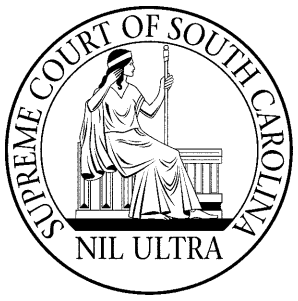

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40

November 26, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

EXTENSION TO FILE PETITION – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

None

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2007-UP-513-Stephen Vaughn v. South Carolina Department of Health and Environmental Control and Beresford Creek Homeowner's Association
(Administrative Law Court Judge John D. Geathers)

2007-UP-514-Peerless Insurance Company v. Lynn Wilson
(Oconee, Judge Alison Renee Lee)

2007-UP-515-The State v. Ronald Jacobs
(Richland, Judge G. Thomas Cooper, Jr.)

2007-UP-516-The State v. Angelia Turner Hensley
(Spartanburg, Judge Paul M. Burch)

2007-UP-517-The State v. Reggie Branson
(Spartanburg, Judge Roger L. Couch)

2007-UP-518-The State v. Della Ann Frazier
(Richand, Judge G. Thomas Cooper, Jr.)

2007-UP-519-The State v. James Aquan Moody
(Richland, Judge Reginald I. Lloyd)

2007-UP-520-The State v. Jarvoris Mungro
(York, Judge G. Thomas Cooper, Jr.)

2007-UP-523-Mario Benson v. State of South Carolina
(Spartanburg, Judge J. Mark Hayes, II)

2007-UP-524-South Carolina Department of Social Services v. Priscilla I., sic Corcella I., and Michael I.
(Florence, Judge Jerry D. Vinson, Jr.)

2007-UP-525-The State v. Donald Ray Perry
(Richland, Judge James W. Johnson, Jr.)

2007-UP-526-The State v. Manley M. Thompson
(Lancaster, Judge John C. Hayes, III)

2007-UP-527-The State v. Neal Stevens
(Aiken, Judge Doyet A. Early, III)

2007-UP-528-Thomas C. McSwain v. Little Pee Dee Farms and Legion Insurance Company/South Carolina Property and Casualty Insurance Guaranty Association
(Dillon, Judge James E. Lockemy)

2007-UP-529-Adoptive Father and Adoptive Mother v. Child, a minor under the age of fourteen years, Birth Father and Birth Mother
(Greenville, Judge Aphrodite K. Konduros)

2007-UP-530-John J. Garrett v. Lister, Flynn, & Kelly, P.A., Toney Lister, and Brendan Delaney
(Spartanburg, Judge Roger L. Couch)

2007-UP-531-Franklin Ventures, LLC v. Shalash Abdel Jaber
(Charleston, Judge R. Markley Dennis, Jr.)

2007-UP-532-The State v. Roderick Bradley
(Allendale, Judge Paul M. Burch)

2007-UP-533-Ronald C. Harris v. Kyle Smith d/b/a DYSKY Unlimited Properties and Michael Taylor d/b/a MTP of Columbia
(Richland, Judge Alison Renee Lee)

PETITIONS FOR REHEARING

4285-State v. Whitten	Denied 11/16/07
4292-SCE&G v. Hartough	Pending
4295-Nationwide Insurance Co. v. Smith	Pending
4296-Mikell v. County of Charleston	Pending
4298-Stalk v. State	Denied 11/16/07
4302-Hiott v. State	Denied 11/16/07
4305-State v. Gault	Pending
4306-Walton v. Mazda of Rock Hill	Pending
4308-Hutto v. State	Pending

2007-UP-362-Robinson v. Anderson News	Pending
2007-UP-364-Alexander's Land Co. v. M&M&K Corp.	Pending
2007-UP-403-SCDSS v. C. H. Doe	Denied 11/16/07
2007-UP-404-Dew v. Santee Cooper	Denied 11/16/07
2007-UP-412-Hall v. State	Pending
2007-UP-418-State v. Goodson	Pending
2007-UP-420-State v. B. Johnson	Denied 11/16/07
2007-UP-423-State v. Dukes	Denied 11/16/07
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-467-State v. N. Perry	Pending
2007-UP-493-Babb v. Noble	Pending
2007-UP-494-National Bank of SC v. Renaissance	Pending
2007-UP-497-Harris v. Harris	Denied 11/16/07
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-507-State v. Sabo	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4022 – Widdicombe v. Tucker-Cales	Granted 11/05/07
4128 – Shealy v. Doe	Pending
4139 – Temple v. Tec-Fab	Pending
4143 – State v. K. Navy	Pending
4156--State v. D. Rikard	Pending
4159--State v. T. Curry	Pending

4173 – O'Leary-Payne v. R. R. Hilton Heard	Pending
4179 – Wilkinson v. Palmetto State Transp.	Pending
4185—Dismuke v. SCDMV	Pending
4189—State v. T. Claypoole	Pending
4195—D. Rhoad v. State	Pending
4196—State v. G. White	Pending
4198--Vestry v. Orkin Exterminating	Pending
4200—S. Brownlee v. SCDHEC	Pending
4202--State v. Arthur Smith	Pending
4205—Altman v. Griffith	Pending
4209-Moore v. Weinberg	Pending
4211-State v. C. Govan	Pending
4212-Porter v. Labor Depot	Pending
4213-State v. D. Edwards	Pending
4217-Fickling v. City of Charleston	Denied 10/31/07
4220-Jamison v. Ford Motor	Pending
4224-Gissel v. Hart	Pending
4225-Marlar v. State	Granted 11/05/07
4227-Forrest v. A.S. Price et al.	Pending
4231-Stearns Bank v. Glenwood Falls	Pending
4233-State v. W. Fairey	Pending

4235-Collins Holding v. DeFibaugh	Pending
4237-State v. Rebecca Lee-Grigg	Pending
4238-Hopper v. Terry Hunt Const.	Pending
4239-State v. Dicapua	Pending
4240-BAGE v. Southeastern Roofing	Pending
4242-State v. T. Kinard	Pending
4243-Williamson v. Middleton	Pending
4244-State v. O. Gentile	Pending
4245-Sheppard v. Justin Enterprises	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending
4262-Town of Iva v. Holley	Pending
4265-Osterneck v. Osterneck	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending
4276-McCrosson v. Tanenbaum	Pending
4284-Nash v. Tindall	Pending
4286-R. Brown v. D. Brown	Pending

2005-UP-345 – State v. B. Cantrell	Denied 10/18/06
2005-UP-490 – Widdicombe v. Dupree	Granted 11/05/07
2006-UP-222-State v. T. Lilly	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-329-Washington Mutual v. Hiott	Pending
2006-UP-350-State v. M. Harrison	Pending
2006-UP-359-Pfeil et. al v. Walker et. al	Pending
2006-UP-372-State v. Bobby Gibson, Jr.	Pending
2006-UP-378-Ziegenfus v. Fairfield Electric	Denied 10/31/07
2006-UP-385-York Printing v. Springs Ind.	Dismissed 08/17/07
2006-UP-390-State v. Scottie Robinson	Pending
2006-UP-403-State v. C. Mitchell	Granted 10/31/07
2006-UP-413-Rhodes v. Eadon	Pending
2006-UP-416-State v. Mayzes and Manley	Pending
2006-UP-417-Mitchell v. Florence Cty School	Pending
2007-UP-015-Village West v. Arata	Denied 10/31/07
2007-UP-023-Pinckney v. Salamon	Pending
2007-UP-052-State v. S. Frazier	Pending

2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-062-Citifinancial v. Kennedy	Pending
2007-UP-063-Bewersdorf v. SCDPS	Pending
2007-UP-064-Amerson v. Ervin (Newsome)	Pending
2007-UP-066-Computer Products Inc. v. JEM Rest.	Pending
2007-UP-090-Pappas v. Ollie's Seafood	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-098-Dickey v. Clarke Nursing	Pending
2007-UP-109-Michael B. and Andrea M. v. Melissa M.	Pending
2007-UP-110-Cynthia Holmes v. James Holmes	Pending
2007-UP-111-Village West v. International Sales	Pending
2007-UP-128-BB&T v. Kerns	Pending
2007-UP-130-Altman v. Garner	Pending
2007-UP-133-Thompson v. Russell	Pending
2007-UP-135-Newman v. AFC Enterprises	Dismissed 10/30/07
2007-UP-147-Simpson v. Simpson	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-177-State v. H. Ellison	Pending
2007-UP-183-State v. Hernandez, Guerrero, Arjona	Pending

2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-189-McMasters v. Charpia	Denied 10/31/07
2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-226-R. Butler v. SC Dept. of Education	Pending
2007-UP-243-E. Jones v. SCDSS	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-252-Buffington v. T.O.E. Enterprises	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-266-State v. Dator	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-331-Washington v. Wright Const.	Pending
2007-UP-337-SCDSS v. Sharon W.	Pending
2007-UP-340-O'Neal v. Pearson	Pending
2007-UP-341-Auto Owners v. Pittman	Pending
2007-UP-344-Dickey v. Clarke Nursing Home	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of C. H. Barrier, Respondent.

Opinion No. 26395
Heard October 16, 2007 – Filed November 19, 2007

DEFINITE SUSPENSION

A. Camden Lewis and Peter D. Protopapas, of Lewis & Babcock, of Columbia, for Respondent.

Barbara M. Seymour, Assistant Deputy Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

PER CURIAM: In this attorney disciplinary matter, the sub-panel and full panel recommend an admonition and costs of $564.38. We impose a sixty day suspension.

FACTS

Respondent graduated from law school in 2001. He went to work for attorney Jack Schoer in September 2002, performing three to four residential real estate closings per week. For four months, Respondent would go to Schoer's office, pick up a closing packet, attend a closing and review the documents with the borrower. He would then return the closing packet to Schoer's office. If a second witness was not present at the closing, Respondent would witness the signatures himself and return the packet to Schoer without a second witness' signature or notarization. Respondent was aware that at some point after the documents were returned, someone who

was not actually at the closing would sign as a witness to the documents and would sign as notary.

In January 2003, Respondent ceased working for Schoer and began working as a judicial law clerk/staff attorney at the Court of Appeals. In late January 2003, while employed as a staff attorney, Respondent began conducting two to three closings per month for Schoer, in the same manner as described above. He continued this practice through April 2005, at which time he left his position with the Court of Appeals and went to work full time for Schoer.

Formal charges were filed against Respondent in March 2006. The complaint alleged Respondent had engaged in the practice of law while working as a law clerk, and that he had assisted non-lawyers in the unauthorized practice of law. After a hearing, the sub-panel found Respondent had engaged in misconduct in regard to practicing law while employed as a law clerk in violation of Canon 5(D) of the Code of Conduct for Staff Attorneys and Law Clerks, Rule 506, SCACR. However, the sub-panel did not find misconduct with regard to assisting non-lawyers in the unauthorized practice of law. The sub-panel found that Respondent's actions regarding the real estate closings were wrong, but were not dishonest and did not amount to a misrepresentation such that they did not violate Rule 8.4(d).[1] It also found Respondent's character and inexperience mitigating, as well as the fact that he accepted full responsibility for his actions and was sincerely remorseful. The sub-panel recommended an admonition, and the full panel adopted the sub-panel's report and concurred with the recommended sanction. We disagree with the recommended sanction and impose a sixty day suspension.

[1] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

DISCUSSION

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with the Supreme Court. In re Yarborough, 337 S.C. 245, 524 S.E.2d 100 (1999).

Canon 5(D), Rule 506, SCACR (the Code of Conduct for Staff Attorneys and Law Clerks), prohibits a staff attorney or law clerk from "undertak[ing] to perform legal services for any private client in return for remuneration." By practicing law while employed as a law clerk, Respondent has engaged in the unauthorized practice of law in violation of Rule 5.5, Rules of Professional Conduct, Rule 407, SCACR.

Further, we find Respondent's conduct in conjunction with the real estate closings constitutes a violation of the Rules of Professional Conduct, Rule 407, SCACR. In allowing the closing documents to be returned un-signed by a second witness, without proper notarization, with the knowledge that some other person who was not at the closing would subsequently sign as a witness and notarize his signature, we find Respondent violated Rule 8.4(d) (conduct involving dishonesty or misrepresentation) and Rule 8.4(e) (conduct prejudicial to the administration of justice).

We find Respondent's actions in this matter warrant a sixty day suspension from the practice of law. See In re Poff, 366 S.C. 542, 623 S.E.2d 642 (2005) (attorney's actions in representing title insurance company and not attending closings, but in signing and notarizing closing documents as if he had been witness warranted sixty day suspension); In re Lattimore, 361 S.C. 126, 604 S.E.2d 369 (2004) (attorney's misconduct, which included closing residential real estate loans in "flipping" transactions and allowing non-lawyers he supervised to notarize signatures they had not witnessed and to conduct real estate closings, warranted disbarment).

Accordingly, Respondent is definitely suspended from the practice of law for sixty days. Furthermore, we order respondent to pay the costs of these disciplinary proceedings to the Commission on Lawyer Conduct within

30 days of the date of this opinion. Respondent shall file an affidavit with the Clerk of Court, within 15 days of the date of this opinion, showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BEATTY, JJ., and Acting Justice Dorothy Mobley Jones, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Christopher L. James, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26396
Heard October 18, 2007 – Filed November 19, 2007

DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Donald V. Myers, of Lexington, for petitioner.

Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Commission on Indigent Defense,

Division of Appellate Defense, of Columbia, for respondent.

PER CURIAM: We granted this petition for a writ of certiorari to review the Court of Appeals' opinion in State v. James, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004). After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

TOAL, C.J., MOORE, WALLER, PLEICONES, JJ., and Acting Justice J. Michael Baxley, concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of G. Turner Perrow, Jr., Respondent.

Opinion No. 26397
Submitted October 23, 2007 – Filed November 19, 2007

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway, for respondent.

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

FACTS

Matter I

On May 22, 2006, respondent disbursed funds from his trust account on a refinance loan prior to depositing the loan proceeds into his trust account. Respondent deposited the funds on May 25,

2006, after a check in the amount of $33,336.92 was presented against the trust account.

Matter II

Respondent admits he failed to verify that funds for two real estate closings were wired to the correct account prior to disbursement of the funds. The funds for the two closings had been wired to respondent's former trust account and, as a consequence, were not available to cover a $77,840.03 check that was presented on February 22, 2007 against his present trust account. Respondent had the funds transferred to the present trust account once the mistake was recognized.

ODC acknowledges that no clients were harmed in either Matter I or Matter II and the funds were delivered to the appropriate parties.

LAW

Respondent admits that by his misconduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall not disburse funds from account containing funds of more than one client unless funds to be disbursed have been deposited in the account and have been collected). Further, respondent admits his misconduct violated the financial recordkeeping requirements of Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

In the Matter of Adrian Edward Cooper, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Herbert W. Hamilton, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Hamilton shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Hamilton may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Herbert W. Hamilton, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Herbert W. Hamilton, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Hamilton's office.

Mr. Hamilton's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina

November 13, 2007

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

---

O R D E R

By Order dated April 4, 2007, the Court amended Rules 413 and 502, SCACR, pursuant to a request from the Office of Disciplinary Counsel. Among other things, these amendments eliminated the subpanel process in disciplinary proceedings. However, several provisions within the rules continue to refer to the subpanel process or to Rule 26(c)(7), which was deleted by the amendments to Rule 413 and Rule 502.

Therefore, pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rules 413 and 502, South Carolina Appellate Court Rules, as set forth in the attachment to this Order. This order is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

November 15, 2007

RULE 5
DISCIPLINARY COUNSEL

. . .

(b) Powers and Duties. Disciplinary counsel shall have the authority and duty to:

> **(1)** receive and screen complaints, refer complaints to other agencies when appropriate, conduct preliminary investigations, recommend to an investigative panel of the Commission and upon authorization conduct full investigations, notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after full investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

. . .

RULE 14
TIME, SERVICE AND FILING

. . .

(b) Extending and Diminishing Time Prescribed by These Rules.

> **(1) By the Commission.** The chair of the Commission, the vice-chair of the Commission, or the chair of the hearing panel before which the matter is pending, may extend or shorten the period of time to perform any act required by Rules 19-26. Any request for an extension by an investigative panel or hearing panel shall be considered by the chair or vice-chair of the Commission. No extension over 30 days shall be granted except upon good cause shown. The grant or denial of an extension shall not be subject to an interlocutory appeal.

. . .

RULE 15
OATHS; SUBPOENA POWER

. . .

(e) Quashing Subpoenas. Any attack on the validity of a subpoena shall be heard and determined by the investigative or hearing panel before which the matter is pending. Any resulting order shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

. . .

RULE 25
DISCOVERY

(a) Exchange of Witness Lists. Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the lawyer. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request. The hearing panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing.

. . .

(g) Failure to Disclose. If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews,

or other evidence required to be disclosed or exchanged under this rule, the hearing panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely disclosed exculpatory material, the hearing panel may require the matter to be disclosed and grant a continuance, or take such other action as may be appropriate.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the hearing panel. Review of these decisions shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

RJDE, Rule 502, SCACR.

RULE 5. DISCIPLINARY COUNSEL

. . .

(b) Powers and Duties. Disciplinary counsel shall have the authority and duty to:

> **(1)** receive and screen complaints, refer complaints to other agencies when appropriate, conduct preliminary investigations, recommend to an investigative panel of the Commission and upon authorization conduct full investigations, notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after full investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

. . .

RULE 14. TIME, SERVICE AND FILING

. . .

(b) Extending and Diminishing Time Prescribed by These Rules.

> **(1) By the Commission**. The chair of the Commission, the vice-chair of the Commission, or the chair of the hearing panel before which the matter is pending, may extend or shorten the period of time to perform any act required by Rules 19-26. Any request for an extension by an investigative panel or hearing panel shall be considered by the chair or vice-chair of the Commission. No extension over 30 days shall be granted except upon good cause shown. The grant or denial of an extension shall not be subject to an interlocutory appeal.

. . .

RULE 15. OATHS; SUBPOENA POWER

. . .

(e) Quashing Subpoenas. Any attack on the validity of a subpoena shall be heard and determined by the investigative or hearing panel before which the matter is pending. Any resulting order shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

. . .

RULE 25. DISCOVERY

(a) Exchange of Witness Lists. Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange the names and addresses of all persons known to have knowledge of the relevant facts. Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the judge. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request. The hearing panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing.

. . .

g) Failure to Disclose. If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews, or other evidence required to be disclosed or exchanged under this rule, the hearing panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely

disclosed exculpatory material, the hearing panel may require the matter to be disclosed and grant a continuance, or take such other action as may be appropriate.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the hearing panel. Review of these decisions shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cecil Brazell and Jackie Brazell, Appellants,

v.

Audrey B. Windsor, Respondent.

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

Opinion No. 4309
Heard October 11, 2007 –Filed November 8, 2007

AFFIRMED

Brian Dumas, of Columbia, for Appellants.

J. Rutledge Young, Jr., Stephen L. Brown, and William Howard, Sr., all of Charleston, for Respondent.

STILWELL, J.: Cecil and Jackie Brazell appeal the order of the circuit court dismissing their request for the remedy of rescission. The order

was issued following a motion made pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. We affirm.[1]

FACTS

On October 20, 2004, the Brazells and Audrey Windsor entered into a contract for the purchase and sale of a home located at 8509 Oyster Factory Road, Edisto Island, South Carolina. The parties agreed that the closing date would be November 30, 2004. The Brazells had executed a HUD-1 Settlement Statement and deed conveying the property to Windsor in advance of the closing date. The total purchase price was $550,000, and after satisfying liens the Brazells were to receive $327,818.54 in net proceeds.

On December 3, 2004, Windsor or her agent notified the Brazells the reverse osmosis system on the property did not function.[2] On December 6, 2004, the deed was recorded and Windsor's closing attorney forwarded the Brazells a check for the net proceeds. Windsor withheld $2,000 from the check, noting in the memo section of the check that the amount reflects "seller's proceeds less $2,000 escrow for reverse osmosis system repair." Along with the net proceeds check, Windsor's attorney also forwarded an escrow agreement proposing how the parties would treat the $2,000. The Brazells refused to accept the check, refused to execute the escrow agreement, and demanded the transaction cease.

The Brazells filed this action alleging, inter alia, breach of contract and requesting rescission of the contract. Windsor moved to dismiss the remedy of rescission. The circuit court granted her motion, and the Brazells appeal.

---

[1] Windsor filed a motion to dismiss with this court arguing the appeal should be dismissed for lack of jurisdiction. After hearing argument from both parties, we deny the motion.

[2] A reverse osmosis system is used to improve the smell and taste of water in places where tap water is of poor quality.

STANDARD OF REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Id.; Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). In deciding whether the circuit court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Spence, at 116, 628 S.E.2d at 874 (2006). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. Id.; Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Spence, at 116-17, 628 S.E.2d at 874.

LAW/ANALYSIS

I. Assumption of Truth in the Pleadings

The Brazells argue the circuit court failed to consider the allegations in the complaint as truthful and therefore erred in granting Windsor's motion to dismiss the remedy of rescission at the 12(b)(6) stage. We disagree.

Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed. Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004) (citations omitted). "It is a general legal principle that a breach of contract warranting rescission 'must be so substantial and fundamental as to defeat the purpose of the contract.'" Rogers v. Salisbury Brick Corp., 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989) (citation omitted). See also Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). Furthermore, rescission should only be

granted when breaches defeat the object of the contracting parties and not for minor or casual breaches. Rogers, at 143-44, 382 S.E.2d at 917 (citing Davis v. Cordell, 237 S.C. 88, 115 S.E.2d 649 (1960) (applying this doctrine to real estate transactions)); Ellie, at 95, 594 S.E.2d at 494. As a remedy, rescission should return the contracting parties to the status quo ante. See Ellie, at 95, 594 S.E.2d at 494. Finally, courts should not grant rescission where the nonmoving party has substantially changed position in reliance on a contract. See King v. Oxford, 282 S.C. 307, 313-314, 318 S.E.2d 125, 129 (Ct. App. 1984).

Here, taking the facts as alleged in the complaint as true, the Brazells failed to state facts sufficient to justify resorting to the remedy of rescission. [3] Their alleged minor breach of $2,000 held in escrow pending repairs is not substantial or fundamental enough to defeat the purpose of a $550,000 real estate transaction.[4] Windsor withheld the $2,000 in lieu of requiring that the Brazells repair the reverse osmosis system. The $2,000 withheld amounted to .04% of the total contract cost. Furthermore, Windsor did not refuse to pay the $2,000, it was simply held in escrow. Due to the minor alleged breach, South Carolina law will not afford rescission as a remedy in this case.

Additionally, the circuit court bottomed its opinion on the difficulty that would be involved in returning the parties to the status quo ante. While this argument has substantial appeal, we need not address it as we have

---

[3] Nakell v. Liner Yankelevitz Sunshine & Regenstreif, LLP, 394 F.Supp.2d 762 (M.D.N.C. 2005), has a different result but applies the same analysis employed in this case. "[T]o justify rescission of a contract, the breach of the contract must be so material as in effect to defeat the very terms of the contract." Id. at 769. In Nakell, the court held the counterclaim for rescission should not have been dismissed because the court could not determine whether there was a material breach or whether the parties could be returned to their original position from the pleadings alone. Id. at 771.

[4] Although the complaint does not contain the overall purchase price of the property, the HUD-1 reveals that information.

already determined the claimed breach was not substantial enough in nature to warrant rescission.

II. Grounds not Stated in Initial Motion[5]

The Brazells further argue dismissal of the rescission remedy is improper because the order grants relief on grounds not stated in Windsor's 12(b)(6) motion. Windsor's initial motion to dismiss was premised upon the grounds that rescission is an equitable remedy that could not be sought in an action at law. Windsor then faxed a memorandum in support of motion to the Brazells on the day before the hearing raising the issues of material breach and return of the parties to the status quo ante.

The Brazells describe Windsor's actions as an "amendment by ambush." However, the Brazells failed to move for a continuance on the day of the hearing to avoid any perceived "ambush." Consequently, the court was denied the opportunity to rule on this issue, and it is not preserved for our review. See A & I, Inc. v. Gore, 366 S.C. 233, 243, 621 S.E.2d 383, 388 (Ct. App. 2005) (finding issue of last-minute presentation of magistrate's return not preserved where appellant failed to request a continuance and circuit court was therefore denied opportunity to rule); Mixson, Inc. v. Am. Loyalty Ins. Co., 349 S.C. 394, 401, 562 S.E.2d 659, 663 (Ct. App. 2002) (holding grant of summary judgment on same day as granting motion to compel not preserved for review where appellant failed to move for a continuance for discovery to be completed).

III. 12(b)(6) Motion Converted into Summary Judgment

Finally, the Brazells contend the 12(b)(6) motion was converted into a motion for summary judgment because the circuit court weighed the facts and considered the issue of material breach. We disagree.

[5] The analysis of issues involved in the first and second arguments on appeal are similar and are therefore combined herein.

Initially, we note the circuit court must consider the issue of material breach in order to determine whether to grant or deny Brazell's 12(b)(6) motion. This consideration alone does not convert Brazell's motion into a summary judgment motion. Rather, a 12(b)(6) motion is converted into a motion for summary judgment when the court goes outside the face of the complaint to rule on the motion. Here, there was no need for the circuit court to consider evidence outside the complaint and its attachments to determine no material breach was alleged. Furthermore, even if the circuit court looked outside the face of the complaint, the error would be harmless. See Higgins v. MUSC, 326 S.C. 592, 605, 486 S.E.2d 269, 275 (Ct. App. 1997) (indicating conversion of a 12(b)(6) motion into a summary judgment motion may be harmless error when, without reference to the matters outside of the plaintiff's complaint, dismissal can still be justified under Rule 12(b)(6)).

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Boyd Frazier, Appellant.

Appeal From Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 4310
Heard October 11, 2007 – Filed November 8, 2007

AFFIRMED IN PART AND REVERSED IN PART

Appellate Defender Katherine Hudgins, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

STILWELL, J.: John Boyd Frazier appeals his convictions for murder and armed robbery claiming the court erred in admitting certain

statements of his co-conspirator and in denying his motions for directed verdict on both charges. We affirm in part and reverse in part.

FACTS

Frazier was tried for the murder and armed robbery of William Brent Poole, the husband of Frazier's paramour, Renee Poole.[1] Brent was murdered while he and Renee walked along the shore at Myrtle Beach on the night of June 9, 1998.[2] Officer Scott Brown of the Myrtle Beach Police Department testified that while on beach patrol in his truck the night of the murder he was approached by Renee. Brown testified that Renee told him, "my husband has been shot." After briefly examining the scene and realizing Brent had in fact been shot, Brown escorted Renee back to his truck and radioed dispatch. As he did so, Renee "kept touching her chest and saying 'we were robbed.'" As he was talking to dispatch, Brown asked Renee to describe the killer. She told him the suspect was wearing all black clothes and a ski mask and had instructed them to lie face down on the beach

The trial judge had initially agreed to allow the testimony regarding Renee's statements at the scene over Frazier's objection that the statements were testimonial in nature, and Renee was not available for cross-examination. However, upon reconsideration the trial judge determined the testimony regarding all of Renee's statements except "my husband has been shot" should be stricken from the record. The trial judge then offered a curative instruction to the jury, and the trial proceeded.

The State called Donna and Mark Hobbes who testified that as they exited the Carolina Winds Motel to go for a walk on the beach the night of

---

[1] This is Frazier's second trial on these charges. The South Carolina Supreme Court reversed and remanded Frazier's original conviction because certain expert evidence was not admitted and certain unreliable, hearsay statements by a co-worker were admitted. State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (2004).

[2] The parties were all residents of Winston-Salem, North Carolina. Brent and Renee had come to Myrtle Beach to celebrate their wedding anniversary.

the murder, they noticed a man they later described as being "suspicious." Mark testified that the man stared at them, and he stared back until the man turned and moved quickly in the direction of the beach. Donna testified that she noticed the man because he was running and because he had on dark, heavy clothing that seemed inappropriate for the weather. As the Hobbeses walked toward the beach access point, which consisted of a short boardwalk and steps down to the strand, Donna saw the man again crouched behind the motel. The man then stood and looked straight at the couple so that both the Hobbeses were able to see his face. They testified the man then ran in the general direction of the beach but toward an area where there was heavy vegetation rather than the clear, sandy portion of the beach. The couple later, both in independent photographic lineups and in court, identified Frazier as the "suspicious" man. Both indicated they were confident in their identification.

Frazier's supervisor testified that the week prior to the murder, Frazier had requested June 8, 9, and 10 off from work. Frazier offered no alibi for the night of the murder other than telling officers he was home alone sick. Captain William Frontz testified that pursuant to a search warrant copies of a day planner were discovered at Frazier's home. The day planner contained a notation on June 9: "Renee and Brent." Other writing was above that notation but had been marked out. Bruce Wolford, a friend of Frazier, testified that Frazier hated Brent and the control he exercised over Renee by virtue of their sharing a young daughter. Wolford also testified that Renee and Frazier were together at Wolford's home during the time period before the murder when Renee and Frazier were allegedly no longer romantically involved. Wolford overheard the pair discussing the fact that Renee and Brent were planning a trip to the beach. Renee and Brent's neighbor, James Bollow, testified that a black Chevrolet Blazer, the vehicle he had seen Frazier in previously, had been at the Poole home during Brent's work hours and during the days leading up to the murder.

It was further shown that Frazier had previously owned a gun that could not be excluded as the murder weapon.[3] Frazier could not account for the whereabouts of the gun, indicating he had sold it at a gun show. The State also showed that Frazier had borrowed a vehicle from a friend the day before the murder and returned it the day after the murder. Frazier told that same friend upon returning the vehicle that Brent had been "shot and killed" even though Frazier's contact with police to that point had not involved any discussion of Brent having been shot.

Finally, the State presented the testimony of Howard Sirles who testified that he discovered Brent's soaking wet wallet on July 5 in his yard located across the road from the beach area that contained the murder scene.[4] Officer David Blubaugh testified the wallet contained Brent's driver's license, $9 cash, two ATM cards, photographs, and other miscellaneous items.

LAW/ANALYSIS

I. Testimony of Officer Brown

Frazier contends the trial judge erred in admitting, through the testimony of Officer Brown, Renee's statement "my husband has been shot." We disagree. Before delving into a lengthy Crawford[5] analysis, it becomes apparent that the propriety of the trial judge's ruling on this issue is not preserved for our review. The trial judge initially allowed testimony regarding Renee's statements to Officer Brown immediately after the murder finding them to be non-testimonial. After reconsidering the issue, the trial judge informed the jury that all statements other than "my husband has been shot" would be stricken from the record and could not be considered as

---

[3] The murder weapon was never discovered, but through ballistics analysis of the fired bullets the State's forensic expert could determine that the murder weapon was likely one of a list of 38 guns.

[4] Sirles' prior deposition testimony was read into the record because he was unable to attend the trial due to health problems.

[5] Crawford v. Washington, 541 U.S. 36 (2004).

evidence. The attorneys and the trial judge agreed this was an acceptable way for this matter to be dealt with, and Frazier offered no objection even after the judge read the verbatim curative instruction she planned to give the jury. In order to preserve such an issue for our review where a curative instruction was offered, an appellant must make a contemporaneous objection to the sufficiency of the instruction or make a motion for mistrial. State v. Walker, 366 S.C. 643, 658-59, 623 S.E.2d 122, 130 (Ct. App. 2005). In this instance, the curative instruction specifically allowed for the inclusion of the statement "my husband has been shot." Not having objected to that portion of the curative instruction, nor having moved for a mistrial, Frazier cannot now claim error in the admission of the statement.

II. Denial of Directed Verdict Motion—Murder

When reviewing the denial of a directed verdict, this court must view the evidence and all reasonable inferences in the light most favorable to the state. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. Id. at 292-93, 625 S.E.2d at 648. "When the state relies exclusively on circumstantial evidence and a motion for directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight." State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). The court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. Id. "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." Id. (citations omitted).

In this instance, the State built its murder case out of numerous pieces of circumstantial evidence coupled with the identification of the Hobbeses. Testimony regarding Frazier's ongoing, adulterous relationship with Renee and hatred of Brent provided evidence of motive. The prosecution presented evidence that the relationship continued up until the time of Brent's murder, even though Renee and Frazier were supposedly no longer a couple.

Testimony about Frazier asking for time off from work and his lack of a corroborated alibi on the night in question was evidence of opportunity. In addition, there was testimony that Renee and Frazier discussed the beach trip and that the date of the trip was indicated on Frazier's calendar with the notation, "Renee and Brent." Furthermore, a friend of Frazier's testified that Frazier borrowed a car for the three-day period around the time of the murder. Upon returning the car to his friend, Frazier stated that Brent had been shot. The source of his knowledge of that information is not revealed in the record, but the record shows he had not been informed by police that Brent had been shot.

The State offered evidence that Frazier had the means to commit the murder in that he owned a gun that could have been the murder weapon. Finally, there is the Hobbeses' unwavering testimony placing Frazier at Renee and Brent's hotel and close to the murder scene at the relevant time. This is in contrast to Frazier's claim to police that he had not been to Myrtle Beach in four years. Taken together, these things amount to more than a mere suspicion Frazier committed the crime. It was within the jury's province to determine if the evidence established proof of guilt beyond a reasonable doubt, and they concluded that it did. We conclude the trial judge did not err in denying Frazier's motion for directed verdict.

III. Denial of Directed Verdict Motion—Armed Robbery

"Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another in his presence by violence or by putting such person in fear." State v. Parker, 351 S.C. 567, 570, 571 S.E.2d 288, 289 (2002) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). Armed robbery occurs when a person commits a robbery while armed with a deadly weapon, while using a representation of a deadly weapon, or while using an object the victim reasonably believed was a deadly weapon. S.C. Code Ann. § 16-11-330(A) (Rev. 2003).

We have reviewed the record for evidence to support the trial court's denial of Frazier's directed verdict motion on the armed robbery charge. While there admittedly is evidence that could support a robbery charge, we

do not believe the evidence rises above the level of creating a mere suspicion that Frazier committed an armed robbery. Poole's wallet was discovered in Mr. Sirles' yard almost a month after the murder, with no fingerprints or any evidence to connect it to Frazier. The contents of the wallet appeared to be intact. A wedding ring was found in the sand near Brent's body, but there is no testimony in the record to identify that ring as belonging to the deceased.[6]

Had Renee's statements to Officer Brown indicating a robbery had been committed been allowed, we would be presented with an altogether different analysis. However, absent those statements, or any substantial circumstantial evidence connecting Frazier to an armed robbery of Brent Poole, we are left to merely speculate how the wallet found its way to Mr. Sirles' yard. The meager facts and circumstances the jury was left to rely upon do no more than create a mere suspicion of guilt. A directed verdict motion should be granted when the evidence presented merely raises a suspicion of guilt. Therefore, the trial court's denial of Frazier's motion for a directed verdict on the charge of armed robbery was error.

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

AFFIRMED IN PART AND REVERSED IN PART.

SHORT and WILLIAMS, JJ., concur.

[6] In the State's closing argument the solicitor characterizes the wedding ring as belonging to Brent, and there is no objection from Frazier. We cannot, however, ascertain in the record any direct testimony identifying the ring as belonging to Brent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Green Tree Servicing, LLC as successor in interest to Green Tree Financial Servicing Corp., Respondent,

v.

Tom Adams, Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4311
Submitted October 1, 2007 – Filed November 20, 2007

AFFIRMED

Tobias G. Ward, Jr. and J. Derrick Jackson, both of Columbia, for Appellant.

David Randolph Whitt, of Columbia, for Respondent.

SHORT, J.: Green Tree Servicing, LLC (Green Tree) filed this action against Tom Adams, seeking to clear title on property purchased by Green Tree at a foreclosure sale. The circuit court declared the property free and clear of Adams' lien. Adams appeals. We affirm.[1]

FACTS

On May 26, 1999, Kenny Claxton executed a note from Green Tree for $68,400. A mortgage was recorded in the Register of Deeds office on June 14, 1999, securing the note. Thereafter, on August 26, 2004, Adams obtained a judgment against Claxton in the amount of $199,999.98 and duly recorded and indexed the judgment on September 4, 2004.[2]

Claxton defaulted on the Green Tree note, and on October 26, 2004, Green Tree commenced an action for foreclosure. Green Tree did not serve Adams or name him as a party to the action. On January 18, 2005, a hearing was held before the master-in-equity. Green Tree waived its right to a deficiency judgment. Green Tree purchased the property at public auction for $58,583. The amount of Green Tree's debt was $80,904.44. The master entered a report and confirmation of the sale on February 28, 2005.

Green Tree discovered Adams' judgment lien in June of 2005 and filed a "Rule to Show Cause and Petition ancillary proceeding" to add Adams as a party to the foreclosure action. On December 19, 2005, the master entered an order stating he no longer had subject matter jurisdiction to add Adams as a party to the case.

Green Tree then filed this action to clear title in circuit court. The court denied Adams' motion to dismiss and Adams counterclaimed seeking to foreclose his judgment lien. Adams stipulated he would have been unable and unwilling to bid at the foreclosure sale and further stipulated the value of the property was less than Green Tree's debt. The circuit court bound Adams

---

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

[2] Adams' mortgage was recorded again on December 7, 2004.

to the previous foreclosure proceedings and cleared Green Tree's property from Adams' judgment lien. Adams appeals.

STANDARD OF REVIEW

"An action to remove a cloud on and quiet title to land is one in equity." Bryan v. Freeman, 253 S.C. 50, 52, 168 S.E.2d 793, 793 (1969). In an action in equity, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005).

LAW/ANALYSIS

I. Binding a Non-Party to a Foreclosure Action Thereby Extinguishing a Lien

Adams first argues the circuit court cannot bind him to a foreclosure action to which he was not a party, thereby extinguishing his lien. We agree in part but find no reversible error.

A court may not act against a party without personal jurisdiction. BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Moreover, a court should not render a judgment affecting the rights of a party without proper notice. Ex Parte South Carolina Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002). Accordingly, the circuit court cannot bind Adams to the prior judgment.

However, the circuit court properly exercised personal jurisdiction over Adams in the subsequent action to clear title. Green Tree served Adams in this action and Adams fully participated by defending and counterclaiming for relief.

Likewise, the circuit court properly concluded Adams has no recourse against Green Tree or the property. First, Adams declined to exercise any possible right of redemption by stipulating that the value of the property was less than the amount owed to Green Tree and that he had neither the ability nor the willingness to buy the property. See 27 S.C. Jurisprudence § 109, at

247-48 (1996) ("An omitted junior lienholder retains his right of redemption, giving him the right to tender to the buyer at the senior foreclosure sale the balance which was owed on the senior lien at the time of the foreclosure."). Id. at 248 ("Redemption requires payment of the entire debt that has accrued upon the senior mortgage. . . regardless of whether the property brought less at the foreclosure sale."). Therefore, Green Tree's failure to serve Adams or make him a party to the foreclosure action did not prejudice Adams. Although Adams cannot enforce his lien against this property, his judgment is not extinguished but is still of record. Adams simply must seek relief on his judgment from another source.

II. Union National Bank v. Cook

Adams next argues the circuit court erred in relying on Union National Bank of Columbia v. Cook, 110 S.C. 99, 96 S.E. 484 (1918). We disagree.

The circuit court quoted the following language from Union National Bank:

> But it should appear to the Court that the junior incumbrancer has a substantial right in the land to be protected and his lien enforced for some practical purpose, and not merely the prosecution of a fictitious cause of action. In other words, it must appear to the court prima facie that the land is worth more than prior incumbrances and that in probability upon a resale of the land the proceeds would reach the claim of the junior incumbrancer.

Id. at 115, 96 S.E. at 488. The circuit court cited this language to emphasize that the debt Claxton owed to Green Tree substantially exceeded the foreclosed property's value such that any resale of the property would not benefit Adams as a junior lien holder. Like the lienholder in Union National Bank, Adams is unable to show how his absence from the foreclosure action prejudiced him.

III. Statutory Language

Adams finally argues his lien can only be extinguished, pursuant to section 15-39-880 of the South Carolina Code, by naming him as a party in the foreclosure action. We disagree.

Section 15-39-880 provides:

> No lien created by operation of law . . . shall constitute a lien or attach or reattach as a lien on real property of the lien debtor or real property in which the lien debtor has an interest after a public sale of such real property at any execution or judicial sale in any action or special proceeding to which the lien creditor is duly made a party as provided by law. But this section and § 15-39-890 shall not be construed to affect any prior mortgage lien not foreclosed in any such action or special proceeding and shall not be construed to require the foreclosure of any such prior mortgage lien . . . .

S.C. Code Ann. § 15-39-880 (2005). Adams again maintains his lien was improperly extinguished in the foreclosure action. As explained above, the foreclosure action did not improperly extinguish Adams' lien. Rather, this proceeding removed the lien and cleared title to that property. Adams' judgment remains viable and on the judgment roll.

Finally, our supreme court addressed the necessity of making a junior lien holder a party under similar facts in Peeples v. Snyder, stating:

> The first mortgagee had the legal right to foreclose his mortgage without making the second mortgagee a party to the action. While the second mortgagee,

> under the circumstances, was a proper party, she was not a necessary party; and however expedient it may have been, and was, to have made her a party, as this case has demonstrated, in order that all questions might be determined in the one action, the omission did not affect the validity of the foreclosure proceedings; it only affected the effectiveness of it in leaving open, undetermined, the rights of the second mortgagee.

141 S.C. 152, 156, 139 S.E. 405, 406 (1927) (emphasis in original). As in Peeples, the omission of Adams in the foreclosure proceedings did not invalidate the sale. Rather, it merely left Adams' rights as to the Green Tree property undetermined, which have now been addressed in this case. As previously noted, his judgment against Claxton remains viable.

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

STILWELL and WILLIAMS JJ., concur.