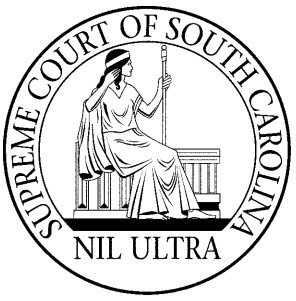

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 17, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stephen P. Donohue, Appellant,

v.

City of North Augusta, the Mayor and City Council of North Augusta, Respondents.

Appellate Case No. 2014-002235

Appeal from Aiken County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27530
Heard May 5, 2015 – Filed June 17, 2015

AFFIRMED IN PART AND REVERSED IN PART

James D. Mosteller, III, of Mosteller Law Firm, LLC, of Barnwell, for Appellant.

Belton Townsend Zeigler, Gary Tusten Pope, Jr., and Charles Douglas Rhodes, III, all of Pope Zeigler, LLC, of Columbia, and Kelly F. Zier, of Zier Law Firm, of North Augusta, for Respondents.

JUSTICE PLEICONES: This is an appeal from a circuit court order upholding the validity of an ordinance amending respondent City of North Augusta's (City's) 1996 Tax Increment Financing District (TIF) ordinance and finding that

respondents Mayor and City Council[1] did not violate the Freedom of Information Act (FOIA).[2] We affirm the order to the extent it upholds the ordinance, but reverse the finding that respondents did not violate the FOIA, and remand that issue with instructions.

FACTS

Appellant is a resident of North Augusta. He brought this action to challenge the validity of Ord. No. 2013-19 which amended Ord. No. 96-10. The 1996 ordinance created a TIF[3] within the Redevelopment District[4] created in 1991 by respondents' Resolution 91-06. He also challenged respondents' compliance with the Freedom of Information Act[5] (FOIA) between January 2013 and September 2013.

ISSUES

1) Was Ord. No. 2013-19 adopted in compliance with S.C. Code Ann. § 31-6-80(F)(2) (Supp. 2014)?

2) Did respondents violate the requirement in S.C. Code Ann. § 30-4-70 (2007) that they announce the specific purpose of Council's executive sessions?

ANALYSIS

I. Validity of Ord. No. 2013-19

In 1996, respondents adopted an ordinance creating a Redevelopment Plan to revitalize the City's riverfront and the adjacent areas. In 2013, City Council adopted an ordinance amending the Redevelopment Plan to allow the City to

---

[1] Hereafter, we refer to respondents collectively.
[2] S.C. Code Ann. §§ 30-4-10 *et seq*. (2007).
[3] *See* S.C. Code Ann. §§ 31-6-10 *et seq*. (2007 and Supp. 2014). The TIF Act authorizes municipalities "to incur indebtedness to revitalize blighted and deteriorating areas" within their city limits. *See Wolper v. City Council of City of Charleston*, 287 S.C. 209, 212, 336 S.E.2d 871, 873 (1985).
[4] *See* S.C. Code Ann. §§ 31-10-10 *et seq*. (2007).
[5] Specifically, S.C. Code Ann. § 30-4-70 (2007).

proceed with "Project Jackson." This project involves an as yet undeveloped parcel of riverfront property where commercial activities, including brick works, had been located. The proposed project includes a minor league baseball stadium, a convention center, parking decks, a YMCA, a 200 room hotel, and assorted commercial buildings. The 2013 ordinance both extended the duration of respondents' Redevelopment Plan and the associated TIF Bonds[6] and increased the amount of the estimated Bond Issuance to finance the Plan.[7]

Appellant acknowledges the TIF Act authorizes amendment of the Redevelopment Plan ordinance, but contends that the City did not comply with the statutory requirements of S.C. Code Ann. § 31-6-80(F) (Supp. 2014). Subsections (F)(1) and (2) provide:

> (F)(1) Subsequent to the adoption of an ordinance approving a redevelopment plan pursuant to Section 31-6-80, the municipality may by ordinance make changes to the redevelopment plan that do not add parcels to or expand the exterior boundaries of the redevelopment project area, change general land uses established pursuant to the redevelopment plan, change the proposed use of the proceeds of the obligations in relationship to the redevelopment plan, or extend the maximum amount or term of obligations to be issued under the redevelopment plan, in accordance with the following procedures:
>
> > (a) The municipality must provide notice of the proposed changes by mail to each affected taxing district. The proposed changes shall become effective only with respect to affected taxing districts that consent to the proposed changes by resolution of the governing body of the taxing districts.
> >
> > (b) The municipality must publish notice of the adoption of the ordinance in a newspaper having general

[6] The Plan's end date was extended from December 5, 2016, to November 18, 2048.

[7] The amount was increased from $13.4 million to $55 million.

> circulation in the affected taxing districts. Any interested party may, within twenty days after the date of publication of the notice of adoption of the redevelopment plan, but not afterwards, challenge the validity of the adoption by action de novo in the court of common pleas in the county in which the redevelopment plan is located.
>
> (2) Subsequent to the adoption of an ordinance approving a redevelopment plan pursuant to Section 31-6-80, the municipality may by ordinance make changes to the redevelopment plan that adds parcels to or expands the exterior boundaries of the redevelopment project area, to general land uses established pursuant to the redevelopment plan, to the proposed use of the proceeds of the obligations in relationship to the redevelopment plan, or to extend the maximum amount or term of obligations to be issued under the redevelopment plan, in accordance with the procedures provided in this chapter for the initial approval of a redevelopment project and designation of a redevelopment project area.

At issue here is the meaning of the last clause of subsection (F)(2) which requires the amendatory ordinance be enacted "in accordance with the procedures provided in this chapter for the initial approval of a redevelopment project and designation of a redevelopment project area."

Appellant contends the final clause of § 31-6-80(F)(2) requires respondents to redetermine that the property affected by the amended ordinance meets the criteria set forth in § 31-6-80(A)(7) (Supp. 2014). He argues respondents were required to hear evidence and then state their § 31-6-80(A)(7) findings[8] in Ord. No. 2013-19.

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[8] This subsection requires:

> (7) findings that:
>
> > (a) the redevelopment project area is an agricultural, blighted, or conservation area and that private initiatives are unlikely to alleviate these conditions without substantial public assistance;

The circuit court held that when a redevelopment ordinance is amended to increase the amount of bonds and to extend the time to repay them, § 31-6-80(F)(2) does not require updated or additional findings of blight, declining or static property values, etc., as are required in the original ordinance by § 31-6-80(A)(7). The court held the statutory language in § 31-6-80(F)(2) providing that a "municipality may by ordinance make changes to the redevelopment plan . . . . in accordance with the procedures for the initial approval" refers only to the procedural requirements, i.e. public notices and hearings found in § 31-6-80(B)-(D), and not to the substantive requirements found in § 31-6-80(A)(7). We agree.

Section § 31-6-80(F) permits a municipality to amend a Redevelopment Plan. Subsection (F)(1) is concerned with relatively minor changes, and in those cases provides for a simplified procedure requiring only notice to affected taxing districts and public notice of the adoption of the amended ordinance. While (F)(1) creates a truncated process for relatively minor changes, (F)(2) specifies that the procedural requirements attendant to the enactment of the original ordinance, and not the shortened process allowed in (F)(1), must be met when a more substantial change to the Redevelopment Plan is contemplated. Since we agree with the circuit court that (F)(2) requires only procedural compliance with § 31-6-80(B)-(D), and since there is no contention that respondents failed to meet these requirements, we affirm that part of the order which upholds the validity of Ord. No. 2013-19.[9]

II. FOIA Violations

Appellant contends that the circuit court erred in finding that between January and September 2013 respondents complied with the FOIA's requirement that "the

---

> (b) property values in the area would remain static or decline without public intervention; and
>
> (c) redevelopment is in the interest of the health, safety, and general welfare of the citizens of the municipality.

[9] In light of this ruling, we do not address the additional grounds upon which the circuit court upheld the ordinance. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999).

specific purpose of the executive session"[10] be announced in open session. The circuit court held an announcement that the purpose of the executive session was the discussion of a "proposed contractual matter" satisfied the specific purpose requirement. We agree with appellant that the FOIA was violated.

Section 30-4-70(a) (2007) allows a public body to hold a closed meeting for any one of five reasons. If such a closed executive session is to be held, its "specific purpose" must be announced in the open session. "Specific purpose" is defined by statute as:

> a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated.
>
> § 30-4-70(b).

Subsection (a)(1) covers employment matters while (a)(5) covers "Discussion of matters related to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other business in the area served by the public body." Here, respondents did not invoke either (a)(1) or (a)(5), but rather, in each of the eleven executive sessions challenged by appellant, the minutes reflect respondents invoked only § 30-4-70(a)(2), and merely stated that the specific purpose of the meeting was to be a "contractual matter."

In *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001), the Court was asked to determine whether the city had met the "specific purpose" requirement of the FOIA before going into executive session. In that case, the written agenda reflected as item 4(C) "Towing-Contractual Recommendation." When item 4(C) was reached, the City Council minutes reflect:

[10] S.C. Code Ann. § 30-4-70(b) (2007).

> C. Towing -- Contractual Recommendation
>
> Mayor Grissom advised this matter would be discussed in Executive Session
>
> Upon motion Councilman Cain, seconded by Councilman Woods, Council voted unanimously to go into executive session.

Id. at 164, 547 S.E.2d at 866. In finding this notice insufficient, Court said:

> FOIA is clear in its mandate that the "*specific* purpose" of the session "*shall* be announced." (emphasis added in original opinion). Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. As evidenced by the minutes, the presiding officer did not announce the specific purpose of the executive session. This was a violation of FOIA.
>
> The City argues, even if there was no "specific purpose" announced, reversal is not warranted because substantial compliance with FOIA should be found when only a technical violation has occurred, and there has been no demonstrated effect on a complaining party. *See Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995). However, given the history and the purpose of FOIA, this was more than a "technical violation." The statute clearly mandates the specific purpose of the session must be announced.

Id.

The circuit court erred in finding that respondents satisfied the FOIA's specific purpose requirement when they announced the specific purpose of the executive session in these types of general terms:

> **ITEM 1. LEGAL: Executive Session-Request of the City Administrator**
>
> Upon the request of the City Administrator and in accordance with Section 30-4-70 (a) (2) and on motion by Councilmember Baggott, second by Councilmember Adams, City Council unanimously voted to go into executive session for the purpose of discussion of negotiations incident to 1 proposed contractual matter.
>
> On motion by Councilmember McDowell, second by Mayor Jones, the executive session was adjourned. There was nothing to report out.[11]

Having found respondents violated the FOIA, we now remand the issue to determine what relief, if any, appellant is entitled to as a result of these violations. *Quality Towing, supra*. Since none of the challenged executive sessions related to Ord. No. 2013-19, we disagree with appellant's contention that the FOIA violations would support the invalidation of Ord. No. 2013-19. On remand, the circuit court shall limit its consideration of possible remedies to attorneys' fees and/or costs and/or prospective injunctive relief relating to future executive sessions. *See Sloan v. South Carolina Dep't of Rev.*, 409 S.C. 551, 762 S.E.2d 682 (2014).

CONCLUSION

The circuit court's order is

AFFIRMED IN PART AND REVERSED IN PART.

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

[11] This excerpt is from the minutes of the August 5, 2013 meeting.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Sanders, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-213162

ON WRIT OF CERTIORARI

Appeal from Dorchester County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 27531
Submitted May 1, 2015 – Filed June 17, 2015

REVERSED AND REMANDED

Appellate Defender Susan B. Hackett, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Deputy Attorney General David A. Spencer, of Columbia, for Respondent.

JUSTICE HEARN: In exchange for the State's promise not to seek the death penalty on three charges of murder, Anthony Sanders consented to a bench trial and waived his right to any appellate, post-conviction, or habeas corpus

review. He was convicted of three counts of murder and sentenced to life imprisonment. His subsequent application for post-conviction relief (PCR) was dismissed based on the agreement. He now argues the PCR court erred in dismissing his petition without an evidentiary hearing. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Sanders was charged with three counts of murder.[1] During a pre-trial status conference, the parties presented a negotiated "Contractual Consent Order to Waive Rights to a Jury Trial" (the Agreement) to the trial court. The terms of the Agreement provided that in exchange for the State not seeking the death penalty, Sanders would agree to a bench trial and would also waive any right to further judicial review, including direct appeal, PCR, or habeas corpus proceedings.

Prior to approving the Agreement, the trial court engaged in a lengthy colloquy with Sanders. Sanders said he had sufficient time to discuss the Agreement with his counsel and desired to freely enter into it. The court explained to Sanders he was giving up the right to have another court review its decision, and Sanders acknowledged he understood. The court discussed PCR and stated Sanders would be waiving the right to challenge his attorneys' actions afterward. Sanders said he had discussed the PCR statute with his lawyers and wanted to waive that right as well. Additionally, the court explained the process of a death penalty jury trial and explained Sanders was agreeing to waive his rights to a jury trial in exchange for the removal of the death penalty. Ultimately, the trial court accepted the Agreement, finding Sanders had freely and voluntarily entered into it.

The case proceeded to a bench trial. The court again questioned Sanders about the Agreement before the trial began, and Sanders confirmed he still wished to waive his rights in exchange for eliminating the death penalty. The court ultimately convicted Sanders of all three murders and sentenced him to life imprisonment without the possibility of parole on each count.

---

[1] The facts of the underlying triple homicide are horrific and involve the shooting deaths of Diane Grant, her twenty-year-old son Jatavius Devore, and her fifteen-year-old daughter Deanna Devore. Grant and Jatavius were found just inside the entrance to their apartment with single gunshot wounds to the head. Deanna was found behind the apartment, nude from the waist down and shot multiple times.

Sanders filed a *pro se* appeal to the court of appeals, which was dismissed for failure to serve and file a notice of appeal with proper proof of service. Sanders then filed the instant action for PCR alleging he received ineffective assistance of counsel because his attorneys "misadvised him with misleading statements" which rendered his signing of the Agreement involuntary. The State moved to dismiss pursuant to the terms of the Agreement.

A hearing was held before the PCR court. Sanders initially moved for a continuance based on his assertion that his attorneys failed to investigate potential witnesses, which the State opposed based on the Agreement. Sanders argued that his entering into the Agreement was not knowing and voluntary because his lawyers did not adequately apprise him of the rights he was waiving. He therefore requested an evidentiary hearing.

The State argued the PCR court need only review the colloquy between the trial court and Sanders to determine whether he had voluntarily waived his right to an ineffective assistance of counsel claim, and if the court so found, the Agreement should be enforced. After reviewing the record and the Agreement, the PCR court agreed and dismissed the application.

This Court granted certiorari to review the decision of the PCR court.

STANDARD OF REVIEW

On certiorari in a PCR action, this Court applies an "any evidence" standard of review. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). Accordingly, the Court will affirm the PCR court's findings if any evidence of probative value exists in the record. *Narciso v. State*, 397 S.C. 24, 34–35, 723 S.E.2d 369, 374 (2012). However, the Court will reverse the PCR judge's decision when it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

Sanders argues the PCR court erred in failing to allow him to present evidence that his waiver was entered into upon the advice of constitutionally ineffective trial counsel. We agree.

The State, however, would frame the issue differently as a simple question of whether Sanders entered into the Agreement knowingly and voluntarily, which

the PCR court found he did. The State therefore argues this Court is bound by its previous holding in *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008), where we held a knowing and voluntary waiver of PCR is enforceable. We believe the State misapprehends the issue raised by Sanders and thus *Spoone* is not dispositive here.

In *Spoone*, the Court addressed the enforceability of a guilty plea agreement wherein Spoone waived his right to a direct appeal, PCR, and habeas corpus relief. *Id.* at 141, 665 S.E.2d at 606. Spoone filed an application for PCR, which the PCR court dismissed after finding his waiver was knowingly and voluntarily entered into. *Id.* On certiorari, Spoone argued his waiver was not knowing and intelligent, and therefore his case should be remanded to the PCR court for a merits hearing on his separate claims for ineffective assistance of counsel. *Id* at 141, 665 S.E.2d at 607. In addressing his allegations, the Court first acknowledged that such waivers were allowed under federal law and noted the Court's practice of following federal jurisprudence in the area of plea agreements. *Id.* at 142, 665 S.E.2d at 607. The Court held such waivers were enforceable provided they are knowing and voluntary. *Id.* In affirming the PCR court's finding that Spoone's waiver was enforceable, the Court considered "the particular facts and circumstances of the instant case, including: (1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing." *Id.* at 143, 665 S.E.2d at 608.

The State argues that under *Spoone*, the threshold issue is whether the waiver was knowingly and voluntarily entered into. Because the PCR court reviewed the record and found Sanders entered into the Agreement knowingly and voluntarily, the State urges the Court to affirm under *Spoone*. However, *Spoone* addressed only whether such waiver agreements may be enforced. Sanders readily concedes a waiver of PCR is permissible under this Court's jurisprudence, but raises the narrower issue of whether a defendant can challenge the attorney's conduct in advising a defendant to enter into the waiver. We view this issue as significantly different from the issue in *Spoone*.

Instead, we agree with the wealth of federal jurisprudence which allows for ineffective assistance of counsel claims to proceed despite a previous waiver of collateral review where the challenge directly attacks the effectiveness of the advice to agree to that waiver. *See e.g.*, *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (holding "an ineffective assistance of counsel argument survives a

waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself"); *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005) ("We therefore hold that a plea agreement that waives the right to file a federal habeas petition pursuant to 28 U.S.C. § 2254 is unenforceable with respect to an [ineffective assistance of counsel] claim that challenges the voluntariness of the waiver."); *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001) ("[W]e hold that a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver."). As the United States Court of Appeals for the Seventh Circuit succinctly stated:

> Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.

Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999). Although we recognize the value in allowing defendants to waive certain rights in exchange for concessions by the State, we cannot countenance a rule in which a defendant is precluded from challenging the very advice he received in agreeing to that waiver.[2]

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[2] Furthermore, we express our concern with the ethical implications of a waiver of ineffective assistance of counsel claims. A number of jurisdictions have acknowledged the conflict of interest that arises when an attorney counsels his client to waive the right to challenge his representation. *See, e.g.*, Advisory Opinion of the Board of Commissioners on Grievances and Discipline, Ohio Adv. Op. 2001-6 (Ohio Bd. Com. Griev. Disp. 2001) ("[T]he Board advises that it is unethical under the Ohio Code of Professional Responsibility for a prosecutor to negotiate and a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or postconviction claims of ineffective assistance of trial counsel or prosecutorial misconduct."); Nebraska Ethics Advisory Opinion for Lawyers No. 14-03 (Neb. Jud. Eth. Comm. 2014) ("[I]t [is] the opinion of the committee that a defense attorney may not advise a criminal defendant regarding a plea agreement which contains a waiver of the right to seek post-conviction relief on the basis of a claim of ineffective assistance of counsel. A conflict of interest for the attorney is present in such situations [and] is

Consequently, we hold that although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective. Accordingly, the PCR court erred in not allowing Sanders to present evidence of ineffective assistance of counsel on the limited issue of his counsel's advice in connection with entering into the agreement.

CONCLUSION

Based on the foregoing, we reverse and remand to the PCR court for an evidentiary hearing on the narrow issue of whether Sanders received ineffective assistance of counsel in being advised to enter into the Agreement.

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

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so serious as to be a conflict that cannot be waived by a defendant."); Waiver of Appellate and Postconviction Rights in Plea Agreement, N.C. Eth. Op. RPC 129 (N.C. St. Bar. 1992) ("[T]he waiver of rights arising from the ineffective assistance of counsel or prosecutorial misconduct appears to be, and shall prospectively be deemed to be, in conflict with the ethical duties expressed or implied in the rules."); Utah State Bar Ethics Advisory Opinion Committee, Utah Eth. Op. 13-04 (Utah St. Bar. 2013) ("The Committee concludes that it is a violation of Rule of Professional Conduct 1.7 for an attorney to counsel his client to enter into a plea agreement which requires the client to waive the attorney's prospective possible ineffective assistance at sentencing or other postconviction proceedings."). The Supreme Court of Kentucky issued a recent opinion finding the use of an ineffective assistance waiver constitutes professional misconduct. *United States, ex rel. U.S. Attorneys for E. & W. Dists. of Ky. v. Ky. Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014). In the opinion, it held such "waivers in plea bargain agreements (1) create[] a nonwaivable conflict of interest between the defendant and his attorney, (2) operate[] effectively to limit the attorney's liability for malpractice, and (3) induce[], by the prosecutor's insertion of the waiver into plea agreements, an ethical breach by defense counsel." *Id.* at 140. We find this practice especially troubling where, as here, the defendant enters into the agreement prior to a trial, which allows significantly more potential for error than a guilty plea.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lawrence E. Morrow and Evelyn M. Morrow,
Petitioners,

v.

Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of Baltimore Management, LLC; THI of South Carolina at Magnolia Place at Spartanburg, LLC, d/b/a Magnolia Place at Spartanburg, Respondents.

Appellate Case No. 2012-212871

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 27532
Heard January 13, 2015 – Filed June 17, 2015

REVERSED AND REMANDED

John S. Nichols and Blake A. Hewitt, both of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, and Gary W. Poliakoff and Raymond P. Mullman, Jr, both of

Poliakoff & Associates, PA, of Spartanburg, for Petitioners.

William L. Howard, Sr., D. Jay Davis, Jr., and Russell G. Hines, all of Young Clement Rivers, LLP, of Charleston, and Lori D. Proctor, of Cooper & Scully, PC, of Houston, TX, for Respondents.

JUSTICE HEARN: The court of appeals dismissed as interlocutory an appeal which severed a number of defendants from this lawsuit, ostensibly under the label of "bifurcation." We hold the order went far beyond our common understanding of bifurcation, thereby affecting a substantial right of the petitioners. We therefore reverse.

FACTUAL/PROCEDURAL HISTORY

Lawrence and Evelyn Morrow filed a lawsuit against THI of South Carolina at Magnolia Place at Spartanburg, LLC (Magnolia Place) alleging personal injuries were suffered by Lawrence as a nursing home resident. The Morrows alleged that due to Magnolia Place's negligence, Lawrence sustained an injury while being assisted in the shower and was required to undergo surgery to remove a penile implant. They also alleged the nursing home failed to properly monitor Lawrence's diabetes or properly care for his pressure wounds.

The Morrows also brought suit against Fundamental Long-Term Care Holdings, LLC, Fundamental Clinical Consulting, LLC, Fundamental Administrative Services, LLC, THI of Baltimore, Inc., THI of South Carolina, Inc., and THI Holdings, LLC (collectively, Fundamental Entities). The Morrows alleged the Fundamental Entities were vicariously liable for the negligence of Magnolia Place, and furthermore were directly responsible for Lawrence's injuries by way of their conscious disregard for his health in underfunding Magnolia Place, which led to issues with staffing, training, and nutrition.

The Fundamental Entities thereafter filed a motion to bifurcate the trial pursuant to Rule 42(b), SCRCP between the nursing home negligence claims and the corporate negligence claims, and further, to stay discovery related to the corporate negligence claims. The Fundamental Entities argued bifurcation was proper because the issues of nursing home negligence and corporate negligence

were distinct, and the Morrows could only move forward on the corporate negligence claims if they were first successful against Magnolia Place. As an extension, the Fundamental Entities argued bifurcation of the trial would simplify the issues, save significant judicial resources, and cut costs related to discovery.

The trial court granted the motion, finding that without first proving negligence against the nursing home the Morrows' claims for corporate negligence could not proceed. Accordingly, the trial court ordered that discovery and a trial on the nursing home negligence claims could go forward, and only if the Morrows were successful, a new jury could hear the corporate negligence claims in a later proceeding.

The Morrows moved for reconsideration pursuant to Rule 59(e), SCRCP, and the trial court issued a Form 4 order denying the motion. The Morrows appealed, and a single judge of the court of appeals issued an order dismissing the case finding the order granting bifurcation was not immediately appealable. The Morrows petitioned for rehearing, which was denied by a three-judge panel. The Morrows petitioned this Court for a writ of certiorari and we granted the petition.

ISSUE PRESENTED

Did the court of appeals err in holding the trial court's order of bifurcation was not immediately appealable?

LAW/ANALYSIS

The Morrows argue the court of appeals erred by holding the trial court's order of bifurcation was not immediately appealable because the order affects a substantial right. We agree.

The determination of whether a trial court's order is immediately appealable is governed by statute. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005); *see* S.C. Code Ann. § 14-3-330 (1976 & Supp. 2014). Pursuant to Section 14-3-330, appellate courts have jurisdiction to immediately review:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until

> final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
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> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. The provisions of section 14-3-330 have been construed by this Court to serve the underlying policy favoring judicial economy by avoiding "piecemeal appeals." *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709. By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.

The Morrows argue the trial court's order is immediately appealable under section 14-3-330 because it is based on a material misunderstanding of their claims against the Fundamental Entities. Specifically, they argue the trial court's order conflates the theories of vicarious liability and direct liability by determining the Morrows can move forward on their claims against the corporate defendants only if they first recover against Magnolia Place. We agree.

The Morrows correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. *See* Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. Rev. 431 (1996). Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of respondeat superior. *Id.* at 439. Conversely, direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a

hospital underfunded, understaffed, or undertrained so as to provide substandard care. *Id.* at 462. Accordingly, the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other. *See Scampone v. Highland Park Care Ctr.*, 57 A.3d 582, 596–600 (Pa. 2012) (holding that claims of vicarious liability and direct liability could be brought either concomitantly or alternately in case against nursing home); *see also Montgomery Health Care Facility, Inc. v. Ballard*, 565 So. 2d 221, 225–26 (Ala. 1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of home); *cf. Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 237 (Ill. 2007) (recognizing direct corporate liability as a valid theory of recovery in the context of workplace accidents).

We therefore find that the trial court's order misapprehended the nature of the Morrows' claims against the Fundamental Entities. The order treats these claims as based solely on vicarious liability that can be tried only after a finding of negligence on the part of Magnolia Place, when instead they are grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows. By considering the Morrow's claims against the Fundamental Entities as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.[1]

Accordingly, we find the trial court's order fits neatly within the statutory provision allowing immediate appeals where a substantial right is implicated. S.C. Code Ann. § 14-3-330(2)(a). The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. *See Neeltec Enters., Inc., v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14-3-330(2)(a)]"). To prevent the Morrows from appealing the order immediately

[1] Defense counsel candidly admitted during oral argument that if the Morrows' claims against the Fundamental Entities was unsuccessful he would argue that based on the "bifurcation" order, summary judgment on the claims of corporate liability would be proper.

would encourage piecemeal litigation and limit their appellate remedies after the first trial on nursing home negligence and its subsequent appeal.[2]

We decline the Fundamental Defendants' invitation to base our decision on the manner in which the motion was characterized—one of bifurcation. Our review of trial court orders is not constrained by how the order is styled. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.").

The trial court's order is quite distinct from other orders of bifurcation which have come before this Court. *See e.g.*, *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000) (holding order bifurcating issue of exclusion under insurance contract from issue of occurrence was not appealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000) (holding order bifurcating issues in contract case between liability and damages was not immediately appealable); *see also Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004) (encouraging bifurcation of issues of actual and punitive damages in complex medical malpractice cases). We are therefore free to evaluate the trial court's order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable.

CONCLUSION

Accordingly, we hold the trial court's order is immediately appealable pursuant to § 14-3-330(2)(a). The order of the court of appeals dismissing the case is reversed and we remand for a determination on the merits of the appeal.

TOAL, C.J., and BEATTY, J., concur. KITTREDGE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

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[2] The dissent asserts the trial court's order will have no effect if the Morrows win on their nursing home negligence claim. We respectfully disagree. The trial court's order implicates a substantial right of the plaintiffs. Just because *part* of the prejudice stemming from the order may be cured at a later date does not remove it from the purview of section 14-3-330(2)(a).

JUSTICE KITTREDGE: Because I believe the court of appeals properly dismissed the appeal as interlocutory, I respectfully dissent.

I reject any suggestion that perceived error in the trial court's bifurcation order impacts the appealability question. The majority is convinced that the trial court erred in bifurcating the plaintiffs' (the Morrows) claims against the Magnolia Place nursing home and corporate defendants (Fundamental Entities). The majority agrees with the Morrows that the trial court order "is based on a material misunderstanding of their claims" and that "the trial court order conflates the theories of vicarious liability and direct liability." After discussing the law concerning direct and vicarious liability, the majority "finds that the trial court's order misapprehended the nature of the Morrows' claims against the Fundamental Entities." This perceived error in the bifurcation order, in my judgment, is a central feature of today's decision. Yet, error in an order granting or denying bifurcation does not transform the order into an appealable one.

Even if I were to accept the Court's premise of error in the bifurcation order, I would still resist the temptation to find the interlocutory order immediately appealable. This is because the Morrows are in no manner precluded from appealing a subsequent, and truly final, order preventing their claims against the Fundamental Entities from going forward.[3] The Court nevertheless concludes that the trial court order implicates a "substantial right" pursuant to section 14-3-330(2)(a), which allows an appeal from an interlocutory order when the order "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." The bifurcation order before us neither discontinues their action against the Fundamental Entities nor prevents a judgment from which an appeal may be taken should (and we are speculating) the Morrows be precluded from pursuing their claims against the Fundamental Entities.

I am concerned that today's loose construction of section 14-3-330 undermines the final judgment rule. I would affirm the court of appeals.

PLEICONES, J., concurs.

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[3] This highlights another concern. Assuming the Morrows' claim against Magnolia Place is successful, the additional claims against the Fundamental Entities would proceed in the normal course pursuant to the bifurcation order. In that event, the Morrows would have no reason to appeal.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Steven Robert Lapham, Respondent.

Appellate Case No. 2014-002762

Opinion No. 27533
Heard May 7, 2015 – Filed June 17, 2015

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Steven Robert Lapham, of Anderson, *pro se*.

PER CURIAM: The Office of Disciplinary Counsel (ODC) filed formal charges against Steven R. Lapham (Respondent) relating to fourteen separate matters, including, *inter alia*, engaging in the unauthorized practice of law, failure to cooperate with ODC, failure to cooperate with the Attorney to Protect Clients' Interests (ATP), and failure to communicate with his clients. Following a hearing, a panel of the Commission on Lawyer Conduct (the Panel) recommended disbarment.

We disbar Respondent, order him to make the restitution outlined in this opinion, to pay the costs of the proceedings, and to reimburse the Lawyers' Fund for Client Protection. In addition to the other requirements of 33 of the Rule for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules, we require him to complete the Legal Ethics and Practice Program Ethics School, the Trust Account School, and the Advertising

School prior to seeking readmission to the South Carolina Bar. As an additional condition of any readmission, he must enter into an agreement with a Law Office Management Advisor approved by the Commission on Lawyer Conduct.

FACTUAL/PROCEDURAL BACKGROUND

ODC filed formal charges against Respondent on April 8, 2014. Respondent failed to file an answer and the Panel held him in default. The allegations against Respondent, which are deemed admitted due to his default, are as follows:

Matter 12-DE-L-0636

Clients paid a company which fraudulently promised to help them secure a government grant for repairs to their home and thereafter hired Respondent to help them obtain a refund. Respondent told the clients the company was running a scam, and promised he would get their money back.

Respondent charged the clients $2,000.00, even though he knew the operation was a scam. Respondent wrote three letters to the company requesting a refund, and had only two telephone conversations with the clients. Although Respondent suggested a meeting with the clients to discuss their situation, he never followed up with them and never returned their documents. The clients continued to attempt to contact Respondent, but to no avail.

Respondent did not respond to the notice of investigation from ODC until he was subpoenaed to appear for an on-the-record interview. He appeared for the interview on September 20, 2012. One of the clients also filed a complaint with the Resolution of Fee Disputes Board of the South Carolina Bar. Respondent did not cooperate with the Board, which ultimately found Respondent should refund $2,000.00 to the clients. Respondent did not refund the money. A certificate of non-compliance was filed in Anderson County on December 3, 2012.

Respondent was subpoenaed to appear for a second interview on January 10, 2013. Respondent signed the certificate of service indicating he received notice of the scheduled interview. Respondent failed to appear or contact ODC about his absence until January 11, 2013. At that time, he indicated he would provide ODC with the documents previously requested. He further assured counsel for ODC that he would provide responses to notices of investigation in several other cases. Respondent never provided the requested information. Respondent was placed on

interim suspension on January 15, 2013, and James Jolly, Jr. was appointed as ATP. *In re Lapham*, 402 S.C. 223, 742 S.E.2d 1 (2013). Respondent was again subpoenaed to appear for an interview on March 19, 2013, but failed to appear.

Matter 12-DE-L-1112

A certificate of non-compliance was submitted to ODC by the Resolution of Fee Disputes Board for Respondent's failure to pay an award of $800.00 to one of Respondent's clients. Respondent failed to respond to the notice of investigation and failed to appear for an interview pursuant to Rule 19(c)(3), RLDE.

Matter 12-DE-L-1213

Client hired Respondent to represent her in a divorce. On at least two occasions, Respondent showed up late at night, unannounced at her home. One of these times was the evening before the divorce hearing. He was not prepared to try the case the next day and pleaded with her to settle. Respondent refused to negotiate with the guardian *ad litem* and was unprepared when the hearing went forward.

After the client requested her file several times from Respondent, he informed her the order had not yet been signed and he was still working on the case. Respondent failed to keep her informed about the status of the case and failed to promptly comply with her requests for information. The client went to another attorney and asked him to retrieve the file from Respondent. The new attorney looked into the matter, and found the order had been signed two weeks before.

Matter 12-DE-L-1219

Respondent was appointed to represent a client on several criminal charges. Respondent did not show up for a hearing; when the client called Respondent the next day, Respondent hung up on him. Respondent did not respond to the client's requests for discovery materials, nor did he answer the client's telephone calls.

Matter 12-DE-L-1261

Client, who was in jail, was looking for a new attorney after firing his previous one. The client's mother saw Respondent's business card in the detention

center and arranged for Respondent to meet with her son. The client told his mother not to retain Respondent without his approval.

Respondent met with the client at the detention center and quoted him a fee of $5,000.00. Respondent advised the client to pursue a plea deal because of his prior record. The client told Respondent he would be in touch, but ultimately decided not to hire Respondent.

Before the client could speak to his mother, Respondent called her and said her son wanted to retain him and asked for $700.00 as an initial fee.[1] The client's mother gave Respondent $700.00 but did not sign a fee agreement.

When the client learned about Respondent's behavior, he immediately told his mother to call and request a refund. Respondent went to see the client at the detention center, and the client insisted Respondent refund the money because he had never agreed to hire Respondent. However, Respondent refused to refund the money because he claimed to have earned it by visiting the client at the detention center twice. When the mother told Respondent she would report him to the Bar, Respondent refunded her $300.00, but insisted on keeping the other $400.00.

Matter 13-DE-L-0076

Client's mother hired Respondent to pursue a contempt action against the father of her daughter's children for failure to pay child support. The client's mother asked to pay in installments and Respondent agreed. She made four payments totaling $1,850.00.

Shortly after hiring Respondent, the client's mother began e-mailing and calling Respondent for information about the case. Respondent spoke to her once on the phone, but generally avoided her calls and did not respond to her e-mails. In December 2012, Respondent told the client he would file her case later that month. On December 31, 2012, Respondent told the client's mother he had been too busy to file the case, but that he would file it on January 2, 2013. On January 2, 2013, Respondent told client's mother he could not file the case that day, but that he would file it later that week. The client's mother called and e-mailed him several times thereafter with no response.

[1] Respondent told client's mother he needed the $700.00 to get his truck fixed.

On January 17, 2013, Respondent signed for a certified letter sent by the client's mother informing him he was fired and requesting a refund of her money. The client's mother later discovered Respondent had been suspended from practice on January 15, 2013. Respondent did not inform her that he was suspended or that she needed to find new counsel. Respondent never refunded any of her money and did not provide an accounting to her.

Matter 13-DE-L-0171

Client hired Respondent to represent him on several criminal charges and agreed to a fee of $5,000.00. The client made payments every week, eventually paying Respondent a total of $2,200.00 toward this total. On February 8, 2013, Respondent went to the client's home and collected $100.00 as part of the payment plan. The following day, the client received a letter from the ATP advising him that Respondent had been suspended on January 15, 2013.

Matter 13-DE-L-0172

Client hired Respondent to represent him on a charge of criminal domestic violence. Respondent went to the client's home to discuss the case and subsequently agreed to represent him for $3,000.00. The client paid Respondent in full.

When the client was scheduled to appear in court for a first appearance, he called Respondent to plan where to meet before the hearing. Respondent misrepresented to the client he had taken care of it, and no one needed to appear for the hearing. The client received a letter from the court regarding his "no show" at the hearing, and subsequently obtained new counsel. The client never heard from Respondent again, and never received a refund.

Matter 13-DE-L-0202

Respondent was suspended from the practice of law on January 15, 2013. Early in February 2013, after a case had been heard and the final order was being circulated, opposing counsel in the case e-mailed Respondent for his review of the order not realizing Respondent had been suspended. Respondent nevertheless called opposing counsel on February 13, 2013 and stated he represented one of the parties and requested changes to the proposed order.

Matter 13-DE-L-0207

Client hired Respondent for a custody matter and provided Respondent with documentation and affidavits. Respondent informed him it was not a problem that the client did not have an address for the child's mother.

Respondent charged the client $1,500.00 and told him it would take six to eight weeks to get into court. Respondent explained it was a simple case and he foresaw no problems.

Throughout his representation, Respondent behaved unprofessionally in that he would not acknowledge his client in the courtroom, would not return his telephone calls, and did not send him copies of any paperwork. The client's case experienced significant delays due to Respondent's conduct, and as a result the client's daughter could not start school on time. The client eventually retained another attorney to assist him in the matter.

Matter 13-DE-L-0214

In late 2012, a client hired Respondent to represent him on a driving under the influence (DUI) charge. Respondent quoted a fee of $2,500.00; the client paid Respondent $500.00, and agreed to make monthly payments of $500.00 until he was paid in full. The client informed Respondent he had already paid $200.00 for an administrative hearing, which was scheduled for December 5, 2012. Respondent arrived late for this hearing.

The client received notice that a pre-trial conference was scheduled for January 29, 2013. Respondent and the client met January 10, 2013, and the client gave Respondent an additional $500.00 payment and the notice of the pre-trial conference. Respondent was suspended from the practice of law on January 15, 2013, but did not inform the client or the court. Respondent did not file a notice of appearance, and did not appear for the pre-trial conference. Respondent called the court and stated he could not be there but offered no reason why.

The client pled guilty to a lesser charge and was fined and received six points on his license. He did not want to plead guilty but felt it was his best option under the circumstances. Respondent gave the client no reason for not appearing at the hearing, and the client informed him he would file a complaint. The client also asked for a refund of the $1,000.00 he had paid, but Respondent never refunded any money.

Matter 13-DE-L-0225

Although suspended from the practice of law on January 15, 2013, Respondent called the prosecuting attorney for the City of Anderson on February 19, 2013 and informed her he was suspended but he needed a continuance for a client, who had a hearing the next day. The attorney told Respondent he could not request a continuance while suspended. Respondent said he did not know what to do, and the attorney stated she could not advise him. The attorney later learned Respondent had also contacted the Court Coordinator about a continuance in the same case.

Matter 13-DE-L-0298

Client hired Respondent on September 3, 2012, to represent her in an uncontested divorce action. She paid him a total of $850.00. Respondent told her the divorce would be final on February 19, 2013, but she never heard from Respondent again. The client later learned from the ATP that Respondent had been suspended from the practice of law.

Matter 13-DE-L-307

Client met with Respondent to discuss representation on a DUI charge. The client's girlfriend attended the interview because the client was not proficient in English. Respondent asked for $400.00 up front and told the client he could pay $300.00 per month until he reached a total of $2,500.00. Respondent told the client he would send $150.00 to Columbia to get a court date for a conditional license. Respondent then told the client he had sent the money on time, but did not get a court date. Respondent did not refund the $150.00.

The client later found a notice stating that a hearing had been scheduled for the conditional license but Respondent never told him about it and Respondent did not attend the hearing. Respondent met the client and girlfriend at Spinx Gas Station, Zaxby's, a laundromat, and other places to collect the monthly payments. They called Respondent regularly for updates on the case but Respondent always said he had not received any evidence yet.

A pre-trial conference was scheduled for December 3, 2012, but Respondent did not appear for the hearing. Although he told the court that he had a scheduling conflict, he informed his client he had requested a jury trial. Respondent eventually stopped communicating and would not return telephone messages.

Respondent did not inform his client that he had been suspended from the practice of law. The client paid Respondent a total of $2,050.00.

Additional Allegations

On April 19, 2013, ODC filed a rule to show cause as to why Respondent should not be held in criminal and civil contempt of this Court.

The grounds for the rule included Respondent's failure to cooperate with the ATP clients' interests, engaging in the unauthorized practice of law, and failure to file a Rule 30, RLDE, affidavit as required by the Court in its order placing him on interim suspension.

A hearing was held on September 4, 2013. A majority of the Court issued an order finding Respondent in criminal contempt for engaging in the unauthorized practice of law, and sentencing him to sixty days' imprisonment. *In re Lapham*, S.C. Sup. Ct. Order dated Sept. 4, 2013. The Court issued a subsequent order on September 19, 2013, finding Respondent in civil contempt for failure to comply with the requirements of Rule 30, RLDE, and for failure to cooperate with the ATP. *In re Lapham*, 405 S.C. 582, 748 S.E.2d 779 (2013). The Court ordered Respondent to fully cooperate with the ATP. The Court also ordered Respondent to file the Rule 30 affidavit within two weeks after the completion of his sentence. Respondent was released on October 4, 2013, and filed the Rule 30 affidavit on November 18, 2013, more than five weeks late.

In addition to filing the Rule 30 affidavit late, Respondent admitted in the affidavit that he had not complied with the requirements of Rule 30 in that he admitted that he had not notified his clients that he had been suspended, had not notified any opposing counsel, had not filed any motions to withdraw as counsel, had not refunded any fees to any clients, and had not surrendered his certificate to practice law. Respondent also stated in the affidavit that he had returned all of his files to the ATP.

At the end of 2013, the ATP was informed that someone had boxes of files belonging to Respondent. A woman then brought approximately twenty-one boxes of client files and other materials to the ATP's office. The ATP was relieved on August 22, 2014 and Respondent was required to repay the Lawyers' Fund $5,612.40 for the ATP's costs.

Panel Hearing

Respondent appeared *pro se* at the hearing before the Panel on October 17, 2014, and was allowed to present evidence in mitigation. Respondent testified he has been homeless since 2009, when he sold the house he had shared with his former wife. Since then he has been living with other people, in his office, or in his car.[2] He stated he had no money to pay restitution and was on food stamps. He has been attempting to take the GMAT and get his Ph.D. in marketing to teach at the college level.[3]

Respondent testified his difficulty has always been financial and he has never engaged in drug use. He expressed his difficulty learning the practice of law—he could not find a job and had to go into practice on his own without really knowing what he was doing.

Panel Report

The Panel noted the only mitigating factors presented by Respondent were his personal problems and his difficulty in practicing by himself, which the panel gave "very little weight." In aggravation, the Panel considered Respondent's failure to answer the formal charges, failure to cooperate with the disciplinary investigation, failure to cooperate with the ATP, and Respondent's dishonest and selfish motives in accepting clients' money after being suspended and when he did no work on their cases. The Panel accordingly recommended disbarment.

LAW/ANALYSIS

This Court has the sole authority to discipline attorneys for misconduct. *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006). When the lawyer is in default, the sole question before the Court is that of the appropriate sanction. *In re Brunty*, 411 S.C. 434, 454, 769 S.E.2d 426, 436 (2015). This Court has recognized disbarment is not intended to be simply a punishment of the offending attorney, but serves to remove "an unfit person from the profession for the protection of the courts and the public." *In re Taylor*, 396 S.C. 627, 632, 723 S.E.2d 366, 368 (2012) (quoting *In re Burr*, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976).

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[2] He stated at the time of the hearing he was living in his car in Anderson.

[3] Respondent testified he has both an MBA and a master's degree in agriculture economics from Clemson University.

Based on the factual allegations, we find Respondent in violation of the following: Rules 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.5 (fees); 1.8(f) (compensation from another for client); 1.15 (safekeeping property); 1.16 (terminating representation); 3.2 (expediting litigation); 3.3 (candor to tribunal); 3.4 (fairness to opposing party and council); 4.1 (truthfulness in statements to others); 5.5 (unauthorized practice of law), 8.1(b) (failure to cooperate with disciplinary authority); 8.4(a) (violating rules of professional conduct); 8.4(d) (engaging in dishonesty or misrepresentation); 8.4(e) (conduct prejudicial to the administration of justice), of the South Carolina Rules of Professional Conduct, Rule 407, SCACR; and Rules 7(a)(1) (violation of rules of professional conduct); 7(a)(3) (willful violation of subpoena or Supreme Court order); 7(a)(5) (polluting the administration of justice and bringing disrepute to the profession); 7(a)(6) (violation of Oath of Office); 7(a)(10) (willful failure to comply with resolution of the Fee Disputes Board), RLDE.

Considering the numerous instances of misconduct combined with Respondent's deception of both his clients and ODC, we agree with the Panel's recommendation of disbarment. It is significant that Respondent failed to file an answer to the formal charges and has repeatedly failed to cooperate with ODC and the ATP in the investigation of these matters. *In re Hall*, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998) ("An attorney's failure to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law. Such an attorney is likely to face the most severe sanctions because a central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers."). While we acknowledge Respondent represented himself at oral argument before this Court and expressed his desire to one day again practice law, he himself admitted it would not be for at least several years and acknowledged he would likely be disbarred; he simply requested that he one day be able to reapply for admission. We therefore find disbarment the appropriate sanction.

CONCLUSION

Respondent is disbarred, and is ordered to pay $795.22 for the costs of this proceeding. He is ordered to pay restitution as follows: $2,000.00 to the clients in Matter 12-DE-L-0636; $400.00 to the client and his mother in Matter 12-DE-L-1261; $1,850.00 to the client's mother in Matter 13-DE-L-0076; $2,200.00 to the client in Matter 13-DE-L-0171; $3,000.00 to the client in Matter 13-DE-L-0172; $1,500.00 to the client in Matter 13-DE-L-0207; $1,000.00 to the client in Matter

13-DE-L-0214; $850.00 to the client in Matter 13-DE-L-0298; and $2,050.00 to the client in Matter 13-DE-L-0307. Respondent is also ordered to reimburse the Lawyers' Fund for Client Protection for all claims paid on his behalf. If Respondent is unable to pay the above costs, restitution, and reimbursement within thirty days of the date of this opinion, he shall enter into a payment plan with the Commission on Lawyer Conduct within sixty days of the date of this opinion.

Prior to filing any petition for readmission, Respondent must complete the Legal Ethics and Practice Program Ethics School, the Trust Account School, and the Advertising School. If readmitted, he must enter into an agreement with a Law Office Management Advisor approved by the Commission on Lawyer Conduct. This agreement must be for at least two years from the date of his readmission and must include a thorough review of Respondent's office management practices and a quarterly report from the Advisor to the Commission. Respondent will be responsible for the payment of the Advisor's fee. Within fifteen days of the date of this opinion, Respondent shall file the affidavit required by Rule 30, RLDE, and return his certificate of admission to practice law to the Clerk of this Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deep Keel, LLC, Respondent,

v.

Atlantic Private Equity Group, LLC, Terry L. Rohlfing, Jerry T. Caldwell, and Bluffton Village Town Center Property Owners' Association, Inc., Defendants,

Of Whom Atlantic Private Equity Group, LLC, Terry L. Rohlfing, and Jerry T. Caldwell are the Appellants.

Appellate Case No. 2013-002281

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5320
Heard April 16, 2015 – Filed June 17, 2015

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

Keating L. Simons, III, Simons & Dean, of Charleston, for Appellants.

Charles S. Altman and Meredith L. Coker, Altman & Coker, LLC, both of Charleston, for Respondent.

FEW, C.J.: Atlantic Private Equity Group, LLC defaulted on a promissory note personally guaranteed by Terry L. Rohlfing and Jerry T. Caldwell. The master-in-equity ordered foreclosure of the mortgage securing the note and entered a deficiency judgment against Atlantic. On appeal, Atlantic challenges the master's admission of evidence on authentication and hearsay grounds. We affirm the judgment of foreclosure because we find the loan documents upon which the judgment was based were properly admitted into evidence. However, we reverse the deficiency judgment because the testimony of the amount remaining due on the note was hearsay. In addition, we vacate the master's finding that Rohlfing and Caldwell were liable on the guaranties because the finding was outside the scope of the order of reference. We remand for further proceedings.

I. Facts and Procedural History

On March 27, 2008, Atlantic executed a promissory note to Community First Bank for a commercial loan in the amount of $2,000,000. The note was secured by a mortgage on two parcels of real estate in Beaufort County. Rohlfing and Caldwell executed personal guaranties to ensure payment of the note. When Atlantic defaulted, Community First brought a foreclosure action against Atlantic and breach of guaranty claims against Rohlfing and Caldwell. It sought deficiency judgments against all three. While the action was pending, Community First merged with Crescent Bank and became known as CresCom Bank, which later assigned the loan to the respondent, Deep Keel, LLC.

Atlantic, Rohlfing, and Caldwell filed a joint answer in which they admitted Community First made a loan to Atlantic, the loan was secured by a mortgage, and "not all monthly payments have been timely made." However, they denied Deep Keel was entitled to foreclosure or a deficiency judgment.

The circuit court referred the case to the master "for the purposes of adjudicating the foreclosure action." The order of reference provided that upon resolution "of the foreclosure action, this case is to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury against [Rohlfing and Caldwell]." At the beginning of the foreclosure hearing, the master acknowledged Deep Keel's breach of guaranty claims against Rohlfing and Caldwell "would be heard in a separate action."

To support its claim for foreclosure, Deep Keel offered into evidence six documents (the "loan documents") through its sole member—Scott Bynum—to establish the existence and terms of the loan. Atlantic objected, arguing the loan documents were inadmissible because (1) Deep Keel failed to authenticate them and (2) they contained hearsay to which no exception applied. The master overruled the objections and admitted the loan documents.

Deep Keel attempted to establish the amount remaining due on the loan through Bynum's testimony. The testimony was based on documentation Bynum received from CresCom Bank at the time the loan was assigned, but Deep Keel did not offer those documents into evidence. Atlantic objected on hearsay grounds, and the master overruled its objection.

The master ordered foreclosure of the mortgage, found there was $1,655,027 remaining due on the note, and granted Deep Keel a deficiency judgment against Atlantic.[1] Although the master returned the case to the circuit court as the order of reference directed, the foreclosure order included a finding that Rohlfing and Caldwell "executed and delivered . . . personal Guaranties" and were "liable for a limited principal amount of $350,000."

II. Admission of Loan Documents

Atlantic disputes the admissibility of the loan documents, which include (1) a promissory note; (2) a mortgage; (3) an assignment of leases, rents, and profits;[2] (4) a loan modification agreement dated April 2009; (5) a loan modification agreement dated May 2010; and (6) a partial release of mortgage and assignment of leases, rents, and profits. Atlantic argues Deep Keel failed to properly authenticate these loan documents, and they contained inadmissible hearsay. We address these two arguments separately.

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[1] Deep Keel bought the property at public auction for $900,000. The master found that after applying the proceeds of the sale to the debt, Atlantic's remaining liability on the note was $755,027 plus interest.

[2] This assignment of leases "grants a security interest . . . in and to [revenue] from the property [secured by the mortgage]."

A. Authentication

A party offering evidence must meet "[t]he requirement of authentication . . . as a condition precedent to admissibility." Rule 901(a), SCRE. The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* "[T]he burden to authenticate . . . is not high" and requires only that the proponent "offer[] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (decided under Fed. R. Evid. 901(a)[3]); *see also* 29A Am. Jur. 2d *Evidence* § 1045 (2008) ("The authentication requirement does not demand that the proponent of . . . evidence conclusively demonstrate [its] genuineness . . . .").

We find Deep Keel offered evidence sufficient to authenticate the loan documents. First, Bynum's testimony complied with Rule 901(b)(1), SCRE, which provides that evidence may be authenticated by a witness with knowledge who testifies that an item "is what it is claimed to be." Bynum testified he agreed to purchase a note from CresCom Bank, he examined the loan documents while negotiating the agreement, and the loan documents offered in evidence were the ones he examined and later received pursuant to this transaction. This testimony authenticated the loan documents because it was sufficient to support a finding that they were the documents Deep Keel claimed them to be—the note, mortgage, and assignment of leases executed by Atlantic in 2008 when it borrowed the money from Community First; the two loan modification agreements "modify[ing] the original note"; and a partial release of the security interests granted through the mortgage and assignment of leases. *See* Rule 901(a).

Atlantic argues, however, Bynum was not a witness with knowledge under Rule 901(b)(1) because he did not know "when, how, or by whom the documents were prepared, how they came to be in the possession of CresCom Bank, or how they were maintained by that bank." The authentication requirement does not demand

[3] When South Carolina adopted the Rules of Evidence in 1995, Rule 901(a) was "identical to the federal rule." Rule 901, SCRE, note. The federal rule was amended in 2011 with changes that were "stylistic only" and not "inten[ded] to change any result in any ruling on evidence admissibility." *See* Fed. R. Evid. 901 advisory committee's note to the 2011 amendment.

this degree of proof. *See Hassan*, 742 F.3d at 133. Bynum's testimony demonstrated he had personal knowledge that the loan documents admitted into evidence were the same ones CresCom Bank provided to him when Deep Keel purchased the asset the loan documents represent—the 2008 note, as modified, with security interests. This is sufficient evidence to meet the Rule 901(a) requirement of authentication.

Second, Deep Keel authenticated the loan documents under Rule 901(b)(4), SCRE, which provides that evidence may be authenticated based on "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." The note the master admitted into evidence (1) names Atlantic as the "Borrower"/"Mortgagor" and Community First as the "Lender," (2) states $2,000,000 as the amount of the loan, (3) provides the date of execution—March 27, 2008, and (4) recites a specific "loan number" of 145003387. The mortgage—which was recorded in the public record[4]—contains the same information, including the loan number. The specific and distinctive information on the face of the note, considered in connection with the mortgage, is sufficient to support a finding that the note was the one Atlantic executed in 2008. *See Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 398, 396 S.E.2d 369, 373-74 (1990) (finding admission proper under "the principle articulated in Fed. R. Evidence 901(b)(4)" where "[a]n examination of the[] documents establishes that [they] relate to the same subject, are internally consistent, [and] often refer to or answer each other");[5] 59A C.J.S. *Mortgages* § 991 (2009) (stating when promissory notes "correspond on their face with those recited in the mortgage, no further proof of their execution [or] their identity is

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[4] *See* Rule 901(b)(7), SCRE (providing an item may be authenticated with "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept").

[5] *Kershaw* was decided before we adopted the Rules of Evidence. *See* Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). However, the adoption of the Rules did not change prior law regarding this principle of authentication. *See* Rule 901, SCRE, note (stating "[s]ubsection (b)(4) is consistent with prior law," and citing *Kershaw* for support).

required until defendant presents countervailing evidence"); 59A C.J.S. *Mortgages* § 987 (2009) (stating a note "is admissible when sufficiently identified as the one recited or referred to in the mortgage" (footnote omitted)). The remaining loan documents each refer to the note and mortgage and, importantly, (1) name Atlantic and Community First as the parties to the transaction, (2) state the same principal amount of the loan—$2,000,000, (3) specifically reference the date March 27, 2008, and (4) recite the same loan number found on the note and mortgage. These facts are sufficient to support a finding that the loan documents were the documents Deep Keel claimed them to be. *See* Rule 901(a).

Third, we find the first five loan documents—excluding the partial release—are self-authenticating under Rule 902(9), SCRE, which provides, "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." The note is commercial paper, and the other four loan documents are either commercial paper themselves or "documents relating thereto."[6] *Id.* Each of the five documents bears the signature of Terry L. Rohlfing.

The "general commercial law" of South Carolina includes our Uniform Commercial Code, *see* S.C. Code Ann. § 36-1-101(a) (Supp. 2014), which provides, "In an action with respect to an instrument, the authenticity of . . . each signature on the instrument is admitted unless specifically denied in the pleadings," S.C. Code Ann. § 36-3-308(a) (Supp. 2014). The note Rohlfing signed on behalf of Atlantic is an "instrument,"[7] and thus, this is "an action with respect to an

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[6] A note is commercial paper. *See* S.C. Code Ann. tit. 36, Commercial Code, Background and Introduction at 7 (2003) (stating "commercial paper" is "the Code term for . . . notes"); *Black's Law Dictionary* 1285 (10th ed. 2014) (defining "commercial paper" as "[a]n instrument . . . for the payment of money," such as "a note"). The loan modification agreements are also commercial paper because they "modify the original note," and the mortgage and assignment of leases, rents, and profits are "documents relating thereto" because they represent security interests to secure repayment of the note.

[7] "'Instrument' means a negotiable instrument," S.C. Code Ann. § 36-3-104(b) (Supp. 2014), and "'negotiable instrument' means an unconditional promise or

instrument." Deep Keel alleged in its complaint that "Atlantic, . . . by and through . . . Rohlfing, executed and delivered to Community First Bank Note #0145003387 . . . in the amount of $2,000,000" and "a mortgage" on "March 27, 2008." In response to these allegations, Atlantic "admit[ted] . . . that [Community First] made a loan to Defendant Atlantic." Atlantic did not specifically deny anything in response to these allegations. Atlantic also made no specific denial to similar allegations as to the other loan documents. We find Atlantic admitted the authenticity of Rohlfing's signature on the first five loan documents pursuant to subsection 36-3-308(a).

Atlantic points out, however, that in its answer it "[made] reference to the original loan documents and den[ied] any allegations of these paragraphs inconsistent therewith." Atlantic argues this denial was sufficient to contest the authenticity of Rohlfing's signature on the note. We disagree and find Atlantic's answer did not "specifically den[y]" the validity of the signatures, § 36-3-308(a), and was too general to challenge the authenticity of the first five loan documents. *See* 29A Am. Jur. 2d *Evidence* § 1200 (2009) ("Authentication of notes . . . is sufficient . . . where the Uniform Commercial Code . . . provides that each signature on an instrument is admitted unless specifically denied in the pleadings." (footnote omitted)); *see also Nat'l Equip., Ltd. v. David Jones Sales, Trucking Div., Inc.*, 268 S.C. 551, 555, 235 S.E.2d 125, 126-27 (1977) (finding appellant's answer "raises no question as to the genuineness of her signature" because she "neither alleged forgery nor specifically denied her signature"); *Conran v. Yager*, 263 S.C. 417, 419, 421, 211 S.E.2d 228, 229, 230 (1975) (finding appellant "plead a general denial" and "concede[d] the existence of the note" and thus "raised no question as to the genuineness of his signature [on the note], [and] the respondent's production of the note . . . entitled him to 'recover on it'").[8] Additionally, we point out Atlantic offered no evidence at the hearing and did not argue Rohlfing's signature on the

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order to pay a fixed amount of money, with or without interest or other charges described in the promise or order," S.C. Code Ann. § 36-3-104(a) (Supp. 2014). "[A] promissory note secured by a real estate mortgage" is "a negotiable instrument." *Swindler v. Swindler*, 355 S.C. 245, 247, 250, 584 S.E.2d 438, 439, 440 (Ct. App. 2003). Therefore, the note is an "instrument" for purposes of subsection 36-3-308(a).

[8] For the continued validity of *National Equipment* and *Conran* after the adoption of the Rules of Evidence, see footnote 5.

note was invalid. *See United States v. Vidacak*, 553 F.3d 344, 351 (4th Cir. 2009) (finding exhibits properly admitted where the appellant "offered no basis for inferring that the exhibits were forged or altered that would arouse this Court's suspicion as to their authenticity").

The admission of evidence is within the discretion of the trial court. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). We find the master acted within his discretion in admitting the loan documents because Deep Keel presented evidence—Bynum's testimony, the loan documents themselves, and the mortgage—sufficient to support a finding that the loan documents were the documents Deep Keel claimed them to be, and thus sufficient evidence to meet the requirement of authentication. *See* Rule 901(a).

B. Hearsay

Atlantic also argues the loan documents should have been excluded because they were hearsay. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct. App. 2014); *see also* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). However, "[a] statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000).

The master relied on the business records exception to the hearsay rule to admit the loan documents. *See* Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510 (2014). However, the master's reliance on a hearsay exception was unnecessary because the loan documents were not hearsay in the first place. The loan documents form the basis of Deep Keel's claim that Community First loaned Atlantic money in exchange for an obligation to pay it back and a security interest in the real estate. Thus, the loan documents were offered to establish the existence of a contract and the terms of that contract. Written contracts "offered in court not for the truth of any facts stated in [them] but to prove the existence of a contractual right or duty" should not be excluded as hearsay. 31A C.J.S. *Evidence* § 462 (2008); *see also*

Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 540 (5th Cir. 1994) ("Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are non[-]hearsay."); *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 559, 658 S.E.2d 80, 87 (2008) (recognizing that "words of contract" are non-hearsay when they are not "offered for the truth of the matter asserted" and "form[] part of an issue" being litigated). We find the loan documents were properly admitted to show the existence of an agreement to loan money, the terms of repayment, and the existence of a security interest in the real estate. Because the loan documents were not offered to prove the truth of any statement, they were not hearsay and the master correctly admitted them.

III. Admission of Testimony Regarding Amount Remaining Due

In contrast to Deep Keel's thorough presentation of documents to prove the existence of its agreement with Atlantic and the terms of repayment, Deep Keel offered no documentation of the amount remaining due on the loan. The only evidence Deep Keel offered of the amount due was Bynum's testimony. Atlantic objected to this testimony on the basis of hearsay, but the master admitted it pursuant to the business records exception. Atlantic contends Bynum's testimony should have been excluded because it was hearsay to which no exception applied.[9]

A. Hearsay

We first consider whether Bynum's testimony concerning the amount due on the note was hearsay. At the hearing, Bynum testified he reviewed "all the documents related to the amounts due and the payments that were made on the loan at the time [Deep Keel] purchased it." He further testified these documents contained "a calculation . . . regarding what the balances are today." He was then asked to testify to the current principal balance due on the note. Atlantic objected on the basis that Bynum's testimony regarding the principal balance "is based upon his review of bank records," which were hearsay. The master allowed Bynum to testify that the remaining balance of the original principal was $1,532,238.

[9] Because no actual records were offered in evidence to prove the amount, there is no authentication issue.

Bynum then explained how that figure was calculated. He testified that by the time Deep Keel acquired the loan, which was originally for $2,000,000, the principal had been reduced due to payments made by Atlantic, rent received from tenants, and proceeds from the sale of one of the properties securing the loan. He explained the current balance was calculated from "loan agreements" and "accounting records" that "show what payments were made, when they were made, [and] how much interest accrued." He then testified that with the addition of interest on the principal and several other costs, the total amount remaining due was $1,655,027.

We find Bynum's testimony was hearsay. Bynum had no personal knowledge of any transactions with Atlantic before he purchased the note. His testimony demonstrates his knowledge was based exclusively on documents that show payments and interest charges. By testifying to a conclusion based only on statements he read in documents, Bynum necessarily testified to the truth of those statements. His testimony, therefore, was offered to prove the truth of the statements and was hearsay.

B. Business Records Exception

The master relied on the business records exception to admit Bynum's testimony. According to Rule 803(6), the following is not excluded by the rule against hearsay:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . .

See also § 19-5-510 ("A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the

opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."); *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002) (explaining business records are admissible under Rule 803(6) and section 19-5-510 "as long[] as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court").

Atlantic first asserts the business records exception does not apply in this case because no records were actually offered in evidence. Bynum's testimony demonstrates he reviewed bank records that showed the principal balance and total amount due on the note, but these records were never offered in evidence at the hearing. The plain language of Rule 803(6) allows for the admission of "[a] memorandum, report, record, or data compilation," not testimony describing such a document. We hold Rule 803(6) does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record is not offered in evidence. *See Thompson v. State*, 705 So. 2d 1046, 1048 (Fla. Dist. Ct. App. 1998) ("While the business-records exception to the hearsay rule allows the admission of '[a] memorandum, report, record, or data compilation,' it does not authorize hearsay *testimony* concerning the contents of business records which have not been admitted into evidence." (citation omitted)); *State v. Watkins*, 224 P.3d 485, 492 (Idaho 2009) (finding written notes relied on by the witness "were not offered into evidence" and "[i]n the absence of any document . . . there was simply no 'business record' that might fall within this hearsay exception"); *Bass v. Washington Kinney Co.*, 457 N.E.2d 85, 96 (Ill. App. Ct. 1983) ("[I]t is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record.").[10]

[10] Deep Keel's argument that Bynum's live testimony could be admitted under the business records exception would require Bynum to testify to the content of the records. This is prohibited by the "Requirement of Original" in Rule 1002, SCRE, which provides, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

Deep Keel argues Bynum was a "qualified witness" under Rule 803(6) and section 19-5-510 and thus should have been permitted to testify to the calculations he made from the information contained in the records. Deep Keel relies on *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999), in which this court held a witness is qualified to testify about a business record, despite the fact he or she did not personally participate in the creation of the record and was not the custodian "at or near the time" the record was made. 335 S.C. at 642, 518 S.E.2d at 48. We held a person is a "qualified witness" under the rule if the testimony conveys information from a person "with knowledge" at the time the records were created. *Id.*[11] In this case, Bynum appears to be a "qualified witness" under *Twelfth RMA* because he studied the manner in which Community First and CresCom Bank maintained the records before he purchased the note. Thus, his testimony conveyed information from a person with knowledge at the time the records were created. 335 S.C. at 642, 518 S.E.2d at 48.

However, establishing that a witness is qualified to testify about a business record does not automatically lead to admission of that record. The qualified witness must then lay the foundation to meet the requirements of Rule 803(6) and section 19-5-510. *See State v. Davis*, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006) (stating the proponent of evidence has the burden of establishing that a record falls within a hearsay exception). There are numerous elements to the foundation for a business record to which Bynum did not testify in this case. *See Ex parte Dep't of Health & Envtl. Control*, 350 S.C. at 249-50, 565 S.E.2d at 297 (listing the elements of the business records exception).

Because the business records exception applies only to the admission of business records themselves, the exception does not apply to Bynum's hearsay testimony. Deep Keel did not argue, and we do not find, any other hearsay exception applies. Thus, we find the master abused his discretion in admitting the evidence.

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[11] *See also Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1310 (D.S.C. 1994), *aff'd sub nom. C.W. Haynes & Co. v. Midfirst Bank, SSB*, 87 F.3d 1308 (4th Cir. 1996) ("Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation.").

C. Prejudice

We must next determine whether Atlantic was prejudiced by the admission of the evidence. *See Fields*, 363 S.C. at 26, 609 S.E.2d at 509 (stating to warrant reversal, the appellant must prove the evidentiary ruling was erroneous and resulted in prejudice). Without Bynum's hearsay testimony concerning the unpaid balance, Deep Keel could not prove the amount remaining due on the debt, and the master had no basis for calculating the amount of the deficiency. We find the error prejudiced Atlantic.

IV. Findings Related to Liability of Guarantors

Rohlfing and Caldwell argue the master erred by finding they executed and delivered personal guaranties to Community First and were liable on the guaranties because those issues were outside the scope of the order of reference. Specifically, they contend this court should vacate the master's finding 18, which states:

> On or about March 27, 2008, [Rohlfing] and [Caldwell] executed and delivered to [Community First] Bank personal Guaranties to individually guaranty the Note and debt of [Atlantic]. The said unsecured Guaranties make [them] liable for a limited principal amount of $350,000.00.

We first consider whether this issue is preserved for our review because Rohlfing and Caldwell did not argue in their Rule 59(e), SCRCP, motion that the master erred in including finding 18 in his order. We find the issue preserved. A master's authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction, which "may be raised at any time, including on appeal." *Normandy Corp. v. S.C. Dep't of Transp.*, 386 S.C. 393, 403, 688 S.E.2d 136, 141 (Ct. App. 2009). *Cf.* 386 S.C. at 402-04, 688 S.E.2d at 141-42 (finding the master had subject matter jurisdiction to rule on a particular issue because the order of reference "did not limit the issues to be addressed by the master"). Thus, we address the merits of Rohlfing and Caldwell's argument.

"Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference." *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). "When a case is referred to a

master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers." *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). The circuit court referred the case to the master "for the purposes of adjudicating the foreclosure action." The order of reference specifically provided that "upon a resolution or disposition of the foreclosure action, this case is to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury against" Rohlfing and Caldwell. The order did not authorize the master to decide any issues regarding Rohlfing's and Caldwell's liability on the guaranties; it specifically restricted the master from doing so. Because finding 18 exceeded the scope of the order of reference,[12] we vacate the finding.

V. Conclusion

We find the master acted within his discretion in admitting the loan documents because they were properly authenticated and were not hearsay. However, we find Bynum's testimony regarding the amount due on the note was hearsay to which no exception applied, and thus, the master erred in admitting his testimony on that issue. Finally, we find the master acted outside the scope of the order of reference by making a finding bearing on the liability of Rohlfing and Caldwell, and we vacate this finding.

We **AFFIRM** the judgment of foreclosure, **REVERSE** the deficiency judgment entered against Atlantic, **REMAND** to the circuit court for further proceedings necessary for final judgment on all claims, and **VACATE** finding 18.

HUFF and WILLIAMS, JJ., concur.

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[12] We decide only the narrow issue raised by Rohlfing and Caldwell—whether the master exceeded the scope of the order of reference—and do not address their entitlement to a jury trial on the breach of guaranty claims. *See Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 21, 25), *reh'g granted* (Apr. 9, 2015) (stating "a party does not have a right to a jury trial when he is included in the action solely for the purpose of obtaining a deficiency judgment").