 611, 616 (1947) (discussing the maxim that he who seeks equity should do equity).

Although Covington makes a compelling argument that Regions Bank's failure to name him in the foreclosure action suggests Regions Bank attempted to circumvent Covington's interest, Covington cannot show he was prejudiced because he was able to intervene and has participated fully in the lawsuit. Because the decision of whether to prevent Regions Bank from seeking equitable relief is discretionary, and Covington was allowed to join the lawsuit without prejudice to his claim, we decline to affirm based on this additional sustaining ground.

Regions Bank also argues the trial court erred in ruling that the payment of a check relates back to the date it was delivered. Regions Bank asks the court to undertake a factually intensive analysis, as did the court in San-A-Bel, to determine that it would be inequitable to credit Covington with having paid the check on the date of delivery. Covington argues that it is well-settled in other jurisdictions that payment of a check, when honored upon presentment, relates back to the date the check is delivered to the payee. After considering the equities at play in this matter, we find the trial court properly concluded Covington is entitled to a first priority equitable lien

based on Regions Bank's knowledge of Covington's interest in Lot 38. Thus, we need not decide whether Covington's check relates back to the date of delivery or should be considered paid upon delivery.

Finally, Regions Bank also argues it should have priority over Covington's equitable lien because the future advances made to Wingard relate back to the date of the mortgage pursuant to section 29-3-50(A) of the South Carolina Code (2007). Initially, we note this issue was not raised to or ruled upon by the trial court. See S.C. Dep't of Transp. v. Horry Cnty., 391 S.C. 76, 82-83, 705 S.E.2d 21, 25 (2011) (finding an issue must be raised to and ruled upon by the trial court in order to be preserved for appellate review). Nonetheless, even if the advances made by Regions Bank after Covington's check was deposited relate back to the date of the mortgage, Covington's equitable lien is still entitled to priority because of Regions Bank's knowledge of Covington's interest.

CONCLUSION

For the foregoing reasons, the decision of the trial court is hereby

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samuel G. Smith, Sr., Melissa Smith, and Samuel G. Smith, Jr., an infant under the age of Fourteen (14) years, by and through his next friend, Samuel G. Smith, Appellants,

v.

The Regional Medical Center of Orangeburg and Calhoun Counties, Elizabeth A. Lewis, D.O., and AMN Healthcare, Inc. d/b/a Staff Care, Defendants,

Of whom The Regional Medical Center of Orangeburg and Calhoun Counties is the Respondent.

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

Opinion No. 4847
Heard March 9, 2011 – Filed June 22, 2011

AFFIRMED

Charles L. Henshaw, Jr., of Columbia, for Appellant.

Richard B. Ness, of Bamberg, for Respondent.

KONDUROS, J.: The parents of Samuel G. Smith, Jr., brought a negligence claim on behalf of themselves and their minor child (collectively the Smiths) for the treatment Smith received from The Regional Medical Center of Orangeburg and Calhoun Counties (TRMC), a governmental entity under the Tort Claims Act (TCA).[1] The Smiths appeal the trial court's granting of partial summary judgment to TRMC based on its finding that a governmental hospital cannot be held liable for the negligent acts or omissions of an independent contractor, as prescribed by the TCA. The Smiths argue TRMC should be held liable under a nondelegable duty of care owed by a hospital. We affirm.

FACTS

On November 1, 2000, Smith was taken to TRMC for emergency services. Smith had a previous medical history of seizures related to his

[1] TRMC qualifies as a governmental entity because it is a governmental health care facility within the definition of section 15-78-30(j) of the South Carolina Code (2005), which states a '"governmental health care facility' means one which is operated by the State or a political subdivision through a governing board appointed or elected pursuant to statute or ordinance and which is tax-exempt under state and federal laws as a governmental entity and from which no part of its net income from its operation accrues to the benefit of any individual or nongovernmental entity." Specifically, TRMC is funded by Orangeburg and Calhoun counties.

genetic disorder, tuberous sclerosis. Upon his arrival to the emergency room, Smith was observed to be cyanotic and not breathing. After several attempts to revive him, it was decided that an endotracheal tube for oxygenation was needed and Dr. Elizabeth Lewis was called to the emergency room to administer the placement of the tube.

Dr. Lewis placed the tube into Smith's airway; however, his condition did not improve. It was determined that the tube was not functioning properly because it was misplaced. The Smiths offered testimony from an expert that the tube was five centimeters longer than it needed to be and the length "unnecessarily endangered" Smith because it obstructed his airway. The Smiths further asserted that because of the misplacement, he was deprived of oxygen and suffered hypoxic brain injury.

At the time of this event, Dr. Lewis was providing anesthesia coverage at TRMC on a temporary basis through Staff Care, which had an agreement to place physicians in the hospital. Dr. Lewis had an employment contract with Staff Care.

The Smiths commenced this lawsuit on November 1, 2002. The trial court ordered that Dr. Lewis be added as a defendant on the allegations that she was an independent contractor. The Smiths allege Dr. Lewis and TRMC jointly undertook to render emergency services and anesthesiology care. Through that care, the Smiths argue Smith suffered deprivation of oxygen resulting in a brain injury that could have been prevented or mitigated had Dr. Lewis exercised due care. Specifically, they contend Dr. Lewis was negligent in failing to (1) manage Smith's airway, (2) timely realize the misplacement of the endotracheal tube, and (3) timely reposition the tube.

The trial court granted partial summary judgment in favor of TRMC. The trial court indicated under a plain reading of the TCA, TRMC could not be held vicariously liable for any negligence on the part of Dr. Lewis, because she was an independent contractor. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citations omitted). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

LAW/ANALYSIS

The Smiths contend the trial court erred in concluding a governmental hospital cannot be held liable for the negligent acts or omissions of an independent contractor. They argue governmental hospitals cannot maintain immunity by hiring independent contractors to perform medical services, citing a nondelegable duty of care owed by a hospital to emergency room patients. We disagree.

"The doctrine of nondelegable duty has traditionally been used to describe a form of vicarious liability." Martin C. McWilliams, Jr. & Hamilton E. Russell, III, Hospital Liability for Torts of Independent Contractor Physicians, 47 S.C. L. Rev. 431, 452 (1996). "The real effect of finding a duty to be nondelegable is to render not the duty, but the liability, not delegable . . . ." Id.

> A person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the liability, not the duty that is not

> delegable. The party which owes the nondelegable duty is vicariously liable for the negligent acts of the independent contractor.

Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000) (citations omitted) (emphasis added). Thus, "the doctrine of nondelegable duty is an exception to the general rule of nonliability for the torts of independent contractors." McWilliams & Russell, 47 S.C. L. Rev. at 453.

On appeal, the Smiths do not contend that the trial court erred in its determination that Dr. Lewis was an independent contractor. Rather, they cite Simmons for the proposition that TRMC is liable for the negligence of Dr. Lewis despite the fact that she does not meet the definition of "employee" under the TCA. The Smiths argue the nondelegable duty of a hospital to render emergency services, recognized in Simmons, permits a governmental hospital to be liable for the negligence of an independent contractor. However, the duty discussed in Simmons does not necessarily apply to an independent contractor of a government hospital. Simmons merely found a nongovernmental hospital could not delegate its duty to render competent emergency room services to its patients and, therefore, may be vicariously liable for the negligence of an independent contractor. 341 S.C. at 50-51, 533 S.E.2d at 322. In this case, we are presented with whether a governmental hospital subject to the TCA may be liable for alleged negligent acts or omissions committed by an independent contractor. We find it cannot.

Unlike the private hospital analyzed in Simmons, TRMC is a governmentally funded hospital that is statutorily governed by the TCA. The TCA "governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity . . . ." Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003). The Legislature has stated its intent to "grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived." S.C. Code Ann. § 15-78-20(b) (2005). "The State, an agency, a political subdivision,

and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages" contained in the TCA. S.C. Code Ann. § 15-78-40 (2005). Furthermore, the code provides the provisions of the TCA "must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f) (2005).

Specifically excluded from the definition of "employee," however, are independent contractors:

> "Employee" means any officer, employee, agent, or court appointed representative of the State or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty including, but not limited to, technical experts whether with or without compensation, but the term does not include an independent contractor doing business with the State or a political subdivision of the State.

S.C. Code Ann. § 15-78-30(c) (Supp. 2010) (emphasis added). Therefore, the entity is not liable for a loss resulting from "an act or omission of a person other than an employee including but not limited to the criminal actions of third persons." S.C. Code Ann. § 15-78-60(20) (2005).

Because TRMC is a governmental entity, the TCA governs the civil claims and remedies to which TRMC is subject. The TCA codifies qualified and limited liability and shields the state and its political subdivisions, like TRMC, from liability for certain acts and omissions. The Legislature, through the TCA, has (1) stated its intention for independent contractors to be excluded from the definition of employee, (2) mandated strict construction of statutory language, (3) developed a policy of liberally construing the TCA in

favor of immunity and limiting liability, and (4) declared that the TCA is the public policy of South Carolina.

Nevertheless, Smith argues Madison v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (2006), requires a finding that TRMC may be liable as a government entity for the acts of its independent contractor. We disagree. Madison specifically held that a governmental entity to which the immunity exemptions of the TCA applied is not liable for the acts or omissions of its independent contractor. Id. at 142-43, 638 S.E.2d at 660. However, the court found a governmental entity could be liable for a duty directly owed, independent of any acts or omission of the independent contractor. Id. (stating this duty "may include (1) adequately supervising the provision of services by another entity or (2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity"). Essentially, if the duty breached is one owed directly by the governmental entity to the client, the TCA's immunity may not insulate the entity from liability.

Here, the trial court order and briefs on appeal discuss only the alleged negligent breach of Dr. Lewis's duty and TRMC's vicarious liability for that breach. The TCA and Madison foreclose a finding of liability against TRMC on that basis.

CONCLUSION

The TCA provides immunity to governmental entities, such as TRMC, from the negligence of its independent contractors. Accordingly, the judgment of the trial court is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.