The Supreme Court of South Carolina

In the Matter of Michael Bosworth, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 31, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 11, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 27, 2012

The Supreme Court of South Carolina

In the Matter of Anna-Liisa Nixon, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 2005, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 4, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Anna-Liisa Nixon shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

J.

Columbia, South Carolina

January 27, 2012

The Supreme Court of South Carolina

In the Matter of Richard Kennedy, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 1, 1964, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Chief Justice Jean Toal, dated December 16, 2011, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 27, 2012

The Supreme Court of South Carolina

In the Matter of Robert Eric Petersen, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 1984, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 24, 2012, Petitioner returned his Certificate of Admission and submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

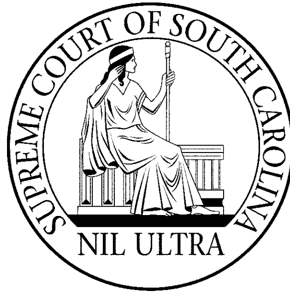
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 27, 2012



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
February 1, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Alexander Michau, Employee,
Claimant, Appellant,

v.

Georgetown County, Self-
Insured Employer, through,
South Carolina Counties
Workers Compensation Trust,
Defendants, Respondents.

Workers Compensation
Richland County
Trial Court Case No. 2008-WC-16-00749

ORDER

The petition for a rehearing is denied. However, the opinion filed on November 21, 2011, is hereby withdrawn, and the attached opinion is substituted for that opinion.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 1, 2012

cc: Raymond C. Fischer, Esquire
William Stuart Duncan, Esquire
Kirsten L. Barr, Esquire
Jamie C. Guerrero, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alexander Michau, Employee, Claimant, Appellant,

v.

Georgetown County, Self-Insured Employer, through, South Carolina Counties Workers Compensation Trust, Defendants, Respondents.

Appeal from the South Carolina
Workers Compensation Commission

Opinion No. 27064
Heard October 6, 2011 – Re-filed February 1, 2012

REVERSED AND REMANDED

Raymond C. Fischer and William Stuart Duncan, both of Georgetown, for Appellant.

Kirsten L. Barr and Jamie C. Guerrero, both of Mt. Pleasant, for Respondents.

CHIEF JUSTICE TOAL: Appellant, Alexander Michau (Employee), appeals a ruling by the Appellate Panel of the South Carolina Workers' Compensation Commission (Commission) denying Employee's claim for repetitive trauma injuries to his shoulders. Specifically, Employee challenges the Commission's interpretation and application of section 42-1-172 of the South Carolina Code. Because the Commission erred in admitting a medical opinion that was not stated to a reasonable degree of medical certainty, as required under section 42-1-172, we reverse and remand.

FACTS/ PROCEDURAL HISTORY

Employee alleges he sustained a compensable repetitive trauma injury to both of his shoulders on September 29, 2008, and reported it to his supervisor that same day. Prior to this date, Employee did not report any work-related problems with his arms to Georgetown County (Employer) although he sought outside treatment. Employee seeks reimbursement for medical expenses and an award of temporary total disability benefits.

Employee is in his sixties and has twice worked for Employer. When he returned to work for Employer in 1988, he was initially employed as a truck driver, but eventually switched to operating a motor grader, a device used to grade and smooth dirt and gravel on roads. Employee usually worked ten hours per day, spending about eight hours actually operating the motor grader.

Employee testified he operated two types of motor graders during his tenure with Employer. The original motor graders had manual levers while newer models were equipped with hydraulics. After Employer purchased the newer model, Employee operated it for approximately three years without any incident, admitting that "it was a good machine."[1] Employee did not file a workers' compensation claim until he began operating the new, non-vibrating machine, but he testified that the old machine did vibrate.

---

[1] Employee elaborated further, "I mean, it was good. I mean, I had a steering wheel that, that I pulled to me, and I had my levers on each side. It was right there. I mean, it was just—it was just easy as—almost as eating ice cream."

In 1997, Employee first sought medical treatment with Dr. Benjamin Lawless for problems relating to his arms and shoulders. Dr. Lawless's medical reports indicate that Employee complained of arthritis-related symptoms involving pain and swelling in his hands and redness in his joints.[2] In August 2005, Dr. Lawless referred Employee for a total body bone scan, which also found evidence of rheumatoid arthritis. Consequently, he referred Employee to a rheumatologist, Dr. Mitch Twinning, who examined Employee on May 24, 2006, and diagnosed him with rheumatoid arthritis. Employee continued treatment with Dr. Lawless for this disease until June 2006.

On December 1, 2006, Dr. Michael Bohan, an orthopaedic specialist, began treating Employee and reported that x-ray data of the left shoulder "show[ed] rather significant degenerative arthritis of the glenohumeral joint as well as the AC joint." Employee eventually underwent surgery on his left shoulder, and on November 21, 2008, Dr. Bohan issued a letter to Employee's attorney stating:

> I do believe *within a reasonable degree of medical certainty* that these repetitive work activities over the years of his shoulders [sic] have resulted in his severe osteoarthritis of both shoulders.

(emphasis added).

Seeking independent verification of Employee's claim, Employer engaged Dr. Chris Tountas, a specialist in the treatment of arthritis, to perform a medical evaluation of Employee. Dr. Tountas opined:

> Based on the history, physical examination, objective findings, and review of available records, it is my *opinion* that [Employee]

---

[2] In June 2001, Employee complained of arthritic symptoms in his arms, and Dr. Lawless's medical report indicates he suspected Employee suffered from carpal tunnel syndrome. In July and November 2001, Employee followed up with Dr. Lawless, again complaining of pain in his arms and hands.

> has had a long history of arthritis involving multiple joints with diagnosis of rheumatoid arthritis . . . . There is no indication from the job description or his employment that would relate any of his shoulder problems to his work driving a road grader. In my opinion this is a natural progression of a preexisting condition. The preexisting condition in my opinion would ultimately result in a need for treatment and the recent surgery.

(emphasis added).

The Commission denied Employee's claim on the grounds that "the greater weight of the medical evidence reflects [Employee's] upper extremity and shoulder problems are related to pre-existing osteoarthritis and/or rheumatoid arthritis and not caused or aggravated by his employment with Georgetown County." In reaching this conclusion, the Commission considered all of the medical evidence including Dr. Tountas's report. Employee disputes the admissibility of Dr. Tountas's report under South Carolina Code section 42-1-172 because it was not stated "to a reasonable degree of medical certainty." Employee argues that without this evidence, the remaining competent evidence would support Employee's claim of sustaining a compensable repetitive trauma injury.

ISSUES

I. Whether section 42-1-172(C) governs the admissibility of evidence in a workers' compensation claim.

II. Whether the Commission properly construed and applied section 42-1-172 in admitting Dr. Tountas's statement.

STANDARD OF REVIEW

The South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2010); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306

(1981). Under the APA, an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5).

ANALYSIS

I. Admissibility of Evidence under section 42-1-172

Employer contends that South Carolina Code section 42-1-172 does not govern the admissibility of evidence in a workers' compensation claim involving a repetitive trauma injury. S.C. Code Ann. § 42-1-172 (Supp. 2010). We disagree.

Specifically, Employer argues that admissibility of evidence in this case is governed *solely* by section 1-23-330, which provides that "in contested cases . . . [i]rrelevant, immaterial or unduly repetitious evidence shall be excluded." S.C. Code Ann. § 1-23-330 (2005). However, Employer cites no supporting authority for this interpretation.

In our view, section 1-23-330 establishes a minimum standard that applies generally, but not exclusively. On the other hand, section 42-1-172(C) expressly creates an additional heightened standard for repetitive trauma injury cases. Specifically, it requires "medical evidence," in the form of "expert opinion or testimony [to be] stated to a reasonable degree of medical certainty." S.C. Code Ann. § 42-1-172(C). Indeed, section 42-1-172(C) commands that the "[c]ompensability of a repetitive trauma injury must be determined *only* under the provisions of this statute." *Id.* (emphasis added); *see also Murphy v. Corning*, 393 S.C. 77, 84, 710 S.E.2d 454, 458 (Ct. App. 2011) ("[T]he compensability of a repetitive trauma injury must be determined by the Commission under the provisions of [section] 42-1-172 . . . . [and] the Commission erred by failing to address [section] 42-1-172.").

Thus, in repetitive trauma injury cases such as this, section 42-1-172 governs the admissibility of medical evidence.

II. Commission's Construction and Application of section 42-1-172

Employee argues that the Commission incorrectly construed section 42-1-172 by admitting Dr. Tountas's medical evidence, as it was not stated "to a reasonable degree of medical certainty."[3] We agree.

Section 42-1-172 provides:

> An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence . . . . As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.

S.C. Code Ann. § 42-1-172.

The plain reading of the statute requires that "opinion or testimony" must be "stated to a reasonable degree of medical certainty." *Id.* In contrast, "documents, records, or other material" is not similarly modified. *Id.* As this Court has recognized, the "use of the word 'or' in a statute 'is a disjunctive particle that marks an alternative.'" *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009). Here, the legislature intentionally used "or" after a series of commas to expand the definition of "medical evidence" beyond "opinion or testimony." S.C. Code

[3] Specifically, the Commission concluded:

> Subsection (C) merely defines what medical evidence is necessary to establish causation of a repetitive trauma claim. This provision of the Act could not have been intended to require every medical report submitted by the parties be stated within a reasonable degree of medical certainty.

Ann. § 42-1-172. This Court has said that words should be given "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (citation omitted). Because the statute does not require that "documents, records, or other material" be "stated to a reasonable degree of medical certainty," we will not expand its plain meaning or interpolate this requirement.[4] *Id.*

Consequently, we must address whether Dr. Tountas's statement constitutes an "opinion or testimony" that must be "stated to a reasonable degree of medical certainty." S.C. Code Ann. § 42-1-172. Employer contends that Dr. Tountas's letter represents "documents, records, or other material" that need not be stated to a reasonable degree of medical certainty. The Commission agreed with Employer and pointed out that a contrary interpretation and application of the statute would require this Court to ignore eleven years of Employee's prior medical history and reports merely because they do not contain the magic phrase "within a reasonable degree of medical certainty." We note that Employee does not challenge the other admitted medical evidence, and therefore the only issue we decide here is the admissibility of Dr. Tountas's statement.

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[4] Legislative history also supports this interpretation of section 42-1-172. Had the General Assembly intended to require "documents, records, or other material" be "stated to a reasonable degree of medical certainty," it would have left the April 4, 2007 amended and adopted Senate version of this section intact. This version unambiguously provides:

> As used in this title, "medical evidence" means expert opinion, expert testimony, documents, or other material that is offered or stated to a reasonable degree of medical certainty by a licensed health care provider.

S. 332, reprinted in 4 Senate Journal, South Carolina Regular Session, 2007, at 1662. However, the legislature did not adopt this language.

While we recognize that medical "records" will often also contain physicians' opinions, in this instance, Dr. Tountas was not Employee's treating physician, and Employer specially sought out Dr. Tountas to evaluate Employee and issue a medical "opinion" to decide the compensability of Employee's claim. Under these facts, Dr. Tountas's letter does not constitute "documents, records, or other material," but is an "opinion or testimony" that must be "stated to a reasonable degree of medical certainty." *Id.* § 42-1-172. We stress, however, that our opinion is a narrow one limited to medical evidence given by expert opinion or testimony as provided for in section 42-1-172 and the facts of this case. *See id.* ("*As used in this section*, 'medical evidence' means . . . .") (emphasis added).

In the alternative, it has also been argued that if Dr. Tountas's statement constitutes an "opinion or testimony," the requirement of section 42-1-172 applies only to claimants and not defendants. The statutory language makes no such distinction, so we decline to adopt this forced construction. *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 (finding words should be given "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.") (citation omitted).

Thus, we reverse the Commission's decision to admit Dr. Tountas's medical opinion.

CONCLUSION

For the foregoing reasons, we reverse and remand the case to the Commission to decide whether the remaining competent evidence supports Employee's claim of sustaining a compensable, repetitive trauma injury.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John Barry Kern, Respondent.

Opinion No. 27088
Submitted December 30, 2011 – Filed February 1, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Fleet Freeman, of Law Offices of Fleet Freeman, LLC, of Mount Pleasant, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed ninety (90) days. He requests that any suspension be imposed retroactively to the date of his interim suspension, August 8, 2011. In the Matter of Kern, 393 S.C. 636, 714 S.E.2d 288 (2011). Respondent further agrees to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of imposition of discipline and to complete the Legal Ethics and Practice Program Trust Account School within twelve (12) months

of his reinstatement. We accept the Agreement and definitely suspend respondent from the practice of law in this state for ninety (90) days, retroactive to the date of his interim suspension. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the date of this order and shall complete the Legal Ethics and Practice Program Trust Account School within twelve (12) months of the date of his reinstatement. The facts, as set forth in the Agreement, are as follows.

FACTS

By letter dated April 27, 2011, ODC notified respondent of its investigation and requested a written response within fifteen days. Respondent contacted ODC and requested a thirty day extension. The extension was granted.

ODC received no written response. On June 21, 2011, ODC sent respondent a letter reminding him of its investigation and his duty to response pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). The letter was sent via certified mail and ODC received a return receipt indicating the item had been delivered.

When respondent did not respond to the June 21, 2011, letter, ODC served respondent with a Notice to Appear dated July 13, 2011, via certified mail. Respondent failed to appear on August 3, 2011, as required by the Notice to Appear.

Based on respondent's failure to provide a written response to the investigation and to appear as required, ODC filed a Petition for Interim Suspension. The Court suspended respondent on August 8, 2011. In the Matter of Kern, supra.

The underlying complainant against respondent involved an allegation that unearned legal fees had not been retained in a trust account until the fees had been earned. Specifically, respondent was retained by a client in July 2008 and was paid a $20,000 retainer which

respondent was to deposit in his trust account. Instead of depositing the retainer in his trust account, respondent deposited the retainer in his operating account.

After discovering the retainer had been deposited in his operating account rather than his trust account, respondent did not correct the error. Respondent admits he knowingly allowed the commingling of trust account funds with his own personal funds.

Respondent also admits he failed to submit a statement to his client indicating how much of the retainer had been earned. Eventually, the client filed a fee dispute with the Resolution of Fee Disputes Board. Respondent has now repaid the client in full.

During the investigation, ODC examined respondent's trust account records. No evidence of misappropriation was discovered.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(a) (lawyer shall hold property of client in lawyer’s possession in connection with a representation separate from the lawyer’s own property); Rule 1.15(c) (lawyer shall deposit into client trust account unearned legal fees that have been paid in advance to be withdrawn by the lawyer only as fees are earned); and Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority). In addition, respondent admits he did not comply with the provisions of Rule 417, SCACR. Respondent further admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the

courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for ninety (90) days, retroactive to the date of his interim suspension. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order and shall complete the Legal Ethics and Practice Program Trust Account School within twelve (12) months of the date of his reinstatement. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jennifer Elizabeth Meehan, Respondent.

Opinion No. 27089
Submitted January 17, 2012 – Filed February 1, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Jennifer Elizabeth Meehan, of Sandy Springs, pro se.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR. The facts are set forth below.

Respondent is licensed to practice law in Tennessee and South Carolina. On September 23, 2011, the Supreme Court of Tennessee publicly censured respondent. The Board of Professional Responsibility (the Board) of the Supreme Court of Tennessee specified respondent submitted a false resume to a potential employer and made false statements to disciplinary counsel for the Board.

Respondent reported the public censure to the Office of Disciplinary Counsel (ODC) as required by Rule 29(a), RLDE. ODC submitted a certified copy of the Supreme Court of Tennessee's public censure to the Clerk. In accordance with Rule 29(b), RLDE, the Clerk provided ODC and respondent with thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline in this state was not warranted. ODC filed a response stating it knew of no reason why identical discipline was unwarranted. Respondent did not respond.

After thorough review of the record, we hereby publicly reprimand respondent for her misconduct. See Rule 29(d), RLDE.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dannitte Mays Dickey,

Respondent.

Opinion No. 27090
Submitted December 30, 2011 – Filed February 1, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Bogan Law Firm, of Columbia, 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 the imposition of a letter of caution, admonition, or public reprimand. In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School and Advertising School within six (6) months of the date of the order imposing discipline. We accept the agreement, issue a public reprimand, and order respondent to complete the Legal Ethics and Practice Program Ethics School and Advertising School within six (6) months of the date of this order. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent graduated from law school in 2008. He was admitted to the Bar in May 2010 and completed his mandatory trial experiences in July 2010.

Upon admission, respondent opened a solo practice, handling primarily domestic and criminal matters. Between July 2010 and July 2011, respondent consulted with 93 potential clients. He opened 79 client files and resolved 25 cases by settlement, guilty plea, or completion of non-litigation legal work (i.e., drafting a deed). Representation of 15 of the opened files ended without resolution of the clients' legal matters. As of July 2010, respondent had never handled any matter involving contested litigation to jury verdict.

In August 2010, respondent began using a law firm website at www.divorcelawyercolumbia.com. In December 2010, respondent added a website at www.dmd-law.net to his law firm marketing. Respondent began using these websites without adequate review of the relevant provisions of the South Carolina Rules of Professional Conduct.

The websites contained the following rule violations:

1. material misrepresentations of fact and omissions of facts necessary to make the statements considered as a whole not materially misleading by mischaracterizing respondent's legal skills and prior successes; falsely stating he handled matters in federal court; falsely stating he graduated from law school in 2005; and, listing approximately 50 practice areas in which he had little or no experience;

2. statements likely to create unjustified expectations about the results respondent could achieve;

3. statements comparing respondent's services with other lawyers' services in ways which could not be factually substantiated; and

4. descriptions and characterizations of the quality of respondent's services.

In addition, respondent set up internet profiles on various online directories and professional marketing sites, including www.lawyers.com, www.lawguru.com, and www.linkedin.com. Respondent relied on company representatives who were lawyers and non-attorney web designers who assured him that the advertisements would comply with respondent's ethical requirements. Respondent did not review the applicable provisions of the South Carolina Rules of Professional Conduct prior to posting the internet profiles. As a result, respondent's internet profiles contained the following:

1. material misrepresentations of fact by overstating and exaggerating respondent's reputation, skill, experience, and past results;

2. a form of the word "specialist" even though respondent is not certified by this Court as a specialist;

3. statements likely to create unjustified expectations about the results respondent could achieve; and

4. descriptions and characterizations of the quality of respondent's services.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, specifically, Rule 7.1(a) (lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services; a communication violates this rule if it contains a material

misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading); Rule 7.1(b) (lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services; a communication violates this rule if it is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law); Rule 7.1(c) (lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services; a communication violates this rule if it compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated); Rule 7.2(f) (lawyer shall not make statements in advertisements or written communications which describe or characterize the quality of the lawyer's services);[1] and Rule 7.4(b) (lawyer who is not certified as a specialist shall not use any form of the word "specialist" in any advertisement or statement). 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. Respondent shall complete the Legal Ethics and Practice Program Ethics School and Advertising School within six (6) months of the date of this order.

[1] By order dated August 22, 2011, the Court deleted the prohibition on describing or characterizing the quality of a lawyer's services from the Rules of Professional Conduct.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Wallace A. Mullinax, Jr.,

Respondent.

Opinion No. 27091
Submitted December 30, 2011 – Filed February 1, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Keith M. Babcock, of Lewis Babcock & Griffin, LLP, of Columbia, 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 the imposition of either an admonition or public reprimand. In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School within one (1) year of the date of the order imposing discipline. We accept the agreement, issue a public reprimand, and order respondent to complete the Legal Ethics and Practice Program Ethics School within one (1) year of the date of this order. The facts, as set forth in the agreement, are as follows.

FACTS

In January 2011, Complainant retained respondent to handle a domestic matter. At the Complainant's direction, respondent filed a separate maintenance action seeking, among other things, possession of the residence, alimony, joint custody of the children, child support, and ancillary relief. After unsuccessful early settlement negotiations, respondent filed an Amended and Supplemental Summons and Notice and an Amended and Supplemental Complaint on February 25, 2011. In the complaint, a request was made for divorce on the statutory ground of habitual use of intoxicants by the Complainant's husband.

Respondent admits that he and the Complainant had sexual relations during the course of his representation of Complainant in the domestic matter. Specifically, respondent admits to having sexual relations with Complainant at his office on April 17, 2011, and at his residence on April 20, 2011.

On or about May 4, 2011, respondent received a telephone call from opposing counsel advising that opposing counsel had a report from a private investigator which indicated "inclination" and "opportunity" on the part of Complainant with respondent and also with another individual. On May 4, 2011, after the conversation with opposing counsel, respondent contacted Complainant, told her of the conversation, and advised she would need to obtain new counsel. After receiving the investigator's report, respondent again advised Complainant to obtain a new lawyer and prepared an Order of Substitution of Counsel for Complainant.

On or about May 11, 2011, Complainant picked up her file from respondent's office. Complainant was provided with the order substituting counsel, along with a check from his law firm reimbursing Complainant for all the fees paid to respondent's office.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.8(m) (lawyer shall not have sexual relations with a client when the client is in a vulnerable condition or is otherwise subject to the control or undue influence of the lawyer, when such relations could have a harmful or prejudicial effect upon the interests of the client, or when sexual relations might adversely affect the lawyer's representation of the client) and Rule 8.4(e) (it is misconduct for lawyer to engage in conduct prejudicial to the administration of justice). 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) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We 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. Respondent shall complete the Legal Ethics and Practice Program Ethics School within one (1) year of the date of this order.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William Barry Chisholm, Respondent,

v.

Susan Elaine Chisholm, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
R. Kinard Johnson, Jr., Family Court Judge

Opinion No. 27092
Submitted November 16, 2011 – Filed February 1, 2012

REVERSED

Kenneth C. Porter, Porter & Rosenfeld, of Greenville, for Petitioner.

William Barry Chisholm, pro se, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Susan Elaine Chisholm (Wife) appeals the court of appeals' reversal of the family court's grant of attorney's fees. Wife argues that the court of appeals incorrectly held the family court erred by

solely considering beneficial results in determining the award because the court of appeals had remanded that issue for this very reason. Moreover, Wife contends that the record contains sufficient evidence to support the family court's award. We agree and reverse.

Facts/Procedural Background

Wife and William Barry Chisholm (Husband) were married in 1979 and have two children, Son and Daughter. Husband filed for divorce in 2001 on the ground of adultery, and in 2003 the family court granted a no-fault divorce based on one year's continuous separation. Pursuant to the court's order, Husband was required to pay one hundred percent of Son's private school tuition for his junior and senior year, was granted visitation with Son, and was required to pay child support. The court granted Wife custody of Son and awarded her roughly 67% of her attorney's fees.

Husband and Wife filed cross appeals, and the court of appeals affirmed in part, reversed in part, and remanded. *Chisholm v. Chisholm*, No. 2005-UP-067 (S.C. Ct. App. filed Jan. 25, 2005) [hereinafter *Chisholm I*]. The court of appeals, *inter alia*, awarded more visitation to Husband, directed the family court to equitably determine the amount each party should pay for Son's final two years of high school, and remanded the issue of attorney's fees given the change in disposition. *Id.* On remand, the family court chose not to alter the private school expense allocation and reduced the amount Husband had to pay in attorney's fees from $13,000 to $10,500 "[b]ecause [Husband] achieved beneficial results from the appeal." Husband appealed, and the court of appeals reversed the entire award of attorney's fees, holding that the family court erred by relying solely on the beneficial results obtained in determining whether to grant attorney's fees. *Chisholm v. Chisholm*, No. 2010-UP-140 (S.C. Ct. App. filed Feb. 22, 2010) [hereinafter *Chisholm II*].[1] This appeal followed.

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[1] *Chisholm II*, also reversed the family court's finding that Husband should be 100% responsible for Son's junior and senior year and private school. Wife appealed this finding as well as the court of appeals' failure to dismiss the

Issue

Whether the court of appeals erred in reversing the family court's grant of attorney's fees.

Standard of Review

In reviewing appeals from the family court, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Miles v. Miles*, 393 S.C 111, 117, 711 S.E.2d 880, 883 (2011). Accordingly, we review the family court's grant of attorney's fees de novo. *See Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). De novo review does not relieve an appellant of his burden to "demonstrate error in the family court's findings of fact. Consequently, the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* at 392, 709 S.E.2d at 655 (alteration in original) (internal citation omitted).

Law/Analysis

Wife argues the family court's grant of attorney's fees should have been upheld because the family court properly considered the beneficial results achieved by Husband on appeal as directed by the court of appeals on remand. We agree.

The decision to award attorney's fees rests in the sound discretion of the family court. *Lewis*, 392 S.C. at 394, 709 S.E.2d at 656. When determining whether to award attorney's fees, the court must consider "ability to pay, the parties' respective financial conditions, the effect of the award on each party's standard of living, and the beneficial results achieved." *Upchurch v. Upchurch*, 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006). "Beneficial result

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appeal for Husband's inclusion of irrelevant materials in his Designation of Matter to be Included in the Record on Appeal. This Court granted certiorari only on the issue of attorney's fees.

alone is not dispositive of whether a party is entitled to attorney's fees." *Id.* (citing *Mazzone v. Miles*, 341 S.C. 203, 214, 532 S.E.2d 890, 894 (Ct. App. 2000)).

In *Chisholm I*, the court of appeals remanded the issue of attorney's fees to the family court, stating that "[i]n view of the beneficial results obtained by the husband in this appeal, we remand to the family court for further consideration." Thus, when addressing the issue on remand, the family court "reviewed the record to determine if any change should be made in the decision regarding attorney's fees and costs." Noting that the original award had been based "in part upon the significant content regarding custody of [Son], on which [Wife] prevailed," the judge determined that the amount awarded should be reduced from $13,000 to $10,500, or from 67% of her fees to 50%.

On appeal from this second order, the court of appeals reversed stating that the family court had erred in its determination "both in its original adjudication and on remand." *Chisholm II*, No. 2010-UP-140. This was in error. *Chisholm I* did not address any error as to the manner in which the family court awarded the attorney's fees but instead remanded "in view of the beneficial results obtained by the husband." Given this directive, the family court proceeded to reduce the award based on the beneficial results achieved, while noting that Wife had prevailed on the most heavily contested issue at trial. It would be improper for the court to then, on subsequent review, reach back to declare the original order was in error. Furthermore, when the court gives guidance so plainly by noting that the remand is due to "beneficial results obtained by the husband," it would be inconsistent for the same court to then find consideration of this element was insufficient to support the award. This is especially true given the fact that the court of appeals itself has altered awards of attorney's fees solely on the basis of the beneficial results it awarded in the appeal. *See, e.g.*, *Myers v. Myers*, 391 S.C. 308, 322, 705 S.E.2d 86, 94 (Ct. App. 2011) (reducing Wife's award of attorney's fees after decreasing Husband's alimony obligation and excluding some property from marital estate because Wife's beneficial results had been diminished). Allowing an appellate court to change its mind on its original instruction

would only confuse lower courts as to how to comply on remand. We therefore find that the court of appeals erred in reversing the family court's order and eliminating Wife's award of attorney's fees.

Conclusion

Accordingly, we reverse the court of appeals' denial of attorney's fees and reinstate the amount awarded to Wife by the family court.

REVERSED.

BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion. HEARN, J., not participating.

JUSTICE PLEICONES: I respectfully dissent, and finding no error in the decision of the Court of Appeals, I would dismiss the writ of certiorari as improvidently granted.

The Supreme Court of South Carolina

In the Matter of Allan Riley Holmes, Jr., Respondent.

ORDER

On December 27, 2011, respondent was arrested and charged with possession with intent to distribute heroin. The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. Respondent opposes the petition. The petition is granted.

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

IT IS FURTHER ORDERED that respondent is hereby enjoined from access to any trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain.

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

Columbia, South Carolina

January 25, 2011

The Supreme Court of South Carolina

Carolina Chloride, Inc.,	Respondent/Petitioner,

v.

Richland County, a South Carolina Political Subdivision,	Petitioner/Respondent.

The Honorable Reginald I. Lloyd
Richland County
Trial Court Case No. 2004-CP-40-01616

ORDER

This Court granted a petition for rehearing to review our opinion in *Carolina Chloride, Inc., v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011). After hearing arguments, we dismiss the petition for rehearing as being improvidently granted. Therefore, the above opinion shall be the final decision of this Court in this matter.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 26, 2012

cc: Andrew F. Lindemann, Esquire
William H. Davidson, II, Esquire
Michael B. Wren, Esquire
Christian Stegmaier, Esquire
Amy L. Neuschafer, Esquire
Edward D. Sullivan, Esquire

The Supreme Court of South Carolina

In the Matter of
Michael James Sarratt, Petitioner.

ORDER

On January 7, 2011, the Court definitely suspended petitioner from the practice of law for nine months, retroactive to February 4, 2010, the date of petitioner's interim suspension. In the Matter of Sarratt, 390 S.C. 649, 704 S.E2d 349 (2011). In addition, the Court ordered petitioner to successfully complete an anger management course acceptable to the Office of Disciplinary Counsel (ODC) prior to filing a Petition for Reinstatement.[1]

Petitioner filed a Petition for Reinstatement which was referred to the Committee on Character and Fitness (the Committee) pursuant to Rule 33(d), RLDE, Rule 413, SCACR. After a hearing, the Committee issued a Report and Recommendation concluding petitioner has met the requirements for reinstatement as set forth in Rule 33(f), RLDE, and recommending the Court reinstate petitioner on specified conditions. Neither petitioner nor ODC filed exceptions to the Report and Recommendation.

[1] ODC has confirmed petitioner successfully completed an anger management program which had been approved by ODC.

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

1. for one (1) year from the date of this order, petitioner's practice shall be monitored by a lawyer selected by ODC;

2. at the conclusion of six (6) months, the lawyer shall file a report with the Commission on Lawyer Conduct (the Commission) detailing the lawyer's assessment of petitioner's practice and, at the conclusion of the one (1) year monitoring period, the lawyer shall file a report with the Commission detailing the lawyer's assessment of petitioner's practice and whether continued monitoring should be required; and

3. petitioner shall fully cooperate with the lawyer selected to serve as his monitor and shall be responsible for insuring the lawyer's reports are filed in a timely manner.

Petitioner is hereby reinstated to the practice of law.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 26, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Barbara Solley, Respondent/Appellant,

v.

Navy Federal Credit Union, Inc., Appellant/Respondent.

Appeal From Jasper County
C. Stephen Bennett, Special Referee

Opinion No. 4937
Heard April 5, 2011 – Filed February 1, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

George P. Sibley, III, of Richmond, Virginia; Mark B. Bierbower, of Washington, D.C.; R. Thayer Rivers, Jr., of Ridgeland; and Stephen A. Spitz, of Charleston, for Appellant/Respondent.

Jared Sullivan Newman, of Port Royal, for Respondent/Appellant.

KONDUROS, J.: Barbara Solley filed suit for conversion, slander of title, and negligence against Navy Federal Credit Union (the Bank) after Jimmy L. Mullins, Sr., with whom she owned a house, obtained a mortgage on the house from the Bank without her knowledge. The Bank was held in default after it failed to answer Solley's complaint. After the special referee required Solley to elect the theory of damages, she proceeded with slander of title and was awarded damages, including punitive damages. Solley appeals the special referee's requiring her to elect her remedy prior to the damages hearing, failing to find she was a consumer under federal regulations, and not allowing her to reform her complaint to conform to the evidence and issues actually tried. The Bank appeals arguing the default judgment should be vacated because Solley failed to plead the elements for slander of title. The Bank also argues the special referee committed several errors in awarding damages because Solley did not establish she suffered any damages; she did not establish its conduct was willful, wanton, or reckless; and the punitive damages are excessive compared to the actual damages. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

In 2000, Solley and Mullins[1] purchased a house in Jasper County from Solley's sister.[2] Solley's sister gifted Solley the equity in the home, which Solley believed to be approximately $100,000 at the time. Solley and Mullins obtained financing of $100,000 from the Bank to satisfy her sister's

[1] The two were a couple at the time but not married.

[2] Solley asserts they jointly owned the house, while the Bank maintains they owned it as tenants in common. On August 31, 2000, Solley and Mullins signed an agreement that they were purchasing the property as "joint owners with the right of survivorship." Solley's complaint also states she has title to the property "as a joint tenant with rights of survivorship." The special referee's order states the two "jointly owned, as tenants in common," the property. At the time of the damages hearing, the action between Solley and Mullins to determine the property rights to the house was still pending.

outstanding mortgage. Mullins and Solley satisfied that mortgage in 2005 or 2006.

In April of 2006, without Solley's knowledge, Mullins obtained another loan from the Bank on the home amounting to $233,000.[3] The Bank recorded the mortgage with the Register of Deeds in Jasper County. Solley learned of the mortgage in December 2007 and hired an attorney, who contacted the Bank. On January 14, 2008, Mullins filed an action against Solley for partition. Mullins was incarcerated at the time, and his sister filed the action via his power of attorney. On February 13, 2008, Solley filed an answer and counterclaim. She also filed a third-party complaint against the Bank, alleging conversion, slander of title, and negligence.

After being properly served, the Bank failed to timely respond and Solley moved for a judgment by default. On July 21, 2008, the court entered an order and entry of judgment against the Bank. The Bank did not pursue having the default set aside. The court severed the third-party action from the original action. The court referred the matter to a special referee to conduct the damages hearing. The Bank appeared at the hearing.

At the hearing, Solley testified that the mortgage had "destroyed [her] life." She stated that she did not know "how to resolve the issue." She could not have visitors because she did not know when she might be forced to leave and where she would go. She further testified that her son and grandchildren grew up in the home. Solley provided that she had not slept a night since this incident had begun and she lost her job, her family, and her grandchildren all because of the mortgage. She indicated she and Mullins had separated when he went to prison in January of 2008 and were no longer together. She testified she has no control over what Mullins will do with the mortgage, and this causes her to suffer from anxiety. She also stated she had to hire an attorney to resolve this matter and has had to expend costs in filing the lawsuit.

[3] The parties dispute whether that loan encumbers the entire property or just Mullins's interest. The Banks asserts that the loan only encumbers Mullins's interest.

Solley offered Raymond Molony, a senior vice president at a different bank, to testify. Molony stated he had worked in the banking business since 1978 and had worked for a number of different banks. The special referee qualified him as an expert witness in banking and mortgages. Molony testified that if the Bank commenced a foreclosure action, it could foreclose on the entire piece of property. He further testified that if the Bank foreclosed and recovered enough funds to satisfy Mullins's mortgage and pay Solley for her interest in the property, she would still be evicted from the property.

A manager at the Bank, Laura Suzanne Hall, was also present at the damages hearing. Solley did not call Hall as a witness, but in response to questioning by the special referee, Hall indicated the mortgage was not in foreclosure. She also testified she did not know who closed the mortgage. She provided that normally "an attorney would go over the [d]eed." She testified that the loan should have been closed by an attorney in South Carolina. The Bank conceded that no attorney's name was listed on the signature page of the loan.

The special referee found the Bank published a false statement by filing a mortgage Solley was not privy to upon property in which she was an undivided co-owner. The referee found the mortgage was a false statement because it is invalid as Solley does not owe the Bank a debt. The special referee further found malice by the Bank because it had previously accepted a joint mortgage on the property from Solley and Mullins and then recklessly accepted this singular mortgage.

The special referee noted that based on Solley's testimony, the home was worth around $200,000 at the time of the hearing. The referee found that had she wished to borrow against her interest in the home, the "mortgage would have either severely restricted her borrowing power or not enabled her to borrow at all." Solley's expert testified Solley would likely not have been able to obtain a loan on the home due to Mullins's loan. Further, the referee determined the Bank was "entirely culpable for its conduct," which lasted

over three years and was still continuing. The referee noted the Bank was in the sole position to mitigate Solley's damages and made no attempt to do so. The referee found Solley presented ample evidence of the Bank's net worth, which allowed it to afford an award of punitive damages. The referee posited the award should punish the Bank and deter subsequent similar conduct by it and other lenders.

The special referee found Solley was entitled to special damages, including actual damages sufficient to satisfy the mortgage on the property and remove the impediment to her title. The referee also found she was entitled to punitive damages, "due to the egregious conduct" of the Bank. Accordingly, the referee awarded Solley $233,000 in actual damages and $400,000 in punitive damages.[4] The Bank filed a motion for reconsideration and to set aside judgment pursuant to Rules 59(a),(e) and 60(b), SCRCP. Solley filed a motion for reconsideration of the election of remedies. The referee denied all motions. Both parties appealed.

STANDARD OF REVIEW

"An action in tort for damages is an action at law." Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005). In an action at law, the appellate court corrects errors of law, but affirms the special referee's factual findings unless no evidence reasonably supports those findings. Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). The trial court's findings are equivalent to a jury's findings in a law action. King v. PYA/Monarch, Inc., 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995). "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). Questions regarding credibility and weight of evidence are exclusively for the trial court. Id.

[4] This is a ratio of 1.7:1.

LAW/ANALYSIS

I. THE BANK'S APPEAL

A. Sufficiency of Solley's Complaint

The Bank argues Solley failed to plead several of the elements of slander and thus the judgment is void. Specifically, it contends the mortgage is not false and Solley did not plead malice, plead special damages, or allege the value of the property was diminished in the eyes of a third party. We find this issue unpreserved.

In Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997), the defendant's motion to set aside the default judgment was denied. After a damages hearing, the plaintiff was awarded damages. Id. Subsequently, the defendant filed a motion to reconsider in which it raised, for the first time, the plaintiff was not the real party in interest. Id. That motion was denied. Id. On appeal, this court held the defendant had waived any challenge to the plaintiff's status as the real party in interest by failing to object prior to the entry of default. Id. The supreme court found this court correctly held the issues raised by the defendant, not having been timely raised prior to the entry of default, were waived. Id. at 171, 485 S.E.2d at 374.

The Bank first raised this issue in its Rule 59(e), SCRCP, or in the alternative Rule 60(b), SCRCP, motion to reconsider and to set aside judgment, after damages were awarded and the default judgment had been entered, much like Bardoon. Accordingly, this issue is not preserved for our review.

B. Special Damages

The Bank argues Solley is not entitled to special damages because she did not plead them. It further contends she did not prove the damages and they are excessive. We agree in part.

> The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Because of this discretion, our review on appeal is limited to the correction of errors of law. Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.

Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310-11, 594 S.E.2d 867, 873 (Ct. App. 2004) (citations omitted).

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App. 1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.").

> [T]here is a difference between a defendant being declared in default and subsequently having judgment entered against him for damages. By defaulting, a defendant forfeits his "right to answer or otherwise plead to the complaint." In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability.

Howard v. Holiday Inns, Inc., 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978) (citations omitted). At the damages hearing, the defendant may only participate by cross-examining witnesses and objecting to evidence. Id. at 242, 246 S.E.2d at 882.

> In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.

Jackson, 296 S.C. at 529, 374 S.E.2d at 506 (citations omitted).

"[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

"Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Huff, 319 S.C. at 149, 459 S.E.2d at 891. "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." Home Invs. Fund v. Robertson, 295 N.E.2d 85, 87 (Ill. App. Ct. 1973) (citing Gates v. Utsey, 177 So. 2d 486, 488 (Fla. Dist. Ct. App. 1965)). In Huff, 319 S.C. at 149-50, 459 S.E.2d at 891, the court found a jury reasonably could conclude the defendant published a false statement when she filed a lien she knew or should have known was invalid. "A publication is derogatory to the plaintiff's title if the publication disparages or diminishes the quality, condition, or value of the property." Id. at 150, 459 S.E.2d at

891. The court further found the defendant's lien clearly diminished the value of the property in the eyes of a third party, given that the plaintiff was required to discharge the lien before he could complete the refinancing of the property. Id.

In Huff, the defendant also contended that the plaintiff had no claim for slander of title because the lien was filed against only the plaintiff's former wife's interest in the property and thus did not encumber the plaintiff's interest in the property. Id. at 150 n.2, 459 S.E.2d at 891 n.2. In support of this argument, at oral argument the defendant relied on the rule that a cotenant may separately encumber his interest in property and such encumbrance binds only the cotenant's interest in the property. Id. The property was owned by the plaintiff and his ex-wife at the time the lien was recorded, and the lien specifically stated it was placed against the property of both of them. Id. This court found "[w]hile it may be true that, had the lien been foreclosed and the property sold, the lien could have been satisfied only through the [ex-w]ife's interest in the property, the lien nonetheless attached to the property as whole and affected the value of the property as a whole." Id.

"All pleadings shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRCP; see also Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 340 (1991) (holding to ensure substantial justice to the parties, the pleadings must be liberally construed). "[T]echnical, restrictive or outmoded requirements of Code Pleading are not necessarily required [under the SCRCP]." Gaskins v. S. Farm Bureau Cas. Ins. Co., 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (quoting Harry M. Lightsey, Jr. & James F. Flanagan, South Carolina Civil Procedure 93-94 (2nd ed. 1996)).

"Special damages recoverable in a slander of title action are the pecuniary losses that result 'directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and the expense of measures reasonably necessary to counteract the publication, including litigation.'" Huff, 319 S.C. at 150-51,

459 S.E.2d at 892 (quoting 50 Am. Jur. 2d Libel & Slander § 560; citing Restatement (Second) of Torts § 633)). In Huff, the plaintiff paid the defendant the money demanded in the lien so that he could close the refinancing of the property. Id. at 151, 459 S.E.2d at 892. The court found, "The money paid to satisfy the lien was an expense necessary to counteract the publication and, therefore, constitutes special damages." Id.

> [S]pecial damages in the context of a slander of title claim can take at least two forms. For instance, if a slanderous statement forces a party to sell land at a reduced price, the reduction in value is a realized loss that can form the basis of a damages award. Alternatively, a landowner may take legal action to remedy the effects of the slanderous statement. To the extent that this legal action is reasonably necessary to remove clouds from the party's title, the party may recover those attorney fees.

Neff v. Neff, 247 P.3d 380, 401 (Utah 2011) (footnotes omitted).

The Huff court relied on TXO Production Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 879 (W. Va. 1992), in determining the elements for slander of title. 319 S.C. at 149, 459 S.E.2d at 891. The Huff court recognized that the TXO court had followed the guidelines the Restatement (Second) of Torts provided for those elements. Id. In TXO, the court observed, "Ordinarily, attorneys' fees are not considered damages. However, slander of title is a special case." 419 S.E.2d at 881. The TXO court found "[t]he appellees spent $19,000 responding to TXO's declaratory judgment action that the appellees would not have spent if TXO had not filed the false quitclaim deed and then sued the appellees in an attempt to steal their land." Id. The court followed "the clear majority rule in holding that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title." Id. (citing Rayl v. Shull Enters., Inc., 700 P.2d 567 (Idaho 1984); Chesebro v. Powers, 44 N.W. 290 (Mich. 1889); Paulson v. Kustom Enters., Inc., 483 P.2d 708 (Mont. 1971); Den–Gar

Enters. v. Romero, 611 P.2d 1119 (N.M. Ct. App. 1980), cert. denied, 614 P.2d 545 (N.M. 1980); Summa Corp. v. Greenspun, 655 P.2d 513 (Nev. 1982); Dowse v. Doris Trust Co., 208 P.2d 956 (Utah 1949); Restatement (Second) of Torts, § 633 (1977)).

The Restatement (Second) of Torts § 633, which describes slander of title as a form of the general tort of publication of an injurious falsehood, provides the following requirements for special damages:

> (1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to
>
> > (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and
> >
> > (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.

"[A]ttorney fees may be recoverable as special damages if incurred 'to clear title or to undo any harm created by whatever slander of title occurred.'" Gillmor v. Cummings, 904 P.2d 703, 708 (Utah Ct. App. 1995) (quoting Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566, 569 (Utah 1988)); see Neff, 247 P.3d at 400-01 ("In slander of title cases, attorney fees may be recovered as special damages if the fees are reasonably necessary to remedy the disparagement of the plaintiff's title."); see also 53 C.J.S. Libel § 323 (2005) ("Under some, but not all, authority, attorney's fees may constitute special damages in an action for slander of title or injurious falsehood.").

"[T]he trial court's award of attorney fees as special damages is discretionary in slander of title cases . . . ." Gillmor v. Cummings, 904 P.2d at 709 (citing Day v. W. Coast Holdings, Inc., 699 P.2d 1067, 1071 (Nev.

1985)). "[T]he award of damages must be made on the basis of findings of fact supported by the evidence." Id. (citing Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985)). In Utah, when the trial court has not provided adequate findings of fact concerning the special damages incurred, the court has remanded to the trial court to properly determine the amount of damages that should be awarded. Id.

> However, there is some disagreement among the courts as to whether or not the injured party, in order to establish special damages, must identify a particular prospective purchaser who was prevented by the slander from buying the disparaged property, some courts holding that a particular prospective purchaser must be identified, unless it is impossible to do so, and others that a particular prospective purchaser need not be identified.

James O. Pearson, Jr., Annotation, What Constitutes Special Damages in Action for Slander of Title, 4 A.L.R.4th 532, 537 §2[a] (1981) (footnotes omitted).

The Utah Supreme Court has denied recovery when a party's claim for harm to the value of his property has been based on appraisal value instead of sale of the land at a reduced price, because the damages had not yet been realized. Neff, 247 P.3d at 401 (citing Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361, 364 (Utah 1997) ("Proof of special damages usually involves demonstrating a sale at a reduced price or at greater expense to the seller. It is not sufficient to show that the land's value has dropped on the market, as this is general damage, not a realized or liquidated loss.")). The Utah court also reversed an award of attorney's fees when plaintiffs took no action to clear the clouds from their title, on the basis that the fees were gratuitous in the absence of proof of any other damages. Id. (citing Bass, 761 P.2d at 569).

In Sullivan v. Thomas Organization, the defendants asserted the plaintiffs "failed to allege 'special' damages, because mere unmarketability of title without the actual loss of a sale is not a compensable injury." 276 N.W.2d 522, 526 (Mich. Ct. App. 1979) (citing 50 Am. Jur. 2d Libel and Slander § 546, at 1065-66; William L. Prosser, Law of Torts § 128, at 920 (4th ed. 1971)). However, the Sullivan court noted that "in Chesebro[, 44 N.W. 290], the [Michigan] Supreme Court held that reasonable expenses incurred by the plaintiff in removing the cloud from his title were recoverable as damages in a disparagement of title action." Sullivan, 276 N.W.2d at 526. The plaintiffs in Sullivan requested as relief the cloud on their title be removed, as well as costs and attorney's fees, and the court found this was a sufficient allegation of special damages. Id.

In determining whether it allowed attorney's fees as special damages, the Washington Supreme Court noted that it "adhere[d] to the American rule, which states that absent a contract, statute, or recognized ground of equity, the prevailing party does not recover attorney fees as costs of litigation. Nevertheless, we have also recognized certain circumstances where attorney fees should be recovered as damages." Rorvig v. Douglas, 873 P.2d 492, 497 (Wash. 1994) (citations and internal quotation marks omitted).

The court found it had allowed attorney's fees to be recoverable as special damages in malicious prosecution and wrongful attachment or garnishment. Id. "In malicious prosecution, it has long been the rule that damages include the attorney fees for the underlying action made necessary by the defendant's wrongful act." Id. "Similarly, in wrongful attachment or garnishment actions, and in actions to dissolve a wrongful temporary injunction, attorney fees are a necessary expense incurred in relieving the plaintiff of the wrongful attachment or temporary injunction, and are recoverable." Id. (internal quotation marks omitted). The Washington court found:

> Slander of title is analogous to these actions. It is the defendant who by intentional and calculated action leaves the plaintiff with only one course of action:

> that is, litigation. In malicious prosecution, wrongful attachment, and slander of title, the defendants actually know their conduct forces the plaintiff to litigate. In addition, similar to malicious prosecution and wrongful attachment, actual damages are difficult to establish and often times are minimal in slander of title. Fairness requires the plaintiff to have some recourse against the intentional malicious acts of the defendant.

Id. The court noted, "The majority of jurisdictions that have considered the question in recent years have adopted this rule." Id. (citing Rayl, 700 P.2d at 573; Summa Corp., 655 P.2d at 515; Rogers v. Home Invs. Fund, 295 N.E.2d 85 (Ill. App. Ct. 1973); Dowse, 208 P.2d at 959). "The trend is to recognize that attorney fees and other legal expenses incurred in clearing the disparaged title are recoverable as damages in the common law action of slander of title." Id. (citing James O. Pearson, Jr., Annotation, What Constitutes Special Damages in Action for Slander of Title, 4 A.L.R.4th 532, 560 (1981)). Additionally, "the Restatement (Second) of Torts supports allowing recovery of attorney fees in a slander of title action. It describes slander of title as a form of the general tort of publication of an injurious falsehood." Id.

The Tennessee Court of Appeals has explained why attorney's fees are appropriate as special damages in slander of title cases:

> The sole way of dispelling another's wrongful assertion of title is by hiring an attorney and litigating. If the defamed party were to simply speak out in denial, as he might with a character attack, he could risk completely losing title by adverse possession. The plaintiffs here were forced into court by the defendants' actions. They were required to hire counsel, take depositions, arrange for court reporters, and run up numerous other expenses. These costs, which represented the only possible course of action

> to clear their title, flow directly and proximately from the defendants' conduct. But for the defendants[' actions], the plaintiffs would not have incurred these expenses. As such, they represent an actual pecuniary loss that, if substantiated, should be recoverable as special damages.
>
> The position we take today regarding proof of special damages and litigation expenses is supported by the Restatement (Second) of Torts . . . .

Ezell v. Graves, 807 S.W.2d 700, 703 (Tenn. Ct. App. 1990).

In Childers v. Commerce Mortgage Investments, 579 N.E.2d 219, 222 (Ohio Ct. App. 1989), the trial court found the defendant liable to the plaintiffs for, among other things, the entire amount for which they could have sold their house if not for the defendant's actions and allowed the plaintiffs to keep the house. The court found, "In effect, this gave the [plaintiffs] a double recovery, to which they are not entitled." Id.

In this case, as the dissent and the Bank argue, the Bank's mortgage is a nullity. However, unlike the dissent and the Bank, we believe this makes Solley's action for slander of title even stronger. Recording a mortgage that is a nullity should be considered a false statement derogatory to Solley's title. Further, Solley's expert witness testified she likely would not have been able to obtain a loan on her share of the home due to Mullins's mortgage. However, Solley did not attempt to sell or mortgage her interest in the home. The majority view requires a party to actually suffer a loss, i.e. sell the property for less than it was worth, not be able to sell the home at all, or be unable to obtain a loan. Solley did not attempt to do any of these things. Solley and her attorney contacted the Bank to discuss the mortgage, and the Bank would not speak to her or her attorney about it. Solley had no other choice than to bring this lawsuit. Accordingly, she is entitled to the cost of this litigation, which is the $150 filing fee and her attorney's fees and costs in

bringing the action. Accordingly, we remand this action to the special referee to determine attorney's fees and costs.

C. Punitive Damages

The Bank argues Solley is not entitled to punitive damages because at most it made a mistake in issuing the mortgage and did not harbor any ill will. In the alternative, it maintains the punitive damages are excessive compared to what it contends are Solley's actual damages, the $150 filing fee. We disagree.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future," as well as "to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." Clark v. Cantrell, 39 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000). "'Recklessness implies the doing of a negligent act knowingly'; it is a 'conscious failure to exercise due care.'" Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting Yaun v. Baldridge, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Id. "'It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor . . . .'" Cody P. v. Bank of Am., N.A., Op No. 4875 (S.C. Ct. App. Filed Aug. 23, 2011) (Shearouse Adv. Sh. No. 29 at 93) (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 578, 106 S.E.2d 258, 263 (1958)). "In other words, 'at the time of his act or omission to act the tort-feasor [must] be conscious, or chargeable with consciousness, of his wrongdoing.'" Id. (quoting Rogers, 233 S.C. at 578, 106 S.E.2d at 264) (alteration by court). "A conscious failure to exercise due care constitutes willfulness." Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). "'In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.'" Austin v. Specialty Transp. Servs., Inc., 358

S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004) (quoting S.C. Code Ann. § 15-33-135).

In Cody P., Op No. 4875 (Shearouse Adv. Sh. No. 29 at 93) this court found the trial court properly denied the bank's motion for judgment notwithstanding the verdict (JNOV) on punitive damages. In that case, the plaintiff presented evidence that bank employees had not followed bank procedures when opening an account. Id. In the present case, Molony, Solley's banking expert, testified that anytime two people were on a deed, a banker would want both people to sign the mortgage, acknowledging the debt. He stated that was the practice for 28 years at the banks where he had been employed. He testified to loan money on a piece of property, one needs to look at who owns the property. He further testified that when putting a residential home loan on a piece of property, one needs to get the consent of all the owners. He testified he had seen no evidence in the loan document the Bank had contacted Solley. He stated that at his bank, as an owner Solley would be required to acknowledge the debt one way or the other and that the mortgage would encumber her property.

Both Solley's and Mullins's names were on the loan they satisfied in 2005 or 2006 for the Property from the Bank. Accordingly, the Bank was on notice Solley was an owner of the Property. The Bank asserted in a post-trial motion it was misled by Mullins. However, although we recognize the Bank was not allowed to present evidence because it was in default, no evidence of any fraud is contained in the record. Further, the deed on record with Jasper County was in both Mullins's and Solley's names and thus any documents or information by Mullins that Solley no longer owned the Property could have been easily verified by the Bank. Solley testified the Bank had not contacted her and she had no knowledge of the loan until over a year-and-a-half after Mullins had obtained it. Based on the banking expert's testimony, the Bank's failure to verify the owner of the Property was reckless. In her complaint against the Bank, Solley alleges the Bank was negligent and/or grossly negligent. Because the Bank defaulted, all allegations in the complaint are deemed admitted. Additionally, the evidence in the record indicates the Bank failed to have an attorney close the mortgage, as required by law. Further,

even after being contacted by Solley's attorney, the Bank did nothing to rectify the situation. Accordingly, the record contains sufficiently clear and convincing evidence for the special referee to decide to award punitive damages.

Because we are remanding this case for the special referee to recalculate the actual damages, we also must remand the award of punitive damages for determination in light of the new amount of actual damages. See Reid v. Harbison Dev. Corp., 289 S.C. 319, 322, 345 S.E.2d 492, 493 (1986), overruled on other grounds by O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993) ("Generally, actual damages should not be separated from punitive damages for a retrial on actuals alone. Punitive damages may only be awarded if actuals are recovered, and therefore, retrial only on actual damages may be improper since punitive damages may change depending on the actual damage award. In the interest of justice and fairness to all parties, both actual and punitive damages should be reconsidered together on retrial." (citations omitted)). Because the special referee will make a new determination of Solley's punitive damages on remand, we need not address the Bank's contention that the amount of punitive damages was excessive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. SOLLEY'S APPEAL

A. Election of Remedies

Solley argues the special referee erred by requiring her to elect a remedy prior to the damages hearing. We find this issue unpreserved.

The record must show that the issue was raised in the trial court. Zaman v. S.C. State Bd. of Med. Exam'rs, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991); Reid v. Kelly, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980). A motion or an objection made during an off-the-record conference that is

not made a part of the record does not preserve the question for review. York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("Whe[n] an objection and the ground therefore is not stated in the record, there is no basis for appellate review."); Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct. App. 2000) (finding arguments must be conducted on the record to be preserved for appellate review). Further, the appellant has the burden of providing an adequate record on appeal. Harkins v. Greenville Cnty., 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000); see also Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").

When an appellant acquiesces to the trial court's ruling, that issue cannot be raised on appeal. State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998); see also State v. Bryant, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (holding if an appellant conceded trial court's ruling was not prejudicial, he could not assert on appeal the ruling denied him a fair trial); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (providing a party cannot concede an issue at trial and then complain on appeal).

The record does not contain the Bank's motion for Solley to elect a remedy or the special referee's ruling on the matter. The record does include what seems to be a summary of an off-the-record hearing on the matter. The special referee stated:

> Let the record reflect that after the close of testimony in the case, that [Solley] elected to proceed in this matter on the cause of action for slander of title, which it appears from the facts presented one way or the other would be the probable cause of action and that's what [s]he's elected to proceed under as far as arguing damages.

The record also contains Solley's later request to be allowed to look further into which cause of action she wished to pursue. The Bank objected, stating Solley had "made the election, and [it] made [its] argument based on what was elected." The special referee stated, "I'm not going to change the ruling as far as what he's already moved and you've already elected, and I can't change that." Even though the motion is alluded to after the ruling has occurred, we do not have either side's argument on it or the referee's actual ruling. Therefore, we find this issue unpreserved.

B. Consumer Under Federal Law

Solley maintains the special referee erred in finding she was not a consumer under federal law. An appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Solley's being considered a consumer does not relate to the slander of title cause of action and instead seems to relate to the negligence cause of action. Accordingly, because the slander of title cause of action is the only action remaining, we need not consider this issue.

C. Amending of Complaint

Solley argues the special referee erred in failing to allow her to amend her complaint to conform to the evidence and issues actually tried. An appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal. Id. Because of our determination the Bank's argument regarding pleading the elements of slander of title is unpreserved for our review, we need not reach this issue.

CONCLUSION

Based on the foregoing, the decision of the special referee is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THOMAS, J., concurs.

FEW, C.J., concurring in part and dissenting in part: I concur in Section II of the majority opinion. However, I would resolve the issues addressed in Section I by finding the special referee committed two errors of law: (1) awarding the amount of the loan as special damages and (2) awarding punitive damages. I would reverse the judgment of actual and punitive damages and remand for a new trial as to actual damages only, at which Solley must prove special damages proximately resulting from the conduct the Bank admitted in default to be slander of title.

Solley is not entitled to the value of the mortgage as special damages because the mortgage is ineffective. Solley alleged she "has and holds title as a joint tenant with rights of survivorship to the above described real property." Because the Bank defaulted, that allegation is deemed to be true. See Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (stating "the defaulting party is deemed to have admitted the truth of the plaintiff's allegations").

Taking as true the allegation that Solley and Mullins owned the property as joint tenants with a right of survivorship, section 27-7-40 of the South Carolina Code (2007) prevented Mullins from encumbering the property. The statute states that if property is held by joint tenants with a right of survivorship, such

> joint tenancy includes, and is limited to, the following incidents of ownership: . . . (iii) The fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance. (iv) If all the joint tenants who own real estate held in joint tenancy join in an encumbrance, the interest in the real estate is effectively encumbered to a third party or parties.

§ 27-7-40(iii)-(iv). Therefore, because the mortgage is ineffective to encumber the property, it was error for the special referee to award Solley $233,000.00 in actual damages.

The majority argues that the ineffectiveness of the mortgage makes Solley's slander of title action stronger. I do not disagree. However, because the Bank admitted liability for slander of title in default, the strength of Solley's case is not the issue. The issue is the amount of special damages. I would find it was improper for the referee to measure the award of special damages by the amount of the mortgage because the mortgage is ineffective and does not encumber the property.

The Bank argues Solley is not entitled to punitive damages. I agree. Solley's cause of action for slander of title against the Bank, even including allegations incorporated by reference, does not contain any allegation of reckless or willful conduct. Therefore, even by admitting Solley's allegations in default, the Bank has not admitted liability for punitive damages. See Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) ("In order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights."). I would reverse the award of punitive damages.