The Supreme Court of South Carolina

In the Matter of Larry R. Jackson, Respondent

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 1986, Larry R. Jackson was admitted and enrolled as a member of the Bar of this State. Mr. Jackson is currently administratively suspended pursuant to Rule 419, SCACR.

By way of a letter addressed to SC Supreme Court, dated April 23, 2004, Mr. Jackson submitted his resignation from the South Carolina Bar. We accept Mr. Jackson's resignation.

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

Mr. Jackson shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Larry R. Jackson shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

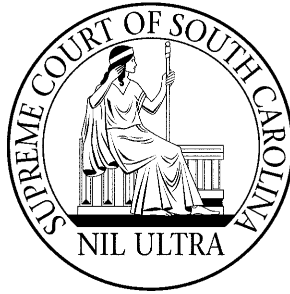
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 10, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25

June 14, 2004

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gene C. Wilkes, Jr., Respondent.

Opinion No. 25836
Heard April 8, 2004 - Filed June 14, 2004

DISBARRED

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

Thomas C. Brittain, of Myrtle Beach, for Respondent.

PER CURIAM: This attorney disciplinary matter consolidates multiple matters. After a hearing, the subpanel recommended Respondent be disbarred. We agree with the subpanel, and disbar Respondent from the practice of law in this State.

PROCEDURAL HISTORY

Respondent was placed on interim suspension on June 27, 2002, and Formal Charges were filed on May 20, 2003. Respondent did not file an answer, and was held in default by consent order dated July 1, 2003.

Pursuant to Rule 24(a) of Rule 413, SCACR, the factual allegations in the Formal Charges are deemed admitted by Respondent.

There are multiple matters, which were consolidated for hearing purposes by the subpanel. The following matters involving misconduct are before this Court:

I. Real Estate Matter A

A married couple owned a condominium as tenants in common in Horry County. The husband died in December 1997, leaving his wife as his only heir. No documents were filed in Horry County to effectuate the transfer of husband's half interest in the condominium to the wife.

On July 6, 1998, Respondent closed on the sale of the condominium without discovering or correcting the title defect. Respondent also failed to discover an outstanding tax lien on the property. The deed, which was filed on July 7, 1998, contained an erroneous property description and an incorrect date.

Some time shortly after the closing, a nonlawyer assistant in Respondent's office discovered the error in the property description. The assistant prepared a corrective deed showing the correct property description. The assistant had the corrected deed executed and filed without consulting Respondent. The corrective deed contained a number of errors, including the lack of a date for the execution of the corrective deed, incorrect recording and execution dates of the original deed, and an incorrect reference number.

In January 2001, Respondent attempted to clear the title. His nonlawyer assistant prepared a second corrective deed, which contained some of the same errors as the first corrective deed, and omitted any reference to the first corrective deed. The second corrective deed was prepared at the direction of Respondent, but without his review or supervision.

The subpanel found Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence);

Rule 1.3 (Diligence); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); and Rule 5.5 (Unauthorized Practice of Law).

The subpanel also found that Respondent failed to fully cooperate with Disciplinary Counsel's investigation, in violation of Rule 8.1 of the Rules of Professional Conduct because Respondent failed to respond to the written Notice of Full Investigation and failed to produce requested documents to the Attorney to Assist and to the Office of Disciplinary Counsel (ODC). However, the subpanel acknowledged that Respondent did appear for an interview pursuant to Rule 19(c)(4), RLDE, Rule 413, SCACR, and did produce the closing file in response to Disciplinary Counsel's subpoena.

The subpanel determined that Respondent is subject to discipline in connection with Real Estate Matter A pursuant to Rules 7(a)(1), 7(a)(3), 7(a)(5), and 7(a)(6) of RLDE, Rule 413, SCACR.

II. Real Estate Matter B

John Smith hired Respondent to close on the sale of a condominium in May 2000. At the time of the closing it was discovered that Smith jointly held title with his deceased sister.

Respondent could not attend the closing; therefore, he secured the services of another attorney. That attorney retained approximately $10,000, which was half of the proceeds of the sale, until the issue was resolved. He also withheld $1,000 to cover repairs for which, by the time of the closing, Smith had already paid for directly. Respondent also agreed to resolve the probate matter and clear the title to the property, and the other attorney withheld $525 at closing for that purpose. Following the closing, the other attorney transferred the withheld funds to Respondent.

The subpanel found that Smith still has not received the full amount of funds withheld at closing, though Respondent returned the $1,000 withheld for repairs following a year of phone calls from Smith. Smith was forced to hire another attorney to resolve the title issues. Further, in November 2001 and in January and April 2002, the balance in Respondent's trust account fell

below the amount he was supposed to be holding in trust on Smith's behalf.

The subpanel found that Respondent's conduct in this regard violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 1.15 (Safekeeping of Property); and Rule 1.16 (Declining or Terminating Representation).

The subpanel further found that Respondent failed to fully cooperate with the disciplinary investigation in violation of Rule 8.1 of the Rules of Professional Conduct, in that he did not respond to the initial inquiries of Disciplinary Counsel and did not timely respond to the Notice of Full Investigation. The subpanel found that Respondent did appear for an interview pursuant to Rule 19(c)(4), RLDE, Rule 413, SCACR, and complied with a subpoena for Smith's file.

The subpanel determined that Respondent is subject to discipline pursuant to Rules 7(a)(1), 7(a)(3), 7(a)(5), and 7(a)(6) of RLDE, Rule 413, SCACR.

III. Tax Conviction Matter

Respondent was arrested in June 2001 on thirteen warrants arising from a South Carolina Department of Revenue investigation. On July 24, 2002, Respondent pled guilty to one count of willful failure to file an individual income tax return and was sentenced to one year imprisonment, suspended upon three years probation and a fine of $1,500, plus assessments. ODC entered into evidence a certified copy of the plea agreement, judgment, and sentence.

Respondent did not report his arrest to ODC or to the Court, did not respond to ODC's inquiries into the matter, and did not respond to the subsequent Notice of Full Investigation. Respondent invoked his Fifth Amendment rights and did not respond to questions regarding the matter at the Rule 19(c)(4) appearance.

The subpanel found that Respondent's conduct violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 8.4(b) (Misconduct-Criminal Act); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Deceit, and Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice). The subpanel also found that Respondent failed to fully cooperate with the disciplinary investigation in violation of Rule 8.1 of the Rules of Professional Conduct because Respondent made no attempt to respond to the Notice of Full Investigation after his conviction.

The subpanel determined that Respondent is subject to discipline pursuant to Rules 7(a)(1), 7(a)(3), 7(a)(4), and 7(a)(5) of RLDE, Rule 413, SCACR.

IV. Probate Matter

Respondent represented Mrs. Doe, who was the personal representative of her late husband's intestate estate. That estate included $45,000 in proceeds from the sale of a condominium that Mr. and Mrs. Doe owned jointly. Respondent received the proceeds in November 2000, but failed to distribute them to Mrs. Doe. Respondent failed to respond to Mrs. Doe's inquiries for a year. Mrs. Doe then sent Respondent a certified letter releasing him as her attorney and demanding that he release the funds and provide her with an accounting.

Mrs. Doe filed a petition for an order requiring Respondent to deposit the money with the probate court and to pay her fees and costs. Her new attorney also requested an emergency hearing, and the court issued a rule to show cause on March 1, 2002. On March 6, 2002, Mrs. Doe received a cashier's check in the amount of $45,000 from Respondent, and she withdrew her request for an emergency hearing. During the time Respondent was supposed to be safekeeping Mrs. Doe's money, the balance in his trust account fell below $45,000 on twenty-one occasions.

Mrs. Doe's attorney appeared at the hearing and testified regarding the

status of and costs associated with the probate matter. She stated that, although Mrs. Doe ultimately received the funds entrusted to Respondent, Mrs. Doe has not been compensated for her costs and fees, which total approximately $5,000.

The subpanel found that Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.15 (Safekeeping of Property); Rule 1.16 (Declining or Terminating Representation); and Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation).

The subpanel found that Respondent violated these rules in that he did not respond to or comply with the demands in Mrs. Doe's letter, and that he did not respond to repeated inquiries from Mrs. Doe's new attorney.

The subpanel further found that Respondent failed to fully cooperate with the disciplinary investigation, in violation of Rule 8.1 of the Rules of Professional Conduct, in that Respondent failed to respond to the Notice of Full Investigation in this matter. Respondent did appear for a Rule 19(c)(4), RLDE, Rule 413, SCACR, interview, and responded to the allegations under oath. However, the subpanel found that Respondent failed to comply with a subpoena for the production of the Doe client file and financial records related to the above transaction.

The subpanel found that Respondent is subject to discipline for his conduct in the Probate Matter pursuant to Rules 7(a)(1), 7(a)(3), 7(a)(5), and 7(a)(6) of RLDE, Rule 413, SCACR.

V. Jones and Title Insurance Matters

Respondent conducted a real estate closing for Mr. and Mrs. Jones on May 31, 2002. Respondent issued the Jones a check for $86,025.40 for the proceeds of the sale, which was returned for insufficient funds.

The Jones's attorney, who also represents Mrs. Doe, testified at the hearing that the Jones have not yet received any funds as compensation for

the $86,025.40 in proceeds from the sale. In addition, the Jones have incurred approximately $5,000 in attorneys' fees and litigation costs, though the Jones's real estate agent refunded the $2,000 commission they paid to him. At the time of Respondent's interim suspension in June 2002, the funds remaining in Respondent's trust account were not sufficient to cover the amount due.

The subpanel found that Respondent violated the following Rules of Professional Conduct found in Rule 407, SCACR, in connection with the Jones matter: Rule 1.4 (Communication); Rule 1.15 (Safekeeping of Property); and, Rule 1.16 (Declining or Terminating Representation).

Moreover, in connection with the Jones matter, it was discovered that Respondent failed to remit title insurance premiums on behalf of many of his clients. Respondent was an agent licensed by the Attorneys' Title Insurance Fund, Inc., to issue title policies. In approximately 150 cases, Respondent collected title insurance premiums without issuing policies or paying the Fund.[1]

The subpanel based its estimate on the notes and partial records of Respondent's staff because the attorney appointed to protect clients' interests was unable to recover most of Respondent's client files or other records. The subpanel noted that Respondent was found to be in contempt of the Supreme Court for destroying his financial records, client records, and computers to avoid compliance with ODC subpoenas. The subpanel also noted that the Court found Respondent failed to cooperate with the attorney appointed to protect clients' interests and failed to comply with an order of the Commission on Lawyer Conduct.

The subpanel found that Respondent's conduct in connection with the Title Insurance Matters violated the following Rules of Professional Conduct

[1] Counsel for the Fund testified that he had identified only twenty-nine cases in which Respondent had accepted premiums and failed to issue policies, and that the costs of rechecking the titles and premiums and issuing new policies totaled $8,783.99. However, at the hearing, there was evidence that another 100 to 120 files for which Respondent had accepted money but not paid premiums existed.

found in Rule 407, SCACR: Rule 1.1 (Competence); Rule 1.2 (Scope of Representation); Rule 1.3 (Diligence); Rule 1.15 (Safekeeping of Property) Rule 1.16 (Declining or Terminating Representation); Rule 8.4(a) (Misconduct-Violation of Rules of Professional Conduct); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

The subpanel found that Respondent's conduct in connection with the destruction of records violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 8.4(b) (Misconduct-Criminal Act); Rule 8.4(d) (Misconduct-Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation); and Rule 8.4(e) (Misconduct-Prejudice to the Administration of Justice).

The subpanel also found that Respondent violated the following Rules for Lawyer Disciplinary Enforcement, found in Rule 413, SCACR: Rule 30 (Duties Following Disbarment or Suspension); and Rule 31 (Appointment of Attorney to Protect Clients' Interests When Lawyer is Transferred to Incapacity Inactive Status, Suspended, Disbarred, Disappears, or Dies).

The subpanel found that Respondent's conduct in connection with the Jones and Title Insurance Matters is subject to discipline in connection with Rules 7(a)(1), 7(a)(3), 7(a)(4), 7(a)(5), 7(a)(6), and 7(a)(7) of RLDE, Rule 413, SCACR.

VI. Mitigation

Counsel for Respondent submitted affidavits from Respondent's mother and his psychiatrist. The affidavits state that Respondent suffers from lifelong attention deficit disorder, major depressive episode, and alcohol dependence. Respondent is currently seeking treatment for these conditions, including medication and psychotherapy. Counsel for Respondent stated that this information was not presented as an excuse or justification for his misconduct, but rather as an explanation.

RECOMMENDATION

The subpanel recommended disbarment for Respondent, citing Respondent's conviction for failure to file a tax return; the contempt order from this Court; Respondent's pattern of neglect, incompetence, and failure to adequately communicate with his clients; the significant financial losses arising from Respondent's misconduct; and, Respondent's repeated failure to cooperate with the disciplinary investigations.

Respondent acknowledged that disbarment is the appropriate sanction. However, Respondent requested that the disbarment be made retroactive to June 27, 2002, the date of his interim suspension. Disciplinary Counsel did not object to the request.

The subpanel also requested that any Order disbarring Respondent from the practice of law include a provision that Respondent is not to be reinstated or readmitted until: (1) he has served his probation and paid fines and assessments ordered in the tax matter; (2) he has compensated all persons or entities who have suffered financial losses as a result of his misconduct; and, (3) he has demonstrated that his mental condition and alcohol dependence are no longer impediments to his ability to practice law.

The subpanel further recommended that Respondent be assessed the costs of this proceeding, pursuant to Rule 7(b)(8), Rule 413, SCACR. The costs incurred were $462.21.

CONCLUSION

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

We disbar Respondent from the practice of law in this state, retroactive

to June 27, 2002. Within six months of the date of this opinion, Respondent and Disciplinary Counsel shall establish a restitution schedule, pursuant to which Respondent shall make restitution to all persons and entities who have suffered financial losses as a result of Respondent's misconduct, including, but not limited to, Respondent's clients, the title insurance company, and the Lawyer's Fund for Client Protection. Failure to make restitution in accordance with this opinion and the restitution plan may result in Respondent being held in contempt of this Court. Respondent shall not apply for readmission until restitution has been paid in full, all civil matters pending against Respondent have been resolved and all judgments are paid in full, and Respondent has served his probation and paid fines and assessments ordered in the tax matter. Further, Respondent must remain on medication to control his condition.

Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Within ninety (90) days of the date of this opinion, Respondent must pay the costs associated with this proceeding. ($462.21).

DISBARRED.

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Paula H. Thomas, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Laurie A. Baker, Respondent.

Opinion No. 25837
Submitted April 26, 3004 - Filed June 14, 2004

DEFINITE SUSPENSION

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

Desa A. Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction within the range of an admonition to a three month definite suspension from the practice of law. See Rule 7, RLDE, Rule 413, SCACR. We accept the agreement and definitely suspend respondent from the practice of law in this state for a three month period. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In May 1998, respondent graduated from law school and was admitted to the North Carolina Bar three months later. She was employed by the firm of Forquer & Green in Charlotte, North Carolina. After she was admitted to the South Carolina Bar in August 1998, respondent was assigned to the firm's Rock Hill law office. Respondent was the only licensed attorney working in the Rock Hill office of Forquer & Green.

On September 1, 1999, Forquer & Green merged with the firm of Brock & Scott. In South Carolina, the firm operated as Green, Brock, Forquer & Scott. At the time of the merger, respondent became an employee of the new law firm and was given a one percent interest in the firm.

With the merger, three non-lawyer employees moved into the Rock Hill office. The three employees included an unlicensed law school graduate (Mr. Brown) and two legal assistants. Respondent supervised all three employees.

While employed at Green, Brock, Forquer & Scott, Mr. Brown conducted real estate closings, both inside and outside of the office, without respondent or another attorney being present. Mr. Brown signed respondent's name on real estate closing documents without indicating he was signing for her. This was done with respondent's knowledge and, in some cases, in her presence.

After conducting real estate closings, it was Mr. Brown's practice to have other firm employees sign as witness and/or notary on the documents even though they were not present at the closings. Mr. Brown also routinely signed as witness and notary to documents related to closings at which he was not present. Respondent was not specifically aware of these practices; however, she admits she was responsible for Mr. Brown's supervision.

From September 1999 until January 2000, respondent and Mr. Brown handled approximately sixty to eighty real estate closings per month. Although respondent represents she had concern, respondent made no meaningful inquiry into the propriety of non-lawyers conducting real estate closings. Respondent did not conduct any legal research, consult with an attorney outside her firm, or seek guidance from the South Carolina Bar concerning the propriety of a non-lawyers conducting real estate closings.

Matter II

On January 17, 2000, respondent left Green, Brock, Forquer & Scott. As a favor to the firm, however, respondent conducted a real estate closing in Greenville for Complainants A and B. Following the closing, respondent left the closing documents in the firm's Rock Hill office and took no further action in regard to the closing. Where she had failed to sign her name on the closing documents, Mr. Brown signed respondent's name, including on an affidavit and a certification. On one document, Mr. Brown notarized respondent's signature when he had signed her name himself. Mr. Brown signed his own name as witness on the documents even though he was not present when the documents were executed. Mr. Brown notarized Complainant A's and Complainant B's signatures in two places. Some of the documents in the closing file were incomplete or left blank. Mr. Brown completed the documents and filled in the blanks.

When Complainants A and B subsequently attempted to refinance the property, they discovered the mortgage and deed had never been filed. Respondent admits she failed to adequately explain her limited role in connection with the closing. She further admits she failed to ensure the closing documents where appropriately completed and filed.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer may limit objectives of representation with client consent after consultation); Rule 5.3 (lawyer having direct supervisory authority over non-lawyer employee shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; lawyer is responsible for conduct of non-lawyer employee if the conduct would be a violation of the Rules of Professional Conduct if engaged in by a lawyer and lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved); Rule 5.5 (lawyer shall not assist non-lawyer in performance of activity which constitutes unauthorized practice of law); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits her misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(4) (lawyer shall not be convicted of a crime of moral turpitude or a serious crime), and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a three month period, effective on the date of this opinion. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kenneth Simmons, Appellant.

Appeal from Dorchester County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25838
Heard April 6, 2004 - Filed June 14, 2004

AFFIRMED IN PART; REVERSED IN PART

Assistant Appellate Defenders Robert M. Dudek and Eleanor Duffy Cleary, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Walter M. Bailey, of Summerville, for respondent.

ACTING JUSTICE KITTREDGE: Kenneth Simmons was convicted of murder, first degree burglary, armed robbery, and first degree criminal sexual conduct. He was sentenced to death and given consecutive

sentences of life and two thirty-year terms on the remaining charges. We reverse the conviction and sentence for armed robbery, but otherwise affirm Simmons' convictions and sentences.

FACTS

On September 1, 1996, the battered body of an eighty-nine-year-old female, whom we will refer to as Ms. B,[1] was found bound and gagged on the kitchen floor of her home in Summerville. She had been raped, severely beaten, and strangled.

The crime went unsolved for more than a year until December 1997 when Simmons, who was incarcerated on other charges, confessed to the killing. He said he smoked crack and drank beer at a club before riding his bicycle home in the early morning hours on the day of the murder. Simmons saw Ms. B in her yard feeding her chickens and followed her into her house. Simmons pushed her and demanded money. Ms. B fell to the floor and hit her head. Simmons then hit her with a stick he had picked up on the back porch. He described the stick as being about two feet long and an inch and a half or two inches in diameter. Simmons raped Ms. B. She was "half and half" alive when he fled the scene.

The State's pathologist testified Ms. B died from blunt trauma and manual strangulation. She had multiple rib fractures caused by stomping or slamming, severe head trauma, and severe vaginal lacerations from the insertion of an object such as a stick or finger. She had semen in her vagina and also in her mouth. DNA testing indicated the semen taken from Ms. B's body was consistent with Simmons' DNA.

The jury found aggravating circumstances of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary, and sentenced Simmons to death.

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[1] We elect not to identify the victim by name.

ISSUES

1. Did the State violate Doyle v. Ohio?

2. Was a juror improperly dismissed after the trial had begun?

3. Did the trial judge err in refusing to charge robbery as a lesser-included offense of armed robbery?

4. Was rebuttal evidence improperly excluded in the penalty phase?

DISCUSSION

1. Doyle v. Ohio

Because the State's case rested largely on Simmons' confession, the defense strategy during the guilt phase was to introduce expert testimony that Simmons was not mentally capable of understanding and waiving his Miranda[2] rights.

Dr. Jeffrey Vidic, a psychologist at the William S. Hall Institute,[3] along with Dr. Thomas Behrman, a psychiatrist also employed at the Hall Institute, attempted to evaluate Simmons for competency on November 23, 1998. Drs. Vidic and Behrman testified as defense witnesses. Dr. Vidic was not satisfied Simmons possessed the ability to comprehend his Miranda warnings and therefore the competency exam could not proceed as planned. Dr. Vidic stated he could not formulate an opinion to a reasonable degree of certainty whether Simmons actually understood his rights or whether he was "malingering an inability to understand his rights." Dr. Behrman's testimony

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

[3] The William S. Hall Institute is the primary educational and research facility for the South Carolina Department of Mental Health.

lent further support to Simmons' position, for he stated, based on his November 23 observations, that Simmons was not "able to explain his rights . . . in a sufficient or meaningful fashion." Dr. Behrman specifically opined that on November 23 Simmons "lacked the ability to waive his rights for the purpose of the evaluation."

On cross-examination, Dr. Vidic testified over Simmons' objection that immediately after the aborted November 23 competency exam, he left a note for his intern, Ms. Skaggs, asking her to administer psychological tests to Simmons during a lunch break. The psychological testing requested by Dr. Vidic did not involve the facts of the case. Simmons refused to cooperate with the testing administered by Ms. Skaggs, invoking his "right" to speak with his lawyer. The State elicited this testimony in response to Simmons' position that he lacked the ability to understand and exercise the Miranda warnings and rights.

On appeal, Simmons argues the trial court erred in allowing the prosecutor's cross-examination in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986). We disagree.

Doyle holds that the Due Process Clause prohibits the government from commenting on an accused's post-Miranda silence. Doyle rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." South Dakota v. Neville, 459 U.S. 553, 565 (1983). This same concept of fundamental unfairness prohibits the government from using a defendant's post-Miranda silence as proof of sanity to overcome an insanity defense. Wainwright v. Greenfield, *supra*; *see also* State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986).

Doyle does not, however, create a per se rule requiring exclusion from evidence of a defendant's post-arrest, post-Miranda silence in all circumstances. As the Doyle court recognized:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an

> exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. at 619, n.11.

In Anderson v. Charles, 447 U.S. 404 (1980), the Court further clarified Doyle:

> Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

447 U.S. at 408. Other courts have found the Supreme Court's holding in Charles is not limited to situations involving inconsistent statements. *See* Splunge v Parke, 160 F.3d 369 (7th Cir. 1998) (initial silence used to show police scrupulously honored defendant's rights); Allen v. State, 686 N.E.2d 760 (Ind. 1997) (refusal to give written statement after oral statement used to show rights respected); Commonwealth v. Waite, 665 N.E.2d 982 (Mass. 1996) (reassertion of silence used to show context in which questioning ended); State v. Correia, 707 A.2d 1245 (R.I. 1998) (same).

The underpinnings of Doyle, and the need for its application, are diminished where a defendant waives his right to silence. Here, Simmons did not remain silent "as to the subject matter of his statements." Simmons, following a waiver of his Miranda rights, confessed to the murder of Ms. B in December 1997. Following the lone invocation of his right to remain silent in the context of the November 23, 1998, competency evaluation, Simmons again waived his Miranda rights and cooperated with a January 1999

evaluation. In this regard, in response to the defense strategy centered on Simmons' purported inability to comprehend the Miranda warnings, the State's targeted and narrow use of Simmons' recognition and exercise of his "right" to speak with counsel did not breach the implied assurance contained in Miranda. Simmons asserted his right to silence only in the context of the November 23 psychological examination. The limited evidence of Simmons' silence in this context was not "designed to draw meaning from silence" regarding the substantive crime and therefore does not violate Doyle. Charles, 447 U.S. at 409.

This case is distinguishable from Greenfield. In Greenfield the evidence of the defendant's silence was used as substantive evidence of guilt in the prosecution's case-in-chief because the defendant pled not guilty by reason of insanity. Here, the evidence of Simmons' silence was not offered as substantive evidence of guilt but as evidence of malingering to rebut his claim that he was incapable of understanding his Miranda rights.

We thus conclude the State's use of evidence of Simmons' silence did not violate the fundamental fairness standard of Doyle.

2. Dismissal of juror

After jury selection, the trial judge informed the jury about sequestration and repeatedly admonished the jury not to discuss the case with anyone. Contact by jurors with family members, by telephone or otherwise, was to be monitored by the SLED team in charge of security and sequestration.

Before the end of the guilt phase, information regarding Juror C was brought to the court's attention. The trial judge noted for the record:

> Captain Polk of SLED received a call from the wife of [Juror C] at which time the lady revealed to him that she was very concerned because she realized that the sister of the defendant, Kenneth Simmons, lived across the street from a piece of property that they owned on Congress Street in the Town of

> Summerville. And in the event that the jury returned a verdict of guilty or imposed the death penalty and they were going to build on a vacant lot across the street from the defendant's sister that it would perhaps cause consternation, fear, concern, or whatever.

The trial judge asked Captain Polk to call Juror C's wife but Captain Polk was unable to immediately contact her.

Meanwhile, the trial judge received a note from Juror C stating:

> Your honor, I have realized that I know a possible relative of the defendant, Kenneth Simmons, and asked earlier in the week if I knew relatives of the accused, I truthfully answered no. After the trial started, I saw a woman I recognized sitting behind Kenneth Simmons. I now realize the woman in the audience was, I believe, a Mrs. Louise that lives opposite a vacant lot I own in the Town of Summerville on Congress Street. In the future my wife and I intend to build on this lot our primary residence. I have upon occasion been cordial with Mrs. Louise and say hello to her while I am on or about my property. Knowing Mrs. Louise will not influence my decision-making ability regarding the guilt or innocence of Kenneth Simmons. If the trial proceeds to the penalty stage, none of the above will influence my decision-making ability regarding life imprisonment or the death penalty as outlined in the pre-trial questionnaire. I felt it was my duty as a juror to inform you of the above and to continue to serve you in any capacity you see fit.

Captain Polk then spoke with Juror C's wife. She told Captain Polk she had talked with her husband about Simmons' sister and stated she was upset, fearful, and "really concerned." Although Juror C's note was written after

the improper conversation, the note contained no reference to the conversation.

The State then moved to excuse Juror C. Simmons requested that the trial judge first question Juror C about the conversation with his wife. The trial judge questioned Juror C in chambers. Juror C confirmed that he and his wife had discussed the personal effect of a verdict in the case. The trial judge explained to Juror C that because he and his wife had discussed the case, he would be excused from the case. As a result of the "improper communication" between Juror C and his wife, Juror C was excused.

On appeal, Simmons contends the trial court erred in dismissing Juror C since the juror indicated he could maintain his impartiality. We disagree. Simmons cites Greer v. Neville, 21 S.C.L. (3 Hill) 262 (1837), for the proposition that once the jury has been sworn, the trial court cannot discharge a qualified juror without legal cause absent the consent of both parties. In Greer, a juror was removed after being seated solely on the basis of counsel's assertion that the juror was biased against counsel and would not do his client justice. There was no evidence to support counsel's bald assertion, and our court of appeals found the excusal of the juror arbitrary.

The court of appeals distinguished Greer in the case of Boland v. Greenville and Columbia R.R. Co., 46 S.C.L. (12 Rich.) 368 (1859), wherein a juror, who was the local coroner, was dismissed during trial because he was needed to investigate a homicide. The court noted it is within the trial court's discretion to substitute an alternate juror where there is a legal necessity or there is disclosed during trial a disqualifying interest of a juryman. *Id.*

In this case, the record indicates Juror C discussed the case with his wife, including the personal effect of a possible verdict, against the trial judge's express admonition not to do so. We hold the trial judge acted within his discretion in excusing Juror C for the juror's unauthorized communication with his wife.[4]

[4] We emphasize this is not a case where a juror was removed for concealing information during voir dire. This juror's self-proclaimed impartiality is therefore not dispositive. *Cf.* State v. Stone, 350 S.C. 442, 567

3. Robbery as a lesser-included offense

Upon the State's objection, the trial court refused Simmons' request to charge robbery as a lesser-included offense of armed robbery ruling that "[w]hile it's a true proposition of law . . . it's not applicable to the uncontradicted facts." Simmons contends this was error because the evidence indicates the only weapons involved were fists and a stick, and whether either of these qualifies as a "deadly weapon" is a question of fact for the jury. The State argues that since the victim died as a result of wounds inflicted by fists or a stick, these are "deadly weapons" as a matter of law.

South Carolina Code Ann. § 16-11-330(A) (Supp. 2003) defines armed robbery in pertinent part as "robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon." (emphasis added). Whether an object has been used as a deadly weapon depends upon the facts and circumstances of each case. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) (murder);[5] *see also* State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (fist may be deadly weapon for purposes of armed robbery). Despite the egregious facts of this case, we adhere to the rule in Davis and hold that whether the robbery was perpetrated with a deadly weapon was a question of fact for the jury.

Although the trial court charged the jury that it was to determine whether a deadly weapon was used, the court refused to give the jury the option of convicting Simmons of the lesser offense of robbery. This was error. We therefore reverse Simmons' conviction and sentence for armed robbery. *See* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (trial judge must charge lesser-included offense if there is any evidence from which it can be inferred the defendant committed lesser rather than greater offense).

S.E.2d 244 (2002) (error to remove juror for innocently concealing information where juror indicated her impartiality was not affected).

[5] *Overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (failure to give King charge not reversible error).

The real impetus in Simmons' challenge to the failure to charge the lesser-included offense is to invalidate the jury's finding of armed robbery as an aggravating factor, and ultimately, invalidate the sentence of death. While we agree that the error requires us to vacate the invalid aggravator of armed robbery, the error does not warrant reversal of the death sentence. Succinctly stated, we find Simmons' death sentence is supported by other valid aggravators.

In Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court held that in states such as ours where aggravating and mitigating factors are not weighed "pursuant to any special standard," a death sentence may be upheld even where one aggravator has been invalidated if there is a valid aggravator remaining.[6] As the Court later explained in Tuggle v. Netherland, 516 U.S. 10, 13 (1995), Zant was "predicated on the fact that even after elimination of the invalid aggravator, the death sentence rested on firm ground." To the contrary, in Tuggle, an aggravator was invalidated because the defendant was precluded from developing rebuttal evidence relevant in the penalty phase. The Court concluded the evidentiary error could have affected the jury's

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[6] Zant involved Georgia's death penalty statute. Georgia's statutory approach requires the factfinder to consider applicable aggravating and mitigating circumstances, without regard to "any special standard." Id. at 873. In weighing "aggravating and mitigating circumstances against each other," the Georgia statutory scheme is not "governed by any specific standards." Id. at 875. Under Georgia law, the factfinder retains "absolute discretion" to impose a life sentence, notwithstanding the presence of an aggravating circumstance. Id. at 871. South Carolina's statutory scheme is in accord, and we find the reasoning of Zant persuasive. *See* S.C. Code Ann. § 16-3-20(B) (2003) (if statutory aggravating circumstance found, defendant sentenced to either death or life imprisonment); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (jury may recommend life imprisonment for any reason or no reason at all); State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993) (under our capital sentencing scheme, jury does not "weigh" aggravating circumstances; the failure of one aggravating circumstance does not require reversal where there remains a valid aggravator).

consideration of the death sentence even though another aggravator was found. We are confronted with no such evidentiary preclusion.

Here, the jury affirmatively found independent aggravators of criminal sexual conduct, kidnapping, burglary, and physical torture, in addition to armed robbery. There was no error in the admission or exclusion of evidence in the penalty phase. We conclude the invalidation of the armed robbery aggravator does not impact the validity of the other aggravators found by the jury in this case, and we reject Simmons' challenge to his death sentence.

4. Rebuttal evidence in penalty phase

In the penalty phase, the State presented victim impact evidence from the victim's family and friends stating how they were negatively affected by the victim's death. During the defense case, Simmons' cousin, Calvin Linning, testified about positive features of Simmons' character. Linning then stated:

> It's awfully hard for me to be up here today because I'm certainly nervous because we know [the victim] personally. I grew up in the Church of God in Summerville and [the victim] and my family was real close. We would take her to the State Youth Convention year after year. My brother is the one that taught her how to drive. And my niece was really close to [the victim]. She had a real close relationship with her. And it was real painful when we discovered about her –

At this point, the State objected to Linning's testimony regarding "his personal feelings about what occurred." The objection was sustained. Linning finished his testimony by asking the jury to give Simmons a life sentence rather than death.

Simmons contends it was a due process violation for the trial court to disallow Linning's testimony that Simmons' family suffered because of the victim's death. We disagree.

First, this argument was not raised at trial and no proffer was made as to what Linning's testimony would have been had he been allowed to continue. This issue therefore is not preserved for review. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (to be preserved for appellate review, issue must be raised and ruled upon in the trial court). In any event, there was no error.

In Payne v. Tennessee, 501 U.S. 808 (1991), the Supreme Court ruled victim impact evidence is admissible to show the victim's uniqueness as an individual human being and the specific harm committed by the defendant in murdering the victim. This evidence is relevant for the jury to meaningfully assess the defendant's moral culpability and blameworthiness. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997). Here, the impact of the victim's death on Simmons' family is not relevant rebuttal to the evidence of Simmons' moral culpability shown by the victim impact testimony. We find no due process violation.

CONCLUSION

Pursuant to S.C. Code Ann. § 16-3-25(C)(2003), we find the death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor; the evidence supports the jury's findings of aggravating circumstances; and the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. *See* State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000); State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996). We reverse Simmons' conviction and sentence for armed robbery and affirm his remaining convictions and sentences.

AFFIRMED IN PART; REVERSED IN PART.

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

The Supreme Court of South Carolina

In the Matter of Mark D. Lattimore, Respondent.

ORDER

Respondent pled guilty to conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349. The information charges that from on or about February 1, 2001, and continuing through on or about August 15, 2002, respondent and his co-conspirators conspired to deceive a mortgage company located in Ohio as to the actual value of real properties located in South Carolina. By inflating the value of the real properties the mortgage company was considering for financing and refinancing transactions, respondent and his co-conspirators fraudulently induced the mortgage company to lend more money that it would have had the appraisals not been inflated and to lend more money than the actual value of the real properties, all to the personal enrichment of respondent and his co-conspirators in the form of inflated fees, commissions, and profits. In furtherance of the conspiracy, respondent and his co-conspirators utilized private and

commercial interstate carriers to send and deliver real estate closing documents from South Carolina to Ohio.

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, of Rule 413, SCACR. Respondent consents to being placed on interim suspension.

The petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina

June 11, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Julie C. Hawkins, Respondent,

v.

William Mark Mullins, Appellant.

Appeal From Aiken County
Dale Moore Gable, Family Court Judge

Opinion No. 3818
Heard March 10, 2004 – Filed June 7, 2004

REVERSED AND REMANDED

Randall K. Mullins, of N. Myrtle Beach; for Appellant.

Gary Hudson Smith, III, of Aiken; for Respondent.

PER CURIAM: William Mark Mullins appeals the decision of the family court, asserting the trial judge erred in failing to find Julie C. Hawkins in contempt of court for various violations of previous court orders relating to

visitation with the parties' minor child. We reverse and remand for the consideration of sanctions, if appropriate.

FACTS

In 1998, Mullins, a resident of Virginia, brought an action against Hawkins, then a resident of North Carolina, seeking visitation with the parties' minor child. In May 1999, the North Carolina District Court issued an order awarding Mullins visitation.

In August 1999, the North Carolina District Court held Hawkins in contempt for leaving the state of North Carolina and withholding the minor child's address from Mullins in violation of the court's order. The court also ordered that Hawkins' brother-in-law, Jim Jackson, not be present for pick-up or drop-off of the minor child or in any way interfere with Mullins' visitation with the minor child. In March 2000, the North Carolina District Court transferred the case to South Carolina.

In December 2000, the family court in Aiken County convened a hearing pursuant to Mullins' Order and Rule to Show Cause, which again alleged Hawkins' noncompliance with court-ordered visitation. Prior to the hearing, the parties reached a final agreement, which granted Mullins monthly visitation, Christmas visitation, and extensive summer visitation.

In April 2001, alleging the prior visitation agreement was not in the best interest of the child, Hawkins sought and received an ex parte order suspending visitation between Mullins and the parties' child. After a May 8, 2001 hearing, the court issued an order lifting the ex parte order, changing the location of the visitation exchange, granting make-up visitation to Mullins, and reinstating summer visitation.

In January 2002, Hawkins contacted Mullins, requesting that his monthly visitation be rescheduled because of their child's temporary illness. Mullins agreed to reschedule, but according to Mullins, when the time came to make up the visit, Hawkins denied that an agreement ever occurred. From February 2002 until July 2002, Mullins continued to exercise monthly

visitation pursuant to the court's orders. In July 2002, Hawkins refused to participate in summer visitation, taking the position that the previous family court order granting summer visitation was incorrectly written, and therefore, "no good." Instead, Hawkins offered to shorten visitation to two weeks in the summer when visitation did not conflict with her plans for the child.

In July 2002, Mullins filed an Order and Rule To Show Cause seeking to have Hawkins found in contempt of court for denial of summer 2002 visitation, for denial of weekend visitation for January 2002, for allowing a prohibited third party to be present during a visitation exchange in July 2001, and to show cause as to why a restraining order should not be issued restraining and enjoining Hawkins or any of her agents from telephone harassment during summer visitation.

The court declined to hold Hawkins in contempt for refusing to participate in summer visitation in 2002. The court also detailed the frequency with which the parties' child could be called while in the possession of the other party, which included a provision limiting phone calls from the child's maternal grandparents.

ISSUES

1. Did the trial court err in failing to find Hawkins in contempt because of Hawkins' willful failure to produce minor child for visitation in January 2002 and July 2002?

2. Did the trial court err in failing to award attorney's fees and costs stemming from Hawkins' contempt?

STANDARD OF REVIEW

On appeal from the family court, this Court has jurisdiction to find facts in accordance with our own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). "A trial court's determination regarding contempt is subject to reversal where it

is based on findings that are without evidentiary support or where there has been an abuse of discretion." Henderson v. Puckett, 316 S.C. 171, 173, 447 S.E.2d 871, 872 (Ct. App. 1994). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

LAW/ANALYSIS

Contempt

Mullins contends that the trial court erred in failing to find Hawkins in contempt for failing to produce their child for visitation during January 2002 and for failing to produce their child for summer visitation in 2002.

A party may be found in contempt of court for the willful violation of a lawful court order. S.C. Code Ann. § 20-7-1350 (Supp. 2003). Before a party may be found in contempt, the record must clearly and specifically show the contemptuous conduct. State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994). In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order. Eaddy v. Oliver, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001). At the same time, we remain cognizant that "contempt is an extreme measure and the power to adjudge a person in contempt is not to be lightly asserted." Bevilacqua, 316 S.C. at 128, 447 S.E.2d at 216. On appeal, the appellate court may reverse a trial judge's determination regarding contempt only if it is without evidentiary support or is an abuse of discretion. Haselden v. Haselden, 347 S.C. 48, 63-64, 552 S.E.2d 329, 337 (Ct. App. 2001).

Mullins asserts Hawkins should have been held in contempt for failing to produce the child for visitation in January 2002. Although Mullins raised the issue in his Order and Rule to Show Cause, there is no indication in the record the trial court ruled on whether Hawkins' was in contempt for denial of January visitation. Furthermore, Mullins failed to raise this matter in a post-trial motion. Therefore, this issue is not preserved for appeal. See I'On v.

Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating parties should raise all necessary issues and arguments to trial court and attempt to obtain a ruling); Townsend v. City of Dillon, 326 S.C. 244, 486 S.E.2d 95 (1997) (holding issues not ruled upon by the trial judge are not preserved for appellate review); Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (ruling issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment).

Mullins next contends that the trial court erred in failing to find Hawkins in contempt for failing to produce their child for summer visitation in 2002. We agree.

In November 2000, Hawkins and Mullins agreed to a visitation schedule that was incorporated into the court's final order. Mullins was granted month-long summer visitation during July. Hawkins filed a SCRCP 59(e) Motion to Alter or Amend Judgment and, in April 2001, Hawkins filed a petition for an ex parte restraining order to suspend visitation. Mullins filed an Order and Rule to Show Cause on the visitation issue. The ex parte restraining order was granted prior to a hearing on the 59(e) motion and the Rule to Show Cause.

On June 12, 2001, the court issued an order addressing the issues raised in the parties' pending filings. The court lifted the ex parte order, granted make-up visitation to Mullins, specified the dates for summer visitation in 2001 and modified monthly visitation and location for exchange. The court ordered the remaining provisions of the December order to remain in full force and effect.

Hawkins asserts the June 2001 order only references summer visitation for the year 2001 and makes no reference to future summer visitation. Because no summer visitation was ordered beyond 2001, Hawkins maintains she made good faith attempts to settle the issue of summer visitation. After denying Mullins' the month-long July summer visitation, Hawkins sent a letter reducing summer visitation to approximately two weeks, at times convenient to her.

We are not convinced Hawkins believed the January 9, 2001 order was "no good". We are equally not satisfied that Hawkins made a good faith effort to reconcile the two orders so Mullins could receive the month-long ordered visitation. Hawkins specifically agreed to the month long summer visitation in the final order from December 2000. Moreover, the June 2001 order required that the month long summer visitation remain in effect. Hawkins' protestations to the contrary are disingenuous. Hawkins had a history of interfering with Mullins' visitation and violating court orders. Accordingly, we find that Hawkins should be held in contempt because of her willful noncompliance with the family court's January 2001 order.

Sanction & Fees For Contempt as to Visitation Exchange

The court found Hawkins in contempt for violating the Court's prior Order requiring that her brother-in-law, Mr. Jim Jackson, not be present at visitation exchanges, but declined to impose sanctions or award Mullins attorney fees and costs. Mullins asserts this was in error. We disagree.

Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion. Sutton v. Sutton, 291 S.C. 401, 409, 353 S.E.2d 884, 888 (Ct. App. 1987). Moreover, the decision to deny attorney fees is largely discretionary with the trial court and its decision will not be disturbed on appeal absent an abuse of that discretion. Smith v. Smith, 308 S.C. 492, 496-497, 419 S.E.2d 232, 234-235 (Ct. App. 1992). Given that Mr. Jackson was not outside with the parties while Father was present for the visitation exchange, we cannot say that the trial court abused its discretion in determining the infraction was not of such a magnitude as to warrant the imposition of sanctions or the assignment of attorney's fees.

CONCLUSION

We find Hawkins should be held in contempt for noncompliance with a court order. We remand this matter to the lower court for consideration of sanctions and attorney's fees if the court deems them appropriate.

REVERSED AND REMANDED.

HEARN, C.J., ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James E. Knight, Jr., and
Frederick Zeigler, Appellants,

v.

Jene Marie Waggoner, Respondent.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3819
Submitted April 6, 2004 – Filed June 7, 2004

AFFIRMED

Peter D. Protopapas, of Columbia, for Appellants.

Spencer Andrew Syrett, of Columbia, for Respondent.

BEATTY, J.: James E. Knight, Jr., and Fredrick Zeigler (Appellants) appeal a ruling by the trial court at the close of evidence allowing Jene Marie Waggoner (Respondent) to voluntarily withdraw counterclaims for trespass and conversion upon a motion by Appellants for a directed verdict on those

claims. Appellants contend that dismissing these counterclaims without prejudice was an abuse of the trial judge's discretion. We affirm.

FACTS

Appellants own property located at 813 Harden Street, Columbia, South Carolina, which adjoins Respondent's vacant lot at the rear of Respondent's property. Respondents erected a fence between the properties prior to Appellants obtaining title to their land. The fence is approximately one foot from Appellants' property line on Respondent's property and encloses an area measuring one foot by sixty feet of Respondent's land. Appellants encroached onto this strip of land in a manner and for a time period they believed satisfied the requirements of adverse possession. In 2000, they brought this action for adverse possession.

In May 2001, Respondent moved to amend her answer to assert counterclaims for trespass and conversion as well as request a jury trial. In February 2002, the trial court granted the motion over Appellants' objection. On July 15 – 17, 2002, the case was tried before a jury. At trial, Appellants moved for a directed verdict on Respondent's counterclaims because, over the course of the trial, Respondent had not mentioned the counterclaims, their elements, or presented any evidence of damages. Respondent moved for a dismissal of the claims without prejudice. Over Appellants' objections, the judge treated the counterclaims as being withdrawn, and dismissed the claims without prejudice. This appeal follows.

STANDARD OF REVIEW

Ordinarily, a plaintiff is entitled to a voluntary dismissal without prejudice as a matter of right, unless there is a showing of legal prejudice to the defendant. See Moore v. Berkeley County, 290 S.C. 43, 44, 348 S.E.2d 174, 175 (1986); Gulledge v. Young, 242 S.C. 287, 291, 130 S.E.2d 695, 697 (1963). If no legal prejudice is shown, the trial judge has no discretion with respect to granting a dismissal without prejudice; but if prejudice to the other party is shown, the matter becomes one of discretion for the trial judge. Id., Ralston Purina Co. v. Odell, 248 S.C. 37, 41-42, 148 S.E.2d 736, 737 (1966).

The same rules regarding voluntary dismissal of a plaintiff's claim apply to voluntary dismissal of a defendant's counterclaim. See Rule 41(c), SCRCP.

LAW/ANALYSIS

Appellants contend that the trial judge erred in granting, without prejudice, Respondent's motion for voluntary dismissal of her counterclaim. Appellants argue they have suffered legal prejudice as the result of the trial court's abuse of discretion. We disagree.

Pursuant to our standard of review, the determination of this case hinges on Appellants' showing at trial, or lack thereof, of legal prejudice that would result from the granting of Respondent's motion. If no showing of legal prejudice is made before the trial judge, the judge must grant a motion for voluntary dismissal. Moore, 290 S.C. at 44, 348 S.E.2d at 175. The burden of this showing of legal prejudice lies solely on the party seeking to defeat the motion. See Prime Med. Corp. v. First Med. Corp., 291 S.C. 296, 300, 353 S.E.2d 294, 297 (Ct. App. 1987).

As the parties opposing the motion for a voluntary dismissal without prejudice, Appellants failed to carry their burden of showing legal prejudice. Appellants conceded that the issues relating to Respondent's counterclaims and any ensuing damages were not addressed during trial. Appellants reasoned that the trial judge should have denied Respondent's motion because Appellants' claims had already been tried.[1] A showing by an opposing party that it has already been put through the time and expense of a trial does not, standing alone, constitute legal prejudice; nor does the mere possibility that the party may have to defend another lawsuit at a later date. Walker v. Jones, 269 S.C. 19, 21, 235 S.E.2d 810, 810-11 (1977). All other justifications for a finding of legal prejudice are asserted by Appellants for the first time on appeal and, therefore, are not preserved for our review. See Wilson v. Builders Transport, Inc., 330 S.C. 287, 294, 498 S.E.2d 674, 678 (Ct. App. 1998) (finding that an argument not presented to the trial court on record is not preserved for appellate review).

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[1] During trial, neither party raised the counterclaims.

Furthermore, the grant or denial of Respondent's motion for voluntary dismissal is largely rendered moot by the fact that the alleged trespasses are of a continuing nature and appear to be reasonably and practicably abatable. See Silvester v. Spring Valley Country Club, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001) ("A nuisance is continuing if abatement is reasonably and practicable possible."). Where there are continuing abatable invasions of one's property by another, the injury is a continuous one and each injury by encroachment gives rise to a new cause of action. See Cutchin v. South Carolina Dept. of Highways and Public Transp., 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990). Therefore, Respondent could file a later suit against Appellants, identical or similar to her dismissed counterclaims, regardless of the trial court's ruling on the motion at issue.

CONCLUSION

Because Appellants failed to meet their burden of showing legal prejudice at trial and this issue is predominantly moot, the decision of the trial court is

AFFIRMED.

HEARN, C.J., and ANDERSON, J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ryan Camden,		**Respondent,**
	v.	
Jeannie Hilton,		**Appellant.**

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

Opinion No. 3820
Heard May 13, 2004 – Filed June 7, 2004

REVERSED

Andrew F. Lindemann, of Columbia, and Lake Eric Summers, of Lexington, for Appellant.

Gaines W. Smith and James A. Stuckey, Jr., both of Charleston, for Respondent.

ANDERSON, J.: Ryan Camden ("Respondent") commenced this action against former Goose Creek City Police Officer, Jeannie Hilton, ("Appellant") for false imprisonment and violation of his Fourth Amendment rights. After the jury returned a verdict for Respondent on the false imprisonment claim and a verdict

for Appellant on the 42 U.S.C. § 1983 claim, the trial court reformed the § 1983 verdict in Respondent's favor. Appellant appeals this ruling. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On July 31, 1998, a robbery occurred at the First Federal Bank in Goose Creek, South Carolina. Many law enforcement agencies responded to the robbery, including the Goose Creek Police Department, the Berkeley County Sheriff's Department, the Charleston County Sheriff's Department, and the Federal Bureau of Investigation (FBI).

At or near the time law enforcement agencies were reacting to the bank robbery, Respondent began walking down College Park Road, located in close proximity to the bank. Deputy Jerry Wright of the Berkeley County Sheriff's Department pulled up behind Respondent and motioned him towards his car. Deputy Wright asked Respondent if he would accompany him for the purpose of answering some inquiries, as Respondent matched the general description of a robbery suspect who had been involved in a car chase with another Berkeley County deputy. Respondent agreed, and he was taken to the mobile command post set up by the various law enforcement agencies involved in investigating the robbery. Respondent professed he was handcuffed prior to being transported to the mobile command post and that he remained cuffed for the majority of his time there.

Upon arrival at the command post, Respondent testified he was introduced to Sheriff Dewitt who asked him again if he would agree to being queried. Respondent agreed, and Sheriff Dewitt questioned Respondent about the bank robbery and his automobile, a 1992 Honda Accord. Respondent averred that earlier in the day he loaned his car to two of his friends so that they could use it to get air in their car tire.

Following the questioning, Sheriff Dewitt asked Appellant to stand up and make a full turn so witnesses from the bank could see him

and determine whether he was one of the people involved. Because none of the witnesses identified Respondent as one of the perpetrators, Sheriff Dewitt removed the handcuffs from Respondent, thanked him for his cooperation, and told him he was "free to go."

In connection with his release from custody, Sheriff Dewitt instructed Deputy Wright that Respondent was cleared of involvement in the bank robbery and to return him to where he was found. Sheriff Dewitt further informed Deputy Wright that he was to protect Respondent's identity from the various media organizations gathering at the command post.

Before Deputy Wright could carry out these instructions, Captain Yvonne Turner of the Goose Creek Police Department instructed Appellant to have Respondent transported to the Goose Creek Police Station. Captain Turner was the top-ranking official from the Goose Creek Police Department at the command post. Captain Turner ordered Respondent's detention because she was told the FBI wanted to question him further. In compliance with this order, Appellant asked another Goose Creek police officer to assist her in transporting Respondent to the police station. According to Appellant's testimony, the other officer's assistance was needed because she was driving an unmarked patrol car and it was police department policy to transport suspects in marked patrol cars if possible. After placing handcuffs back on Respondent, Appellant placed Respondent in the rear of the second officer's car.

Both cars left the command post with Appellant's vehicle in the lead position. According to Respondent, when his car arrived at the police station, Appellant "kept going." Appellant professed she did not see Respondent again after they left the command post.

Respondent declared he arrived at the police station at approximately 1:30 p.m. He was taken out of the patrol car by two policemen who led him through the station and into a small, windowless room, designated as the "Breathalyzer room," a room commonly used for testing persons charged with driving under the

influence. Within a few minutes after being placed in the room, an FBI agent questioned Respondent for about five minutes. He remained handcuffed and alone in this room for the next several hours.

After Appellant had been in this room for three or four hours, Detective Merrithew entered. Respondent asked the detective to find out what was going to happen to him. Detective Merrithew told Respondent a Berkeley County deputy was coming to transport him and the two individuals who borrowed his car earlier in the day. When the Berkeley County deputy arrived, however, he informed Detective Merrithew that he was not looking for Respondent and Respondent should have been sent home.

Detective Merrithew told Respondent he would discern what was occurring and about fifteen minutes later, he returned to the room, apologized, and removed Respondent's handcuffs. Detective Merrithew then gave Respondent a ride home around 7:00 p.m.

Respondent commenced this action averring violation of his civil rights under 42 U.S.C. § 1983, as well as a state law claim of false imprisonment. The common law false imprisonment and the § 1983 action were submitted to the jury. The jury returned a defense verdict on the § 1983 claim. The jury awarded Respondent $3000 actual damages and $3000 punitive damages on the false imprisonment claim.

After the verdicts had been returned and the jury discharged, Respondent moved "to have the verdict conformed to grant [Respondent] judgment on the Section 1983 action." The motion was based on the fact that the jury awarded punitive damages on the state law claim, and concomitantly, all of the elements for recovery under § 1983 had been satisfied.

The trial court granted Respondent's motion because it found the elements for each cause of action were identical and the verdict on the state law claim supported a finding for Respondent on both causes of action. Appellant filed a motion to reconsider, which was denied.

ISSUES

I. Did Respondent waive his right to raise alleged inconsistencies in the verdicts by not objecting prior to the discharge of the jury?

II. Did the trial court improperly weigh the evidence, thereby invading the province of the jury, when it placed greater emphasis on one verdict over the other?

III. Did the trial court err in reconciling the verdicts when Respondent failed to move for a new trial?

IV. Is Appellant entitled to attorney's fees under 42 U.S.C. § 1983?

V. Did the trial court err in concluding the two verdicts were inconsistent and could not be reconciled as returned by the jury?

LAW/ANALYSIS

I. Waiver

Appellant argues Respondent waived his right to raise any alleged inconsistencies in the two verdicts because Respondent did not object until after the jury was discharged.

The rule that parties seeking to reform a verdict must voice their objection before the jury is discharged has been followed in South Carolina since at least 1920. See, e.g., Rhame v. City of Sumter, 113 S.C. 151, 154, 101 S.E. 832, 833 (1920), overruled on other grounds by Rourk v. Selvey, 252 S.C. 25, 164 S.E.2d 909 (1968) ("The defendant's counsel made no attempt to find out what the jury intended, and their objections come too late. It was [counsel's] business to clarify and ask for a correction and reformation of the verdict before the jury were [sic] discharged.").

In Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 560 S.E.2d 894 (2002), our supreme court reaffirmed this principle. In Dykema, a wrongful death action against a hospital and medical provider, the jury awarded plaintiff $2,000,000 in actual damages against the hospital and $500,000 in damages against the medical provider. Id. at 552, 560 S.E.2d at 895. The trial court granted the medical provider's request for JNOV, reasoning that the failure of the jury to award actual damages precluded it from awarding punitive damages. Id.

In finding the trial court erred in granting the medical provider's motion for JNOV, the supreme court noted, "[t]his court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence." Id. at 554, 560 S.E.2d at 896 (citations omitted).

We find the trial court erred in entertaining Respondent's post-trial motion, as the motion was not presented to the court prior to the jury being discharged.

II. Improper Weighing of Evidence

Appellant alleges that by favoring one verdict over the other, the trial court improperly weighed the evidence and thereby invaded the province of the jury. Specifically, Appellant asserts the trial court erred "in concluding that the intent of the jury could be ascertained from the verdict in favor of the Respondent on the state law claim. It is just as possible that the jury's actual intent was consistent with the defense verdict on the federal constitutional claim." We agree.

In Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996), this court examined when it would be appropriate for a trial court to reform a jury verdict:

> A trial court may amend a verdict in matters of form, but not of substance. A change of substance is a change affecting the jury's underlying decision, but a change in form is one which merely corrects a technical error made by the jury. The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. After the amendment, the verdict must be not what the judge thinks it ought to have been, but what the jury intended it to be.

Vinson, 324 S.C. at 406, 477 S.E.2d at 724 (citing 75B Am.Jur.2d Trial § 1886 (1992)).

> While a trial judge may have the right in certain instances in a civil case to make, or order made, a correction in the verdict of a jury, after discharge of the jury, for the purpose of giving effect to what the jury unmistakably found, that power is limited strictly to cases where the jury has expressed their finding in an informal manner but the Judge cannot, under the power of amending the verdict, invade the province of the jury or substitute his verdict for theirs.

Lorick & Lowrance, Inc. v. Julius H. Walker & Co., 153 S.C. 309, 319, 150 S.E. 789, 792 (1929) (citations and quotations omitted). "The law rather forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury." Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 282, 178 S.E. 819, 829 (1934). "Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge's findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury." Id. at 283, 178 S.E. at 830.

In the current case, the judge decided that because the jury found punitive damages on the state law false imprisonment claim, all of the

elements underlying the federal claim were met. Accordingly, the trial court reformed the §1983 verdict in Respondent's favor. Essentially, the court ruled that because the elements for both causes of action were, in its opinion, the same, the verdicts were inconsistent. However, it is not for the trial court to say what it thinks the verdict should be. We find the trial court improperly gave preference to one verdict over the other and by so doing improvidently invaded the province of the jury. We rule the trial court erred in reforming the §1983 verdict in Respondent's favor.

III. New Trial

Alternatively, Appellant claims the trial court erred in granting Respondent's motion to reform the verdict because Respondent failed to move for a new trial. Along with articulating when a trial court should reform a verdict, in Vinson, this court clearly stated "[a] party seeking amendment of a verdict must lay a proper foundation by a motion for a new trial." Vinson, 324 at 407, 477 S.E.2d at 724 (citing Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 178 S.E. 819 (1934)); see Dowd v. Imperial Chrysler Plymouth, Inc., 298 S.C. 439, 441, 381 S.E.2d 212, 213 (Ct. App. 1989) (citing New York Carpet World v. Houston, 292 S.C. 101, 354 S.E.2d 924 (Ct. App. 1987)). "Any question affecting the verdict should be raised by a motion for a new trial." Vinson, 324 S.C. at 407, 477 S.E.2d at 724.

"A jury's verdict should be upheld when possible to do so and to carry into effect what was clearly jury's intentions. But when the verdict is so confused that it is not absolutely clear what was intended, the court should order a new trial." Anderson, 175 S.C. at 283-84, 178 S.E. at 830. A party that seeks an amendment to a verdict must make a motion for a new trial. Id. at 280, 178 S.E. at 829. "The authority of a circuit court judge to correct, modify, or interfere with the verdict of a jury in a case properly triable by jury is embraced in and limited to the power to grant new trials." Id. at 283-84, 178 S.E. at 829. "If in the estimate of the trial court, the verdict of the jury is wrong and erroneous, the court can avoid it only by setting it aside and granting a

new trial." Stone & Clamp, Gen. Contractors v. Holmes, 217 S.C. 203, 233, 60 S.E.2d 231 (1950).

We hold the trial court erred in reforming the §1983 verdict, as Respondent did not lay the proper foundation by making a motion for a new trial.

IV. Attorney's Fees

Appellant contends any error in reconciling the two verdicts is not harmless, as finding Appellant liable under 42 U.S.C. § 1983 subjects her to attorney's fees totaling over $40,000. In view of our reversal of the case, we decline to address the issue of attorney's fees under 42 U.S.C. § 1983.

V. Inconsistency of the Verdicts

Appellant maintains the trial court erred in concluding the two verdicts were inconsistent as returned by the jury. We agree.

In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features. Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967); Dowd v. Imperial Chrysler Plymouth, Inc., 298 S.C. 439, 441, 381 S.E.2d 212, 213 (Ct. App. 1989). Furthermore, "a jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention." Johnson v. Parker, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983); Joiner v. Bevier, 155 S.C. 340, 380, 152 S.E. 652, 656 (1930); Billups v. Leliuga, 303 S.C. 36, 39, 398 S.E.2d 75, 76 (Ct. App. 1990).

A priori, this court emphasizes that the claim posited by Respondent is a Fourth Amendment claim under 42 U.S.C. § 1983. In Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the United States Supreme Court edifies:

> This case requires us to decide what constitutional standard governs a free citizen's claim that law

> enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.
>
> . . . .
>
> A "seizure" triggering the Fourth Amendment's protections occurs only when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen," Terry v. Ohio, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889 (1968); see Brower v. County of Inyo, 489 U.S. 593, 596, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989).

Graham, 490 U.S. at 388 and 395 n. 10, 109 S.Ct. at 1867-68 and 1871 n. 10, 104 L.Ed.2d at 450 and 455 n. 10.

The Fourth Circuit Court of Appeals in Robles v. Prince George's County, 302 F.3d 262 (4th Cir. 2002) explicates:

> We begin by considering Robles' federal constitutional claims. In order to make out a valid claim under 42 U.S.C. § 1983, Robles must show that (1) the actions of the police officers deprived him of an actual constitutional right and (2) that the right was clearly established at the time of the alleged violation. Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Only if both parts of this inquiry are satisfied can Robles overcome the defendants' assertion of qualified immunity.
>
> Robles contends that the PGC officers violated his constitutional right to be free from unreasonable seizures. He asserts that "[b]ecause there was no legitimate reason to

> handcuff [him] to a pole and abandon him, the manner of his seizure was unreasonable."
>
> The Fourth Amendment "governs claims of excessive force during the course of an arrest, investigatory stop, or other 'seizure' of a person." Riley v. Dorton, 115 F.3d 1159, 1161 (4th Cir. 1997) (en banc). However, this court has rejected any concept of a continuing seizure rule, noting that "the Fourth Amendment . . . applies to the initial decision to detain an accused, not to the conditions of confinement after that decision has been made." Id. at 1163 (internal citations and punctuation omitted). Once the single act of detaining an individual has been accomplished, the Amendment ceases to apply. Id. Robles acknowledges that the police had probable cause for his arrest. The officers were acting on the basis of an outstanding warrant issued by Montgomery County which contained five charges against Robles stemming from a vehicular hit and run accident the previous year. Robles also admits that Rozar and DeBarros did not use excessive force when they took custody of him. The officers made clear the reason for his arrest, handcuffed him, and placed him in the back of a police cruiser without incident.

Robles, 302 F.3d at 268.

There are a number of logical reasons why the jury could have legitimately returned a verdict in Respondent's favor on the state law false imprisonment claim, but a verdict for Appellant on the federal claim. The jury could reasonably have determined Appellant was entitled to qualified or "good faith" immunity on the federal claim, as she was following a direct order from Captain Turner when she placed Appellant under arrest. The parties do not dispute that Captain Turner ordered Appellant to transport Respondent to the police station. The jury could have reasonably found Appellant liable on the state law false imprisonment claim because this claim does not recognize a good faith immunity defense.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

To assert a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that (1) the actions of the police officers deprived him of an actual constitutional right and (2) the right was clearly established at the time of the alleged violation. Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818, 827 (1999). "[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Conn v. Gabbert, 526 U.S. 286, 290, 119 S.Ct. 1292, 1295, 143 L.Ed.2d 399, 405 (1999).

"[T]he only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." Hafer v. Melo, 502 U.S. 21, 25, 112 S.Ct. 358, 362, 116 L.Ed.2d 301, 309 (1991). "The doctrine of qualified immunity shields police officers acting in their official capacity from suits for damages under 42 U.S.C. § 1983, unless their actions violate clearly-established rights of which an objectively reasonable official would have known." Rogers v. City of Amsterdam, 303 F.3d 155, 158 (2d Cir. 2002) (quoting Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999)); accord Williams v. Gourd, 142 F.Supp.2d 416, 428 (2001). "This policy is justified in part by the

risk that the 'fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'" Williams, 142 F.Supp.2d at 428 (quoting Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). If the plaintiff alleges "an arrest without probable cause, an arresting officer may assert the defense of qualified immunity if 'either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'" Rogers, 303 F.3d at 158 (quoting Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991)). Because qualified immunity is an affirmative defense, the defendant bears the burden of proving the challenged act was objectively reasonable in light of the existing law. Varrone v. Bilotti, 123 F.3d 75, 78 (2d Cr. 1997). The United States Supreme Court has held a clearly established statutory or constitutional right "must be sufficiently clear that a reasonable official would understand what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640, 107 S.Ct. at 3034, 97 L.Ed.2d at 531.

The qualified immunity defense has been recognized to extend to situations when a police officer is merely following the orders of a superior officer. In Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000), the First Circuit Court of Appeals explained the concept: "Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (e.g. a warrant, probable cause, exigent circumstances)." Id. at 174-175 (citations omitted); see also Varrone, 123 F.3d at 81 (finding that a prison official had qualified immunity for carrying out his supervisor's directive, even though he did not independently investigate the basis and reason for the order).

It is uncontested Appellant was instructed to transport Respondent to the police station by her superior, Captain Turner. Therefore, it is logical the jury felt Appellant was entitled to qualified immunity on the federal claim. The trial court did not refer to "qualified immunity" in its instructions to the jury. Rather, the court used the synonymous phrase "good faith." This is especially apparent when one considers the trial court's instruction on this issue:

> I charge you also that not every error of law or fact on the part of a police officer will subject her to liability under the Civil Rights Act. An arrest is often a stressful and unstable situation calling for discretion and evaluation by the police officer. Thus, an officer acting in good faith is not liable for the arrest even if it should be determined . . . that the officer was in error. I further instruct you that is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present.
>
> And we have—and in those types of cases, the official may not be held personally liable if you find, of course, the person acted in good faith. Because in such a situation, a plaintiff making an arrest, there is a defense of good faith and probable cause that <u>is available to them in a 1983 action</u>.

(emphasis added).

The jury could have logically found Appellant was entitled to the good faith defense on the federal cause of action, but not on the state law cause of action. We find the trial court erred in ruling the verdicts were inconsistent and subsequently reforming the §1983 verdict in Respondent's favor.

Punitive Damages/Qualified Immunity Defense

Throughout his brief, Respondent repeatedly argues the trial court was correct in concluding the Appellant could not be subject to punitive damages and yet still be entitled to a qualified immunity (good faith) defense on the federal claim. This argument is based on the idea that to award punitive damages, it must be proved by clear and convincing evidence that Appellant acted "intentionally, willfully, wantonly, or recklessly." Because the jury found punitive damages, it must have believed Appellant acted willfully or recklessly. Thus, Appellant could not have acted in good faith under the federal claim. We disagree.

A number of cases addressing the qualified immunity, or good faith defense, have squarely rejected the idea championed by Respondent. In Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L.Ed.2d 759, (1988), the United States Supreme Court noted "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated." Id. at 588, 118 S. Ct. at 1592, 140 L.Ed.2d at 773; see Ulichny v. Merton Cmty. Sch. Dist., 93 F.Supp.2d 1011, 1042 n.21 (E.D. Wis. 2000) (finding defense of qualified immunity may not be rebutted by evidence that defendant's conduct was malicious or otherwise improperly motivated); Brown v. Ives, 129 F.3d 209, 211 (1st Cir. 1997) ("The test is objective; claims of malice do not overcome qualified immunity."); Adams v. Treen, 671 F.2d 892, 896 (5th Cir. 1982) ("Qualified immunity now depends on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, not upon malice or other subjective factors."). "The subjective malice or bad faith of the official is irrelevant, and the only inquiry is whether a reasonable person could have believed his actions lawful at the time they were undertaken." Leibowitz v. United States Dep't of Justice, 729 F.Supp. 556, 561 (E.D.Mich.S.Div. 1989). The qualified immunity "standard eliminates from consideration allegations about the official's subjective state of mind, such as bad faith or malicious intention, concentrating the inquiry upon the "objective reasonableness" of the official conduct. Floyd v. Farrell,

765 F.2d 1, 4 (1st Cir. 1985). It is clear that even if Appellant did act in a manner sufficient to support an award of punitive damages on the false imprisonment claim, this does nothing to preempt a good faith defense on the federal claim. See also Robles v. Prince George's County, 302 F.3d 262 (4th Cir. 2002) (finding defendants entitled to good faith defense, but nevertheless liable for actual and punitive damages under a state law claim). We reject the contention that a jury verdict awarding punitive damages preempts a good faith defense in a 42 U.S.C. § 1983 action.

CONCLUSION

We rule the trial court erred because: (1) Respondent did not raise the "inconsistencies" in the verdicts until after the jury was discharged; (2) the court favored one verdict over the other and thereby invaded the province of the jury; (3) Respondent failed to move for a new trial; and (4) the verdicts as returned by the jury were necessarily inconsistent. Accordingly, the trial court's reformation of the § 1983 verdict is

REVERSED.[1]

HEARN, C.J., and BEATTY, J., concur.

[1] The jury verdict on the common law false imprisonment claim in the amount of $3000 actual damages and $3000 punitive damages is not appealed and that verdict remains intact.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Venture Engineering, Inc., Appellant,

v.

Tishman Construction Corporation of South Carolina; Timberland Properties, Inc.; The South Carolina Public Service Authority (Santee Cooper); and High Point Capital, LLC, Defendants,

Of Whom The South Carolina Public Service Authority (Santee Cooper) is the Respondent.

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

Opinion No. 3821
Heard December 11, 2003 – Filed June 7, 2004

AFFIRMED

G. Michael Smith, of Conway; Julio E. Mendoza, Jr., of Columbia; Mark A. Brunty, of Myrtle Beach, for Appellant.

Elizabeth Warner, John Samuel West, both of Moncks Corner;

Francis B. B. Knowlton, of Columbia; John Hamilton Smith, of Charleston; for Respondent(s).

BEATTY, J.: Venture Engineering, Inc. ("Venture") brought a mechanic's lien foreclosure action against Tishman Construction of South Carolina, Timberland Properties, Inc., and the South Carolina Public Service Authority ("Santee Cooper"). Venture appeals the master-in-equity's order finding that Venture's mechanic's lien did not encumber property owned by Santee Cooper. We affirm.

FACTS/PROCEDURAL HISTORY

In May 1995, Timberland Properties, Inc., ("Timberland") purchased approximately 422 acres of real estate owned by the State of South Carolina but managed by Santee Cooper. As part of the sale, Timberland agreed to develop the land within twelve months of the date of purchase. Subsequently, the parties entered an Amendment to Right to Repurchase granting Timberland a ninety-day extension to begin construction of the proposed development. According to the agreement, if Timberland failed to begin development within the prescribed period, Santee Cooper had the right to repurchase the property together with all improvements for the original sale price. Both the contract and deed, along with the Amendment, were properly recorded in Horry County.

In February 1995, Timberland hired Venture to perform services in connection with Timberland's development of the property. However, Timberland failed to pay for Venture's services and Venture filed a mechanic's lien in the amount of $127,786.74 against the property on May 6, 1997. Around the same time, Timberland failed to comply with the terms of its agreement with Santee Cooper, prompting Santee Cooper to exercise its right to repurchase the property on May 17, 1997. Venture initiated the present action in circuit court in September 1997, seeking to foreclose on the mechanic's lien filed against the property.

In June 1997, Timberland voluntarily sought Chapter 7 bankruptcy protection. Santee Cooper filed an Adversary Proceeding in bankruptcy court

for a declaratory judgment seeking formal adjudication of Santee Cooper's ownership claims in the property and seeking a ruling Timberland had no rights to the property. The bankruptcy trustee counterclaimed, asserting that whatever interests Santee Cooper had came about through fraud and preferential treatment. In essence, the trustee claimed that Timberland's transfer of the property was avoidable and, as trustee, he was invoking his right to avoid the transfer.[1]

In February 1999, the bankruptcy court issued a Notice of Settlement and Sale, advising Timberland's creditors that Timberland's bankruptcy trustee intended to submit a proposed settlement for the bankruptcy court's approval. Among other things, the proposed settlement indicated the trustee would sell the property free and clear of all liens and encumbrances. Additionally, the notice provided that any party objecting to the proposed settlement was to submit a written objection within twenty days, pursuant to Rule 9014, District of South Carolina Bankruptcy Rules. Venture, named as a creditor, received a copy of the notice, but did not file any objection.

The bankruptcy court approved the proposed settlement and sale in April 1999. The property was transferred to WBLC, LLC[2] "free and clear of all liens and encumbrances in accordance with 11 U.S.C. § 363."

Following the conclusion of the bankruptcy proceeding, Venture's foreclosure action was referred to the master-in-equity. The master dismissed Venture's claim with prejudice. The master found as a matter of law that Venture's mechanic's lien could not be enforced, that the bankruptcy court approved the sale of the property, and that Venture's claim was barred by res judicata, waiver and equitable estoppel.

[1] Trustees have the power to avoid fraudulent or preferential pre-petition transfers and obligations. See 11 U.S.C. § 548 (Supp. 2003).

[2] WBLC, LLC was the third party purchaser of the property involved in this matter. After Santee Cooper repurchased the property the property was sold, free and clear of all encumbrances, to WBLC.

ISSUES

1. Did the master err when he gave effect to deed language, which should have been void?

2. Did the master err when he allowed a subsequent purchaser to purchase land without regard to a previously filed mechanic's lien?

3. Did the master err in holding that a seller of property, who sells on condition that the buyer develop it, can retake the property without regard to any mechanic's lien for work performed to develop the property?

4. Did the master err in holding that the bankruptcy sale was valid?

LAW/ANALYSIS

Venture raises four issues for review by this Court; however, we feel that Venture's fourth issue is dispositive of the case. Venture argues the master erred in holding the bankruptcy sale was valid. We disagree. We believe that Venture misapprehends the extent of the bankruptcy court's jurisdiction, as well as the jurisdiction of this court.

Venture does not contest the bankruptcy court's jurisdiction or the validity of the sale of the bankrupt's property; however, Venture argues that the property in question was incorrectly included in the bankrupt's estate. Venture's argument before the master and this court is not efficacious. Venture should have made this argument in the bankruptcy court.

A. The Bankruptcy Case

A bankruptcy estate is comprised of all legal or equitable interests of a debtor in property as of the commencement of the case. 11 U.S.C. § 541(a)(1) (1988). The trustee's assertion of his right to avoid the alleged

fraudulent or preferential transfer to Santee Cooper resulted in the estate retaining an equitable interest in the property. A transferee may have colorable title to the property, but the equitable interest – at least as far as the creditors (but not the debtor) are concerned – is considered to remain in the debtor so that creditors may attach or execute judgment on the property as though the debtor had never transferred it. In re Mortgageamerica Corp., 714 F.2d 1266, 1275 (5th Cir. 1983).[3] "[W]hen such a debtor is forced into bankruptcy, it makes the most sense to consider the debtor as continuing to have a legal or equitable interest in the property fraudulently transferred within the meaning of section 541(a)(1) of the Bankruptcy Code." Id. Accordingly, the bankruptcy court had jurisdiction.

During the bankruptcy proceeding, Venture was a named creditor and received proper notice of the settlement and request to sell the property free and clear of all liens.[4] Venture failed to take the necessary action to protect its lien against the property.[5] The specific question before the bankruptcy court was whether the trustee and the debtor had rights in the property in question. The bankruptcy court allowed the parties to resolve the dispute by settlement. The settlement required the trustee to convey, by quit claim deed, his interest in the property to Santee Cooper and for Santee Cooper to sell the property to a third party. The trustee would receive $2,000,000.00. The

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[3] See also In re Criswell, 102 F.3d 1411, 1416 (5th Cir. 1997) (stating property of the debtor is property of the estate upon filing of the bankruptcy petition); but see In re Saunders, 101 B.R. 303 (N.D.Fla. 1989) (finding until there is a judicial determination that property has been fraudulently transferred, the property is not included in the bankrupt's estate).

[4] The moving party must serve any interested party with notice and must simultaneously transmit to the clerk of court for filing (1) the motion; (2) the notice of hearing of the motion; and (3) a proposed order. See SC CI 9014-2(b).

[5] Any response, return and/or objection to the special motion must be served no later than twenty (20) days following the service date of the motion. If the objection time expires without the filing of a response, return and/or objection or other request, the proposed order will be promptly submitted to the judge for his consideration. See SC CI 9014-2(c).

bankruptcy court approved the sale free and clear of all liens and encumbrances in accordance with 11 U.S.C. § 363.

The bankruptcy court found that the settlement was a "global resolution" of the adversary proceeding and that the manner in which the settlement was structured necessitated the bankruptcy court's acceptance or rejection of the entire transaction, including the sale of the property to WBLC. Even though two creditors objected to the settlement, the bankruptcy court overruled the objections and approved the settlement. The proposed settlement involved the issue of ownership of the property. If there was a question concerning the property's ownership, the bankruptcy court was the proper forum to address those issues.

Moreover, Venture's failure to seek a stay of the sale renders the question of whether the land was property of the bankrupt's estate moot. See In re Sax, 796 F.2d 994, 996 (7th Cir. 1986) (reasoning that if the property in question was not a part of the bankrupt's estate, appeal from order approving its sale was rendered moot for failure of the lien holder to obtain a stay of sale, even though sale was improper); see also In re Vetter, 724 F.2d 52, 55 (7th Cir. 1983); 11 U.S.C § 363(m) (1988).

B. The Master-In-Equity Case

The master found, and we agree, Venture is bound by the doctrine of res judicata. "The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action." In re S.N.A. Nut Co., 215 B.R. 1004, 1008 (1997); see also Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Id.

"Bankruptcy proceedings are *in rem*. All persons concerned, including creditors, are deemed to be parties to the [bankruptcy] proceedings." Miller v. R. K. A. Mgmt. Corp., 160 Cal. Rptr. 164, 169 (Cal. Ct. App. 1979) (internal citations omitted). As one of Timberland's creditors, Venture was deemed to be a party in the bankruptcy action. The property was the subject matter in issue in both proceedings. The bankruptcy court ruled on the property issue, finally resolving all issues of ownership.

In bankruptcy matters, orders approving the sale of a debtor's property are considered final decisions and are immediately appealable. In re Sax, 796 F.2d at 996. This matter was resolved when the bankruptcy court ordered the sale of the property free and clear of any liens and encumbrances.[6] Venture could have sought a stay of sale and immediately appealed to the federal court; however, Venture failed to do so. The doctrine of res judicata bars any subsequent action on Venture's behalf.

When a bankruptcy court's order is erroneous, it is correctable only through the federal court and, under the circumstances, the trial court and this court are required to accept the bankruptcy court's order as it was rendered and entered. See Fowler v. Fowler, 474 So.2d 719, 720 (Ct. App. Ala. 1985); see also In re Atlanta Retail, Inc., 294 B.R. 186, 195 (N.D.Ga. 2003) ("Orders of courts having jurisdiction to enter them must be obeyed until reversed, even if proper grounds exist to challenge them. A challenge for error may be directed to the ordering court or a higher court, ... but it may not be made collaterally."). Moreover, this Court is unable to render an opinion

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[6] A sale free and clear of liens and encumbrances pursuant to 11 U.S.C. § 363 is a protected sale. See Matter of Met-L-Wood Corp., 861 F.2d 1012, 1017 (7th Cir. 1988) ("A proceeding under section 363 is an *in rem* proceeding. It transfers property rights, and property rights are rights good against the world, not just against parties to a judgment or persons with notice of the proceeding."); see also Int'l Union, Etc. v. Morse Tool, Inc., 85 B.R. 666 (D.Mass 1988) (finding that the protection of good-faith purchasers under 11 U.S.C. § 363 reflects a salutary policy of not only affording finality to judgments of the bankruptcy court, but particularly of giving finality to those orders and judgments upon which third parties rely).

on the merits of Venture's claims because the master concluded that Venture's claim was barred by res judicata, waiver, and equitable estoppel. Venture did not appeal the master's decision on these grounds.

CONCLUSION

For the forgoing reasons, the decision of the Master is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary Eskew Rowell, Respondent,

v.

Arthur H. Whisnant, Jr., Judith H. Whisnant, Standard Savings & Loan Association, First Palmetto State Bank and Trust Company, Robert L. Wolston and Richland County Treasurer, Defendants,

of whom Arthur H. Whisnant and Judith H. Whisnant are Appellants.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3822
Heard April 8, 2004 – Filed June 7, 2004

AFFIRMED IN PART AND REMANDED

Timothy G. Quinn, of Columbia, for Appellants.

John S. Nichols, and Melvin Dean Bannister, both of Columbia, for Respondent.

STILWELL, J.: Mary Rowell brought this action against Arthur and Judith Whisnant to determine the amount due under a note and mortgage, including fees and costs, and to foreclose the mortgage. The circuit court refused to grant foreclosure, but awarded Rowell attorney's fees of $7,500. The Whisnants appeal.[1] We affirm in part and remand for further findings.

FACTS

Whisnant executed a "Mortgage Note" agreeing to repay Rowell $22,000 with 13% interest per annum. Among other things, the note provided payments were to be made in ten equal annual installments with the first installment due one year after the note's signing.

Additional pertinent provisions of the note provide as follows:

> IF at any time any portion of the principal or interest be past due and unpaid, the whole amount evidenced by this Note shall, at the option of the holder, become immediately due and payable, and the holder shall have the right to institute any proceedings upon this Note and any lien given to secure the same for the purpose of collecting the principal and interest, with costs and expenses, or of protecting any security connected herewith. Failure to exercise this option shall not constitute waiver of the right to exercise the same in the event of any subsequent default.
>
> IN the event of default in the payment of this Note, and if it is placed in the hands of an attorney for collection, the undersigned hereby agree(s) to pay all costs of collection, including a reasonable attorney's fee.

The note was secured by a mortgage on real property owned by Whisnant. The mortgage also contained a provision regarding attorney's fees

[1] The note and mortgage in question were executed only by Arthur. However, Judith was originally made a party to this action and has not been dismissed.

which provided "IT IS AGREED by and between the parties, that in the case of foreclosure of this mortgage, by suit or otherwise, the mortgagee shall recover of the mortgagor a reasonable sum as attorney's fee, which shall be secured by this mortgage, and shall be included in judgment of foreclosure."

Whisnant's payment history was erratic until Rowell obtained services of an attorney for collection. In fact, when Rowell hired her attorney, the payments Whisnant had made were not even sufficient to cover the interest that had accrued. Whisnant made intermittent payments from this time until the note's principal and interest were paid in full nearly sixteen years after it was executed. At trial, Whisnant admitted being behind on the note, making late payments, and that some of his payments followed phone calls or letters from Rowell's attorney. Rowell's attorney sent a number of dunning letters to Whisnant, most also requesting attorney's fees in varying amounts—the most recent requesting fees in the amount of $7,500.

Although payments were rarely, if ever, made on time and several letters threatened Whisnant with foreclosure, Rowell continued to accept Whisnant's payments. Rowell commenced this action a few months after Whisnant's final payment on the note.

In her complaint, Rowell sought a determination of the amount due under the note and mortgage, including fees and costs, and sought foreclosure and sale of the mortgaged property. The Whisnants answered and counterclaimed (1) that the suit was frivolous under the South Carolina Frivolous Civil Proceedings Sanctions Act;[2] and (2) that Rowell's failure to discharge and satisfy the mortgage as required by South Carolina law resulted in damages to them in the amount of $11,000.[3]

Following a bench trial, the circuit court issued its order, refusing to grant foreclosure but awarding Rowell attorney's fees in the amount of $7,500.

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[2] See S.C. Code Ann. §§ 15-36-10 – 50 (Supp. 2003).

[3] See S.C. Code Ann. §§ 29-3-310 and 320 (Supp. 2003).

LAW/ANALYSIS

I. Foreclosure

The Whisnants argue Rowell is not entitled to attorney's fees under the mortgage because foreclosure was denied. Additionally, they contend the amount of the award is unreasonable and unsupported by the evidence. We find no error in the court's decision to award attorney's fees, but remand for a fact-specific determination of the appropriate amount of the award.

The Whisnants' argument that Rowell is not entitled to attorney's fees is premised on their erroneous assertion that because the mortgage did not incorporate the note by reference, the intent of the parties must be construed solely from the mortgage's terms. Relying on this premise, the Whisnants then argue that because the mortgage only provides for attorney's fees in the event of a foreclosure, they are unavailable when, as here, the foreclosure action is denied.

However, Rowell was entitled to attorney's fees under the note itself. As set out above, the note specifically provides that "if it is placed in the hands of an attorney for collection, the undersigned hereby agree(s) to pay all costs of collection, <u>including a reasonable attorney's fee</u>." (Emphasis added.) The Whisnants do not dispute that the note was placed with an attorney for collection or that it remained with the attorney until repayment of the principal and interest was completed. The bulk of the principal and interest payments were made only after the note was turned over to her attorney and collected by Rowell because of his intervention and efforts. A reasonable attorney's fee is therefore due under the note. Accordingly, we affirm the trial court's decision to grant Rowell attorney's fees despite its refusal to foreclose the mortgage.

However, we are unable to affirm the amount of the award. Six factors are normally considered in determining an award of attorney's fees: "(1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services;

and (6) beneficial results obtained." Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). Trial courts should make specific findings of fact on the record for each of the factors set out above. In fact, "[o]n appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact." Id. at 494, 427 S.E.2d at 661.

The only evidence in the record as to attorney's fees is the affidavit of Rowell's collection attorney. At best, this affidavit merely provides a general description of the tasks he performed. Although the record shows counsel authored ten or eleven letters over a thirteen-year period, and that payments were tendered through him, this alone is not enough to support the amount of attorney's fees awarded. Accordingly, because the trial court did not make specific findings of fact as to each of the six factors and there are not enough facts in the record to support the amount of attorney's fees awarded, we remand the award of attorney's fees for such findings to be made.

II. Estoppel

The Whisnants argue alternatively that Rowell should be equitably estopped from claiming a default on the note because of her "long-continued" course of accepting late payments. We disagree.

As discussed previously, the note clearly provided Whisnant would be responsible for reasonable attorney's fees in the event the note was placed with an attorney for collection. Whisnant admits to being late on the note and to making the final payment well after it was due. Furthermore, Rowell's attorney made Whisnant well aware of the intention to seek attorney's fees under the note, as at least five of the letters written to Whisnant specifically ask for the fees to be paid. Therefore, we find this argument to be without merit.

III. Satisfaction of Mortgage

The Whisnants next argue the trial court erred in not requiring satisfaction of the note and mortgage pursuant to S.C. Code Ann. § 29-3-310 (Supp. 2003). Again, we disagree.

Section 310 calls for the satisfaction of mortgages by "[a]ny holder of record of a mortgage who has received full payment or satisfaction . . . [of the debt and other charges] secured by a mortgage of real estate." Id. As Rowell correctly notes, Whisnant has not provided "full payment or satisfaction" of the underlying note the mortgage secures because attorney's fees are owed on the note. Thus the trial court properly held Rowell need not satisfy the mortgage until Whisnant has paid the appropriate amount of attorney's fees. Thus, we hold the mortgage must be satisfied upon payment of attorney's fees due under the note.

Because our treatment of the issues to this point controls the outcome, we decline to address the Whisnants' remaining argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling appellate court need not review remaining issues when disposition of prior issues are dispositive).

CONCLUSION

Accordingly, we affirm the trial court's decision to award attorney's fees, but remand for specific findings to be entered regarding the reasonableness of the amount of the award.

AFFIRMED IN PART AND REMANDED.

HUFF, J., and CURETON, A.J., concur.

1THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carroll D. Richey, Employee, Appellant,

v.

Becton Dickinson, Employer, and Travelers Property Casualty Co., Carrier, Respondents.

Appeal From Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 3823
Submitted May 12, 2004 – Filed June 14, 2004

AFFIRMED

Billy J. Garrett, Jr. and Edward S. McCallum, III, both of Greenwood; and James B. Richardson, Jr., of Columbia, for Appellant.

Byron Putnam Roberts, of Columbia, for Respondents.

HEARN, C.J.: Carroll D. Richey filed a workers' compensation claim against Becton Dickinson and Travelers Property Casualty Co. arising from an accident that occurred in 1987. The single commissioner dismissed

Richey's claim based on the doctrine of laches. The appellate panel and the circuit court affirmed. We also affirm.[1]

FACTS

On October 4, 1987, Richey, while working for Becton Dickinson, was involved in an accident when steam was blown onto his face. Richey filed a Form 50 with the South Carolina Workers' Compensation Commission on November 23, 1988, alleging injuries to his face and ears and requesting a hearing. A hearing was scheduled for March 16, 1989, but was cancelled for unknown reasons. Richey filed another Form 50 on March 13, 2000, alleging injuries to his ears, face and brain arising from the 1987 accident and requesting a hearing. Richey's pre-hearing brief also alleged injuries to his cervical spine.

A hearing before a single commissioner was held on August 24, 2000. The parties agreed to resolve the issue of laches prior to proceeding with a hearing on the alleged injuries. At the hearing, Richey testified that he was not told why the 1989 hearing was cancelled. A handwritten note on the hearing notice explained the cancellation, stating, "no hearing held; issues resolved; claim still open." The commission has not retained a file on the 1989 claim, nor has the original defense attorney or the insurance carrier. Richey testified, however, that he has not received any compensation for this claim.

No evidence exists showing any attempt by Richey to pursue his claim during the eleven-year period from the scheduled hearing in 1989 to his Form 50 filing in 2000. Richey consulted with several attorneys over this period of time, but apparently became frustrated with their services and terminated his relationship with them. He testified nothing prevented him from seeking additional representation after consulting with the other attorneys, except he was "worried about finding a good, honest lawyer."

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

The single commissioner found that Richey's claim was barred by laches. From this ruling, Richey appealed to the appellate panel of the commission, which unanimously affirmed the single commissioner's ruling. Richey appealed to the circuit court and the circuit court affirmed. This appeal follows.

STANDARD OF REVIEW

The question of laches is largely a factual one, so each case must be judged on its own merits. Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423-24 (1996). In a workers' compensation action, the appellate court's scope of review extends only to the correction of errors of law. Gilliam v. Woodside Mills, 319 S.C. 385, 387, 461 S.E.2d 818, 819 (1995).

LAW/ANALYSIS

Richey contends the circuit court erred in finding his claim was barred by the doctrine of laches. Specifically, he argues that pursuant to Halks v. Rust Eng'g Co., 208 S.C. 39, 47, 36 S.E.2d 852, 855 (1946), a timely filed claim remains pending until the case is disposed of by a final award, order, or judgment and the burden to request a hearing rests on both parties, as well as on the commission. Richey further asserts that no statute or agency rule sets a time limit for processing a workers' compensation claim. Therefore, he submits he should not be punished for his delay because it was not his sole responsibility to request a hearing and because the commission, insurance carrier, and original defense attorney acted improperly in destroying their files. While we agree that the responsibility to request a hearing following a Form 50 filing rests not only on the claimant, but also on the responding parties and the commission, we find the single commissioner did not err in barring Richey's claim under the doctrine of laches.

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519

S.E.2d 583, 598 (Ct. App. 1999) (citations omitted). Under the doctrine of laches, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. Id. at 296, 519 S.E.2d at 599. The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice. Id. at 297, 519 S.E.2d at 599.

This court has recognized the applicability of the doctrine of laches in a workers' compensation claim. See Muir, 336 S.C. at 296-97, 519 S.E.2d at 598-99 (affirming the commissioner's finding that the claim was not barred by the doctrine of laches because claimant did not act unreasonably in pursuing the claim); McMillan v. Midlands Human Res., 305 S.C. 532, 533, 409 S.E.2d 443, 444 (Ct. App. 1991) (quoting the commissioner's finding that "[a] claimant must prosecute his claim in a timely fashion or it may be barred by the doctrine of laches," although the commissioner's authority to dismiss the case for failure to prosecute was not disputed on appeal). In Richey's case, despite the shared responsibility in requesting a hearing set forth in Halks, Respondents nonetheless demonstrated that Richey was negligent in pursuing his claim and had the opportunity to act sooner. Richey's accident occurred in 1987 and he filed his Form 50 request for a hearing in 1988. While a hearing was scheduled in 1989, the results of that hearing are unknown. The fact that the file no longer exists prevents the court from determining what truly happened with Richey's claim. In fact, the handwritten "issues resolved" note on the hearing notice suggests the claim may have been settled. Richey had the opportunity to seek another hearing on his claim at any time, yet he offered no reasonable explanation for his eleven-year delay.

Respondents also demonstrated that Richey's failure to pursue the claim resulted in material prejudice. As stated above, the commission's file no longer exists. Neither the carrier nor the original defense attorney has a file regarding the claim filed in 1988, and the result of the original hearing is unknown. Further, Richey's most recent Form 50 alleges injuries to his brain and cervical spine in addition to the injuries to his ears and face alleged in his earlier Form 50. Respondents also demonstrated that it would be

extremely difficult to depose the physicians who examined and treated Richey because some are no longer in practice and cannot be located. Additionally, some of the medical records Richey seeks to introduce are not on letterhead and do not bear the signatures of the physician. We agree with the single commissioner that due to the lack of records and time lapse, the proximate cause of Richey's additional injuries is difficult to ascertain. Moreover, we agree that even if Richey's additional injuries were a result of the accident in 1987, Respondents were denied the opportunity to provide Richey with any appropriate treatment that may have prevented Richey's additional injuries.

Thus, we find the circuit court properly affirmed the decision of the full commission to apply the doctrine of laches to Richey's claim. Accordingly, the decision of the circuit court is

AFFIRMED.

STILWELL, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,	Respondent,
v.	
Jacqueline D. Sims; Stanley S. Bates; Maurice Lucas; Eugene Kinard; John Doe I.; John Doe II.; John Doe III.; Mark Sims, a minor child born August 30, 1984; Heather Sims, a minor child born January 21, 1986, and Demarios Sims, a minor child born June 20, 1991,	Defendants,
of whom Jacqueline Sims is the	Appellant.

Appeal From Newberry County
John M. Rucker, Family Court Judge

Opinion No. 3824
Submitted May 12, 2004 – Filed June 14, 2004

AFFIRMED

Leroy Ellis Davis, of Columbia, for Appellant.

Bryan Christopher Able, of Laurens, for Respondent.

HEARN, C.J.: Jacqueline D. Sims appeals a family court order terminating her parental rights to her two minor children.[1] Sims argues the order was not supported by clear and convincing evidence. We affirm.[2]

FACTS

Sims is the biological mother of three children who, at the time of the initial action, were minors. All three have different fathers, none of whom played an active role in the children's lives. Sims has raised the children with no financial help from the respective fathers. She is unemployed and relies on a support check of about $500 per month as her sole source of income.

The South Carolina Department of Social Services ("DSS") first became involved with Sims and her family sometime in 1993. In 1998, inspection of the family residence revealed several holes in the home's floor and generally squalid conditions. The children were removed from the home at that time and placed into emergency protective custody by law enforcement. At the merits hearing, the family court found that Sims physically neglected the children because of the deplorable conditions of the home. Additionally, Sims was criminally prosecuted for child endangerment and, as a consequence, spent a short time in jail. Upon release, she entered a treatment program with DSS with the hopes of regaining custody of the children. The treatment program was incorporated into the removal order and required Sims find stable and adequate housing and maintain adequate living conditions for the children. The order specifically required Sims to maintain running water, a clean environment, utilities, electricity, and a supply of proper food and clothing. The order prohibited Sims from sharing her home with members of her extended family. Sims was also ordered to

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[1] Sims's oldest child was seventeen at the time of the commencement of this action. Because he was so close to emancipation, DSS chose not to include him in this case. Furthermore, Sims's next oldest child is now eighteen and thus no longer a minor. Therefore, this appeal concerns only Sims's parental rights to her youngest son, Demarius, who is now twelve years old.

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

attend parenting classes and vocational rehabilitation. This removal order was not appealed.

DSS filed a complaint for the termination of Sims's parental rights to her two youngest children and a hearing was held on January 9, 2002. A DSS caseworker testified that Sims successfully completed the parenting and vocational training classes required by the DSS treatment plan. However, the caseworker stated that Sims has had seven different residences since the removal of her children and that in all seven residences, Sims resided with other family members. The caseworker visited her at three of the seven homes. During a 1999 visit to a residence Sims shared with her mother, the caseworker found the home to be severely unkempt. There was little food in the house, the floors and sink were very cluttered, and the residents appeared to use a bucket for a toilet. At Sims's next confirmed residence, the caseworker observed a slight improvement, but continued to find Sims's living conditions to be unsatisfactory due to clutter. The caseworker visited Sims's most current residence, accompanied by the guardian ad litem, just one day prior to Sims's termination of parental rights (TPR) hearing. As in previous visits, the caseworker found this home to be in a "deplorable state." The house was cluttered with trash and what appeared to be stuffing from an old chair. Dirty dishes and bags of beer cans were strewn about the kitchen. The caseworker testified that the back room of the house where the children were staying emitted a strange odor. The guardian stated that sheets and floors were filthy and the entire house smelled like urine. Another DSS caseworker, who was assigned to Sims's twenty-three year old son, also a resident of the home, visited the residence regularly and testified that these conditions accurately represented the habitual state of the home.

Sims testified that she had taken every action possible to comply with the treatment program since the removal of her children. She stated that she completed the parenting classes and improved her personal hygiene. Further, Sims testified that she attempted to comply with the adequate housing requirement of the removal order but could not afford a place of her own. Sims also offered the testimony of two family friends, who testified to her parenting and housekeeping skills.

The family court terminated Sims's rights to her two youngest children finding that Sims had failed to remedy the conditions that caused their removal. The court also found Sims had physically neglected the children as defined in section 20-7-490 of the South Carolina Code and, because of the repetition of neglect, it was not likely the situation could be remedied within twelve months. Alternatively, the family court terminated Sims's parental rights because her children had been in foster care for fifteen of the last twenty-two months. Sims appeals.

STANDARD OF REVIEW

In a TPR case, the paramount consideration is the best interests of the children. See Doe v. Baby Boy Roe, 353 S.C. 576, 579, 578 S.E.2d 733, 735 (Ct. App. 2003), *cert. denied* (April 8, 2004). Grounds for TPR must be proved by clear and convincing evidence. Hooper v. Rockwell, 334 S.C. 281, 296, 513 S.E.2d 358, 366 (1999); see also Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

In a TPR case, the appellate court may review the record and make its own findings of whether clear and convincing evidence supports termination. South Carolina Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999). However, our broad scope of review does not require us to disregard the findings below or ignore the fact that the trial judge was in a better position to assess the credibility of the witnesses. Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996).

LAW / ANALYSIS

Sims argues the family court erred in granting TPR because DSS failed to prove the statutory grounds for the termination of parental rights by clear and convincing evidence. Sims asserts that her living situation (i.e. the actual unkempt state of her residence and the fact that it was shared with other family members) could have been remedied within twelve months, and

therefore no ground for termination was proven by clear and convincing evidence. We disagree.[3]

Section 20-7-1572 of the South Carolina Code (Supp. 2003) outlines the grounds upon which, if coupled with a finding that the decision is in the best interest of the child, the parental rights of a mother or father may be terminated. Here, the family court, in addition to finding termination to be in the best interest of the children, specifically found the following statutory grounds applied to Sims and children:

> (1) The child or another child in the home has been harmed as defined in Section 20-7-490,[4] and because

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[3] We note that Sims, upon whom the burden of presenting a sufficient record for review rests, failed to include the family court's TPR order in the record on appeal. See Harkins v. Greenville County, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (affirming the circuit court on one issue because Appellant had not met its burden of presenting an adequate record on appeal). This omission alone could justify a finding that the issues of this appeal are not preserved for our review. See York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("The record should include the ruling on appeal."); Polson v. Burr, 235 S.C. 216, 218-219, 110 S.E.2d 855, 856 (1959) (refusing to decide the merits of an appeal due to the failure to incorporate in the record the order from which the appeal was taken); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."). Additionally, we could find Sims's issues on appeal abandoned due to their conclusory nature and lack of supporting authority. See Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). However, due to the magnitude and consequence of a TPR and because a copy of the family court's order was located in this court's case file, we have proceeded to the merits of this appeal. See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000) ("[P]rocedural rules are subservient to the court's duty to zealously guard the rights of minors.").

> of the severity or repetition of the abuse or neglect, it is not reasonably likely that the home can be made safe within twelve months. In determining the likelihood that the home can be made safe, the parent's previous abuse or neglect of the child or another child in the home may be considered.
> (2) The child has been removed from the parent . . . , has been out of the home for a period of six months following the adoption of a placement plan . . . , and the parent has not remedied the conditions which caused the removal.
> (8) The child has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months.

S.C. Code Ann. § 20-7-1572 (Supp. 2003).

We find there is clear and convincing evidence in the record to terminate Sims's parental rights based solely on physical neglect of the children and the unlikelihood that the home could be made safe within twelve months under section 20-7-1572(1). As determined by the family court at the time of the children's removal, the children suffered harm as defined by section 20-7-490 because Sims failed to supply them with adequate shelter. Since this finding of harm, Sims has not acquired adequate housing for the children as required by the order. She has lived in seven different residences and evidence was presented by DSS that three of these homes, including Sims's residence at the time of the TPR hearing, were inadequate for children. Sims presented no tangible evidence of any future plans to acquire stable and adequate housing.

Section 20-7-1572(1) does not require the family court to find that improvement of the home within twelve months is impossible, but rather

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[4] "'Child abuse or neglect' or 'harm' occurs when the parent . . . (c) fails to supply the child with adequate food, clothing, shelter, or education." S.C. Code Ann. § 20-7-490(2) (Supp. 2003).

that such improvement is not reasonably likely. Because Sims's inadequate living conditions have continued since the children's removal, the family court acted within its authority in finding Sims's home was not reasonably likely to be made safe within twelve months. As such, there is clear and convincing evidence to support the family court's finding under section 20-7-1572(1) that the children had been harmed and that it was not likely the home would be safe within twelve months.

Furthermore, under section 20-7-1572(2), it is undisputed that at the time of the TPR hearing the children had been removed from the care of Sims and placed under the responsibility of the State for over two years. As discussed above, Sims failed to provide adequate and stable living arrangements for the children during this time and thus, did not remedy the conditions that caused the children's removal. Therefore, we find TPR pursuant to section 20-7-1572(2) was supported by clear and convincing evidence.

Additionally, Sims does not appeal the family court's finding that the children have been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months pursuant to section 20-7-1572(8). A finding pursuant to section 20-7-1572(8) alone is sufficient to support a termination of parental rights. See Baby Boy Roe, 353 S.C. at 580-81, 578 S.E.2d at 735-36.

Finally, we agree with the family court's ruling that termination of Sims's parental rights is in the best interest of the children. As stated above, clear and convincing evidence was presented that Sims failed to maintain adequate living conditions for her children. The guardian ad litem testified that prior to their placement in foster care, the children lacked personal hygiene skills. The guardian explained that since their placement in foster care, their personal hygiene has improved and they have learned how to bathe and care for themselves. Further, the guardian stated that the children have made great progress since their placement in foster care and recommended termination of Sims's parental rights.

Because we find clear and convincing evidence to support the grounds for terminating Sims's rights and termination of her rights is in the best interests of the children, the TPR order of the family court is

AFFIRMED.

STILWELL and CURETON, JJ., concur.