The Supreme Court of South Carolina

Re: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the Commission on Continuing Legal Education and Specialization by April 1, 2004, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e), SCACR.

Columbia, South Carolina
March 5, 2004

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The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2004, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e), SCACR.

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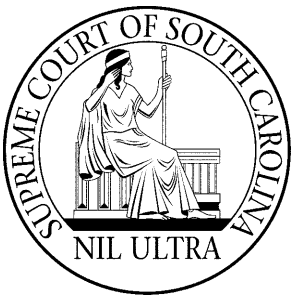

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 8, 2004

ADVANCE SHEET NO. 9

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Antonio Tisdale, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Charleston County
Paul M. Burch, Circuit Court Judge
A. Victor Rawl, Post-Conviction Relief Judge

Opinion No. 25789
Submitted January 22, 2004 - Filed March 8, 2004

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, all of Columbia, for Petitioner.

Joseph Edward Cadmus, of Charleston, for Respondent.

PER CURIAM: Respondent was convicted of entering a bank with intent to steal, armed robbery, grand larceny, and possession of a weapon during the commission of a crime. The trial judge vacated the grand larceny conviction and sentenced respondent to thirty years for armed robbery, thirty years concurrent, for entering a bank with intent to steal, and two years consecutive, for possession of a weapon during commission of a crime. The Court of Appeals affirmed the convictions and sentences. State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000).

Respondent filed an application for post-conviction relief (PCR). The PCR court granted respondent relief and ordered a new appeal, finding respondent received ineffective assistance of appellate counsel. We reverse the PCR court.

ISSUE

Did the PCR court err in holding appellate counsel was ineffective for failing to raise all meritorious issues on appeal?

ANALYSIS

The PCR court held that respondent's appellate counsel was ineffective because she had an obligation to raise all meritorious issues on appeal. We disagree.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745 (1983) (emphasis supplied). "For judges to second-guess reasonable professional judgments and impose on…counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy…." Jones, 463 U.S. at 754.

In the case at hand, the order granting respondent PCR stated:

> Appellate Counsel testified during the PCR Hearing that she made a tactical decision to raise only two preserved issues on appeal…*Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. However, this should not be the rule for appellate counsel. Effective Appellate Counsel has an obligation to raise all meritorious issues on appeal.* The strategy of choosing one or two issues on direct appeal when several meritorious issues exist deprives the applicant of effective assistance of counsel. (emphasis supplied).

We find that the PCR judge decided this case using an incorrect standard. See Thrift, 397 S.E.2d at 526; Jones, 463 U.S. at 754. Further, the State failed to call this error of law to the PCR judge's attention by way of a Rule 59(e), SCRCP motion. Therefore, due to the unusual circumstances of this case, we reviewed the grounds that respondent claims were meritorious but were not raised by appellate counsel. We find no merit to respondent's claims. The burden of proof is on respondent to show that counsel's performance was deficient as measured by prevailing professional norms, and that respondent was prejudiced by this deficiency. See Strickland v. Washington, 466 U.S. 668 (1984), Southerland, 524 S.E.2d at 836. Because respondent is unable to prove prejudice, the PCR court's decision is reversed.

CONCLUSION

We **REVERSE** the PCR court's decision that appellate counsel was ineffective.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Barnett, Appellant.

Appeal From Richland County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 3751
Submitted June 9, 2003 – Filed March 8, 2004

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General David Spencer, all of Columbia; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

HOWARD, J.: John Barnett was convicted of two counts of kidnapping, two counts of first-degree burglary, and one count of grand larceny of a motor vehicle. Subsequently, he was sentenced to thirty years imprisonment for each of the kidnapping charges, forty years imprisonment for each of the burglary charges, and five years imprisonment for the grand larceny of a motor vehicle charge, all to run concurrently. Barnett appeals, arguing the indictment charging grand larceny of a motor vehicle was insufficient to confer subject matter jurisdiction because the body of the indictment failed to allege the motor vehicle's value was in excess of one thousand dollars. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

A grand jury indicted Barnett for two counts of kidnapping, two counts of first-degree burglary, and one count of grand larceny of a motor vehicle. The indictment for grand larceny of a motor vehicle was captioned "GRAND LARCENY OF MOTOR VEHICLE UNDER $5000 S.C. Code: 16-13-30(B)(1)," and alleged:

> [t]hat John Barnett did in Richland County on or about March 10, 2000, feloniously take and carry away the personal property of Rosa Daniels to wit: 1988 Pontiac 6000 with S.C. tag 542KJD, valued under $5000.00. Against the peace and dignity of the State, and contrary to the statute in such case made and provided.[1]

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[1] The indictment originally alleged Clanda James owned the motor vehicle. However, the indictment was amended to name Rosa Daniels as the owner of the motor vehicle. The amendment of the name of the victim under these circumstances is not a jurisdictional flaw. See State v. Johnson, 314 S.C. 161, 166, 442 S.E.2d 191, 194 (Ct. App. 1994) (holding an amendment changing the name of the owner of the property listed in an indictment for breach of trust did not change the nature of the offense); State v. Sweat, 221 S.C. 270, 273-74, 70 S.E.2d 234, 235-36 (1952) (holding an amendment to a larceny indictment did not change the nature of the offense, where the

(emphasis added).

Subsequently, Barnett was convicted on all the charges and sentenced to thirty years imprisonment for each of the kidnapping charges, forty years imprisonment for each of the burglary charges, and five years imprisonment for the grand larceny of a motor vehicle charge, all to run concurrently. Barnett appeals.

LAW/ANALYSIS

Barnett argues the indictment for grand larceny of a motor vehicle was insufficient to confer subject matter jurisdiction because the body of the indictment did not allege the stolen vehicle was valued at more than one thousand dollars. We disagree.

In evaluating the sufficiency of an indictment, this Court should "look at the issue with a practical eye in view of the surrounding circumstances." State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993); see also State v. Thompson, 305 S.C. 496, 504 n. 1, 409 S.E.2d 420, 425 n. 1 (Ct. App. 1991) (holding when evaluating an indictment, this Court should give "a common sense reading [to] the indictment as a whole"). If the offense is stated with sufficient certainty and particularity to enable the trial court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, the indictment is sufficient to confer subject matter jurisdiction. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). "The true test of the sufficiency of an indictment is not whether it could be made more

---

indictment changed the name of the victim); see also State v. Guthrie, 352 S.C. 103, 111-12, 572 S.E.2d 309, 313-14 (Ct. App. 2002) (holding an element is an essential ingredient of the crime when an amendment to that element would materially change the proof required to convict the defendant of the crime); 41 Am. Jur. 2d Indictments and Informations § 168 (1995) (stating an amendment is substantive and thus not permitted unless "the same defense is available to the defendant both before and after the amendment and upon the same evidence").

definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) (citations omitted). "An indictment passes legal muster if it 'charges the crime substantially in the language of the . . . statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood . . . .'" State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002) (quoting S.C. Code Ann. § 17-19-20 (1985)).

South Carolina Code Annotated section 16-13-30(B) (2003) defines grand larceny as "[larceny] of goods, chattels, instruments, or other personalty valued in excess of one thousand dollars . . . ." See State v. Parker, 351 S.C. 567, 570, 571 S.E.2d 288, 289 (2002) ("[G]rand larceny is the felonious taking and carrying away of the goods of another, where the value exceeds $1,000."). Larceny is the taking and carrying away of the goods of another without consent. State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979).

It is clear the indictment sufficiently alleges larceny, a misdemeanor, as it alleged Barnett feloniously took a motor vehicle from Rosa Daniels against the peace and dignity of the State. See Brown, 274 S.C. at 49, 260 S.E.2d at 720 (holding larceny is the taking and carrying away of the goods of another without consent). However, the remaining inquiry is whether the indictment sufficiently alleges the motor vehicle was worth more than one thousand dollars, elevating the charge to grand larceny. See S.C. Code Ann. § 16-13-30(B).

This case is analogous to State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003). In Wilkes, the defendant was convicted of one count of resisting arrest and two counts of assault on a correctional facility employee. One of the indictments was captioned, "ASSAULT ON CORRECTIONAL FACILITY EMPLOYEE § 16-3-630," and the other indictment was captioned "ASSAULT ON CORRECTIONAL FACILITY EMPLOYEE." Both indictments alleged the defendant "did in Chester County on or about April 24, 1999[,] assault . . . [an officer] while she[/he] was attempting to

process him after his arrest." Neither of the indictments, within their bodies, alleged the officers were correctional facility employees.

On appeal, this Court vacated the two indictments for assault on a correctional facility employee, holding the indictments were jurisdictionally defective because they failed to allege the officer was a correctional facility employee. This Court further held the captions of the indictments could not cure the otherwise defective indictments. Id. at 464, 578 S.E.2d at 718.

On grant of certiorari, our supreme court reversed, holding the indictments were sufficient to confer subject matter jurisdiction to the circuit court because, reading the captions in conjunction with the body of the indictment, the indictments "stated the offense with sufficient certainty and particularity to enable the trial court to know what judgment to pronounce and . . . [the defendant] to know what he was being called upon to answer." Id. at 465, 578 S.E.2d at 719.

In the present case, although the body of the indictment fails to specifically state the motor vehicle's value was in excess of one thousand dollars, the caption of the indictment states the charge is "GRAND LARCENY" and cites "S.C. Code: 16-13-30(B)(1)." We conclude this language, coupled with the language in the body of the indictment, is sufficient to state the offense of grand larceny with certainty and particularity such that the circuit court knew what judgment to pronounce and Barnett knew what to defend against. Thus, the indictment is not jurisdictionally defective.

CONCLUSION

For the foregoing reasons, the decision of the circuit court is

AFFIRMED.

GOOLSBY, J., concurs.

BEATTY, J., dissenting in a separate opinion.

BEATTY, J.: I respectfully dissent. Barnett maintains the circuit court lacked subject matter jurisdiction of the grand larceny charge because he was not properly indicted on the charge. Specifically, he contends the language of the indictment could be construed to mean he faced the misdemeanor charge of petit larceny rather than grand larceny, which is a felony. Put differently, Barnett alleges the indictment failed to include an essential element of grand larceny – that the value of the property stolen was in excess of $1,000. I agree.

In July 2000, a grand jury indicted Barnett for two counts of kidnapping, two counts of first-degree burglary, and grand larceny. The caption of Barnett's indictment for grand larceny read "GRAND LARCENY OF MOTOR VEHICLE UNDER $5000" and referenced S.C. Code Section 16-13-30(B)(1). The body of the indictment alleged:

> That John Barnett did in Richland County on or about May 10, 2000, feloniously take and carry away the personal property of Rosa Daniels, to wit: 1988 Pontiac 6000 with S.C. tag 542KJD, valued under $5000.00.

Grand larceny involves stolen property valued in excess of $1,000, whereas petit larceny applies to stolen property valued at $1,000 or less. See S.C. Code Ann. § 16-13-30, et seq. (Supp. 2002); State v. Parker, 351 S.C. 567, 570, 571 S.E.2d 288, 289 (2002). "The monetary value of the goods taken is an element of the offense of grand larceny." Parker, 351 S.C. at 571, 571 S.E.2d at 290; see also Johnson v. State, 319 S.C. 62, 64, 459 S.E.2d 840, 841 (1995) (grand larceny involved taking and carrying away of goods valued at $200 or more; value is element of grand larceny offense); State v. Ates, 297 S.C. 316, 318, 377 S.E.2d 98, 99 n.1 (1989) ("In a grand larceny prosecution, value is ***critical*** element; it is the State's burden to prove value of stolen goods exceeds $200.") (emphasis added).[2]

[2] Previously, the value of goods for grand larceny was $200 or more. See S.C. Code Ann. § 16-13-30 (1985). The statute has been amended to set the

The circuit court lacks jurisdiction to convict a defendant of an offense unless the defendant waives presentment, the offense is a lesser-included offense of the crime charged in the indictment, or there is an indictment that sufficiently states the offense. State v. Owens, 346 S.C. 637, 648, 552 S.E.2d 745, 751 (2001). "An indictment is sufficient if it apprises the defendant of the ***elements*** of the offense intended to be charged ***and*** apprises the defendant of what he must be prepared to meet." Granger v. State, 333 S.C. 2, 4, 507 S.E.2d 322, 323 (1998) (emphasis added). The indictment sufficiency criteria must be viewed with a "practical eye"; all the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached. State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993). This includes looking both at the face of the indictment and the circumstances surrounding the trial. See State v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002) (examining the indictment "on its face" and considering the "events at trial" to determine whether the appellants were on notice and apprised of the charges against them).

The caption of the indictment charged Barnett with violation of S.C. Code Ann. § 16-13-30(B)(1). The caption read that Barnett was charged with "GRAND LARCENY OF MOTOR VEHICLE UNDER $5000." However, the body of the indictment failed to make specific reference to the code section applicable to grand larceny, and did not list the elements of the offense. "[O]ne cannot infer the elements of an offense from the caption of the indictment." State v. McCloud, 354 S.C. 40, 47, 579 S.E.2d 534, 537 (Ct. App. 2003) (Shuler, J., dissenting) (citing State v. Lark, 64 S.C. 350, 353, 42 S.E. 175, 176-77 (1902)); see also State v. Tabory, 262 S.C. 136, 141, 202 S.E.2d 852, 854 (1974) ("[T]he State may not support a conviction for an offense intended to be charged by relying upon a caption to the exclusion of the language contained in the body of the indictment.").

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value of goods for grand larceny at more than $1,000. S.C. Code Ann § 16-13-30 (B)(1) (Supp. 2002).

Our supreme court used the phrase "practical eye" to determine whether an indictment is legally sufficient. See Gunn, 313 S.C. at 130, 437 S.E.2d at 78. Courts are called to examine the totality of the circumstances to determine whether a defendant was aware of the crime for which he was charged. Id. "All the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached."[3] Viewing the indictment with a practical eye, I believe the indictment was insufficient to apprise Barnett of the elements of the crime he should have been prepared to meet. Nothing in the record indicates that Barnett was granted a preliminary hearing, whereby he could discover the crimes for which he was being tried. See McCloud, 354 S.C. at 44, 579 S.E.2d at 536. Although the record reflects that the trial court and solicitor made several references to Barnett's charges, doing so during the trial did not allot Barnett sufficient notice to prepare his defense.

In State v. Wilkes, our supreme court reversed this Court's decision to vacate two indictments for assault on a correctional facility employee. 353 S.C. 462, 578 S.E.2d 717 (2003). The body of the indictments used the word "officer" to describe the victim, instead of "correctional facility employee." Otherwise, the body of each indictment included the elements of the offense, as well as the title and code section of the charges.[4] Moreover, the language in the body of the indictment was phrased substantially in the language of the statute defining the offense. See State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981).

Unlike Wilkes, the body of the indictment in this matter does not include all of the elements of the offense of grand larceny, nor does it include

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[3] Reddick, 348 S.C at 633, 560 S.E.2d at 443 (citing State v. Hiott, 276 S.C. 72, 81, 276 S.E.2d 163, 167 (1981); State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981); State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950)).

[4] Both indictments contained the titles of the charges in the body that state the victim was a correctional facility employee. Additionally, both indictments cite S.C. Code Ann. § 16-3-360, appropriately apprising the defendant of the charges he would be called to meet. Wilkes, 353 S.C. at 465, 578 S.E.2d at 719.

the code section. Moreover, in Wilkes, the gist of the issue was one of semantics, not elements of the offense. The question was whether, in the context of the indictment, "officer" and "correctional facility employee" were synonymous as used in the statute. Wilkes, 535 S.C. at 464, 578 S.E.2d at 718. It was patently clear the words were synonymous.

However, in the instant case there is no such clarity. In actuality, the body of the indictment merely charges petit larceny. The caption of the indictment lists the code section where grand larceny of more than $1000 and less than $5000 is set forth. This caption may assist the judge in determining the proper sentence; however, it does not provide the missing element required in the body of the indictment for grand larceny. See Tabory, 262 S.C. at 140, 202 S.E.2d at 854. Therefore, Barnett was not on proper notice of the crime charged: the offense of petit larceny as charged in the body of the indictment or, grand larceny as stated in the caption. An indictment should not leave this question for criminal defendants to decipher; the law requires indictments to clearly answer this question.

Weighing the circumstances surrounding Barnett's indictment and subsequent conviction, I believe Barnett was not sufficiently apprised of the elements of the crime of grand larceny. I believe the indictment could have been construed to involve stolen property valued at less than $1,000, making the crime petit larceny, a misdemeanor. Therefore, Barnett was prejudiced by the missing property value from the indictment. For the foregoing reasons, I believe the conviction for grand larceny should be vacated.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Anthony A. Heyward, Appellant.

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

Opinion No. 3752
Heard January 13, 2004 – Filed March 8, 2004

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

HOWARD, J.: Anthony A. Heyward was convicted for kidnapping, criminal sexual conduct in the first degree ("CSC"), and carjacking. Subsequently, the circuit court sentenced him to life imprisonment without parole for kidnapping, life imprisonment without parole for CSC, and fifteen years imprisonment for carjacking, the sentences to run concurrently. Heyward appeals, arguing the circuit court erred by failing to start the jury selection process de novo, where the circuit court found a juror to have been struck in violation of Batson v. Kentucky, 476 U.S. 79 (1986). We affirm.

FACTUAL/PROECDURAL BACKGROUND

A grand jury indicted Heyward for kidnapping, CSC, and carjacking. During jury selection, the State moved for a Batson hearing, arguing Heyward's strikes were exercised in a gender-based, discriminatory manner. The circuit court agreed. However, rather than strike the entire jury and begin the jury selection process de novo, the circuit court seated the juror.

Following the trial, the jury found Heyward guilty of kidnapping, CSC, and carjacking, and the circuit court sentenced him to life imprisonment without parole for kidnapping, life imprisonment without parole for CSC, and fifteen years imprisonment for carjacking, the sentences to run concurrently.

On appeal, Heyward's appellate counsel reviewed the record, concluded the appeal lacked merit, and filed a petition to be relieved. Pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), this court reviewed the record and brief, denied counsel's request, and ordered the following issue to be briefed:

> Did the trial court err in seating a juror, whom it found to have been struck in violation of Batson v. Kentucky, 476 U.S. 79 (1986), rather than ordering the process of selecting the jury to start de novo as set forth in State v. Jones,

293 S.C. 54, 58, 358 S.E.2d 701, 704 (1987), abrogated on other grounds by State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995)?

(S.C. Ct. App. Order dated June 11, 2003).

LAW/ANALYSIS

Heyward argues the circuit court committed reversible error by failing to strike the jury and start the jury selection process de novo, where the circuit court found a juror to have been struck in violation of Batson v. Kentucky, 476 U.S. 79 (1986). We disagree.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venireperson on the basis of race." State v. Haigler, 334 S.C. 623, 628, 515 S.E.2d 88, 90 (1999); see Batson v. Kentucky, 476 U.S. 79, 85 (1986) (holding the Fourteenth Amendment to the United States Constitution prohibits a state prosecutor from exercising peremptory challenges to strike potential jurors solely on the basis of race); see also Georgia v. McCollum, 505 U.S. 42, 50-55 (1992) (holding a prosecutor may challenge a defendant's use of peremptory strikes); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994) (holding the Fourteenth Amendment to the United States Constitution is violated if the State strikes a juror on the basis of gender).

Our supreme court has set forth a "bright line test" for determining if a juror has been struck in violation of Batson. See State v. Jones, 293 S.C. 54, 57-58, 358 S.E.2d 701, 703-04 (1987), abrogated by, State v. Chapman, 317 S.C. 302, 306, 454 S.E.2d 317, 320 (1995)). Furthermore, if the circuit court finds a juror has been struck in violation of Batson, our supreme court has mandated that the circuit court strike the entire jury and begin the jury selection process de novo. Id. at 58, 358 S.E.2d at 704. This mandate seeks to: 1) protect the defendant's right to a fair trial; 2) protect each venireperson's right not to be excluded from jury service for discriminatory reasons; and 3)

preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process. Haigler, 334 S.C. at 628-29, 515 S.E.2d at 90.

In this case, forty-one qualified jurors were randomly drawn from the jury pool, and their names were placed on a consecutively numbered list. The remaining jurors in the pool were then excused from the courtroom. Beginning with the first name on the list, the circuit court called out each juror in order, giving first the State and then the defendant the right to strike the juror. The jurors did not know who was struck by either side.

Following jury selection, both parties made a Batson challenge. All of Heyward's strikes removed female jurors, and the State asserted his strikes were exercised in a gender-based, discriminatory fashion. Ultimately, the circuit court concluded Heyward's reason for striking the sixteenth juror on the list was pretextual, finding it to be a gender-based discriminatory strike. However, rather than striking the entire jury, the circuit court seated the juror.

Having seated the sixteenth juror on the list as juror number nine ("juror number nine'), the circuit court moved the last juror of the twelve-person jury to the first alternate juror's position, removing the last alternate juror completely.[1] The court then revisited each of the three remaining jurors selected in the initial process in their original order, noting that Heyward had the option of striking another juror because the court had denied his strike of juror number nine. Heyward declined to strike any of the three remaining jurors included on the original panel.

Initially, we agree the circuit court erred by seating the juror in violation of Jones.[2] However, this does not end our inquiry. Rather,

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[1] No alternates were needed in the trial.

[2]We note that in Jones, the solicitor's juror strikes were the subject of challenge. Jones 293 S.C. at 57, 358 S.E.2d at 703. In pertinent part,

we must determine whether a harmless error analysis is appropriate, and if so, whether the error in this case was harmless.

In State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), the circuit court quashed a jury, finding the defendant struck a juror in a discriminatory manner. Subsequently, upon starting the jury selection process de novo, the defendant attempted to strike the same juror again, and the circuit court seated the juror. Id. at 51, 456 S.E.2d at 359. Our supreme court affirmed, holding "'a party's right to use peremptory challenges can be subordinated to a venireperson's constitutional right not to be improperly removed from jury service.'" Id. at 52, 456 S.E.2d at 359-360 (quoting Jefferson v. State, 595 So.2d 38, 41 (Fla. 1992)).[3]

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the court stated that when "the solicitor has failed to give a racially neutral reason for the contested peremptory strikes, the process of selecting the jury shall start de novo." Id. Thus, Jones did not deal with the situation in this case, in which the party who improperly strikes a juror demands a de novo jury selection as a result of his/her own impropriety. However, absent further guidance from our supreme court, we conclude Jones is controlling on the issue.

[3]We recognize the facts in Franklin are dissimilar in that the seating of the juror over defense objection occurred during the de novo selection mandated by Jones. In that regard, the Court's ruling was limited by those facts. See Franklin, 318 S.C. at 53, 456 S.E.2d at 360 ("We hold *once a new venire has been selected in compliance with Jones*, supra, 'that it is within the trial judge's discretion to fashion the appropriate remedy under the particular facts of each case and, as long as neither party's constitutional rights are infringed, that remedy may include the seating of an improperly challenged juror.'" (emphasis added) (quoting Jefferson, 595 So.2d at 47). We also note the Court took pains not to undermine the requirement of Jones. Id. ("Our decision today does not impact Jones."). However, the Court did recognize that Jones was not intended to cover all situations. Id. ("Jones did not consider the case where a party attempts repeatedly to strike a prospective juror in violation of Batson. We do not accept the argument that Jones

Subsequently, in State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999), our supreme court, analyzing a Batson challenge, ruled, "no showing of actual prejudice is required to find reversible error *for the denial or impairment of the right to a peremptory challenge*." Short, 333 S.C. at 477, 511 S.E.2d at 360. (emphasis added).

As we interpret Franklin, seating a juror who has once been improperly struck by a party in violation of Batson is not, in and of itself, an impairment or denial of that party's right to peremptory challenges. Consequently, under the circumstance of this case, a harmless error analysis is appropriate and does not offend State v. Short.

Viewing the facts of this case, in light of the above, we conclude no prejudice resulted from the failure to select a jury de novo, as Heyward's right to exercise peremptory strikes was not impaired, and the selection process provided Heyward with the same choices he enjoyed in the first instance, with the exception of the unconstitutional strike of juror number nine. Thus, under the limited circumstances of this case, we hold the error was harmless. State v. Wright, 304 S.C. 529, 534, 405 S.E.2d 825, 828 (1991) (ruling there is no prejudice to defendant where he received what Batson was intended to provide); see also Franklin, 318 S.C. at 52, 456 S.E.2d at 360.

CONCLUSION

For the foregoing reasons, Heyward's conviction is **AFFIRMED.**

HEARN, C.J., and KITTREDGE, J., concur.

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mandates . . . the trial judge in all instances to 'give the offending party exactly what he wanted, namely,' a jury panel which unconstitutionally excludes a particular juror.") (quoting People v. Moten, 603 N.Y.S.2d 940, 947 (N.Y. App. Div. 1993)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deloitte & Touche, LLP, Appellant,

v.

Unisys Corporation, Respondent.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3753
Submitted February 9, 2004 – Filed March 8, 2004

AFFIRMED

John E. Schmidt, III, Dwight F. Drake and C. Mitchell Brown, all of Columbia, for Appellant.

James T. Hewitt, of Greenville, for Respondent.

BEATTY, J.: Deloitte & Touche, L.L.P. appeals a circuit court order denying its motion seeking arbitration. We affirm.

FACTS

In 1996, Deloitte commenced an action against Unisys Corporation based on a contractual dispute. Unisys then gave notice of and filed a demand for arbitration. Unisys also subsequently moved to have the case dismissed under Rules 12(b)(1) and 12(b)(8), SCRCP. At the time, Deloitte was opposed to arbitration and argued against Unisys's arbitration demand. The circuit court held that Deloitte could not be forced to arbitrate its claims against Unisys, reasoning that the arbitration provision of the contract under which Unisys made its request was unenforceable under South Carolina law and incapable of being "rescued" by the Federal Arbitration Act.[1] Unisys appealed the ruling, but the appeal was dismissed as being interlocutory and premature.

Following the dismissal of the appeal, the parties resumed litigation. That process has lasted for nearly five and one-half years. The discovery phase has generated thousands of documents and numerous motions and hearings. A three-day "Phase I" bench trial was conducted, where Deloitte was allowed to present one of its claims.[2] The trial judge ruled in favor of Unisys. Deloitte then moved for arbitration in August 2002, shortly before Unisys was to present its counter-claims in "Phase II" of the trial. Deloitte asserted that it could "join" Unisys in "voluntary arbitration" since Unisys had continued to maintain an open file with the American Arbitration Association even after its demand for arbitration was denied.

The trial judge denied Deloitte's motion for arbitration on August 15, 2002. He found Deloitte's motion to be duplicative of Unisys's

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[1]The Federal Arbitration Act, 9 U.S.C.A. § 1, *et seq.* (2003).

[2]The trial judge had granted Deloitte's 2000 motion to bifurcate the case.

1997 motion to compel arbitration. The trial judge reasoned that Deloitte, having successfully contested Unisys's motion nearly six years earlier, could not now argue in favor of arbitration. In the alternative, the trial judge found that Deloitte waived its right to seek arbitration by litigating the case for five and one-half years.

ISSUES

I. Did the trial judge err in finding Deloitte's motion duplicative of Unisys's 1997 motion to compel arbitration?
II. Did the trial judge err in holding that Deloitte waived its right to seek arbitration by engaging in the litigation process?

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination . . . [and is] subject to de novo review." Stokes v. Metropolitan Life Ins. Co., 357 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002) (citation omitted). However, the circuit court's factual findings underlying the ruling will be disturbed only if there is no evidence to reasonably support them. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664, 521 S.E.2d 749, 753 (Ct. App. 1999).

LAW/ANALYSIS

I. Arbitration Motion

Deloitte argues that the trial judge erred in finding its motion duplicative of Unisys's 1997 motion to compel arbitration. Specifically, Deloitte contends that the 1997 order merely held that Unisys could not force Deloitte into arbitration under the arbitration clause in the contract, not that the parties could not voluntarily arbitrate their dispute. Therefore, according to Deloitte, the 1997 order has "no effect in an instance, such as this, where the parties agree to arbitrate." We disagree.

We note at the outset that if Unisys *were willing* to arbitrate the dispute, this current appeal would not exist. In fact, Unisys stated in its

brief that there has *not* been an "open invitation" to arbitrate from Unisys since the 1997 order. Indeed, the trial judge found in his 2002 order that "[t]he arbitration has been inactive and dormant for five and one-half years, and the parties have not conducted any activity in that forum pursuant to the ruling of [the circuit court] in 1997." Deloitte maintains that parties to a dispute reserve the right to choose arbitration even after the start of litigation. And that may well be true. But such is not the case here. Unisys wanted arbitration, but Deloitte opposed it. Unisys was forced to comply with that wish following the circuit court's 1997 ruling. That Unisys has "never withdrawn its demand for arbitration" is immaterial since the motion was denied. Given that no arbitration is currently taking place between the parties, what Deloitte is attempting to do here is to force Unisys into arbitration under the contractual clause the circuit court found unenforceable in 1997.[3] We decline to do so.

We find that the trial judge did not err in ruling that Deloitte's motion was duplicative of Unisys's 1997 motion to compel arbitration.

II. Waiver

Deloitte also argues that the trial judge erred in finding that Deloitte waived its right to arbitrate. Again, we disagree.

"It is generally held that the right to enforce an arbitration clause may be waived." Liberty Builders, 336 S.C. at 665, 521 S.E.2d at 753 (citation omitted). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Id. To establish that there has been a waiver, a party must show it has been unduly burdened by the other party's delay in seeking arbitration. Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985).

[3]The trial judge was correct to explain that "one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." State ex rel Medlock v. Love Shop, Ltd., 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985).

The trial judge relied primarily on Liberty Builders in concluding that Deloitte waived its right to seek arbitration. There, the parties sought assistance from the trial court on numerous occasions, and submitted several motions, including motions to amend, compel, add parties, and dismiss. Liberty Builders, 336 S.C. at 666, 521 S.E.2d at 753. Those proceedings lasted for more than two years. Id. The time and work necessary to resolve these motions resulted in substantial attorneys' fees for the non-moving party. This Court found that the non-moving party was prejudiced by the delay and that the moving party had "waived its right to enforce the arbitration clause by submitting the dispute to the court and availing itself of that system for two and one-half years." Id. at 668, 521 S.E.2d at 754.

In the current case, Deloitte has availed itself of the litigation process for approximately five and one-half years. The parties have conducted a significant amount of discovery, resulting in the production of thousands of documents. Significantly, Deloitte has also been permitted to try one of its claims against Unisys. Therefore, just like the non-moving party in Liberty Builders, Unisys, the non-moving party here, has been prejudiced since it was forced to start and maintain the litigation process. The trial judge was correct in finding that Deloitte waived its right to seek arbitration.

Deloitte argues that Liberty Builders is not controlling because that defendant had not repeatedly argued that the dispute should be arbitrated; it was only the plaintiff that belatedly demanded arbitration. We find this factual difference to be inconsequential. Deloitte could have submitted its case for arbitration when Unisys first sought arbitration in 1997. In fact, Deloitte could have chosen arbitration at any time, but it did not. Instead, after pursuing litigation for nearly six years, culminating in an unsuccessful trial, Deloitte now wants to compel Unisys to arbitrate. That, it cannot do.

CONCLUSION

Based on the foregoing, the trial court's rulings are **AFFIRMED.**

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

LaRue D. Penny, Jr., Respondent/Appellant,

v.

Sally Z. Green, f/k/a Sally Z. Penny, Appellant/Respondent.

Appeal From Richland County
Rolly W. Jacobs, Family Court Judge

Opinion No. 3754
Heard January 13, 2004 – Filed March 8, 2004

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Michael R. Ellisor, of Lexington, for Appellant-Respondent.

Cynthia Barrier Castengera, of Newland, N.C.; J. Mark Taylor and C. Vance Stricklin, Jr., both of West Columbia, for Respondent-Appellant.

HEARN, C.J.: LaRue D. Penny, Jr. (Husband) and Sally Z. Green (Wife) both appeal from a family court order reducing Husband's child support and alimony obligations. Husband also appeals Wife's award of attorney's fees. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife were divorced in February 1998. The family court judge adopted the parties' settlement agreement and ordered Husband to pay $2,750 per month in alimony until May 2002, with incremental decreases after that date. Husband was also ordered to pay $1,500 per month in child support until May 2002, with the amount decreasing to $1,000 per month after that date.

In 1999, between the divorce and the initiation of this action, Wife moved to Atlanta with the children. In the fall of 2000, Husband left his Columbia pediatric practice and moved to Atlanta, in part to be closer to his children. Another factor in his relocation was that Husband remarried and his current wife's two children also live near Atlanta.[1] Husband filed this action for a reduction in his support obligations, claiming his financial circumstances had changed significantly. Wife answered, denying Husband was entitled to a decrease, and requested an increase in alimony, admonishment of Husband for late support payments, enforcement of Husband's debt payment obligations under the divorce decree, and payment of attorney's fees and costs.

In the 1998 divorce proceeding approving the parties' agreement, Husband's sworn financial declaration stated his annual income was $140,000. In this action for a reduction, however, Husband claimed his income at the time of the divorce was actually $165,226. He testified that his new employment in Atlanta provided him with a minimum salary of

[1]Husband's current wife, while living in Columbia, earned between $20,000 and $54,000 per year working as a registered nurse. For the purposes of this action, the parties stipulated that current wife's income would not be merged into Husband's; however, testimony of the indirect benefit of her financial contribution to Husband's household expenses was admitted.

$100,000, based on a three-day work week.

Following a merits hearing, the family court reduced Husband's alimony obligation to $2,000 per month and set his child support obligation at $1,206 per month.[2] The family court based its decision to grant Husband a reduction on Husband's decreased income, finding Husband had actually earned $168,996[3] at the time of the divorce and imputing a salary of $120,000 to Husband at the time of this action. The family court also awarded Wife the value of $24,627 in attorney's fees by directing Husband to pay $7,000 in addition to the offset credit from his support overage. Wife appeals both orders, arguing the family court erred in reducing Husband's support obligations. Husband appeals the final order, arguing the family court should have further reduced his support obligations and asserting that the court should have awarded him, not Wife, attorney's fees.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find the facts in accordance with its view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither is the court required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

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[2]At the temporary hearing, the family court reduced Husband's child support obligation to $1,063 per month, and ordered Husband to pay Wife $2,500 in attorney's fees.

[3]We acknowledge the slight discrepancy between Husband's testimony that his 1997 income was $165,226 and the family court's finding that Husband's income was $168,996, but view it as inconsequential.

LAW/ANALYSIS

I. Wife's appeal

Wife argues the family court erred in reducing Husband's child support obligation at the temporary hearing and in reducing Husband's alimony and child support obligations at the final hearing. We agree.

"Family courts are empowered to modify child support upon a proper showing of a change in either the child's needs or the supporting parent's financial ability." Henderson v. Henderson, 298 S.C. 190, 196, 379 S.E.2d 125, 129 (1989) (citation omitted); see Stevenson, 276 S.C. at 477, 279 S.E.2d at 617 (finding the issue of child support is subject to continuing review by the family court). "To warrant a modification in child support, the change of circumstances must be either substantial or material." Fischbach v. Tuttle, 302 S.C. 555, 557, 397 S.E.2d 773, 774 (Ct. App. 1990).

Similarly, to justify modification of an alimony award, the changes in circumstances must be substantial or material. Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997); see also S.C. Code Ann. § 20-3-170 (1985) (stating that changed conditions may warrant a modification or termination of alimony). Further, the change in circumstances must be unanticipated. Kelley v. Kelley, 324 S.C. 481, 486, 477 S.E.2d 727, 729 (Ct. App. 1996). Several considerations relevant to the initial determination of alimony may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse. Id.

We find Husband failed to show a substantial or material change in circumstances. The family court's decision to reduce Husband's support was ostensibly based on two reasons, both of which we find to be erroneous. First, the family court found that Wife's income had increased at the time of the final hearing. At the time of the divorce, Wife's 1997 financial declaration stated her gross monthly income was $1,273, and, at the time of

the present action, her 2001 financial declaration indicates monthly income of $2,269.92. It was error to base a reduction on this ground, however, because such a change was expected. By agreement of the parties, Husband's alimony payments were to be reduced over time, beginning only six months after the final order granting modification. Although the divorce decree does not explain the reason for the automatic decreases in Husband's support obligations, the record supports the family court's finding that they were in anticipation of Wife increasing her income. It thus was error for the family court judge to grant Husband a reduction on this basis. See, e.g., Brown v. Brown, 278 S.C. 43, 44, 292 S.E.2d 297, 297 (1982) (finding that while the wife's income increased since the divorce, this increase cannot be used to justify a reduction in alimony because it was contemplated by the parties at the time of the divorce).

The family court's second basis for reducing support was the Husband's reduction in reported income. We find, however, that Husband's reduced income failed to constitute a substantial change impacting his ability to pay the obligations to which he originally agreed. This conclusion is based on our review of the family court's analysis of the Husband's initial income, his current income, and his imputed income.

Financial declarations are sworn documents required by Rule 20 of the South Carolina Rules of Family Court. Here the family court, which approved the parties' agreement in February 1998, relied on Husband's representation of $140,000 in annual income, as reflected in his financial declaration. In this action for reduction, however, Husband testified his income in 1997 had been under-reported by him and that it was actually $165,226. The family court then utilized this inflated figure as support for its decision to reduce Husband's support obligation, finding that Husband's income had decreased substantially since the 1998 divorce. This was error.

A party cannot misrepresent income and expenses on a financial declaration for purposes of having an agreement approved and then refute the accuracy of that document in a subsequent modification action. See Rogers v. Rogers, 343 S.C. 329, 332, 540 S.E.2d 840, 841 (2001) (relying on original financial declaration rather than other records indicating an increased income

in evaluating change of circumstances); see also Calvert v. Calvert, 287 S.C. 130, 336 S.E.2d 884 (Ct. App. 1985) (concluding husband was barred by res judicata from subsequent challenge of cost of living index incorporated in divorce decree). Therefore, we find the family court erred in allowing Husband to contradict his previous financial declaration in an effort to demonstrate a larger disparity from his present income. It was error for the family court to utilize Husband's inflated income of $168,996 rather than relying on the figure of $140,000 reported in Husband's original financial declaration. We find the correct annual income to attribute to Husband for purposes of evaluating his claim of changed circumstance is $140,000, as reflected in his 1998 financial declaration.

Regarding Husband's current income, we believe the family court was correct in imputing to Husband an annual income of $120,000, rather than the $100,000 per year urged by Husband. Initially we note that Husband's purported salary with his new practice in Atlanta is based on a one-year contract that guarantees him a minimum of $100,000, based on a three-day work week.

Moreover, under the Child Support Guidelines, "income" is defined as "the actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." 27 S.C. Code Ann. Regs. 114-4720(A)(1) (Supp. 2002). The Guidelines provide further that "[i]n order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." Id. at 114-4720(A)(5)(b). Where a parent voluntarily lessens his or her earning capacity, this court will closely scrutinize the facts to determine the parent's capacity to earn, rather than his or her actual earnings. See Robinson v. Tyson, 319 S.C. 360, 363, 461 S.E.2d 397, 399 (Ct. App. 1995).

We recognize that following the parties' divorce, Husband's medical practice underwent some detrimental financial changes. We agree

with the family court's conclusion that Husband's salary in Columbia before he moved to Atlanta was roughly $120,000 per year. This conclusion is supported by Husband's 1999 W-2 indicating his salary was approximately $130,000, and his 2000 W-2 showing his salary at approximately $118,000. The family court correctly noted the recent reduction in Husband's salary was brought about by Husband's voluntary decision to leave his Columbia medical practice and move to Atlanta. We reiterate that Husband's purported $100,000 salary from his Atlanta medical practice is a guaranteed minimum salary and is achieved by working only three days per week. When a spouse voluntarily undertakes a move that will reduce his or her income, the family court may properly impute income to that spouse. Id. The family court's imputation of income to Husband was tantamount to finding Husband underemployed. As such, the court was justified in examining Husband's earning potential based upon recent work history and qualifications. Since Husband was earning approximately $120,000 before he voluntarily moved to Atlanta, the family court did not err in imputing that level of income to him. This is especially true considering Husband's current job in Atlanta seems to allow Husband the opportunity to work more hours and increase his annual salary.

Comparing Husband's initial income to the income properly imputed to him, Husband's annual salary has decreased from $140,000 to $120,000. We find this decrease is not significant enough to severely impact his standard of living or his ability to pay support obligations, particularly where that decrease is due to a voluntary relocation. See Townsend v. Townsend, 356 S.C. 70, 587 S.E.2d 118 (Ct. App. 2003) (finding that husband's decrease in income from $250,000 to $186,000 per year without showing of inability to pay support obligations is not a substantial change in circumstances); Kielar v. Kielar, 311 S.C. 466, 429 S.E. 2d 851 (Ct. App. 1993) (stating that involuntary resignation resulting in a salary decrease from over $300,000 to roughly $180,000 per year did not amount to substantial change in circumstances because it had no impact on standard of living and ability to pay obligations). Because there was no substantial change in circumstances sufficient to support a reduction of Husband's alimony and child support obligation, we find the family court erred in reducing Husband's support obligations. Accordingly, the family court's decision is

reversed, and the parties' previous alimony and child support agreement as incorporated in the 1998 divorce decree is reinstated.

II. Husband's appeal

A. Alimony

Husband argues the family court erred in not further decreasing or terminating his alimony obligation. Husband also contends the family court erred in imputing to him a $120,000 annual income. We disagree.

As discussed above, we find the family court erred in reducing Husband's alimony obligation. Therefore, we cannot find, as Husband argues, that the court did not reduce his obligation enough. As also explained above, we believe the family court was correct in imputing to Husband an annual income of $120,000. Thus, we find no merit to either one of Husband's alleged errors regarding his support obligations.

B. Attorney's fees

Husband argues the family court erred in failing to award attorney's fees in his favor. Further, Husband argues the family court erred in awarding attorney's fees to Wife. We disagree.

Before awarding attorney's fees, the family court should consider: (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). An award of attorney's fees will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988).

We find the family court was correct in granting attorney's fees

to Wife and not to Husband. Though Wife's annual income has nearly doubled since the parties' divorce in 1997, Husband has a much greater earning potential as a pediatrician. As such, Husband is clearly more able to pay both his own attorney's fees and those accrued by Wife. Along those lines, Husband's standard of living will be better able to absorb the fees in view of his income. Finally and most importantly, Wife has now prevailed in the Husband's attempt to alter the support obligations. Accordingly, the family court judge did not err in awarding attorney's fees to her.

CONCLUSION

The family court's temporary and final orders decreasing Husband's child support and alimony obligations based on change of circumstances are reversed, thereby reinstating the alimony and child support plan outlined in the divorce decree of February 6, 1998. We remand this matter to the family court for a determination of alimony and child support arrearages. The award of attorney's fees to Wife is affirmed.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HOWARD and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William P. Hatfield, individually and on behalf of The Hyman Law Firm, Respondent,

v.

Susan F. Van Epps, Appellant.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Opinion No. 3755
Heard January 13, 2004 – Filed March 8, 2004

James H. Moss and H. Fred Kuhn, Jr., both of Beaufort, for Appellant.

Kevin M. Barth, of Florence; R. Davis Howser and Andrew E. Haseldon, both of Columbia, for Respondents.

PER CURIAM: William P. Hatfield, individually, and on behalf of the Hyman Law Firm, brought an action against Susan Van Epps to recover attorney's fees she owed Law Firm. Van Epps filed a counterclaim, asserting legal malpractice. Van Epps appeals the trial judge's decision to grant a directed verdict in Law Firm's favor on a portion of her malpractice cause of action and from the jury verdict, asserting the trial judge made numerous errors. We affirm in part, reverse in part, and remand.

FACTS

Van Epps and Leslie Stewart were married in 1982. Both are physicians. The couple had two sons, born in 1987 and 1989. They separated in 1995, and Stewart filed for divorce that same year. On June 5, 1995, Van Epps hired Evander Jeffords of the Hyman Law Firm to represent her in the divorce. At the time of the divorce, Stewart was a member of Pee Dee Surgical Group. When Van Epps hired Jeffords, he was also representing a senior partner of the Pee Dee Group, Dr. Bolick, in his divorce.

Pursuant to Law Firm's recommendation, Van Epps obtained twenty affidavits from witnesses favoring her on the issue of child custody. Van Epps was awarded custody at the temporary hearing. At the divorce trial, Law Firm failed to call any witnesses to testify on Van Epps' behalf on the custody issue. In fact, of the three witnesses besides Van Epps who were called by Law Firm, two testified in support of its claim for attorney's fees. [1]

In assessing the value of the Pee Dee Group for purposes of equitable distribution, Jeffords suggested Van Epps use Carroll Webster, a CPA whom Jeffords was also using in Bolick's divorce action. At the time Jeffords selected him to perform the valuation for Van Epps, Webster was performing personal accounting work for Van Epps and Stewart, and he was also the CPA for Pee Dee Surgical Group. Webster used two contracts

[1] The trial judge refused to permit Van Epps' counsel to cross-examine Jeffords as to why he failed to call any of the people who filed affidavits as witnesses at the final hearing.

signed by the members of the Pee Dee Group, a Stockholder Redemption Agreement and a Salary Continuation Agreement,[2] in order to value the practice for the Bolick divorce. Jeffords asked Webster to use the same formula in his valuation of the medical practice for Van Epps' divorce.

Stewart filed his action for divorce in June of 1995. The merits hearing was held on April 15 and 16, and May 28 - 30, 1996. The only expert valuation of the Pee Dee Surgical Group introduced at trial came from Webster, who testified the practice had a value of approximately $52,000, using the Salary Continuation Agreement, and a value of $665, using the formula set forth in the Shareholder Redemption Agreement. Stewart averred in his financial declaration that the value of the practice was zero.

The family court ultimately granted Van Epps a divorce based on Stewart's adultery. The court granted Stewart custody of the parties' two children and ordered Van Epps to pay child support of $2,500 per month. The family court adopted Webster's value of $52,258.00 for the practice. On March 15, 1996, one month prior to the first day of the merits hearing, a Stock Purchase Agreement was executed between McLeod Physician Services, Inc., and the four shareholders of the Pee Dee Surgical Group whereby McLeod agreed to purchase Stewart's practice for 3.1 million dollars. Pursuant to the contract, the closing was scheduled for March 14, 1997. Stewart ultimately received $775,000 for his interest pursuant to the sale.

Law Firm commenced this action in November of 1998 to recover attorney's fees from Van Epps in the sum of $52,120. Van Epps counterclaimed, alleging Law Firm was negligent in its representation in her divorce. She claims Law Firm failed to present numerous witnesses regarding the custody issue, failed to obtain a proper valuation of the Pee Dee Surgical Group, and failed to inform her of a conflict of interest. The trial judge directed a verdict in favor of Law Firm on the custody issue and sent

[2] The salary continuation document, by its own terms, applied only in the event of the retirement, death, or disability of a shareholder.

the remaining issues to the jury. After an Allen[3] charge, the jury found for Law Firm, awarding it $52,120 in attorney's fees, and found in favor of Law Firm on Van Epps' counterclaim. After a successful request for pre-judgment interest of $18,100 on the original attorney's fees, Law Firm was awarded an additional $19,090.37 in attorney's fees and costs. Under the trial judge's order, the judgment against Van Epps totaled $89,310.37. Van Epps appeals.

LAW/ANALYSIS

I. Child Custody

Van Epps argues the trial judge erred in directing a verdict in favor of Law Firm on the claim of legal malpractice regarding the child custody issue. We agree.

Van Epps contends the trial judge erred in directing a verdict in Law Firm's favor where there was evidence that Law Firm's breach of the duty owed to her was the proximate cause of child custody being granted to Stewart. When reviewing an order granting a directed verdict, this court views the evidence in the light most favorable to the party against whom the verdict was granted. Carson v. Adgar, 326 S.C. 212, 216, 486 S.E.2d 3, 5 (1997).

It is undisputed that at the final divorce hearing, Law Firm did not call any witnesses, other than Van Epps herself, in support of her claim for custody. Stanley Feldman, an attorney, testified for Van Epps as an expert witness. He opined Law Firm deviated from the standard of care by failing to call any witnesses on Van Epps' behalf. According to Feldman: "[Law Firm's] failure to call witnesses in this case fell below the standard, made the performance, or made the work below the standard in all fairness." He also testified that: "I think there has been a deviation from the standard of care in the failure to present those witnesses and failure to present a proper

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[3] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896).

custody case." In response to Van Epps' counsel's question as to whether he had an opinion as to "most probably whether or not the failure to call those witnesses was a contributing proximate cause … to the loss of her children," Feldman responded, "Yes, sir." No motion was made to strike Feldman's testimony.

At the conclusion of Van Epps' case, Law Firm moved for a directed verdict on the ground that the evidence failed to establish that Law Firm's breach of duty to Van Epps was the proximate cause of any damages. The trial judge ruled that because Feldman did not testify that Law Firm's deviation from the standard of care most probably caused her to lose custody, the evidence was not sufficient to submit the claim to the jury.

In granting Law Firm's motion for a directed verdict, the trial judge relied on Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). There, the supreme court stated that "before expert testimony is admissible upon the question of the causal connection between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probably' rule." Id. at 111, 410 S.E.2d at 543. Nevertheless, the Baughman decision also specifically holds that: "In determining whether particular evidence meets this test it is not necessary that the expert actually use the words 'most probably.' It is sufficient that the testimony is such 'as to judicially impress that the opinion … represents his professional judgment as to the most likely one among the possible causes.'" Id. (quoting Norland v. Washington General Hospital, 461 F.2d 694, 697 (8th Cir. 1972)).

Feldman fell short of testifying that Law Firm's failure to call any witnesses, other than Van Epps, on the issue of custody was the sole cause of her loss of custody; however, this was not necessary in order to withstand Law Firm's motion for directed verdict. See Sims v. Hall, Op. No. 3703 (S.C. Ct. App. filed December 8, 2003) (Shearouse Adv. Sh. No. 43 at 60) ("Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury."). While expert testimony is normally required in a professional negligence action to establish both the standard of care and the defendant's failure to conform to that standard, Feldman's

testimony satisfied that requirement. Feldman clearly testified that Law Firm deviated from the standard of care in representing Van Epps and that this breach of care was a contributing proximate cause in the loss of custody of her children. This evidence was sufficient to create a jury issue as to whether the alleged breach of the standard of care proximately caused damage to Van Epps. Stallings v. Ratliff, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987) ("The issue of breach of duty does not turn on a ritual incantation of certain magic words by an expert witness. Breach of duty is a fact question to be decided by the jury on the evidence presented in each case.").

The trial judge erred in refusing to submit the issue of Law Firm's negligence in its handling of Van Epps' custody claim to the jury. Accordingly, we reverse and remand this issue for a new trial.

II. Child Custody Affidavits

Van Epps also argues the trial judge erred in failing to allow the custody affidavits into evidence. We agree.

As noted earlier, Van Epps procured twenty affidavits which were submitted to the family court at the temporary hearing. Van Epps attempted to introduce these affidavits into evidence in this action. The trial judge sustained Law Firm's objection to their introduction on the basis of hearsay. This was error.

It is well settled that a statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. R & G Constr., Inc., v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). These affidavits were not offered for the truth of the matter asserted, i.e., that Van Epps should have been awarded custody of the parties' two children. Rather, they were offered to show the extent of Law Firm's alleged negligence in failing to call any of these witnesses at the final hearing. Although the trial judge ultimately agreed with Van Epps' counsel that the affidavits were not being offered for the truth of the matter asserted and were, therefore, not hearsay, the judge nevertheless

inexplicably refused to admit them, ruling instead that Van Epps should offer a compilation of the affiants' names and the dates of each affidavit.

We hold that Van Epps was entitled to introduce these affidavits into evidence to show the extent of Law Firm's alleged negligence in failing to call any witnesses on her behalf at the custody trial. The trial judge erred in sustaining Law Firm's objection on the basis of hearsay.

III. Business Valuation

Van Epps claims it was error for the trial judge to deny her directed verdict motion on the legal malpractice issue regarding the value of the Pee Dee Group because the evidence showed Law Firm did not present a proper business valuation. We disagree.

This court must affirm the denial of a directed verdict motion when there is any evidence to support the ruling below. Pike v. S.C. Dep't of Transp., 332 S.C. 605, 610, 506 S.E.2d 516, 518 (Ct. App. 1998), *aff'd as modified*, 343 S.C. 224, 540 S.E.2d 87 (2000). During the trial, Harry Wilson, an attorney, testified as to the standard of care of family law attorneys. When asked whether he believed Law Firm deviated from this standard of care in its efforts to value the Pee Dee Surgical Group, Wilson stated, "I do not believe that [Law Firm] has deviated from the standard of care in regards to this business valuation." Although Van Epps' expert disputed Webster's business valuation, Wilson's testimony was some evidence that Law Firm did not breach the standard of care regarding the valuation. Therefore, the denial of the directed verdict motion was proper.[4]

[4] Although we affirm the denial of the directed verdict based on the record before us, our decision in no way affects Van Epps' ability to move for a directed verdict on this issue at her new trial.

IV. Sale of the Pee Dee Surgical Group

Van Epps contends the trial judge erred in refusing to allow into evidence the amount of the sale of the Pee Dee Surgical Group to McLeod Hospital. We agree.

The trial judge, relying on McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998), ruled in limine that the amount of the sale of the surgical practice to McLeod was not relevant to the issue of the value of Stewart's practice for the purposes of marital litigation. Moreover, the trial judge ruled that even if the evidence were relevant, it would be highly prejudicial, and therefore inadmissible. We hold this was error.

Marital property is to be identified and valued as of the date the marital litigation is filed or commenced. See S.C. Code Ann. § 20-7-473 (Supp. 2002); Mallett v. Mallett, 323 S.C. 141, 151, 473 S.E.2d 804 810 (Ct. App. 1996). However, it is equally well settled that the parties to domestic litigation are entitled to share in any appreciation or depreciation in marital assets occurring after separation but before divorce. See McDavid v. McDavid, 333 S.C. 490, 497 n. 7, 511 S.E.2d 365, 369 n. 7 (1999) ("We know of no authority, and the husband does not cite any, that holds that only one spouse is entitled to any appreciation in marital assets that occurs after the parties separate and before the parties are divorced. We would think both parties would be entitled to any such appreciation."); Fields v. Fields, 342 S.C. 182, 187, 536 S.E.2d 684, 686 (Ct. App. 2000) (affirming family court judge's decision to value stock in three businesses as of December 31, 1997, the closest date to the parties' December 12, 1997, divorce rather than as of the date of filing); Dixon v. Dixon, 334 S.C. 222, 228, 512 S.E.2d 539, 542 (Ct. App. 1999) ("It is an unfortunate reality that, given the volume of cases handled by our family courts, there often is a substantial delay between the commencement of an action and its ultimate resolution. Thus, it is not unusual for the value of marital assets to change, sometimes substantially, between the time the action was commenced and its final resolution. In such a case, the family court has the ability to consider the post-filing appreciation or depreciation when valuing and apportioning the marital estate."); Mallett, 323 S.C. at 141, 473 S.E.2d at 804 (affirming valuation of husband's business

at time of final hearing where business had declined in value by more than $30,000 since commencement of the action).

Given these authorities, the trial judge erred in ruling that the evidence relating to the sale of the medical practice was not relevant to the issue of the value of Stewart's practice for purposes of the marital litigation. Moreover, to the extent the trial judge based his decision on relevancy on the McElveen decision, it was also in error.

First, it must be noted that the issue of the valuation of the husband's interest in his medical practice in McElveen did not involve the question of the relevancy of any evidence; rather, the McElveen court had to determine what evidence was most probative on the issue of valuation. In McElveen, the parties stipulated during the trial that the fair market value of husband's interest in his medical practice was $250,000, specifically noting that the stipulation was reached independently of substantially conflicting experts' opinions. Subsequent to the trial but before the family court issued its decree, the wife moved to set aside the trial stipulation as to the value of the husband's interest, to re-open the evidence on this issue, and for sanctions. This motion was based on previously undisclosed negotiations to sell the medical practice. The family court granted the wife leave to undertake discovery pursuant to the post-trial motion and reserved ruling on the issue of the medical practice valuation pending completion of discovery. The family court found that negotiations to sell the husband's medical practice did in fact begin prior to the time of the stipulation, that they were relevant, and that they should have been disclosed during the original discovery process. McElveen, 332 S.C. at 590, 506 S.E.2d at 5. As a result, the family court set aside the parties' stipulation and re-opened the case for the limited purpose of taking evidence on the issue of the fair market value of the practice. Ultimately, the family court found that although negotiations to sell the practice had taken place, a 1987 stock purchase agreement among the shareholder-physicians was controlling on the issue of the valuation of the husband's interest in the practice. Even though the value of the husband's interest as calculated by the 1987 stock purchase agreement was less than the value the parties had stipulated during the trial, the family court determined

the stipulated value was the correct value to be used in the division of the marital property.

Both parties in McElveen appealed the issue of the valuation of the husband's interest in the medical practice to this court, with the wife contending that the family court erred in refusing to find that the letter of intent to purchase the medical group for $19,800,652 was controlling as to the value of the husband's interest, and the husband arguing that the family court erred in valuing his interest in the practice in an amount exceeding the $183,000 stock purchase price established by the 1987 stock purchase agreement. This court held the unaccepted offer to purchase the entire practice was of little probative value, and the most probative evidence of the value of the husband's interest in the medical practice was derived from the 1987 stock purchase agreement. 332 S.C. at 593-594, 506 S.E.2d at 6.

Importantly, the stock purchase agreement in McElveen, which we found probative, was exclusive. In other words, Dr. McElveen was restricted by the terms of the agreement from transferring his shares in the practice other than as computed by the formula set forth in the agreement. In this case, the salary continuation agreement merely required Dr. Stewart to give notice and a right of first refusal to his partners, but the method of valuation was not limited to an exclusive formula unless no bona fide offer from a third party existed. We held in McElveen that once the family court set aside the stipulation, it was error for the court to return to the value proposed in the stipulation without some evidence to support that figure. Accordingly, we held the family court's decision to value the husband's interest at the stipulated value of $250,000 rather than pursuant to the terms of the 1987 stock purchase agreement was not supported by the evidence. We certainly did not hold, however, that such an agreement was the only way to value a medical practice or that other evidence of value was inadmissible. See id. at 594, 506 S.E.2d at 6 ("We do not intend by our holding to suggest that a stock purchase agreement, where applicable, will always provide the best evidence of fair market value. Our holding as to the determinative nature of the stock purchase agreement in this case should be viewed as limited to the facts presently before us.").

The trial judge thus erred in relying on McElveen as support for his decision that the sale of the Pee Dee Surgical Group was not relevant on the issue of valuation for purposes of the marital litigation. In fact, we read McElveen to support our decision that the sale of the Pee Dee group was clearly relevant for purposes of the marital litigation. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE. The essence of Van Epps' malpractice claim against Law Firm relating to the evaluation of Stewart's interest in the Pee Dee Surgical Group is that Law Firm's use of Carroll Webster, rather than an independent witness who arguably would have vigorously pursued the true value of the practice, resulted in the undervaluing of Stewart's share in the practice. It is readily apparent that the agreement to sell the practice to McLeod, which was entered into prior to the parties' merits hearing and thereafter finalized, tends to make it more probable that Van Epps' claim of malpractice was meritorious. It was thus error for the trial judge to refuse to admit this evidence.

We likewise reject any contention that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Law Firm. In assessing Van Epps' claim of malpractice against Law Firm, the jury was clearly entitled to know that Stewart's interest, which was valued at zero by Stewart and approximately $665 and $52,000 by Webster, was ultimately purchased for $775,000, and that the agreement to purchase it was signed by Stewart and his fellow shareholders prior to the merits hearing in the parties' domestic action. Accordingly, we reverse and remand the issue of malpractice as it relates to the business valuation for a new trial.

V. Conflict of Interest

Van Epps argues the trial judge erred in refusing to direct a verdict in her favor on the issue of legal malpractice regarding a conflict of interest. We disagree.

This court must affirm the denial of a directed verdict motion when there is any evidence to support the ruling below. Pike, 332 S.C. at

610, 506 S.E.2d at 518. Van Epps contends a conflict of interest existed due to Law Firm's representation of both Van Epps and Bolick in their divorce actions. Professor John Freeman, appearing without compensation, was qualified as an expert in lawyer's duties and legal malpractice, based largely on his academic and other professional involvement in matters of legal ethics. He stated, "I believe there was an improper conflict of interest, and I believe that Susan Van Epps suffered because that conflict of interest was not dealt with properly." Professor Freeman further testified that this conflict gave rise to Law Firm's failure to properly value Stewart's interest and that, in his opinion, if there was an unethical conflict of interest, no attorney's fees should be awarded. On the contrary, Jeffords testified that although he disclosed his representation of Bolick to Van Epps, he did not consider the representation to pose a conflict of interest and he therefore did not use that term when speaking with Van Epps. Harry Wilson, an attorney qualified as an expert on the standard of care of domestic attorneys, testified that he did not believe Law Firm's representation of Bolick and Van Epps constituted a conflict of interest.[5] Accordingly, since there was conflicting evidence presented on the issue of conflict of interest, the trial judge did not err in failing to grant a directed verdict to Van Epps.[6]

VI. Attorney's Fees

Van Epps claims the trial judge erred in refusing to direct a verdict in her favor on the issue of attorney's fees. She asserts the trial judge should have directed a verdict in her favor because Law Firm was not entitled

[5] We need not decide whether an attorney licensed to practice law in this state is necessarily competent to testify as an expert in the field of legal ethics because Van Epps, although initially objecting to Wilson's qualification in this field, has not raised the issue of Wilson's qualifications on appeal.

[6] Because the conflict of interest issue was a part of Van Epps' overall claim for legal malpractice, our disposition of this issue does not preclude Van Epps from re-trying the conflict of interest issue at her new trial. Furthermore, because our decision to affirm the denial of Van Epps' directed verdict motion is based on the record before us, our decision does not impact Van Epps' ability to move for a directed verdict on this issue at her new trial.

to $52,120 in uncollected attorney's fees in light of its legal malpractice and conflict of interest. However, because we found the trial judge did not err in denying Van Epps' directed verdict motions as to her claims for legal malpractice and conflict of interest, we also find the trial judge did not err in denying her motion for directed verdict on the issue of attorney's fees.[7] See Pike, 332 S.C. at 610, 506 S.E.2d at 518 (requiring the appellate court to affirm the denial of a directed verdict motion when there is any evidence to support the ruling below). However, because the issue of attorney's fees is inextricably linked to Van Epps' conflict of interest claim, the issue of attorney's fees is also remanded to be determined de novo at the new trial.

CONCLUSION

For the foregoing reasons, the decision of the trial judge is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HEARN, C.J., HOWARD, and KITTREDGE, JJ., concur.

[7] We again note that our decision to affirm the denial of Van Epps' motion for directed verdict as to attorney's fees is based exclusively on the record before us. On remand, Van Epps may again move for a directed verdict on this issue, and the trial judge shall rule on her motion based upon the evidence presented at the new trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Delores Matthews, Respondent,

v.

Richland County School District One, Appellant.

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

Opinion No. 3756
Submitted February 9, 2004 – Filed March 8, 2004

APPEAL DISMISSED

W. Michael Duncan, of Columbia, for Appellant.

J. Lewis Cromer, of Columbia, for Respondent.

HEARN, C.J.: Richland County School District One appeals the trial court's award of attorney's fees to Delores Matthews following a jury verdict on her claim under the Payment of Wages Act. We dismiss the appeal as being untimely.

FACTS

On August 31, 2002, Matthews commenced this action by filing a complaint alleging a cause of action under the South Carolina Payment of Wages Act.[1] Matthews worked as a bookkeeper for School District when the events underlying the current litigation occurred.

Matthews averred she performed work for School District during the summer months of 1999, for which she received no compensation. Specifically, Matthews sought remuneration of standard pay for 157.5 hours, overtime pay for 217.5 hours, and travel expenses of $1,053. The total amount sought in the complaint amounted to approximately $8,000.

Following a jury trial on December 19, 2001, a verdict was returned for Matthews in the amount of $10,000 actual damages. After the jury was dismissed, School District made a motion for judgment notwithstanding the verdict ("JNOV") on the ground there was no evidence in the record to support the amount awarded. School District also made a motion for remittitur, specifically asking the court to reduce the amount awarded to an amount supported by the evidence.

The trial court denied both of School District's motions and upheld the verdict of $10,000. School District received a written copy of the entry of judgment on January 14, 2002, and moved pursuant to Rule 59(e), SCRCP, to alter or amend the judgment on January 25, 2002. This motion restated the argument made in School District's JNOV motion that there was no evidence to support the award of $10,000. Matthews submitted a response to School District's motion on January 31, 2002, in which she asked the court to let the verdict stand, or, in the alternative, order a new trial nisi and allow her to recover attorney's fees. Included with this response, Matthews filed three affidavits, each attesting to the fact that $8,000 in attorney's fees was reasonable and appropriate.

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[1] S.C. Code Ann. §§ 41-10-10 – 110 (Supp. 2002).

At the hearing held on March 7, 2002, the trial court began by questioning his authority to reconsider his denial of the post-trial motion. Counsel for both parties assured the court it had jurisdiction, and the trial court ultimately granted School District's motion. In its order dated March 19, 2002, the trial court found the evidence supported a verdict in the amount of $7,100. However, the trial court also awarded Matthews attorney's fees in the amount of $4,900. Thus, the total awarded to Matthews following the hearing was $12,000, rather than the original $10,000 awarded by the jury. School District filed its notice of appeal on April 19, 2002.

School District's argument on appeal is that the trial court erred in making a mandatory award of attorney's fees in its March 19th order when School District disputed Matthews' claims for wages and expenses in good faith.

LAW/ANALYSIS

We conclude the trial court lacked jurisdiction to entertain School District's identical, successive post-trial motion and, as a result, the appeal to this court is untimely, thereby depriving us of jurisdiction.[2]

Rule 203(b)(1), SCACR, provides that the notice of appeal from a civil action shall be served on respondents within thirty days after receipt of written notice of entry of the order or judgment. Although timely motions for JNOV, to alter or amend the judgment, or for a new trial stay the time for appeal until such time as written notice of entry of the order granting or denying the motions is received, they do not extend the time for appeal when, as in the current situation, the subsequent motions are merely restatements of previous motions.

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[2] Although neither party raised this argument on appeal, this court is obligated to evaluate subject matter jurisdiction on its own motion. Ness v. Eckerd Corp., 350 S.C. 399, 402, 566 S.E.2d 193, 195 (Ct. App. 2002).

Recently, in Collins Music Co. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002), *cert. denied*, 123 S. Ct. 303 (2003), this court considered this very issue. In Collins, after a jury verdict was awarded against it, IGT made timely motions for JNOV, new trial, and new trial nisi remittitur. Id. at 560, 579 S.E.2d at 524. All of these motions were denied by the trial judge and IGT was served with a copy of the order on September 5, 2001. Id.

IGT served a motion to alter or amend pursuant to Rule 59(e), SCRCP, on September 12, 2001, which merely restated the arguments made in the post-trial motions. Id. at 561, 579 S.E.2d at 524. IGT received written notice of the entry of the order denying its motion to alter or amend on November 5, 2001, and thereafter served its notice of appeal on November 21, 2001. Id.

Relying on Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (holding that successive post-trial motions do not toll the time for appeal) and Quality Trailer Products, Inc. v. CSL Equip. Co., 349 S.C. 216, 562 S.E.2d 615 (2002) (holding that successive new trial or JNOV motions do not toll the time for serving the notice of appeal), we held that because IGT's Rule 59(e) motion did not raise any new issues, but rather repeated the arguments made in its earlier motions, it was not a proper Rule 59(e) motion and thus, did not toll the time for serving the notice of appeal. Collins, 353 S.C. at 566, 579 S.E.2d at 527. Therefore, because the issues raised in the subsequent motions were preserved for review after the court's first post-trial order, the time to appeal lapsed while IGT was seeking a ruling on its subsequent Rule 59(e) motion. Id.

The facts of the current case are similar to those in Collins, Coward Hund, and Quality Trailer. School District made a motion for JNOV immediately following the jury's verdict on the grounds that the evidence did not support the amount awarded by the jury. The trial court denied this motion. School District received a written copy of entry of the judgment on January 14, 2002, and moved pursuant to Rule 59(e) to alter or amend the judgment on exactly the same grounds – that

the evidence did not support the verdict. The trial court issued an order on March 19, 2002, granting School District's motion and awarding attorney's fees. School District filed its notice of appeal on April 19, 2002.

We find that School District's time for appeal began to run when it received the written notice of judgment on January 14, 2002. Because School District's Rule 59(e) motion was nothing but a restatement of the arguments it made in its post-trial motion, the Rule 59(e) motion did not stay the time to file the notice to appeal. While we recognize that the trial court granted School District's second motion, making this case slightly different from prior South Carolina cases on this issue, we conclude the trial court lacked jurisdiction to consider School District's identical post-trial motion. Cf. Leviner v. Sonoco Products, Co., 359 S.C. 492, 493-494, 530 S.E.2d 127, 127-128 (2000) (finding that a full written order issued by the circuit court after the court had already issued a form order remanding the workers' compensation case was a nullity because neither party had made a timely motion to alter or amend the judgment and the circuit court did not file a timely sua sponte order altering or amending the judgment). As explained in Collins, successive post-trial motions are not appropriate unless the initial post-trial order alters the judgment. Here, the trial court declined to alter the jury's verdict in any way after School District's initial post-trial motions. Thus, the trial court's jurisdiction ended and School District's time to appeal the verdict began to run upon receipt of the trial court's order denying School District's post-trial motions. The alternative of allowing trial courts to consider successive post-trial motions would result in a party's ability to appeal being governed by whether its successive post-trial motion was granted or denied.[3]

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[3] We agree with the rationale of the Illinois Supreme Court which stated, "Permitting successive post-judgment motions would tend to prolong the life of a lawsuit – at a time when the efficient administration of justice demands a reduction in the number of cases pending in trial courts – and would lend itself to harassment. There must be finality, a time when the case in the trial court is really over

CONCLUSION

Accordingly, because School District's time for appeal began to run on January 14, 2002, and School District did not file its notice of appeal until April 19, 2002, its appeal is untimely. The trial court's order dated March 19, 2002, is vacated for lack of jurisdiction, and the jury's original verdict is reinstated.

APPEAL DISMISSED.

ANDERSON and BEATTY, JJ., concur.

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and the loser must appeal or give up. Successive post-judgment motions interfere with that policy." B-G Assoc., Inc. v. Giron, 550 N.E.2d 1080, 1083 (Ill. App. Ct. 1990) (citing Sears v. Sears, 422 N.E.2d 610, 613 (1981)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

All Saints Parish, Waccamaw, a South Carolina non-profit corporation, a/k/a The Episcopal Church of All Saints and a/k/a The Vestry and Church Wardens of the Episcopal Church of All Saints Parish, and Martha M. Lachicotte, Frances Ward Cromwell, and Alberta Lachicotte Quattlebaum, Individually and as Representatives of the Inhabitants of the Waccamaw Neck Region in Georgetown County, and Evelyn LaBruce, Individually and as descendant of George Pawley, Plaintiffs,

Of Whom All Saints Parish, Waccamaw, a South Carolina non-profit corporation, a/k/a The Episcopal Church of All Saints and a/k/a The Vestry and Church Wardens of the Episcopal Church of All Saints Parish are Respondents,

v.

The Protestant Episcopal Church in the Diocese of South Carolina, The Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America, Mark Sanford, in his official capacity as the Governor of South Carolina, State of South Carolina and John Doe and Jane Doe as descendants to George Pawley and William Poole, Defendants,

Of Whom The Protestant Episcopal Church in the Diocese of South Carolina, The Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America are Appellants,

and

Mark Sanford, in his official capacity as the Governor of the State of South Carolina, State of South Carolina and John Doe and Jane Doe as descendants to George Pawley and William Poole are Respondents.

Appeal From Georgetown County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 3757
Heard September 10, 2003 – Filed March 8, 2004

VACATED IN PART, REVERSED IN PART and REMANDED

Benjamin A. Moore, Jr., Julius A. Hines and Coming B. Gibbs, Jr., all of Charleston, for Appellants.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney Treva Ashworth, Senior Assistant Attorney General C. Havird Jones, Jr., all of Columbia; D. Michael Henthorne, of Anderson; Fred B. Newby and Henrietta U. Golding, both of Myrtle Beach, for Respondents.

HOWARD, J.: This is a suit involving All Saints Parish, Waccamaw ("the Parish"), the Protestant Episcopal Church in the Diocese of South Carolina ("the Diocese"), the Protestant Episcopal Church in the United States of America ("the National Church"), and the descendants of the trustees ("the Does") to determine who owns real and personal property located on Pawley's Island, South Carolina.

In 1745, a trust was created for the "Inhabitants On Waccamaw Neck for the Use of a Chapple or Church for divine worship of the Church of England established by Law." The trust was not recorded until 1767, the same year the Parish was recognized by the colonial government. During the next 100 years, the Parish became affiliated with the Diocese and the National Church.

In September 2000, after an ecclesiastical dispute arose between the Parish, the Diocese, and the National Church, the Bishop of the

Diocese filed a notice with the Register of Deeds in Georgetown County, stating the Diocese and the National Church held an interest in the property by means of church canons. The Parish filed suit to have the statement removed from the deed book and to have the circuit court declare the Parish to be the sole owner of all real and personal property.

Because of the existence of the trust deed, the circuit court appointed a guardian *ad litem* to represent any interest the Does might have in the property. The Does moved for partial summary judgment, alleging they owned legal title to the real property. Based on the Parish's affiliation with the Diocese and the National Church, the Diocese and the National Church claimed an interest in the property by means of the Statute of Uses, adverse possession, laches, and staleness. The circuit court ruled for the Does on the motion for summary judgment, finding the Does held legal title to the real property. The Diocese and the National Church appeal. We vacate in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

The property at issue in this case is located in Georgetown County, in an area known as the Waccamaw Neck region. In 1745, Percival Pawley and his wife conveyed the property[1] to two trustees, George Pawley and William Poole, "in Trust For The Inhabitants On Waccamaw Neck for the Use of a Chapple or Church for divine worship of the Church of England established by Law."

In 1767, the General Assembly passed an act creating the Parish

[1] The Pawleys received the property from John Hutchinson's widow in 1731. John Hutchinson received the property in 1711 as a land grant from the Lords Proprietors. See Coburg Dairy v. Lesser, 318 S.C. 510, 512 n.1, 458 S.E.2d 547, 548 n.1 (1995) ("From 1672 until 1730, grants of land were made by the Lords Proprietors who were granted enormous tracts of land in America by Charles II, King of England. The Lords Proprietors owned all of Carolina and acted in the stead of the sovereign in making land grants.").

in the "Waccamaw Neck" region and appointing seven men to serve as commissioners for the Parish.[2] See Act No. 961 of May 23, 1767, 4 Stat. 266. Later that year, one of the commissioners recorded the 1745 trust deed in Charleston County.

Although the charter was renewed on several occasions,[3] in 1902 the Parish became concerned that its charter had "probably long since expired," vesting its property with the Diocese.[4] To remedy this situation, the Chancellor of the Diocese suggested the Parish apply to the South Carolina Secretary of State for a corporate charter and request a quitclaim deed from the Diocese. Later that same year, the Parish received its certificate of incorporation from the Secretary of State. In 1903, the trustees of the Diocese executed a deed that relinquished title of the property to the Parish.

Subsequent to the recording of this deed, the Parish leased parts of the property for uses not authorized by the trust and mortgaged the property.[5]

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[2] In 1770, the Royal Privy Council disallowed the Parish's colonial charter. However, in 1778, the Parish was recognized by the government of the newly formed state of South Carolina. See Act No. 1071 of Mar. 16, 1778, 4 Stat. 407; S.C. Const. of 1778, arts. XII-XIII.

[3] In 1839, the original Parish charter was "revived" for a fourteen-year term. See Act No. 2788 of December 21, 1839, 11 Stat. 70. The charter was renewed for an unspecified term in 1852. See Act No. 4081 of December 16, 1852, 12 Stat. 137.

[4] According to an 1880 statute, title to "all property belonging to any of the corporations or churches or dormant parishes formerly connected with the [Episcopal Church for the South Carolina Diocese], but which have now ceased to have active operation . . . or whose charters of incorporation may have expired" vested in the Diocese. See Act No. 222 of Feb. 20, 1880, 17 Stat. 257.

[5] The Diocese authorized these mortgages.

In September 2000, after an ecclesiastical dispute arose involving the Parish, the Diocese, and the National Church, the Bishop of the Diocese issued a notice setting forth the canons of the Diocese and the National Church that limit the alienation and encumbrance of church property. This notice was recorded in the public records of Georgetown County.

In response to the recording of this notice, the Parish filed a complaint in October 2000, seeking a removal of the notice from the deed book and a declaration that it owned the real and personal property located on Pawley's Island. The Diocese and the National Church answered and counterclaimed, alleging the property was owned by the Parish subject to the canons of the Diocese and the National Church.

The Parish requested the court appoint a guardian *ad litem* to represent the interests of John and Jane Doe, the representatives of the descendants to the original trustees of the 1745 trust.

After the circuit court appointed a guardian *ad litem* to represent the Does, the Does petitioned for partial summary judgment on the issue of the ownership of the real property, arguing they were the sole owners of the real property. Thereafter, the Parish aligned itself with the Does' position.[6]

At the hearing, the Diocese and the National Church defended against the Does' claim,[7] maintaining the position that the Parish

[6] The Parish also filed a motion for summary judgment asking the circuit court to declare "the subject property [was] governed by the 1745 Trust Deed, and as a matter of law [the Diocese] and [the National Church] have no right to assert any interest in the said property." The circuit court declined to rule on the Parish's motion because of its disposition on the Does' motion.

[7] Neither the Diocese nor the National Church filed a cross-motion for summary judgment.

owned the real property and they owned an interest in any property owned by the Parish.

After hearing extensive argument on the Does' motion for summary judgment, the circuit court concluded the language contained in the 1745 trust deed was clear and unambiguous and therefore refused to consider parol evidence to explain the terms in the trust deed. The circuit court granted the Does' motion for partial summary judgment, ruling "the 1745 Deed created an active valid and binding charitable trust and legal title to the Subject Property is held by the common law heirs of George Pawley represented by John Doe and Jane Doe, and the equitable title is held by the inhabitants of the Waccamaw Neck as the Trust beneficiaries." In making its ruling, the circuit court determined: 1) the Diocese and the National Church did not have standing to assert Statute of Uses, adverse possession, laches, and staleness; 2) the Statute of Uses did not execute the trust; 3) the trust did not fail when the Church of England ceased to be recognized in the United States; 4) the Parish did not acquire the property by adverse possession; 5) the Does' claim was not barred by laches; 6) the Does' claim was not barred by staleness; 7) the Diocese and the National Church were "at best, incidental beneficiaries" to the trust; and 8) the court did not have subject matter jurisdiction to determine the ownership of the personal property. The Diocese and the National Church appeal.

ISSUES PRESENTED

1. Did the circuit court err by holding the Diocese and the National Church did not have standing to assert Statute of Uses, adverse possession, laches, and staleness?

2. Did the circuit court err by ruling on summary judgment that the Statute of Uses did not execute the trust?

3. Did the circuit court err by ruling on summary judgment that the trust did not fail when the Church of England ceased to be recognized in the United States?

4. Did the circuit court err by granting summary judgment to the Does on the claim of adverse possession?

5. Did the circuit court err by granting summary judgment to the Does on the claim of laches?

6. Did the circuit court err by granting summary judgment to the Does on the claim of staleness?

7. Did the circuit court lack subject matter jurisdiction to declare the Diocese and the National Church to be incidental beneficiaries of the trust?

8. Did the circuit court err by declaring it did not have subject matter jurisdiction to determine the ownership of the personal property?

LAW/ANALYSIS

I. Standing

The Diocese and the National Church argue the circuit court erred by holding they did not have standing to assert Statute of Uses, adverse possession, laches, and staleness. We agree.

A party must have a personal stake or interest in the subject matter of the lawsuit to have standing. Anchor Point v. Shoals Sewer, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992) (holding a party has standing to sue if the party has "a real, material, or substantial interest in the subject matter of the action, as opposed to . . . only a nominal or technical interest in the action"); Duke Power v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 96, 326 S.E.2d 395, 404 (1985) ("[T]o have standing to present a case before the courts of this State, a party must have a personal stake in the subject matter of the lawsuit."); see Town of Sullivan's Island v. Felger, 318 S.C. 340, 346, 457 S.E.2d 626, 629 (Ct. App. 1995) (holding the town has standing in a declaratory action to determine whether Felger owns fee simple title to

the property, even though the town does not have a direct interest in ownership of the property).

The present lawsuit began as an action with the Parish as plaintiff and the Diocese and the National Church as co-defendants. The Parish initiated the lawsuit after the Bishop of the Diocese filed a notice in the County of Georgetown Deed Book, claiming the Diocese and National Church hold an interest in any property owned by the Parish based on the canons of the Diocese and the National Church.[8] In its complaint, the Parish requested the circuit court declare it to be the sole owner of the property.

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[8] The quoted language from the canons of the Diocese read, in part, "[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for the Episcopal Church and the Protestant Episcopal Church in the Diocese of South Carolina." The quoted language from the canons of the National Church was nearly identical. Although the Parish claims it is not bound by these canons, the Parish does not deny it has been affiliated with the National Church since as early as 1820 and with the Diocese since at least 1903. We note the interpretation of the canons is an ecclesiastical dispute and beyond the jurisdiction of the civil court. See Fire Baptized Holiness Church of God of Americas v. Greater Fuller Tabernacle Fire Baptized Holiness Church, 323 S.C. 418, 421-23, 475 S.E.2d 767, 769-70 (Ct. App. 1996) ("The trial court . . . found that the issue of whether the 1975 deed comported with Church discipline so as to effectively transfer the subject property to the National Church was ecclesiastical in nature, and therefore beyond the jurisdiction of the civil court . . . . [In affirming the trial court's decision, this Court stated], [t]he interpretation of the Discipline, and what it mandates, is a matter for the ecclesiastical tribunal of the National Church, not the civil court."); see also Seldon v. Singletary, 284 S.C. 148, 149-50, 326 S.E.2d 147, 148-49 (1985) (holding a local congregation that is part of a hierarchical church is under the government and control of the religious organization); Morris Street Baptist Church v. Dart, 67 S.C. 338, 343, 45 S.E. 753, 754 (1903) ("Episcopalians subject themselves, in church affairs, to the authority of synods and councils.").

Because the Parish requested it be declared the sole owner of the property and did not simply ask the circuit court to determine the claims between the Parish, the Diocese, and the National Church, the circuit court heard arguments for the appointment of representatives for anyone having an interest in the property. The circuit court appointed the Does to represent the claim of the descendants of the trustees to the 1745 trust.

After being appointed, the Does moved for partial summary judgment, claiming they alone held legal title to the real property. The Parish supported this motion. Unless the Diocese and the National Church are able to assert the Parish owns the real property, their claim to an interest in the property will be lost based solely on the Parish's decision not to pursue the issue. Thus, the Diocese and National Church have a stake in any lawsuit that could affect the Parish's interest in the property.

Therefore, the circuit court erred by ruling the Diocese and the National Church did not have standing to assert Statute of Uses, adverse possession, laches, and staleness. Consequently, we reverse.

II. Summary Judgment

Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "If triable issues exist, those issues

must go to the jury." Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991).

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, South Carolina Rules of Civil Procedure." Lanham v. Blue Cross & Blue Shield of South Carolina, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

A. Statute of Uses

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the Statute of Uses did not execute the trust. We agree.

In a trust where the trustee is instructed to use the property for the benefit of another, the Statute of Uses executes to vest legal title with the beneficiary, if the beneficiary is capable of taking legal title and the trustee has no active duties. Restatement (Second) of Trusts § 67 (1959); see id. at cmt. b ("When the Statute of Uses executes a use or trust not only is the interest of the beneficiary made legal but the interest of the person who otherwise would hold subject to the use or trust is extinguished. The Statute thus has a double effect in turning the equitable interest of one person into a legal interest and extinguishing the legal interest of the other."); Johnson v. Thornton, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975) ("In a passive trust the legal and equitable titles are merged in the beneficiaries and the beneficial use is converted into legal ownership, but as to an active trust the title remains in the trustee for the purpose of the trust."); see also Young v. McNeill, 78 S.C. 143, 153, 59 S.E. 986, 989 (1907) (holding the Statute of Uses will not execute the trust if the beneficiary of the trust is not capable of taking legal title); Bowen v. Humphreys, 24 S.C. 452, 455 (1886) (holding the Statute of Uses will not execute the trust "as long as there is anything remaining for the trustee to do which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the trust").

The Does argued the Statute of Uses did not execute the trust. According to the Does, the plain language of the trust deed established the beneficiary was not capable of taking legal title, and the trustee had active duties.

The circuit court agreed with the Does, ruling the term "inhabitants on Waccamaw Neck" referred to the people living in the geographic region and ruling the language in the deed imposed an affirmative duty upon the trustees to assure "continued use of the property for a chapel or church and to ensure that divine worship [was] maintained."[9]

Because of these rulings, the circuit court refused to consider parol evidence regarding the issues of whether the beneficiary was capable of taking legal title and whether the trustee lacked affirmative duties.

"The primary consideration in construing a trust is to discern the settlor's intent." Bowles v. Bradley, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995). When the beneficiary "is described in terms applicable . . .

[9] In finding the settlor's intent was to ensure the property was used for divine worship, the circuit court ignored the words "Church of England established by Law." Because this language revealed the settlor's intent to use the property to house a chapel for a specific denomination of the Christian faith, we hold the circuit court erred in this ruling. See First Carolina Joint Stock Land Bank v. Deschamps, 171 S.C. 466, 480, 172 S.E. 622, 627 (1933) ("In view of the . . . provisions of the trust deed and of the decisions cited, ... [t]his construction gives full effect to the intention as expressed in every part of the deed."); Town of Pawlet v. Clark, 13 U.S. 292, 324 (1815) (holding the interpretation of a grant must "give full effect to all the words" in the document); see also Combe v. Brazier, 2 S.C. Eq. 431, 446-47, 2 Des. Eq. 431, 446-47 (1806) (holding that because there are "slight shades of difference between the different sects of protestant Christians," a trust deed which provided for a Methodist minister to preach at a church failed when the minister became an Episcopal priest).

to more than one person or thing, [parol] evidence is admissible to prove which of the persons or things so described was intended."[10] Cuningham v. Cuningham, 20 S.C. 317, 330 (1883) (quoting James Wigram & John O'Hara, A Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills 142 (1872)); see Bowles, 319 S.C. at 380, 461 S.E.2d at 813 ("[W]hen there is no defect on the face of a document but an uncertainty appears upon attempting to effectuate the document, then the document contains a latent ambiguity and parol evidence is admissible to determine the settlor's intent."). Furthermore, the evidence must be considered in light of the law as it existed at the time. See id. (holding it was proper to review the case law applicable to the time when the settlor wrote his trust deed to determine "issue" had only one legal interpretation at the time, meaning no latent ambiguity existed).

In adopting the Does' argument, the circuit court ignored the argument of the Diocese and the National Church that "Inhabitants on Waccamaw Neck" referred to the Parish. According to the Diocese and the National Church, the settlor intended to deed the property to the Parish but could not do so directly until such time as the church was officially recognized by the government. Based on this argument, the Statute of Uses executed the trust once the Parish was officially established, meaning the trustees had no continuing duties.[11]

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[10] The law relating to discerning the drafter's intent is identical for wills and trusts. See Deschamps, 171 S.C. at 480, 172 S.E. at 627 (holding courts are authorized to ascertain a maker's intent in the construction of wills and trust deeds); South Carolina Nat'l Bank v. Bonds, 260 S.C. 327, 331-32, 195 S.E.2d 835, 837 (1973) ("In construing the terms used by the Testator in his will, the paramount consideration of this Court is to ascertain and effectuate the intent of the Testator."); Bowles, 319 S.C. at 380, 461 S.E.2d at 813 ("The primary consideration in construing a trust is to discern the settlor's intent.").

[11] Because the Royal Privy Council disallowed the 1767 Act creating the Parish in 1770, the Diocese and the National Church raise the possibility that the property may have escheated to the government

To advance their point, the Diocese and the National Church offered parol evidence, statutes, cases, and constitutions to demonstrate that in colonial times churches could not be recognized by the government until they owned property, and they could not own property until they had been officially recognized. See Pawlet, 13 U.S. at 330 (holding "no parish church . . . could have a legal existence until consecration and consecration was expressly inhibited unless upon a suitable endowment of land"). As such, a colonial practice arose in which a settlor placed property in trust for a congregation until such time as the government recognized the church. See id. at 331 ("[I]t would form an exception to the generality of the rule, that to make a grant valid there must be a person *in esse* capable of taking it. And under such circumstances until a parson should be legally inducted to such new church, the fee of its lands would remain in abeyance."). The Diocese and the National Church argued this practice was followed by the settlor as evidenced by the fact that the trust was not recorded until the year the Parish was recognized by the government, approximately twenty years after the trust was created.

Because uncertainty arose when attempting to effectuate the trust deed, we hold "inhabitants on Waccamaw Neck" was a latent ambiguity, and it was error for the circuit court to refuse to consider parol evidence, statutes, cases, and constitutions in determining whether the beneficiary was capable of taking legal title and whether the trustees lacked affirmative duties.[12] See Bowles, 319 S.C. at 380,

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three years after vesting with the Parish. Because we remand this case in full, we need not further address this issue.

[12] The circuit court relied on Beckham v. Short, 298 S.C. 348, 349-50, 380 S.E.2d 826, 827 (1989), to support the proposition that parol evidence is inadmissible to vary the terms of a deed in the absence of fraud, mistake, or other grounds for reformation or rescission. Because the Diocese and the National Church sought to introduce the parol evidence to explain the term, not to vary it, we hold the circuit court erred in its reliance on Beckham. See Shelley v. Shelley, 244 S.C. 598,

461 S.E.2d at 813 ("[W]hen there is no defect on the face of a document but an uncertainty appears upon attempting to effectuate the document, then the document contains a latent ambiguity and parol evidence is admissible to determine the settlor's intent.").

When the parol evidence is considered, there is at least a genuine issue of material fact as to the meaning of "inhabitants on Waccamaw Neck." Therefore, the circuit court erred by ruling on summary judgment that the Statute of Uses did not execute the trust. See George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

B. Failure of the Trust[13]

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the trust did not fail when the Church of England ceased to be recognized in the United States.[14] We agree.

606, 137 S.E.2d 851, 855 (1964) ("'[E]vidence is admissible which merely intends to explain and apply what the testator has written.'" (quoting McCall v. McCall, 25 S.C. Eq. 447, 456, 4 Rich. Eq. 447, 456 (1852))).

[13] The Does and the National Church assert this argument only if, upon remand, the Statute of Uses is determined not to execute the trust in a subsequent circuit court proceeding. If the Statute of Uses executed the trust in 1767, the possibility that the trust failed in the 1770s as a result of the disestablishment of the Church of England in the United States is irrelevant.

[14] As part of its ruling, the circuit court concluded the trust did not fail when the Church of England ceased to be recognized as the official church in the United States. The Diocese and the National Church argued against this ruling, alleging the trust failed once the Church of England was no longer "established by law" as required by the language of the trust. The Diocese and the National Church make this

"Charitable trusts are entitled to peculiar favor; the courts will construe them to give them effect, if possible, and to carry out the general intention of the donor." Colin McK. Grant Home v. Medlock, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (Ct. App. 1986).

"Although a court has considerable discretion to adapt a trust to changed circumstances, this flexibility is not unlimited." Id. at 471, 349 S.E.2d at 658; see Bonds, 260 S.C. at 337, 195 S.E.2d at 840 ("[T]here is no question that where conditions have substantially changed, the Court is allowed considerable discretion [in trying to effectuate the intent of the testator]."); Furman Univ. v. McLeod, 238 S.C. 475, 490, 120 S.E.2d 865, 872 (1961) ("[T]he Court of Equity has the power upon a proper showing, to permit a deviation from the strict terms of a trust if necessary or advisable to carry out the purposes thereof.").

A court is authorized to deviate from the terms of a trust to carry out the settlor's intent but is prohibited from applying the trust property to a different charitable purpose from that designated by the terms of the trust. Bonds, 260 S.C. at 337-41, 195 S.E.2d at 840-42; see id. at 341-42, 195 S.E.2d at 842-43 ("[T]he Testator's primary purpose was to create a perpetual memorial . . . by aiding deserving high school graduates in pursuit of their education . . . . With the many changes which have taken place since the Testator's death . . . it is obvious that if the terms of the trust were literally complied with and the beneficiaries limited to the graduates of 'Greenville City High Schools,' the Testator's main purpose would be defeated rather than effectuated."); McLeod, 238 S.C. at 489, 120 S.E.2d at 871-73 (holding the circuit court was authorized to deviate from the strict terms of the trust because the intent of the testator was to benefit the school); Pringle v. Dorsey, 3 S.C. 502, 507-09 (1872) (holding the trust was for the benefit of a particular church that was subsequently destroyed by fire, and no departure from the trust was authorized because no evidence suggested the testator indicated any organization other than

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argument in connection with their assertion that the Parish holds the property by adverse possession.

the particular church was to benefit from the trust); Attorney Gen. v. Jolly, 21 S.C. Eq. 379, 394-96, 2 Strob. Eq. 379, 394-96 (1848) (holding the income of a trust could not be diverted from a particular congregation to the national church, when the testator specifically requested the money be given to the congregation).

We find Bonds instructive on this point. In Bonds, a Greenville County resident created a trust whose income was "to be used for assistance of deserving students of Greenville City High Schools in completing their education." Bonds, 260 S.C. at 330, 195 S.E.2d at 836. When the document was written in 1941, two Greenville City High Schools existed. By the time the trust became effective in 1971, one of these high schools had been destroyed by fire and students were bused throughout the consolidated Greenville County school system to achieve racial integration. As a result, students who would have been eligible for trust proceeds in 1941 did not qualify in 1971 and vice versa. Id. at 330-36, 195 S.E.2d at 836-39. In determining whether the trust failed, our supreme court stated that because "a change in conditions which the Testator could not have reasonably anticipated" occurred, the application of the trust language to the "factual situation [as it existed in 1971] result[ed] in certain latent ambiguities and uncertainties." Id. at 336, 332, 195 S.E.2d at 839, 838. Thus, our supreme court concluded it was proper to admit parol evidence to determine if the intent of the testator could be carried out with a deviation from the literal words of the trust or if the change of circumstances meant that the purpose of the trust had been frustrated. Id. at 331-342, 195 S.E.2d at 837-43.

Similarly, in the present case, the trust required the property be used to house a chapel for worship of the "Church of England established by Law." When the settlor wrote this term in 1745, there was no ambiguity as to the meaning of the term. The term referred to the state church of England which was recognized by the ruling authorities of the American colonies. However, after the formation of the United States, both the national constitution and state constitution disallowed the establishment of a state-sponsored church. See U.S. Const. amend. I ("Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof."); S.C. Const. art. I, § 2 ("The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.").

Thus, a latent ambiguity arose once the Church of England ceased to be recognized in the United States. Therefore, the circuit court erred by refusing to consider parol evidence concerning the legal successor of the Church of England in the United States. See Bonds, 260 S.C. at 332, 195 S.E.2d at 838 (holding "the application of [the trust] language to the current factual situation result[ed] in certain latent ambiguities and uncertainties"); cf. Pawlet, 13 U.S. at 323-36 (holding the court should consider common law, statutes, and historical material in determining whether a charter grant of "one share for a glebe[15] for the church of England as by law established" was either void or devolved to the state after the American Revolution).

When the parol evidence is considered, there is at least a genuine issue of material fact as to whether the trust failed when the "Church of England established by law" ceased to exist in the United States. Thus, the circuit court erred by granting summary judgment to the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

C. Adverse Possession

i. Evidence of Adverse Possession

The Diocese and the National Church argue the circuit court erred by granting summary judgment to the Does on the claim of adverse possession because ample evidence was presented that the

[15] A glebe is the "[l]and possessed as part of the endowment or revenue of a church or ecclesiastical benefice." Black's Law Dictionary 698 (7th ed. 1999).

Parish had adversely possessed the property in excess of forty years. We agree.

"To constitute adverse possession, the possession must be continuous, hostile, open, actual, notorious and exclusive for . . . [the required] statutory period." Davis v. Monteith, 286 S.C. 176, 180, 345 S.E.2d 724, 726 (1986).

Where the party claims the property under color of title, the statutory period is forty years. S.C. Code Ann. § 15-3-380 (1977) ("No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period."); see Black's Law Dictionary 260 (7th ed. 1999) (stating color of title is "a written instrument or other evidence that appears to give title, but does not do so").

In 1903, the Diocese presented the Parish with a quitclaim deed to the property. At least from 1903 to the filing of the lawsuit in 2000, the Parish continually possessed the property at issue in this case.[16] During this period, the Parish built structures on the property, improved the property, and sold burial plots from the property. Additionally, the Parish mortgaged the property on four separate occasions from 1959 to 1993. On each occasion, the Parish represented to the lender that it

[16] The Parish began possession of the property once it was chartered in 1767. There is some dispute as to whether the Parish existed continuously from 1767 to 1903. Because our analysis on adverse possession is not affected by the events of this time period, we decline to comment on this issue.

held fee simple title to the property.[17] See Miller v. Leaird, 307 S.C. 56, 62, 413 S.E.2d 841, 844 (1992) (holding evidence of adverse possession included mortgage payments paid on the property, taxes paid on the property, and boundary lines marked on the disputed property); see also First Baptist Church of Woodruff v. Turner, 248 S.C. 71, 81, 149 S.E.2d 45, 49 (1966) ("'The giving of a deed or mortgage by one in possession of land is ordinarily evidence of assertion of title.'" (quoting Carr v. Mouzon, 86 S.C. 461, 467, 68 S.E. 661, 663 (1910))).

Thus, the Diocese and the National Church presented ample evidence that the possession by the Parish was continuous, hostile, open, actual, notorious, and exclusive from at least 1903 to 2000, a period of nearly 100 years. See Presbyterian Church of James Island v. Pendarvis, 227 S.C. 50, 57, 86 S.E.2d 740, 743 (1955) (holding evidence of adverse possession included the church's dealings with the property as if it owned the property in fee simple for a period of more than half a century, and the fact that the church's title had not been questioned for approximately fifty years). Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Parish had adversely possessed the property for at least forty years. Therefore, the circuit court erred by granting summary judgment in favor of the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

ii. Requirement of Hostile Possession

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the Parish was not in hostile possession of the property. We agree.

[17] On each occasion, the Parish obtained permission from the Diocese, as required by the canons of the Diocese and the National Church.

Hostile possession is "possession asserted against the claims of all others." Black's Law Dictionary 1184 (7th ed. 1999).

An adverse possession claim fails if the claimant's possession is not hostile. Perry v. Heirs at Law and Distributees of Gadsden, 316 S.C. 224, 225, 449 S.E.2d 250, 251 (1994).

In the present case, the circuit court cited Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (Ct. App. 1989), for the proposition that possession cannot be hostile if based on a mistaken belief of ownership.

Our supreme court stated the rule that "possession under a mistaken belief that property is one's own and with no intent to claim against the property's true owner cannot constitute hostile possession . . . is applicable only to cases involving boundary disputes between adjoining landowners." Perry, 316 S.C. at 226, 449 S.E.2d at 251; see Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743 (holding a party's possession was adverse even when "due to the long lapse of time all parties, including the congregation and the ministers, had simply forgotten the trust").

Because the dispute in this case concerns the entire piece of property and is not merely a boundary dispute, the circuit court erred by applying Cook.[18]

As an additional ground for finding the Parish's possession was not hostile, the circuit court cited Frady v. Invester, 118 S.C. 195, 205, 110 S.E. 135, 138 (1921), for the proposition that one who enters

[18] Although the Parish admits it was not aware of the trust until 1986, the deed was properly recorded in 1767 and remained on record from that time. Thus, the Parish had constructive notice of the trust. Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743 (holding the parties had constructive notice of the 1713 trust because it was recorded in the office of the Register of Deeds in 1732).

property based on permissive use may not fulfill the hostility requirement of adverse possession.[19]

Although our supreme court noted a party cannot adversely possess property used with the permission of the owner, it stated a party may adversely possess such property upon a clear disclaimer of the owner's title. Monteith, 289 S.C. at 180, 345 S.E.2d at 726; see Young v. Nix, 286 S.C. 134, 136, 332 S.E.2d 773, 774 (Ct. App. 1985) ("Where one enters land under permission from the title holder, the possession can never ripen into an adverse title unless a clear and positive disclaimer of the title under which entry was made is brought home to the other party.").

The actions of the Parish from at least 1903 to 2000, including leasing the property for uses not permitted by the trust and mortgaging the property, could not have been based on the permission of the trustees because no additional trustees were appointed after the death of the last trustee in 1774. Further, none of the four mortgages taken out by the Parish made reference to any ownership interest related to the 1745 trust.[20] Thus, the circuit court erred in applying Frady to these facts.

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Parish fulfilled the hostility requirement for adverse possession. Thus, the circuit court erred by granting summary judgment to the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

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[19] Even Frady does not preclude a party whose possession began under permissive use from adversely possessing the property, so long as the party "either surrendered the possession or gave notice of an adverse possession." Id.

[20] See footnote 17, supra.

iii. Repudiation of the Trust by a Beneficiary or a Trustee[21]

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the Parish had not repudiated the trust. We agree.

In a claim for adverse possession "where one's possession was begun in privity with or in subservience to the title of another," adverse possession cannot begin until the trust is openly repudiated by "a clear, positive, and continued disclaimer of the title . . . [and the adverse claim is] brought home to the other party." Bradley v. Calhoun, 125 S.C. 70, 82, 117 S.E. 811, 815 (1923); cf. Ham v. Flowers, 214 S.C. 212, 218-19, 51 S.E.2d 753, 756 (1949) (holding when a party took possession of property to protect his interest as a mortgagee, that party entered "the premises in the quasi character of trustee for the mortgagor and [could] not hold adversely to [mortgagor's] rights until he distinctly disavows and repudiates his mortgagee relationship and notice thereof is brought home to the mortgagor").

Repudiation "need not be in specific words but may consist of conduct inconsistent with the existence of the trust." Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743-44 (holding the party's leasing the property and using the property in a manner not consistent with the trust was "tantamount to a repudiation of the trust").

Although the factual situations in Calhoun, Ham, and Pendarvis involved trustees adversely possessing against the trust, "[t]he same requirements logically apply to the possession by a beneficiary." See Reasor v. Peoples Fin. Servs., 579 S.E.2d 742, 744 (Ga. 2003) (holding

[21] The Diocese and National Church assert this argument only if the Parish is determined to be the beneficiary of the trust during a subsequent circuit court proceeding or the Parish is determined to be the trustee of the trust in a subsequent probate court proceeding. See S.C. Code Ann. § 62-7-201(a)(1) (Supp. 2002) (stating the probate court has exclusive jurisdiction to appoint trustees).

a trustee or a beneficiary may adversely possess against the trust by denying the trust and possessing in a continuous, hostile, open, actual, notorious, and exclusive manner); see also Lewis v. Hawkins, 90 U.S. 119, 126 (1874) (holding a beneficiary can adversely possess against the trust if a distinct denial of the trust or a possession inconsistent with it is clearly shown).

In 1947, the Parish leased portions of the property for uses not authorized by the trust. This act constituted evidence of repudiation. See Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743-44.

From 1959 to 1993, the Parish mortgaged the property at least four times, each time listing itself as the owner of the property.[22] Because neither the language of the trust nor an order of the probate court authorized such action, mortgaging the property was additional evidence of repudiation. See 27 S.C. Jur. Mortgages § 12(i) (1996) ("A trustee may not mortgage trust property unless the trust agreement specifically authorizes such action without court approval."); see also Chapman v. Williams, 112 S.C. 402, 405-06, 100 S.E. 360, 361 (1919) ("This court does not say that under no circumstances will it allow trustees to put a mortgage on trust property, but three things must appear: (a) the necessity for the mortgage must be absolute; (b) the trustees must consent to the mortgage; and (c) the trustees must have the power to make the mortgage.").

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Parish repudiated the trust. Thus, the circuit court erred by granting summary judgment to the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

[22] See footnote 17, supra.

D. Laches

The Diocese and the National Church argue the circuit court erred by granting summary judgment to the Does on the claim of laches. We agree.

Laches is an equitable doctrine, which "arises upon the failure to assert a known right." Ex parte Stokes, 256 S.C. 260, 267, 182 S.E.2d 306, 309 (1971); see Byars v. Cherokee County, 237 S.C. 548, 559, 118 S.E.2d 324, 330 (1961) ("Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence.").

To prove laches, a party must establish: "(1) delay, (2) unreasonable delay, [and] (3) prejudice." Hallums v. Hallums, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988); see Arceneaux v. Arrington, 284 S.C. 500, 503, 327 S.E.2d 357, 358 (Ct. App. 1985) ("Whether . . . [a claim] is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.").

In addition, "the circumstances must . . . [be] such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." Byars, 237 S.C. at 559, 118 S.E.2d at 330; see Pendarvis, 227 S.C. at 58, 86 S.E.2d at 744 (holding a party seeking to enforce a trust "may become barred by laches if he fails to proceed with reasonable diligence").

Assuming the trust still exists, no assertion of rights has been made on behalf of the trust in approximately 200 years. During this

200-year period, the Parish leased the property for uses not mentioned in the trust and mortgaged it on at least four different occasions.[23]

In the mortgages dated 1979, 1988, and 1993, the Parish covenanted it was "lawfully seised" of the property it was mortgaging. According to Black's Law Dictionary, "seise" means to hold in fee simple. Black's Law Dictionary 1362 (7th ed. 1999). Thus, for approximately fifteen years, the Parish was specifically claiming to a third party that it held the property in fee simple.[24] During this fifteen-year time period, the Does did not challenge the Parish's claim of ownership, even though a default on the mortgage could have resulted in foreclosure.

Prejudice is arguably shown because to allow the Does to assert ownership of the property after such a delay could cause the outstanding balances on the mortgages to come due immediately. See Arceneaux, 284 S.C. at 503, 327 S.E.2d at 358 (holding a claim is barred by laches if the delay prejudices the other party).

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Does' claims are barred by laches. Thus, the circuit court erred by granting summary judgment in favor of the Does on the issue of laches. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

E. Staleness

The Diocese and the National Church argue the circuit court erred by granting summary judgment to the Does on the claim of staleness. We agree.

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[23] This lawsuit was commenced in 2000. The Parish mortgaged the property for a fifth time in 2001.

[24] See footnote 17, supra.

A stale demand is "'one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and to do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied.'" Pendarvis, 227 S.C. at 59, 86 S.E.2d at 744 (quoting Bell v. Mackey, 191 S.C. 105, 123, 3 S.E.2d 816, 824 (1939)).

We find Pendarvis instructive on this issue. In Pendarvis, a trust was established in 1713. Pendarvis, 227 S.C. at 53, 86 S.E.2d at 741. The deed was recorded in the Register of Deeds Office for Charleston County within twenty years of the creation of the trust. Id. at 56, 86 S.E.2d at 742. However, the existence of the trust was forgotten for the next 200 years. Id. During this time period, the church treated the property as its own. Id. at 52-56, 86 S.E.2d at 741-43. Because no successor trustees were appointed after the original trustees died, no one representing the trust asserted ownership of the property pursuant to the terms of the trust during this 200-year period. Id. at 54, 86 S.E.2d at 742. When the church decided to subdivide the property in 1945, the trust was rediscovered and a suit was commenced to clear title to the property. Id. at 56, 86 S.E.2d at 742. In explaining numerous reasons not to enforce the trust, our supreme court reviewed these facts and then stated a court "should not now undertake to enforce this ancient trust." Id. at 57, 86 S.E.2d at 743.

Similarly, in the present case, a trust established in 1745 was recorded in the Register of Deeds Office for Charleston County approximately twenty years after the trust's creation. The trust was then forgotten for the next 200 years, during which time the Parish treated the property as its own. No successor trustees were appointed after the original trustees died, and thus, no one representing the trust asserted any ownership rights to the property during this 200-year period. The trust was rediscovered in 1986 and still no claim was made by the descendants of the trustees for another twenty years. It was not until the Diocese gave notice to the Register of Deeds Office for

Georgetown County that both the Diocese and the National Church held an interest in the property that a lawsuit was filed in which the Does eventually asserted a claim to the property.

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as whether the Does' claims were stale.[25] See id. at 59, 86 S.E.2d at 744. Thus, the circuit court erred by granting summary judgment in favor of the Does on the staleness claim. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

III. Subject Matter Jurisdiction

Standard of Review

"Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998); see Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) ("[S]ubject matter jurisdiction . . . may be raised at any stage of the proceeding.").

[25] The dispute between the parties concerning the term "inhabitants on Waccamaw Neck" in the present case exemplifies why it is "difficult or impossible for the court to ascertain the truth of the matters in controversy and to do justice between the parties." Pendarvis, 227 S.C. at 59, 86 S.E.2d at 744. The Parish claims this term should be read according to its plain meaning. The Diocese and the National Church contend the term had a special meaning in colonial times and referred to the political unit that would exist once a parish was established. In attempting to ascertain the intent of the settlor, we note the extreme difficulty in determining which of these meanings would have been more prevalent in colonial times.

A. Ascertaining Beneficiaries

The Diocese and the National Church argue the circuit court lacked subject matter jurisdiction to declare the Diocese and the National Church to be incidental beneficiaries of the trust. To the extent the circuit court order does this, we agree and vacate.

The probate court has exclusive jurisdiction to "ascertain beneficiaries." S.C. Code Ann. § 62-7-201(a)(3) (Supp. 2002). A beneficiary "includ[es] a person who has any present or future interest, vested or contingent . . . and, as it relates to a charitable trust, includes any person entitled to enforce the trust." S.C. Code Ann. § 62-1-201(2) (1987).

The circuit court found the Diocese and the National Church were "at best, incidental beneficiaries" to the trust. To the extent that the circuit court's statement was a finding that the Diocese and the National Church were incidental beneficiaries, we vacate.

B. Personal Property

The Diocese and the National Church argue the circuit court erred by declaring it did not have subject matter jurisdiction to determine the ownership of the personal property. We agree.

"[T]he probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." S.C. Code Ann. § 62-7-201 (Supp. 2002).

In its complaint, the Parish sought a declaration that it owned the personal property located on the real property. The Diocese and the National Church counterclaimed for a declaration that all personal property located on the real property was owned by the Parish, subject to an interest held by both the Diocese and the National Church.

After the circuit court determined the holders of both legal and equitable title to the real property, the circuit court stated it had "no

further jurisdiction regarding this case." In the Rule 59(e), South Carolina Rules of Civil Procedure, motions to alter or amend the judgment, the Diocese and the National Church noted the issue of personal property had not been resolved. The circuit court did not address this issue in its order denying the motion.

The language of the trust deed refers only to real property.[26] Thus, because the personal property is not subject to the trust, the probate court cannot have exclusive jurisdiction over the personal property. Accordingly, we remand this issue to the circuit court.

CONCLUSION

Based on the foregoing, the circuit court's order is

VACATED IN PART, REVERSED IN PART and REMANDED.

STILWELL and KITTREDGE, JJ., concur.

[26] In their brief, the Does concede the personal property is not subject to the trust.