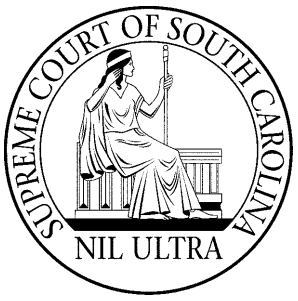

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40

October 18, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Emma F. Hessenthaler, Petitioner,

v.

Tri-County Sister Help, Inc., Respondent.

On Writ of Certiorari to the Court of Appeals

Appeal From York County
James R. Barber, Circuit Court Judge
On Petition for Rehearing

Opinion No. 25650
Heard November 21, 2002 – Filed May 12, 2003
Reheard March 3, 2004 – Refiled October 18, 2004

Affirmed in Result

William Gary White, III, of Columbia, for Petitioner.

Chalmers Carey Johnson, of Charleston, for Respondent.

Ashley Bryan Abel, and Lisa Robette Claxton, both of Greenville, for Amicus Curiae.

CHIEF JUSTICE TOAL: Tri-County Sister Help (the shelter) asserts that the trial judge erred in determining that Frances Hessenthaler (Hessenthaler) raised a jury question as to whether she was a contractual employee with the shelter and whether the alleged employment contract was breached because she was dismissed because of her race. This Court issued an opinion on this matter on May 12, 2003,[1] and subsequently granted a petition for rehearing on September 15, 2003. We withdraw the previous opinion and substitute it with this opinion.

FACTUAL/PROCEDURAL BACKGROUND

In 1984, Hessenthaler began working as a monitor for the shelter, which was a domestic violence shelter for battered women and their children. Hessenthaler worked under the Executive Director, Natalie Simpson (Simpson), who trained Hessenthaler to manage many of the shelter's affairs, including keeping the books and records, training volunteers, supervising the other monitors, and assisting the women and children in the shelter. By late 1995, Hessenthaler had advanced to the position of shelter director, which was directly below the Executive Director position. Simpson described Hessenthaler as "one of those rare employees that you are so thankful every day to have. She always finished every task and she was willing. She loved the clients, you know."

Simpson eventually left the shelter in 1995, and the shelter's board of directors replaced her with Audrey Harrell (Harrell), an African-American woman. As soon as she was hired, Harrell began firing members of the staff. At one point she left messages on Hessenthaler's answering machine, telling her to inform the employees, who were white women, that they were fired. Harrell hired two black women and one white woman to replace them. One day, Hessenthaler told one of the new black women to operate the hotline, and the woman screamed at her for a few minutes, and the other black woman joined in. Hessenthaler reported the incident to Harrell and told Harrell that she was going to file a grievance. Harrell refused to allow

[1] *Hessenthaler v. Tri-County Sister Help, Inc.*, 2003 WL 21057174 (S.C. May 12, 2003)

Hessenthaler to file a grievance and told her the next day that she would not be supervising the two women.

On January 1, 1996, someone called Hessenthaler at home to report that no one was answering the 24-hour hotline that the shelter operated. Hessenthaler then called Harrell to report the problem. Harrell demanded that Hessenthaler reveal who informed her about the hotline, and Hessenthaler refused to answer the question and told Harrell that she had to go. Hessenthaler then hung up the phone and eventually called a board member to inform her of the hotline situation and the conversation with Harrell.

The next day, Harrell had Hessenthaler meet with her after work, a meeting that lasted three hours and forty-five minutes. Harrell told her that she was going to be punished; that she was going to be demoted from shelter director; that her office would become a bedroom; that Harrell would "destroy her"; and that hanging up the phone on her was "just like calling [Harrell] the 'n' word." Harrell suspended Hessenthaler for two days for insubordination, failure to assist Executive Director in an investigation, and failure to follow the proper chain of command. Harrell told Hessenthaler that a board member would contact her to inform her whether or not she could return to work.

While on suspension, Hessenthaler experienced some health problems, including depression. She also had a hysterectomy and broke some ribs in a car accident. She sent the shelter her doctor's statements justifying her leave of absence from January to mid-April. The board voted to give her an unpaid leave of absence beginning in late January. In February, Harrell sent Hessenthaler a new employee manual, which Hessenthaler did not read at that time. After some back and forth communication by mail,[2] Hessenthaler

[2]One of the communications was a job offer dated April 26, which was accompanied with a list of responsibilities:

1. Train shelter staff and volunteers on shelter policies and procedures
2. Ensure that these policies and procedures are followed by shelter residents

and Harrell finally met on May 8. Harrell read the employee manual aloud to Hessenthaler. The manual contained a disclaimer in bold on the first page, and it also contained an anti-harassment and an anti-discrimination provision.[3] Hessenthaler testified that she did not recall Harrell reading the disclaimer language but remembered thinking it ironic that Harrell was reading a section about fair employment practices.

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3. Provide general facility maintenance and security management
4. Meet with shelter clients weekly to discuss any problems/concerns regarding the shelter
5. Recommend shelter purchases to Assistant Director
6. Facilitate group on shelter orientation and house rules with residents
7. Ensure that appropriate codes and standards are met
8. Purchase approved groceries for shelter
9. Other duties as assigned

[3] The anti-harassment and anti-discrimination provision was as follows:

> TCSH is an equal opportunity employer. All decisions, including hiring, training, and promotion, are made without regard to race, color, religion, national origin, sex, age, handicap, sexual preference, or any other protected status.
>
> No form of harassment will be tolerated in the workplace. Included within this prohibition is any form of sexual harassment, whether it involves verbal or physical conduct, or otherwise interferes with an individual's work or working environment.
>
> Any incident of discrimination should be reported immediately, in confidence, to the Executive Director. If it is inappropriate to speak to the Executive Director, the EEO officer should be contacted. Allegations of discrimination or harassment shall be promptly investigated in as confidential a manner as possible and appropriate corrective action taken, if warranted, which may include termination.

Harrell then offered Hessenthaler the shelter manager position, which included ten more requirements than the job offered earlier, which were:

1. Recruit, train, and motivate volunteers
2. Assess the need for volunteers and coordinate volunteer schedule to ensure 24-hour coverage and other related client services
3. Assist public relations coordinator to establish a Speaker's Bureau to promote public awareness and community education on domestic violence
4. Serve as speaker for the Bureau
5. Receive and process all non-monetary donations
6. Maintain appropriate statistics and logs on volunteers and complete required reports
7. Act as PR coordinator in development and distribution of newsletter
8. Assist in fund-raising activities
9. Solicit donations from various groups and organizations
10. Design and coordinate an incentive award program for volunteers
11. Coordinate mass mailings to churches, social and professional clubs, and organizations in York, Lancaster and Chester Counties

Harrell also told Hessenthaler that she expected her to get a college degree and that she would have to assume the responsibilities of the volunteer coordinator as well. Hessenthaler testified she felt as though eight people were needed to do all of that work. Barbara Close, a member of the shelter board since 1984, resigned because of the way Hessenthaler was treated. She said that there was no way that one person could have accomplished all of these duties.

Hessenthaler left the meeting telling Harrell that she would have to think about whether she should accept the position due to all of the job requirements. She did not return to work by May 13 (her deadline for responding to Harrell's latest job "offer") and found out that she had been terminated.

Hessenthaler brought a breach of contract action against the shelter alleging she was constructively discharged because of her race. The trial

judge found that "[t]estimony was presented that [Hessenthaler] was made to believe that she no longer able to reasonably continue to work for [the shelter], her income was reduced, she was demoted to an inferior position in status and that her working conditions were inferior to conditions of other employees of another race." The jury found in her favor awarding her $25,000 in actual damages. The court of appeals reversed, finding that the trial judge erred in not granting the shelter's motions for directed verdict and judgment notwithstanding the verdict because Hessenthaler was an at-will employee. *Hessenthaler v. Tri-County Sister Help, Inc.*, Op. No. 2001-UP-325 (S.C. Ct. App. filed June 19, 2001).

This Court reversed the court of appeals, finding that the trial judge properly submitted the question of whether the shelter's manual altered Hessenthaler's at-will status to the jury. *Hessenthaler v. Tri-County Sister Help, Inc.*, 2003 WL 21057174. This Court then granted the shelter's petition for rehearing, and the following issues are presented for review:

I. Did the shelter's employee handbook alter Hessenthaler's at-will employment status?

II. Regardless of Hessenthaler's employment status, did she satisfy the burden of proof in showing that the shelter discharged her because of her race?

LAW/ANALYSIS

I. Employee Handbook

The shelter contends that this Court erred in finding that Hessenthaler's at-will employment status was altered by the employee handbook.

Generally, an employer may terminate an at-will employee for any reason or no reason and, in doing so, will not be subjected to a breach of employment contract claim. *Conner v. City of Forest Acres*, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002); *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449(1999). "Because an employee handbook may create a contract, the issue of the existence of an employment contract is

proper for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference." *Connor*, 348 S.C. at 463, 560 S.E.2d at 610 (citing *Small v. Springs Industries*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987)). An employee manual that contains promissory language and a disclaimer is "inherently ambiguous," and a jury should interpret whether the manual creates or alters an existing contractual relationship. *Fleming*, 316 S.C. at 463-464, 450 S.E.2d at 596 (citation omitted).

But in *Connor*, this Court found the City of Forest Acres' handbook ambiguous -- creating a jury question of Connor's employment status -- because the handbook "outlin[ed] numerous procedures concerning progressive discipline, discharge, and subsequent grievance." *Connor*, 348 S.C. at 464, 560 S.E.2d at 611.[4] Forest Acres' handbook provided the following:

> Ordinarily, discipline shall be of an increasingly progressive nature, the step of progression being (1) oral or written reprimand, (2) suspension, and (3) dismissal. Discipline should correspond to the offense and therefore NO REQUIREMENT EXISTS FOR DISCIPLINE TO BE PROGRESSIVE. FIRST VIOLATIONS CAN RESULT IN IMMEDIATE DISMISSAL WITHOUT REPRIMAND OR SUSPENSION.

Id. at 459, 560 S.E.2d at 608. While the disclaimer language in the provision above is conspicuous, the language does not sufficiently communicate to the employee that she can be fired for no reason or any reason. Rather, the employee is left with the understanding that there must be a reason, or "violation," that will cause a disciplinary response that might be progressive or might result in termination.

[4] *See also Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) (finding that handbook did not alter employees' at-will status because it contained conspicuous disclaimers and did not contain a mandatory progressive discipline procedure).

In the present case, the shelter's handbook discipline section, entitled "Corrective/Disciplinary Action," proceeded as follows:

> All [shelter] personnel are required to meet acceptable performance standards and to comply with the policies set forth in this handbook. Failure may result in corrective or disciplinary action, including termination. TCSH reserves the right to terminate an employee at any time when, in the opinion of the Executive Director, a termination is in TCSH's best interests.

This handbook does not set forth a policy of intervening disciplinary procedures -- as the handbook in *Connor* did -- that would give the employee an indication that she could not be fired for any reason or no reason. Rather, the policy clearly states that the shelter may terminate the employee for any reason that is in the shelter's "best interests." Thus, we find that the shelter's handbook was not inherently ambiguous and did not alter Hessenthaler's at-will employment status.

II. Proof of Discrimination

The shelter argues that regardless of Hessenthaler's employment status, she still failed to satisfy her burden of proof to show that the shelter terminated her because of her race. We agree.

Normally, a discrimination case involves the application of Title VII of the Civil Rights Act of 1964, the federal anti-discrimination statute, which only applies to employers of 15 or more employees. 42 U.S.C § 2000e(b). The shelter is not classified as an "employer" pursuant to the statute[5] because it employs less than 15 people. Even though Title VII does not apply to the shelter does not relieve it of its obligation to not discriminate. In *Ludwick v. This Minute of Carolina, Inc.*, this Court held that an at-will employee cannot

[5] 42 U.S.C. § 2000e(b). S.C. Code Ann. § 1-13-100 (Supp. 2002) does not apply either, as it states: "[n]othing in this chapter may be construed to create a cause of action against a person not covered by Title VII of the Civil Rights Act of 1964."

be discharged for a reason that violates public policy. 287 S.C. 219, 337 S.E.2d 213 (1985). Certainly, it is against the public policy of this state for an employer to discriminate against one of its employees on the basis of race or any other protected status. *See e.g., Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 400 S.E.2d 484 (1991) (finding that it was against state and federal public policy to commit housing discrimination against handicapped persons).

While this Court has also held that an employee may not bring a wrongful discharge claim where he is afforded a pre-existing statutory remedy, *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992), we take this opportunity to hold that an employee, such as Hessenthaler, who works for an employer with less than 15 people, may bring a discrimination claim. Therefore, an employee working for an entity employing 15 or more persons must comply with the grievance procedures set forth in Title VII, and an employee working for an entity employing less than 15 people may bring a discrimination claim in circuit court.

Recently, the U.S. Supreme Court found that the appropriate standard for determining whether "race, color, religion, sex, or national origin was a motivating factor for any employment practice"-- in order to obtain a mixed-motive instruction under Title VII -- is the preponderance of the evidence. *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 101, 123 S. Ct. 2148, 2155 (2003). Direct evidence is not required to prove discrimination in mixed-motive cases. *Id*.

Turning to the case at hand, even though Hessenthaler presented evidence that Harrell displayed abusive and manipulative behavior, generally creating a miserable working environment for Hessenthaler, she may not have proven by a preponderance that she was dismissed because of her race. While Hessenthaler testified about (1) Harrell's abusive response to Hessenthaler's hanging up the phone on her -- that it was the equivalent of calling her the 'n' word; (2) Harrell's threats to 'destroy' Hessenthaler; (3) Harrell's removal of two black women out from under her supervision; and (4) Harrell's threatening behavior when she read aloud the employee handbook, this testimony of constant threats and abuse does not prove by a

preponderance of the evidence that Hessenthaler was terminated because of her race.

CONCLUSION

We find that the shelter's handbook was not inherently ambiguous -- Hessenthaler's at-will employment status was not called into question -- because the shelter's handbook disciplinary provision did not include an ambiguous progressive disciplinary procedure. Further, we find that regardless of Hessenthaler's employment status, she failed to prove that the shelter discriminated against her by a preponderance of the evidence. Accordingly, the court of appeals' decision is affirmed in result.

MOORE and WALLER, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which Acting Justice Alison Renee Lee, concurs.

JUSTICE PLEICONES: I respectfully dissent. The only issue properly before the Court is whether the Court of Appeals erred in finding respondent (Shelter) was entitled to a *judgment non obstante veridicto*(JNOV) on petitioner (Employee's) breach of contact claim.[6] Hessenthaler v. Tri-County Sister Help. Inc., Op. No. 2001-UP-325 (S.C. Ct. App. filed June 19, 2001). Finding such error, I would reverse the Court of Appeals thereby reinstating the jury's verdict in favor of Employee.

The employee handbook promulgated by the Shelter contained a nondiscrimination provision as well as a disclaimer in bold on the first page disavowing an intent to create an employment contract. When Employee was terminated, she brought this suit alleging the handbook created a contract and that she was terminated in violation of the nondiscrimination clause. The Shelter contended, and the Court of Appeals agreed, that the disclaimer was effective as a matter of law and that no employment contract was created. Compare Horton v. Darby Elec. Co., Inc., ___ S.C. ___, 599 S.E.2d 456 (2004) (summary judgment for employer where disclaimer was conspicuous, employee understood it, and handbook not couched in mandatory terms).

In my opinion, the facts of this case present a jury issue whether the Shelter's handbook's disclaimer was sufficiently conspicuous so as to negate Employee's contention that the handbook created a contract, one term of which was the nondiscrimination clause. Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589 (1994). Further, in my opinion, there was evidence from which a jury could find that Employee's termination was racially motivated. Accordingly, I would reverse the decision of the Court of Appeals and reinstate Employee's jury verdict on her breach of contract claim.

Acting Justice Alison Renee Lee, concurs.

[6] I would not reach the issue whether Employee could have maintained a wrongful discharge action predicated on a breach of public policy, nor would I create a new state cause of action for employment discrimination modeled on Title VII. We granted certiorari to consider only the employment contract issue raised and litigated by the parties, and, in my opinion, we should confine ourselves to answering the only question we were asked.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolina Care Plan, Inc. (f/k/a Physicians Health Plan, Inc.), Appellant,

v.

United HealthCare Services, Inc., United Health Group, Incorporated, United HealthCare Insurance Co., Ronald H. Harms, and Edward L. Graves, Respondents.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25879
Heard March 4, 2004 – Filed October 18, 2004

AFFIRMED

C. Mitchell Brown, Kevin A. Hall, Jeffrey S. Patterson, and Elizabeth H. Campbell, all of Nelson Mullins Riley & Scarborough, of Columbia, for Appellant.

Eliott R. Good, Michael J. Zaretsky, and Michael W. DeWitt, all of Chorpenning Good & Pandora, of Columbus, OH; Gregory S. Coleman, of Well, Gotshal & Manges, LLP, of Austin, TX; Susan P. McWilliams and Angus H. Macaulay, Jr., both of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for Respondents.

JUSTICE WALLER: The trial court granted respondents' 12(b)(6), SCRCP, motion to dismiss three of appellant's causes of action, granted respondents' motion to compel arbitration, and stayed petitioner's remaining claims pending the outcome of arbitration. Appellants appealed to the Court of Appeals, and this Court certified the case for review pursuant to Rule 204(b), SCACR. We affirm.

FACTS

Appellant (CCP) is a health maintenance organization (HMO), originally organized as a non-profit South Carolina corporation.[1] Respondents United HealthCare Services (UHS), United Health Group (UHG), and United HealthCare Insurance (UHI), (collectively "United"), provide managed health care services for HMO's.

In 1984, CCP and UHS entered into an Administrative Services Agreement, whereby UHS agreed to provide various services in furtherance of CCP's business as a South Carolina HMO. CCP had few, if any, employees, and outsourced virtually all of its work to United.

In 1996, the parties entered into a new agreement. Section 11.14 of the 1996 Services Agreement stated that:

> [a]ny controversy, dispute or claim arising out of or relating to this Agreement or a breach of the Agreement, except as otherwise provided shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association. Upon such submission, UHS and [CCP] shall each choose one arbitrator and those two arbitrators shall

[1] The parent company of CCP was originally known as Physicians Heath Plan of South Carolina (PHPSC). At some point the name appears to have been changed to Physicians Health Plan, Inc. (PHP). In 1996, the company was reorganized and CCP was created as a for-profit subsidiary of PHP. For simplicity's sake, we refer to appellant as CCP throughout.

> mutually agree on the selection of the third arbitrator. Matters submitted to arbitration shall be determined by a majority vote of the arbitrators, and such decision shall be binding upon the parties. The arbitrators shall have no power to award any punitive or exemplary damages or to vary or ignore the terms of this Agreement and shall be bound by controlling law. It is the intent of the parties that all disputes arising under this Agreement which are not otherwise resolved be resolved by binding arbitration and not by other forms of legal proceedings.

In May 2001, CCP filed suit against UHS, UHG, UHI, Ronald Harms, and Edward Graves. Harms was a former chief financial officer of CCP, and Graves was a former chief executive officer of CCP. Harms and Graves were United employees at the time they served on the CCP board of directors, and are still employed by United. CCP alleged, among other things, that all the defendants failed to cooperate in good faith with CCP to promote CCP's economic interests, failed to properly account for funds that United held as a fiduciary to CCP, and generally put the economic interests of United ahead of CCP.

United moved to dismiss or stay the proceedings and compel arbitration. In response, CCP filed an amended complaint, which included new causes of action for fraud, fraud in the inducement, and fraudulent concealment in the making of the arbitration clause. CCP also alleged that the arbitration provision was unconscionable and violated South Carolina public policy because it limited discovery and limited CCP's rights and remedies under the South Carolina Unfair Trade Practices Act (SCUTPA).

United moved to dismiss the three causes of action related to the making of the arbitration clause pursuant to Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action. United argued the arbitration agreement was valid and enforceable, and that the Federal Arbitration Act (FAA) required that all of the claims be submitted to arbitration.

CCP moved to file a second amended complaint, which the trial court granted. However, the trial court then granted United's motion to compel arbitration and to dismiss three of CCP's causes of action related to the making of the arbitration clause.[2] The trial court also ruled that the inclusion of defendants Harms and Graves as defendants did not defeat United's right to arbitrate the dispute, despite the fact that Harms and Graves were not parties to the 1996 Services Agreement containing the arbitration clause. Accordingly, the trial court ordered that the remaining claims be arbitrated pursuant to the rules of the American Arbitration Association and stayed the proceedings pending the outcome of arbitration.

ISSUES

1. Did the trial court err in dismissing CCP's causes of action for fraud, unconscionability, and a violation of public policy pursuant to Rule 12(b)(6)?

2. Did the trial court err in finding that the arbitration clause was applicable to individual defendants and in staying the remaining claims pending arbitration?

1. 12(b)(6) Motions

CCP contends the trial court erred in dismissing the causes of action for fraudulent inducement, unconscionability, and violation of public policy pursuant to Rule 12(b)(6). We disagree.

The ruling on a Rule 12(b)(6), SCRCP, motion to dismiss must be based solely upon the allegations set forth in the complaint. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); Washington v. Lexington County Jail, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999). A 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any

[2] The trial court also implicitly found that the FAA applied because the contract was one evidencing a transaction involving commerce pursuant to 9 U.S.C.A. § 2 (2000).

relief on any theory of the case. Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The question to be considered is whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail. Gentry, id. at 5, 522 S.E.2d at 139.

A. Fraud and Concealment

South Carolina law generally favors arbitration. McMillan v. Gold Kist, Inc., 353 S.C. 353, 359, 577 S.E.2d 482, 485 (Ct. App. 2003). In interpreting agreements within the scope of the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 610, 571 S.E.2d 711, 714 (Ct. App. 2002) (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski v. Bright Acres Associates, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Further, unless the Court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id. at 597, 553 S.E.2d at 118.

A written provision in any contract evidencing a transaction involving commerce to settle by arbitration shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2 (2000). A party cannot avoid arbitration through rescission of an entire contract when there is no independent challenge to the arbitration clause itself. There must be fraud in the inducement of the arbitration agreement to avoid arbitration of the contract. South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc., 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.E.2d 1270 (1967)). "Fraud as a defense to an arbitration clause must be fraud *specifically as to the arbitration clause and not the contract generally*." South Carolina Pub. Serv. Auth., id. at 563, 437 S.E.2d at 24 (emphasis added).

In the present case, CCP alleged that at the time it was considering and negotiating the 1996 Services Agreement with United, CCP relied on and utilized the employees and services of United to run virtually all of CCP's business. Further, CCP had no employees of its own, and used United employees to fill all of its officer positions.

CCP alleged that, during the 1996 negotiations, Bill Martin[3] was both its CEO and a paid employee of UHS. CCP alleged that as its CEO, Martin was responsible for negotiating and reviewing proposed contracts. CCP further alleged that Martin failed to object to the inclusion of the arbitration clause in the 1996 Services Agreement because Martin knew United had committed various torts and other wrongful acts against CCP and Martin knew that United planned to commit additional torts and wrongful acts against CCP in the future. Alternatively, CCP alleged that Martin knew United inserted the arbitration clause into the 1996 Services to limit CCP's ability to discover the extent of United's misconduct and to limit its ability to recover punitive or exemplary damages. CCP further alleged that Martin failed to disclose to CCP's board of directors why United wanted the arbitration clause included or to explain the impact of the provision, and that Martin told CCP's board that the 1996 Services Agreement was merely changing the method of payment between CCP and United.

The trial court found that the pleadings failed to state a claim that CCP was fraudulently induced into agreeing to the arbitration provision. The trial court found that any reliance on the alleged misconduct only went to the entire 1996 Services Agreement and not solely to the arbitration clause. Accordingly, the trial court ruled that, pursuant to Prima Paint, any claims regarding the making of the 1996 Service Agreement must be arbitrated.

CCP argues on appeal that the fraud alleged in the complaint is particular to the arbitration clause and does not go to the entire agreement. CCP essentially alleges that the contract was procured through fraud and that the arbitration clause was a vehicle used by United to further the fraud, to prevent its discovery, and to prevent recovery if the fraud was discovered.

[3] Despite CCP's allegations of wrongdoing against Martin, he is not a named defendant.

CCP also argues that, had Martin performed his duties as CEO and informed CCP that United was committing torts, breaches of the 1984 contract, and various other malfeasances against CCP, CCP would never have agreed to a clause mandating arbitration and limiting punitive damages. However, CCP claims that because United controlled so much of its business and possessed so many of its records and files, CCP was held captive by United and would have been forced to sign the 1996 Services Agreement regardless of whether Martin informed CCP of United's misconduct and its intent to commit future misconduct.[4] Therefore, CCP contends in its brief that, had it known United was acting improperly, CCP would have still signed the 1996 Services Agreement, but would not have agreed to the arbitration clause within the contract.[5]

We hold that CCP made no allegation of fraud specifically as to the arbitration clause, but only challenged the contract generally in its assertion that United committed fraud as to the contract. CCP has not alleged that United lied or committed fraud to induce CCP to enter into the arbitration clause or that United lied or misrepresented the effect of the arbitration

[4] It is unclear from the record why CCP allowed itself to become so entangled with United. However, it appears that at some point after it signed the 1996 Services Agreement, CCP decided to become more independent of United and discovered the alleged fraud.

[5] CCP supports its argument with the affidavit of Dr. Rice Holcombe, who became Chairman of the Board of Directors in 1996. Dr. Holcombe claims that, had he been informed of the prior misconduct by United or its intent to commit future misconduct, he would not have agreed to the inclusion of the arbitration clause in its current form, or would have insisted the arbitration clause be removed altogether. Ordinarily, if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the trial court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, SCRCP. Rule 12(c), SCRCP; Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (holding that where the trial court dismisses a cause of action based upon matters outside the pleadings, a 12(b)(6) motion is converted into Rule 56 motion for summary judgment). However, while United claims in its brief that Dr. Holcombe's affidavit cannot be considered because the affidavit relates to factual issues that are inappropriate to take into consideration at the 12(b)(6) stage, neither party argues that the motion should have been converted into a motion for summary judgment. Further, CCP states in its reply brief that the affidavit is not needed to decide the issue because the second amended complaint is sufficient standing alone. Accordingly, we have not considered the affidavit in our decision.

agreement, its validity, CCP's ability to recover punitive damages, or CCP's ability to demand a jury trial. Therefore, the issue of whether the entire contract was fraudulently induced is the proper question here; meaning the matter must be decided in arbitration. South Carolina Pub. Serv. Auth., id. at 563, 437 S.E.2d at 24.

The dissent argues that CCP's allegation that the arbitration provision was inserted to limit CCP's ability to discover the extent of the misconduct and to limit punitive damages is sufficient under notice pleading rules to survive a 12(b)(6) motion. However, the dissent ignores the rationale behind Prima Paint and the strong presumption favoring arbitration of disputes. Further, in very similar cases, other courts have held an allegation that an arbitration clause was used to further a scheme to defraud is not sufficient to allege fraud as to the arbitration clause specifically. Garten v. Kurth, 265 F.3d 136, 133-44 (2nd Cir. 2001) (citing Campaniello Imports, Ltd., v. Saporiti Italia, S.p.A., 117 F.3d 655 (2nd Cir. 1997) (where there is merely a link between the arbitration clause and general fraud alleged by the plaintiff, and nothing deficient in an arbitration clause itself, a plaintiff may not establish a connection between the alleged fraud and the arbitration clause merely by adding the allegation that the arbitration clause was a part of the overall scheme to defraud); Phillips v. Home Equity Services, Inc., 179 F.Supp.2d 840, 845 (N.D. Ill. 2001) (where there was no evidence that the defendants misrepresented the purpose or the operation of the arbitration clause, there was no evidence to conclude that the parties never agreed to arbitrate their dispute); Hayes Children Leasing Co. v. NCR Corp., 37 Cal.App.4th 775 (Cal. App. 1 Dist. 1995) (holding that it is not enough to allege that the arbitration clause was inserted to further a fraudulent scheme; the question in all cases simply is whether the agreement to arbitrate itself was induced by some fraud).

We can find no allegation in the complaint that the arbitration clause itself was induced by fraud. CCP has simply alleged that United was engaged in fraudulent conduct throughout negotiations, and that the arbitration clause was inserted in a scheme to further that fraud. To follow

the dissent's rationale would violate the holding in Prima Paint[6] and undermine the policy favoring arbitration.

B. Unconscionability and Public Policy

CCP argues that it adequately pled the arbitration provision was unconscionable and in violation of public policy. We disagree.

Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

The trial court ruled that CCP's allegations of unconscionability and violation of public policy as to the arbitration clause were based on the same claims the trial court rejected; that had CCP known of the alleged misconduct by United and Martin, it would have still entered into the 1996 Services Agreement but would not have agreed to the arbitration clause. Therefore, the trial court dismissed both causes of action for failure to state a claim pursuant to Rule 12(b)(6).

CCP argues it sufficiently pled the arbitration clause was unconscionable because Martin, in his capacity as CEO, breached his fiduciary duties by acting in the best interests of United. Again, CCP argues that Martin should have informed CCP about the arbitration clause and the rights being forsaken by CCP. CCP further contends the arbitration clause

[6] A minority of courts have rejected Prima Paint on state law grounds. Shaffer v. Jeffery, 915 P.2d 910 (allegations of fraud in the inducement of a contract or agreement generally, apart from the clause to arbitrate, must be resolved by the court prior to either compelling arbitration or dismissing the case); Blaine v. John Coleman Hayes & Associates, Inc., 818 S.W.2d 33 (1991) (adopting the minority viewpoint that if there are allegations the contract in general was procured by fraud, that a court, not an arbitrator should make that determination). However, this Court adopted the Prima Paint rule in South Carolina Pub. Serv. Auth. Further, as noted above, the parties have not challenged the judge's implicit ruling that the transaction involves interstate commerce.

was one-sided in favor of United because it prevents discovery[7] and prohibits an award of punitive damages.

We hold that CCP has failed to allege any facts that would show the clause was unconscionable. Both parties were sophisticated entities and, as United points out in its brief, CCP was apparently represented by independent counsel. While CCP alleged it lacked a meaningful choice as to the entire contract, CCP has simply failed to allege that it lacked a meaningful choice as to the arbitration clause specifically. Therefore, we agree with the trial court's ruling that any misconduct by Martin affected whether the entire agreement was unconscionable, not simply the arbitration clause.

As to the substantive claim involving the public policy issue, CCP alleged that because the clause sought to limit CCP's rights and remedies, the clause was unenforceable as a matter of law. In its complaint, CCP also alleged that its rights and remedies under the SCUTPA were limited by the clause. This Court has not addressed whether it violates South Carolina public policy for parties to voluntarily forgo punitive damages in an arbitration agreement.

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-67 (Ct. App. 2002). As noted in 83 A.L.R.3d 1037, 1039 (1978):

> courts in some cases have held that an arbitrator has the power, at least in certain circumstances, to award punitive damages. Thus, the court in one case has held that arbitrators possess the power, apparently without limitation in a labor law context, to award punitive damages. In other cases, however, the courts have taken the position that arbitrators have

[7] We note that the arbitration clause does not expressly prevent discovery, and the American Arbitration Association rules provide that arbitrators have broad authority to order and control discovery, including depositions.

> the power to award punitive damages only when they are given such power by express language in the contract authorizing arbitration or in the submission papers.

A number of courts in other jurisdictions have held that an arbitration agreement limiting or excluding punitive damages is enforceable. Martin v. SCI Mgt. L.P., 296 F.Supp.2d 462 (S.D.N.Y. 2003) (parties to an arbitration agreement may expressly preclude an arbitrator from awarding punitive damages); Investment Partners, L.P. v. Glamour Shots Licensing, Inc., 298 F.3d 314 (Miss. App. 2002) (holding provisions in arbitration agreements that prohibit punitive damages are generally enforceable); 7-Eleven, Inc. v. Dar, 757 N.E.2d 515 (Ill. App. 2001) (holding arbitrators may award punitive damages only where the parties have expressly agreed to the arbitrator's authority to award punitive damages).

Other courts have held that an arbitration agreement excluding punitive damages violates public policy. Ex parte Thicklin, 824 So.2d 723 (Ala. 2002) (holding that it violates Alabama public policy for a party to contract away its liability for punitive damages, regardless of whether the provision was intended to operate in an arbitral or a judicial forum); State ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002) (holding prohibitions on punitive damages and class action relief that would be the result of the application of a purchase and finance agreement are clearly unconscionable).

CCP cites In re Managed Care Litig., 132 F.Supp.2d 989 (S.D. Fla. 2000), in support of its public policy argument. In that case, the U.S. District Court for the Southern District of Florida ruled that a similar clause[8] excluding punitive or exemplary damages was unenforceable as a matter of public policy as it related to the plaintiff's RICO[9] claims. However, the United States Supreme Court overturned that decision in PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578

[8] The case involved several similar arbitration clauses that excluded punitive damages. UHG was one of the defendants.

[9] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961 et seq.

(2003). The Supreme Court held that the issue of whether statutory treble damages under the RICO statute were barred was not yet ripe because there was some question as to whether treble damages were punitive or compensatory, and it was unclear how an arbitrator would rule on the issue. PacifiCare, 538 U.S. at 1535-36.

Based on PacifiCare, it is clear an arbitrator may or may not choose to award treble damages in accordance with the SCUTPA, depending upon whether an arbitrator finds the SCUTPA was violated and whether the arbitrator finds that statutory treble damages are punitive or compensatory damages. Accordingly, we hold that the question of whether the clause preventing punitive damages violates public policy as to the SCUTPA is not yet ripe because an arbitrator has not ruled on the issue.

However, CCP is also seeking punitive damages in several common law causes of action. We hold that this issue is also not ripe for two reasons. First, it is unclear whether CCP will prevail on the merits in arbitration. Second, it is unclear whether an arbitrator would find that punitive damages are warranted. Accordingly, we hold that any challenge that the clause violates public policy is premature. See Hawkins v. Aid Assn. for Lutherans, 338 F.3d 801 (7th Cir. 2003) (holding that complaints about the unavailability of punitive damages must first be presented to the arbitrator).

Additionally, we note that our holding in no way limits CCP's ability to pursue its claims of fraud in the inducement of the arbitration clause, unconscionability, and public policy violations in arbitration. See Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1086-87 (8th Cir. 2001) (holding that whether federal public policy prohibits an individual from waiving certain statutory remedies is an issue that may be raised when challenging an arbitrator's award).

2. Non-Signatory Defendants; Stay of Proceedings

CCP also contends that, even assuming the arbitration clause is enforceable, the claims against Harms and Graves fall outside of its scope and must be litigated. CCP also contends the trial court erred in staying the

proceedings. We disagree, and hold that the trial court's order is not immediately appealable.

This Court has held that the FAA does not preempt South Carolina state law in regard to procedural rules on the appealability of arbitration orders. Toler's Cove Homeowners Assn., Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding there is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate; therefore, South Carolina law is not invalidating the arbitration agreement or undermining the goals and policies of the FAA). Pursuant to S.C. Code Ann. § 15-48-200(a) (2003), an appeal may be taken from:

> (1) An order denying an application to compel arbitration made under § 15-48-20;
> (2) An order granting an application to stay arbitration made under § 15-48-20(b);
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) An order vacating an award without directing a rehearing; or
> (6) A judgment or decree entered pursuant to the provisions of this chapter.

Section 15-25-200 does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration. Therefore, the order compelling arbitration of the claims against Harms and Graves and staying the remaining claims is not immediately appealable.

CONCLUSION

We affirm the trial court's dismissal of CCP's fraud, public policy, and unconscionability claims pursuant to Rule 12(b)(6). Any claims related to the making of the contract or the arbitration clause may be pursued in

arbitration. We also hold the trial court's order compelling arbitration of the claims against the non-signatories and staying the proceedings is not immediately appealable.

AFFIRMED.

MOORE and PELICONES, JJ., concur. Acting Justice Roger M. Young dissenting in a separate opinion in which TOAL, C.J., concurs.

ACTING JUSTICE YOUNG: I concur in Part 1. B. and Part 2 of the majority's opinion. I respectfully dissent from Part 1. A., in which the majority holds that the Appellant's complaint does not specifically allege fraud in the inducement of the making of the arbitration clause contained in the contract. The majority finds the complaint alleges fraud in the inducement of only the contract. I disagree. I read the Second Amended Complaint as pleading a cause of action that sufficiently alleges fraud in the inducement of the arbitration clause to comply with precedents of this Court and Rule 12(b)(6), SCRCP. Therefore, I would reverse the trial court's grant of the Respondents' Rule 12(b)(6) motion to dismiss and remand to the trial court for further proceedings on that cause of action.

As the majority notes, in S.C. Pub. Serv. Auth. v. Great W. Coal (Ky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993), this Court adopted the Prima Paint rule, which holds that to avoid arbitration through the rescission of the entire contract, a party must allege fraudulent inducement in the making of the arbitration clause specifically. A party may not avoid arbitration by alleging fraudulent inducement in the making of the contract generally. I find the Appellant has met this burden.

The Appellant's 21st cause of action in the Second Amended Complaint alleges that the United Respondents[10] inserted the arbitration clause into the contract to limit Appellant's ability to discover the extent of the United Respondents' misconduct and to limit Appellant's right to recover punitive damages. Specifically, the amended complaint alleges that Bill Martin, an employee of the United Respondents and, allegedly, an agent of Appellant, knew the true reason the United Respondents wanted the arbitration clause inserted, knew of the Appellant's Board of Directors reliance on him to advise the Board concerning contractual matters, and failed to disclose to the Board why the United Respondents wanted the arbitration clause inserted or of its impact. The complaint alleges that Martin informed the Appellant's Board that the contract merely changed the method of payment between the parties and that the United Respondents required Martin and other United employees to provide Appellant with false

[10] United HealthCare Services, Inc., United Healthcare Group, Incorporated, and United Healthcare Insurance Co.

information regarding their true intentions concerning the fulfillment of contract obligations. This cause of action further alleges the United Respondents planned to commit additional torts, breaches of contract and fiduciary duties, as well as other unspecified wrongs. The complaint specifically alleges the United Respondents had the arbitration clause inserted in an effort to prevent the Appellant from discovering these past and future planned wrongdoings, as well as to limit the Appellant's right to recover punitive damages for this misconduct. Finally, the cause of action alleges the United Respondents required their employees to hide both the reason for the insertion of the arbitration clause and the impact of the clause.

At no point does the Second Amended Complaint allege the Respondents fraudulently induced Appellant into entering the contract generally. This cause of action appears to be carefully drafted and is very specific in its averment of facts that allege the arbitration clause was fraudulently inserted in an attempt by the United Respondents to limit the Appellant's ability to discover other wrongful acts committed by the United Respondents as well as to limit the Appellant's right to recover punitive damages for those wrongful acts.

The Appellant's original complaint and its first amendment would not have survived a S.C. Pub. Serv. Auth. v. Great W. Coal (Ky), Inc. challenge. However, the trial court allowed the Appellant to amend the complaint a second time, and in my opinion this last amendment corrected the earlier defects. The Appellant should not be penalized for these earlier shortcomings when analyzing the Second Amended Complaint. When viewed in a light most favorable to the Appellant as required in a Rule 12(b)(6) motion, the Second Amended Complaint sets forth facts that specifically allege the arbitration clause itself was the subject of the fraudulent inducement, and not the contract generally. Therefore, I would remand the case to the trial court with instructions to proceed on the fraudulent inducement cause of action while staying the remainder of the case until such time as that issue has been resolved.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James M. Loftis and Roxana T. Loftis, Appellants,

v.

South Carolina Electric and Gas Company, Respondent.

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

Opinion No. 3874
Submitted September 14, 2004 – Filed October 11, 2004

AFFIRMED

Kenneth C. Krawcheck, of Charleston, for Appellant.

John M. Mahon, Jr. and Beaumont Barre Covert, both of Columbia; Wade H. Logan, III, Elizabeth Scott Moise and M. Scott Taylor, all of Charleston, for Respondent.

WILLIAMS, J.: In this action filed by a property owner seeking an injunction preventing SCE&G from maintaining power lines on his property and damages resulting from past maintenance, the owner challenges the master's grant of summary judgment. The master based his ruling on, among other things, SCE&G's establishment of a prescriptive easement to maintain the power lines. We affirm.

FACTS

On September 4, 1998, James and Roxana Loftis ("Appellants") purchased a parcel of land located on Bryan Road in Hollywood, South Carolina. On two occasions prior to purchasing the property, Mr. Loftis conducted a walking inspection of the land. Two power lines extended across the property, one dedicated to the previous owner's residence and a second line that provided electrical service to all the residents of Bryan road.

While inspecting the property at the request of Mr. Loftis for the purpose of initiating basic electrical service, SCE&G determined that safety concerns mandated routine trimming around all the power lines on the property. Thus, on three occasions, SCE&G's independent contractors entered the property to clear vegetation. On two occasions, Appellants' father, who was staying on the property, halted the trimming.

Believing SCE&G's trimming activities damaged their property, Appellants brought suit, asserting claims of conversion, negligence, and trespass. Appellants asked the court for money damages, an order requiring SCE&G to remove the existing power lines, and an injunction preventing SCE&G from entering the property in the future.

On October 4, 2002, SCE&G filed and served a motion for summary judgment on all causes of action. On the day scheduled for trial, the master agreed to hear arguments on SCE&G's summary judgment motion prior to the start of trial. Indicating he felt "hamstrung," Appellants' trial attorney explained he was surprised a hearing was being held on the motion. The master postponed the trial, allowing Appellants "ten days to submit a Brief

with any supporting affidavits, or evidence that you want." After reviewing supplemental material from both parties, the master granted summary judgment on the trespass and conversion causes of action based on multiple grounds. This appeal follows.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108, 584 S.E.2d 375, 377 (2003). In determining whether any triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Hendricks v. Clemson Univ., 353 S.C. 449, 455-56, 578 S.E.2d 711, 714 (2003).

LAW / ANALYSIS

Appellants first argue the trial court erred in hearing SCE&G's motion for summary judgment on the day trial was scheduled to begin. In support of their position they cite Rule 6(d), SCRCP, which reads, "a written motion . . . and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing."

We conclude there was no reversible error in the procedure followed by the trial court. SCE&G's motion was filed and served twenty-seven days before the hearing. In response to objections to the timing of the motion hearing, the trial court granted Appellants ten additional days to submit a brief and opposing affidavits and did not rule on the motion until full

consideration of these materials was given. Accordingly, we find Appellants have not been prejudiced. See Dedes v. Strickland, 307 S.C. 152, 155, 414 S.E.2d 132, 134 (1992) (holding that failure to give written notice of a motion hearing is reversible error when it "wrongfully denie[s] the opportunity to submit affidavits, documents or testimony opposing . . . the motion" and thereby causes prejudice to the opposing party). Having addressed Appellants' procedural exception, we move now to the merits of the master's findings.

The master concluded, as one of several grounds for finding a valid easement on Appellants' property, that SCE&G successfully established an easement by prescription. We affirm the master's decision on this ground.[1]

In order to establish an easement by prescription a party must show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under claim of right. Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); Babb v. Harrison, 220 S.C. 20, 24-25, 66 S.E.2d 457, 458 (1951); Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 150, 584 S.E.2d 386, 388 (Ct. App. 2003). Having reviewed the elements which define a prescriptive easement, we now review the evidence on the matter, being mindful to give Appellants "the benefit of all favorable inferences that might reasonably be drawn therefrom." Estes v. Roper Temporary Services, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

We find ample undisputed evidence in the record to support the master's finding of a prescriptive easement. An agent of SCE&G testified that he inspected several telephone poles supporting the electrical lines crossing Appellants' property and found a "birthmark" on one pole reading

[1] In light of our disposition of the case on the issue of prescriptive easement, it is not necessary to address Appellants' remaining issues. See Rule 220 (c), SCACR; Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate courts need not address remaining issues when the disposition of a prior issue is dispositive).

1972 and another reading 1954.[2] The son of Appellants' property's prior owner, who is also a current neighbor of Appellants, testified that the property in question has received electrical service through the power lines since at least 1949. A life-time neighbor and family friend to the property's prior owners testified that the power lines at issue have been on the property since the 1930's, and electrical service provided every decade since. Because one of the two power lines in question is a "primary distribution line" that supplies power to the rest of Bryan Road, the few intermittent periods where Appellants' property did not receive electrical service do not cause the prescriptive easement to fail for lack of "continual" or "uninterrupted" use. Even when Appellants' property was without electrical service, the power lines were still being maintained and used by SCE&G. The evidence clearly supports the master's conclusion that SCE&G used the property to supply power to the residents of Bryan Road for the required twenty-year period.

The brunt of Appellants' argument, however, lies in the third requirement for establishing an easement by prescription. Appellants incorrectly assert that a prescriptive easement cannot be established in this case because "[o]bviously, use is not adverse where the [d]efendant had a mistaken belief it had the right to be on the property." Appellants ignore that a prescriptive easement can also be established under a "claim of right," or, in other words, under the very mistaken belief Appellants admit drove SCE&G's actions. Our courts have held that a party may earn a prescriptive easement under a claim of right if "he demonstrate[s] a substantial belief that he had the right to use" the property in a manner consistent with the alleged easement. Hartley, 355 S.C. at 151, 584 S.E.2d at 389; see also Revis, 321 S.C. at 209, 467 S.E.2d at 462 (holding a party's belief about her right to use a road flowed from a claim of right); Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct. App. 1997) (noting a party's belief that he had a right-of-way may be sufficient for a prescriptive easement pursuant to a claim of right).

[2] A "birthmark" is a physical marking SCE&G places on its telephone poles which reflect the year in which they were erected.

In the case before us, SCE&G has used and maintained the power lines in question since the 1930's pursuant to their belief they had a valid right-of-way to use the property in this manner. Evidence supporting this belief, or claim of right, was presented to the master in the form of testimony regarding SCE&G's search for documents, believed to exist but missing, proving a filed right-of-way on the property. Furthermore, SCE&G presented as evidence several versions of their general service terms and conditions, which have stated the following since 1962:

> "The Customer, in requesting or accepting service, thereby grants the Company without charge necessary rights-of-way and trimming and clearing privileges for its facilities along, across, and under property controlled by the Customer . . . to the extent that such rights-of-way and trimmings are required or necessary to enable Company to supply service to the Customer . . . [and] to serve other Customers."

Since the prior owners of Appellants' property requested and received decades of electrical service, this evidence clearly supports the master's finding that SCE&G had a substantial belief it had a right to use the property in the manner it did based upon the totality of the circumstances. Pursuant to this Court's standard of review, we therefore uphold the master's establishment of an easement by prescription in favor of SCE&G.

Finally, we address Appellants' contention that since they never requested electrical service from SCE&G,[3] they are not bound by SCE&G's easement on the property, no matter what theory supports the easement's establishment. A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. 25 Am Jur 2d Easements and Licenses § 106 at 677 (1996). In order to charge the purchaser of a servient estate with notice of an unrecorded easement, the marks of the servitude must be open

[3] Although Appellants did not officially request electrical service prior to the trimming that gave rise to this action, they have since requested and received such service.

and visible. 25 Am Jur 2d Easements and Licenses § 107 at 678 (1996). Here, the marks of the easement (the poles and power lines) were open and visible. Furthermore, Appellants admit to making inspections of the property and to actual knowledge of the power lines prior to the property's purchase. We therefore conclude that Appellants purchased the property subject to SCE&G's prescriptive easement.

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

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Janet F. Rodman (Fried), Respondent,

v.

John R. Rodman, Appellant.

Appeal From Beaufort County
Robert S. Armstrong, Family Court Judge

Opinion No. 3875
Submitted September 14, 2004 – Filed October 18, 2004

AFFIRMED

Edwin W. Rowland, of Hilton Head Island, for Appellant.

Janet F. Rodman, of Hilton Head Island, *pro se*, for Respondent.

WILLIAMS, J.: John R. Rodman, Jr. ("Husband") appeals a family court denial of his motion to vacate a previous order, which, by the adoption of an agreement between Husband and Janet F. Rodman ("Wife"), awarded Wife "reimbursement alimony." Husband argues that, because the family court lacked subject matter jurisdiction, the judgment is void; therefore the

family court erred in denying the motion as time barred under Rule 60(b), SCRCP. We disagree.

FACTS / PROCEDURAL HISTORY

Husband and Wife participated in a marriage ceremony on August 19, 1999. Husband, however, was not legally divorced from his prior spouse (his fifth wife) until August 31, 1999. In September 2001, Wife discovered Husband was still married to another woman on the date of their marriage.[1] Since this discovery, the parties have lived separate and apart from one another.

In November 2001, the parties, voluntarily and with ample opportunity to seek the advice of counsel, entered into a written settlement agreement. Although not officially represented by counsel until later, Husband was aided during the agreement negotiations by an attorney and family friend, who helped him draft some documents. The parties agreed in writing, inter alia, to the following:

> 1. Husband was not legally divorced from his previous wife at the time of their marriage; thus, an annulment was appropriate.
>
> 2. The written agreement constituted "a final permanent settlement between them with respect to the division of all their property, both real and personal, and with respect to any and all rights of support and all other rights and obligations."
>
> 3. The agreement "is not conditioned upon the obtaining of divorce, but instead is intended to be a complete and full settlement between the parties independent of the obtaining of a divorce."

[1] Husband claims he told Wife about this inadvertent mistake immediately upon realizing it himself. Wife claims she discovered a record of the final divorce date in a stack of Husband's papers and Husband became verbally and physically abusive when confronted with the evidence.

Under the heading "ALIMONY/INSURANCE," Wife agreed to accept $150,460 payable in 120 monthly increments of $2,158, as "reimbursement alimony" for debt Husband allegedly accrued in her name during their marriage. These payments are addressed again in the agreement, under the heading "DIVISION OF PERSONAL DEBT," as follows:

> The parties agree that Wife shall pay debt in her name, however she is depending on the Spousal support payment from Husband to make all the payments. Husband must pay Wife her alimony in a timely fashion so that she can pay the debt he incurred during the marriage.

On March 1, 2002, the family court granted Wife a decree of separate support and maintenance,[2] which fully incorporated the written agreement. Although properly served with the summons, complaint, and notice of the final hearing, Husband did not attend the hearing which led to this family court order.

On March 28, 2003, more than one year following the order, Husband filed a motion to vacate the family court's decree of separate support and maintenance on the ground that the marriage was void ab initio and, as a result, any agreement entered into regarding alimony is null and void. Pursuant to Rule 60(b), SCRCP, the family court denied Husband's motion to vacate on the ground that it was filed more than one year after the date of the initial order. This appeal followed.

SCOPE OF REVIEW

On appeal from the family court, this court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App.

[2] In what appears to be nothing more than a simple mistake, the decree of separate support and maintenance is referenced once in the order as a "final order of divorce."

1999). This court, however, is not required to disregard the family court's findings; nor should we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999); Smith v. Smith, 327 S.C. 448, 453, 486 S.E.2d 516, 519 (Ct. App. 1997).

LAW / ANALYSIS

Husband argues the family court erred by denying his motion as time barred under Rule 60(b), SCRCP. Husband bases this argument on the proposition that the family court lacked subject matter jurisdiction to adopt the property agreement; thus, the judgment was void. We disagree.

Rule 60(b), SCRCP, reads:

> On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud, misrepresentation, or other misconduct . . . ; (4) the judgment is void; (5) the judgment has been satisfied . . . .

The rule continues, "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment or proceeding was entered or taken." Rule 60(b), SCRCP.

It is undisputed that Husband's motion to vacate was filed more than one year following the entry of the family court's order; thus, to be considered timely under the rule, the motion must be based on either subsection (4) or (5). Because Husband makes no claim that the judgment has been satisfied, the sole issue before this court is whether the family court order is "void" under the rule. See Rule 60(b)(4), SCRCP.

The definition of "void" under Rule 60(b) "only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal

jurisdiction." McDaniel v. U.S. Fid. and Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). Husband argues the family court erred in applying the one-year deadline to his motion because the family court lacks subject matter jurisdiction to adopt a property agreement incident a marriage that was void ab initio.[3] He contends that, because of this alleged lack of subject matter jurisdiction, the family court order is void, thus the family court should have applied the "reasonable time" standard of Rule 60(b)(4), and not the one-year limit of subsection (1), (2), and (3).

Because the property agreement was adopted by the family court in response to Wife's petition for annulment and decree of separate support and maintenance, we find Husband's argument to be without merit. It has long been established that S.C. Code Ann. § 20-7-420(6) (1976 & Supp. 2003) grants the family court exclusive jurisdiction over annulment proceedings. White v. White, 283 S.C. 348, 349, 323 S.E.2d 521, 522 (1984). Furthermore, this jurisdiction extends, not just to the issue of the actual annulment, but to "all matters in an annulment action, as in a divorce proceeding," including the equitable distribution of property. Id., 283 S.C. at 350, 323 S.E.2d at 522; see also S.C. Code Ann. § 20-7-420(30) (1976 & Supp. 2003) (granting the family court exclusive jurisdiction "to hear and determine any questions of support, custody, separation, or any other matter over which the court has jurisdiction.").

There is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy, as they are both void ab intio, or "from the inception." Splawn v. Splawn, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993). In fact, the South Carolina Supreme Court has specifically held the family court has subject matter jurisdiction to equitably distribute property in a bigamous marriage. Id., 311 S.C. at 424, 429 S.E.2d at 806. Following the analysis of White and Splawn, we find the family court had subject matter jurisdiction to adopt the agreement of the parties. Because the family court had subject matter jurisdiction to decide the matter, Husband's motion to vacate the order was untimely under Rule 60(b), SCRCP.

[3] Husband makes no allegation that the family court lacked personal jurisdiction or failed to provide proper due process.

CONCLUSION

Because Husband's motion to vacate was untimely, the family court properly denied the motion. The decision of the family court is therefore

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Melissa D. Hamilton a/k/a
Melissa Dawn Hamilton, Respondent,

v.

R & L Transfer, Inc., Appellant.

Appeal From Fairfield County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 3876
Heard September 15, 2004 – Filed October 18, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William A. Bryan, Jr. and Christian Stegmaier, both of Columbia, for Appellant.

Edward C. Boggs and S. Murry Kinard, both of Lexington, for Respondent.

STILWELL, J.: Melissa D. Hamilton brought this action against R & L Transfer, Inc., alleging the negligence of an R & L Transfer employee caused a collision resulting in her injuries. The trial judge directed a verdict for Hamilton on liability, and the jury awarded damages to her. R & L appeals. We affirm in part, reverse in part, and remand.

FACTS

This action arises out of an automobile accident that occurred in Lexington County on the morning of February 24, 1999. Hamilton was driving to work on Interstate 20, traveling towards Columbia. It was snowing and the snow was beginning to accumulate on the road. Hamilton crossed over an icy bridge, causing her to lose control of her vehicle and slide into the median. After her car stopped in the median, Hamilton got out of her car and walked over to another disabled motorist in the median who had also lost control of his vehicle. As Hamilton walked over to the other vehicle in the median, a car driven by Kim Wright also lost control while crossing the icy bridge. Wright's vehicle made a 360-degree spin in the left-hand lane but remained on the highway.

Daniel G. Bishop, an employee with R & L Transfer, was driving an eighteen-wheeler and traveling behind Wright. Bishop crossed over the ice-covered bridge without losing control. However, as he crossed over the bridge, Bishop saw Wright lose control of her vehicle. Bishop testified he had approximately one second to react when he first noticed Wright's car out of control. Attempting to avoid a collision with Wright's vehicle, Bishop slowed and hugged the yellow line closest to the median. However, Bishop and Wright collided, forcing Bishop to veer the eighteen-wheeler into the median where Hamilton stood outside her stranded vehicle. Although Bishop was not aware of a collision between his truck and Hamilton's vehicle, his truck hit Hamilton's car, causing her car to leave the ground and land on her left leg, pinning her underneath the car for several minutes. Hamilton did not suffer any broken bones, but did sustain muscle injury and missed a week and a half of work.

Hamilton brought this action against R & L Transfer alleging Bishop negligently collided with her car. R & L Transfer answered and filed a third-party complaint for equitable indemnification and negligence against Wright. The circuit court granted Wright's motion to dismiss the third-party complaint. R & L Transfer made a motion for summary judgment which was denied. At the conclusion of Hamilton's case, R & L Transfer sought a directed verdict, which was denied. At the close of R & L Transfer's case, Hamilton moved for a directed verdict on the issue of liability. The trial judge granted the motion and submitted the issue of damages to the jury. The jury awarded Hamilton $30,000 in actual damages and $20,000 in punitive damages. Hamilton was also awarded court costs.

R & L Transfer filed motions for judgment notwithstanding the verdict, a new trial based on the thirteenth juror doctrine, new trial absolute, new trial nisi remittitur, and new trial based on prejudicial remarks by the trial court. The trial court denied each motion.

LAW/ANALYSIS

R & L Transfer argues the trial court erred in granting a directed verdict in Hamilton's favor on the issue of liability. We agree.

We find the trial court erred in granting Hamilton's motion for a directed verdict because the issue of R & L Transfer's negligence was an issue for the jury. When ruling on a motion for directed verdict, the court is required to view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999). "If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 92, 508 S.E.2d 848, 849 (1998).

In order to prove R & L Transfer's negligence, it was essential for Hamilton to establish the following: (1) a duty of care owed by R & L Transfer to Hamilton, (2) breach of that duty, and (3) damages to Hamilton proximately resulting from the breach. Thomasko v. Poole, 349 S.C. 7, 11,

561 S.E.2d 597, 599 (2002). A party's negligence is the proximate cause only when, without the negligence, the injury could have been avoided or would not have happened. Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 296, 417 S.E.2d 631, 633 (Ct. App. 1992). "It is generally for the jury to determine whether the defendant's negligence was a concurring proximate cause of the plaintiff's injuries. Only when the evidence is susceptible of only one inference does proximate cause become a matter of law for the court." Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998) (internal citation omitted).

Although the evidence here indicates Bishop's vehicle hit Hamilton's, the evidence does not establish he breached his duty of due care to Hamilton. Because Hamilton was conversing with the other stranded motorist in the median at the time Bishop crossed the bridge, Hamilton was unable to offer any testimony regarding Bishop's speed or other characteristics of his driving at the time of the accident. Similarly, although Wright testified she observed Bishop traveling at a higher rate of speed than the other vehicles on the road, she further explained she only witnessed his driving before he reached the overpass. She did not see the R & L Transfer truck immediately before the accident or as it occurred. This evidence does not establish Bishop was driving negligently at the time of the accident.

Additionally, the evidence does not produce only the inference Bishop's negligence, if any, was the proximate cause of Hamilton's damages. Bishop testified he only had a second to react to the blocked roadway. A neutral witness testified similarly. A jury could conclude either the icy conditions or the sudden emergency of disabled and out-of-control vehicles Bishop faced as he traversed the bridge caused the accident rather than negligent driving by Bishop. See Clark v. Cantrell, 339 S.C. 369, 391-92, 529 S.E.2d 528, 540 (2000) (discussing the sudden emergency doctrine); Elrod v. All, 243 S.C. 425, 438, 134 S.E.2d 410, 417 (1964) (noting the question of sudden emergency is ordinarily for the jury). Because the evidence here is susceptible to more than one inference, the grant of Hamilton's directed verdict motion was error. However, because we find R & L Transfer's liability was a jury issue, we affirm the denial of its directed verdict motion. As a result of our reversal of Hamilton's directed

verdict, we further reverse the award of court costs to Hamilton.

Having determined this case should be remanded for a new trial, we do not address the remaining issues on appeal. See Futch, 335 S.C. at 613, 518 S.E.2d at 598 (ruling appellate court need not review remaining issues when disposition of prior issues are dispositive).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, J., and CURETON, A.J., concur.