The Supreme Court of South Carolina

In the Matter of John
Meadows Williamson, III,

Respondent.

O R D E R

The Office of Disciplinary Counsel petitions this Court for an order transferring respondent, whose practice was formerly located at 3922 Rosewood Drive, Columbia, South Carolina, to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR. Respondent consents to the petition.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Edwin Russell Jeter, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other accounts into which respondent may have deposited client or trust monies. Mr. Jeter shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests

of respondent's clients. Mr. Jeter has authority to make disbursements from respondent's trust, escrow, and/or operating account(s) as is reasonably necessary and may apply to the Chair of the Commission on Lawyer Conduct for authority to make any disbursements that appear to be unusual or out of the ordinary.

IT IS FURTHER ORDERED that this Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as notice to the bank or other financial institution that Edwin Russell Jeter, Jr., Esquire, has been duly appointed by this Court.

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

s/Jean H. Toal C.J.

Columbia, South Carolina
November 29, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

December 10, 2001

ADVANCE SHEET NO. 43

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2001-UP-530 LaBoone v. Burton
(Pickens, Judge Donald W. Beatty)

PETITIONS FOR REHEARING

3382 - Cox v. Woodmen	Pending
3393 - Vick v. SCDOT	Pending
3402 - State v. Donald Ray Wimbush	Pending
3403 - Christy v. Christy	(2) Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
3405 - State v. Jerry Martin	(2) Pending
3408 - Brown v. Stewart	Pending
2001-UP-419 - Moak v. Cloud	Pending
2001-UP-424 - Boan v. Boan	Pending
2001-UP-430 - State v. Dale Johnson	Pending
2001-UP-435 - State v. Ronald J. Huell	Pending
2001-UP-452 - Bowen v. Modern Classic Mtrs.	Pending
2001-UP-454 - Greenville National v. Simmons	Pending
2001-UP-455 - Stone v. Roadway Express	Pending
2001-UP-456 - Ray v. SC State University	Pending
2001-UP-460 - City of Aiken v. Cannon	Pending
2001-UP-461 - Storage Trailers, Inc. v. Proctor	Pending
2001-UP-465 - Town of Yemassee v. Yisrael	Pending

2001-UP-468 - Shealy v. Hare	Pending
2001-UP-469 - James Schneider v. State	Pending
2001-UP-470 - SCDSS v. Hickson	Pending
2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. Alfonso Staton	Pending
2001-UP-478 - State v. Leroy Staton	Pending
2001-UP-479 - State v. Martin McIntosh	(2) Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson	Granted 10-1-01
3271 - Gaskins v. Southern Farm Bureau	Pending
3289 - Olson v. Faculty House	(2) Granted 10-10-01
3314 - State v. Minyard Lee Woody	Pending
3321 - Andrade v. Johnson	Pending
3327 - State v. John Peake	Granted 10-11-01
3333 - State v. Dennis Zulfer	Pending
3344 - Henkel v. Winn	Pending
3346 - State v. Thomas Ray Ballington	Pending
3348 - Thomas v. Thomas	Pending
3351 - Chewning v. Ford Motor Co.	Pending
3352 - Ex Parte Moore v. Fairfield	Pending

3353 - Green v. Cottrell	Pending
3354 - Murphy v. Owens-Corning	Pending
3355 - State v. Leroy Wilkes	Pending
3356 - Keeney's Metal v. Palmieri	Pending
3358 - SC Coastal Conservation v. SCDHEC	Pending
3360 - Beaufort Realty v. Beaufort County	Pending
3364 - SCDSS v. Mrs. H and Mr. H	Pending
3365 - State v. Laterrance Ramon Dunlap	Pending
3369 - State v. Don L. Hughes	Pending
3370 - Bailey v. Segars	Pending
3371 - State v. Curtis Gibbs #2	Pending
3372 - Dukes v. Rural Metro	Pending
3376 - State v. Roy Johnson #2	Pending
3380 - State v. Claude and Phil Humphries	Pending
3381 - Bragg v. Bragg	Pending
3383 - State v. Jon Pierre LaCoste	Pending
3386 - Bray v. Marathon Corporation	(2) Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-123 - SC Farm Bureau v. Rabon	Pending
2001-UP-156 - Employer's Insurance of Wausau v. Whitaker's Inc., of Sumter	Pending
2001-UP-159 - State v. Darnell Hunter	Pending
2001-UP-160 - State v. Elijah Price, Jr.	Pending
2001-UP-192 - State v. Mark Turner Snipes	Pending

2001-UP-232 - State v. Robert Darrell Watson, Jr.	Pending
2001-UP-235 - State v. Robert McCrorey, III & Robert Dimitry McCrorey	Pending
2001-UP-238 - State v. Michael Preston	Pending
2001-UP-248 - Thomason v. Barrett	Pending
2001-UP-249 - Hinkle v. National Casualty	Pending
2001-UP-261 - San Souci Owners Association v. Miller	Pending
2001-UP-292 - Franzello v. Bankhead	Pending
2001-UP-298 - State v. Charles Henry Bennett	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. State	Pending
2001-UP-304 - Jack McIntyre v. State	Pending
2001-UP-321 - State v. Randall Scott Foster	Pending
2001-UP-322 - Edisto Island v. Gregory	Pending
2001-UP-323 - Goodwin v. Johnson	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-325 - Hessenthaler v. Tri-County	Pending
2001-UP-335 - State v. Andchine Vance	Pending
2001-UP-344 - NBSC v. Renaissance Enterprises	Pending
2001-UP-355 - State v. Gavin V. Jones	Pending
2001-UP-360 - Davis v. Davis	Pending
2001-UP-364 - Clark v. Greenville County	Pending
2001-UP-368 - Collins Entertainment v. Vereen	Pending
2001-UP-374 - Boudreaux v. Marina Villas Association	Pending
2001-UP-377 - Doe v. The Ward Law Firm	Pending

2001-UP-383 - Rivera v. Columbia OB/GYN	Pending
2001-UP-384 - Taylor v. Wil Lou Gray	Pending
2001-UP-385 - Kyle & Associates v. Mahan	Pending
2001-UP-389 - Clemson v. Clemson	Pending
2001-UP-391 - State v. Jerome Hallman	Pending
2001-UP-393 - Southeast Professional v. Companion Property & Casualty	Pending
2001-UP-397 - State v. Brian Douglas Panther	Pending
2001-UP-398 - Parish v. Wal-Mart Stores, Inc.	Pending
2001-UP-399 - M.B. Kahn Construction v. Three Rivers Bank	Pending
2001-UP-401 - State v. Keith D. Bratcher	Pending
2001-UP-403 - State v. Eva Mae Moss Johnson	Pending

PETITIONS - U. S. SUPREME COURT

2000-UP-738 - State v. Mikell Anthony Pinckney	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George Eugene Lafaye, IV, Respondent.

Opinion No. 25387
Submitted October 30, 2001 - Filed December 3, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

George Eugene Lafaye, IV, of Greenville, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR, which this Court finds appropriate. We accept the agreement and find that a one-year suspension from the practice of law is the appropriate sanction for respondent's misconduct. The facts as admitted in the agreement are as follows.

Facts

In the first matter, respondent's law firm was retained to represent a party in a negligence action. The circuit court granted summary judgment against the client. Although respondent assured the client that he would pursue an appeal, respondent failed to file either a motion to reconsider or a Notice of Appeal. Respondent actively misled both a member of his law firm and the client by telling them that an appeal had been filed. Respondent also failed to file a timely response to inquiries from ODC regarding this matter.

In a second matter, respondent's law firm was retained to represent a landowner in an inverse condemnation action. The action was settled, and a portion of the proceeds was held in the firm's escrow account to satisfy liens on the property. Respondent advanced funds to the client in violation of the terms of the escrow agreement and without notifying or obtaining consent from the attorneys representing the lien holders.

In a third matter, respondent was retained to represent a client who had been injured in an automobile accident. After the jury returned a verdict in favor of the client, respondent failed to immediately satisfy a medical provider's lien on the judgment. When the medical provider complained, respondent satisfied the lien from his firm's trust account. At the time respondent uttered the check, there were no funds in the trust account belonging to the client or to the medical provider. Although respondent admits that the payment was made without the firm's authorization, he claims that the funds came from an earned, but unpaid, attorney's fee.

Law

Respondent admits that his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation); Rule 1.3 (failing to act with reasonable diligence and promptness while representing a client); Rule 1.4

(failing to keep a client reasonably informed about the status of a matter); Rule 1.15 (failing to properly safeguard funds belonging to a third party and failing to promptly notify the owner of funds upon receipt); Rule 8.1 (failing to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(c) (engaging in conduct involving moral turpitude); 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 8.4(e) (engaging in conduct that is prejudicial to the administration of justice).

Respondent also admits that he violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating rules regarding the professional conduct of lawyers); Rule 7(a)(3) (failing to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice, bringing the legal profession into disrepute, and demonstrating an unfitness to practice law); and Rule 7(a)(6) (wilfully violating the oath of office taken upon admission to practice law in this state).

Conclusion

We find that respondent's misconduct warrants a definite suspension. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for one year.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Olin L. Purvis, III, Respondent.

Opinion No. 25388
Heard November 15, 2001 - Filed December 10, 2001

DISBARRED

Attorney General Charles M. Condon and Assistant Attorney General Tracey Colton Green, both of Columbia, for the Office of Disciplinary Counsel.

Olin L. Purvis, III, pro se, respondent.

PER CURIAM: In this attorney disciplinary matter, the sub-panel and the full panel recommended respondent Olin L. Purvis, III, be disbarred. We agree and disbar respondent.

FACTS

The Commission on Lawyer Conduct filed formal charges against respondent regarding numerous matters. Respondent was placed on interim suspension on January 6, 2000. In re Purvis, 338 S.C. 113, 526 S.E.2d 512 (2000). Respondent did not answer the formal charges, was found in default by the sub-panel, and did not appear at the hearing.

Matter 1

Respondent represented Ann Dunham, a purchaser in a real estate transaction. Respondent accepted funds designated for the purchase of title insurance; however, he failed to obtain the title insurance policy for Dunham. Subsequently, respondent ignored repeated attempts by Dunham to obtain information about the title insurance, and he failed to return her phone calls. Although Disciplinary Counsel notified respondent of Dunham's complaint, respondent failed to respond. After being notified that a full investigation of Dunham's complaint had been initiated, respondent failed to respond to the notice within 30 days, but eventually he responded and submitted to an examination under oath by Disciplinary Counsel.

Matter 2

Paula Pyle, a victim's advocate, filed a complaint against respondent alleging that respondent had verbally abused her during a telephone conversation. Although Disciplinary Counsel notified respondent of this complaint, respondent failed to respond. After being notified that a full investigation of the complaint had been initiated, respondent failed to respond to the notice within 30 days, but eventually he submitted to an examination under oath by Disciplinary Counsel.

Matter 3

Barry and Janice Dodson retained respondent to represent them in a wrongful death action. The insurance company for the defendant in the action tendered the policy limits to respondent with the understanding that the proceeds would be held in escrow pending court approval of the settlement. Despite respondent's agreement with the insurance company, he disbursed the funds to the Dodsons without first obtaining court approval of the settlement. Respondent never sought court approval for the disbursements as was required and as he agreed to do.

Although Disciplinary Counsel notified respondent of this

complaint, respondent failed to respond. Disciplinary Counsel subsequently notified respondent that a full investigation of the complaint had been initiated; however, the notice was returned, marked "unclaimed." Respondent was again notified of the investigation. Respondent failed to respond to this second notice, but eventually he submitted to an examination under oath by Disciplinary Counsel.

Matter 4

In April 1996, Patricia Roetger was injured at her place of employment while working. She retained respondent to represent her in a worker's compensation claim and executed a written fee agreement in November 1997. Respondent, however, failed to file the required forms or otherwise file a claim on behalf of Roetger with the Worker's Compensation Commission. As a result of respondent's failure to act on Roetger's case, her worker's compensation claim is now barred by the statute of limitations.

Moreover, when Roetger was able to contact respondent, he falsely advised her that she could expect a hearing in the near future. At other times, respondent was not present to meet with Roetger even though she arrived timely for previously scheduled meetings. Respondent failed to communicate with Roetger about her case. When Roetger finally terminated respondent in 1998, he failed to provide her with copies of all documents in her file.

Roetger also retained respondent regarding a divorce action. Respondent failed to diligently represent Roetger's interests with respect to the divorce and failed to communicate with her on this matter.

Disciplinary Counsel notified respondent of Roetger's complaint; however, he failed to respond. He also failed to respond to subsequent notice of a full investigation of Roetger's complaint.

Matter 5

Respondent represented Gretchen Johnson regarding injuries she

sustained in an automobile accident. Johnson had previously been represented by Mr. Stark, and while represented by Stark, an offer of settlement was obtained for Johnson. Stark advised respondent, Johnson, and the insurance company that he expected to be compensated from any settlement for $3,356.75 in fees and costs. This amount was based on the offer of settlement previously obtained for Johnson. In a letter dated June 23, 1998, respondent represented to the insurance adjuster that he would protect the interests of both Stark and any medical providers in the case. Respondent eventually settled Johnson's case for $15,000, which was paid by the insurance carrier via a check written to respondent, Johnson and Stark.

On September 18, 1998, respondent sent Stark a copy of a check from respondent's trust account which was payable to Stark's law firm in the amount of $3,356.75. Along with this copy, respondent sent Stark a proposed disbursement schedule which indicated disbursement of funds to Stark. Relying on respondent's representations, Stark endorsed the settlement check and forwarded it to respondent. On October 16, 1998, Stark learned that the medical providers in Johnson's case had been paid. Stark wrote respondent requesting that respondent forward him the check as previously agreed. When respondent failed to respond to the October 16th letter, Stark sent a second letter on November 3, 1998. Respondent failed to respond, and Stark sent a third letter in December. Respondent ignored Stark's repeated requests for payment.

In April 1999, Disciplinary Counsel sent respondent a letter regarding Stark's complaint, but respondent failed to respond. Likewise, respondent failed to respond to Disciplinary Counsel's notice of a full investigation of this complaint.

Matter 6

Ellen Creel retained respondent to institute a medical malpractice action. For over a year after he was retained, respondent failed to communicate with Creel about her case. During this time, respondent failed to respond to multiple phone calls from Creel. When Creel finally managed to speak with respondent, he advised her that he had mailed an explanatory letter to her.

Creel, however, never received the explanatory letter and never was able to speak with respondent again.

Disciplinary Counsel notified respondent of Creel's complaint, but he failed to respond. Although Disciplinary Counsel subsequently notified respondent that a full investigation on this complaint had been initiated, respondent failed to respond.

Matter 7

William S. Sigmon retained respondent to represent him in an action against the Horry County Police Department and Officer B. Rogers. Sigmon paid $500 to respondent as a retainer for "out of pocket expenses." Respondent failed to: (1) institute the action on behalf of Sigmon; (2) communicate with Sigmon regarding the status of his case; and (3) respond to multiple phone calls and letters from Sigmon.

Disciplinary Counsel notified respondent of Sigmon's complaint, but he failed to respond. Although Disciplinary Counsel subsequently notified respondent that a full investigation had been initiated, he failed to respond to this notice as well.

Matter 8

Cindy Purvis, respondent's former wife, filed a complaint against respondent.[1] Disciplinary Counsel notified respondent of this complaint, but he failed to respond. Moreover, when Disciplinary Counsel subsequently notified respondent that a full investigation had been initiated, he failed to respond.

Matters 9 and 10

Dr. Scott J. Willis and Dr. Steven Hannigan, both chiropractors,

[1]This matter involves respondent's alleged failure to pay child support.

filed separate complaints against respondent.[2] Although Disciplinary Counsel notified respondent of these complaints, he failed to respond. Moreover, when Disciplinary Counsel subsequently notified respondent that a full investigation had been initiated on these complaints, he failed to respond to the notification.

Matter 11

Mr. Rees retained respondent in order to represent Rees' daughter in a personal injury matter. The matter concluded in the daughter's favor, and respondent withheld funds from the jury award to pay certain medical bills. Respondent failed, however, to use the retained funds to satisfy the client's bills, and respondent misappropriated the funds. Furthermore, respondent failed to respond to the client's repeated inquiries regarding payment of the bills.

Respondent failed to respond to Disciplinary Counsel's notifications about this complaint, as well as to Disciplinary Counsel's notifications that a full investigation had been initiated.

Matter 12

Barry Kennell retained respondent for $675 to handle a debt collection matter. Despite holding the matter for over one year, respondent failed to take any legal action on behalf of Kennell. Because of respondent's lack of diligence and his failure to communicate, Kennell was ultimately forced to retain new counsel. Respondent did not issue Kennell a refund of the unearned retainer fee. Respondent failed to respond to Disciplinary Counsel's notices regarding the complaint and the initiation of a full investigation.

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[2]These matters involve similar situations. Respondent is charged with not paying the chiropractors who treated respondent's clients despite the fact that respondent settled the clients' claims and obtained the settlement funds.

Matter 13

On several occasions, respondent hired Glenda M. Kemp's court reporting agency to perform services in connection with his law practice. Respondent failed to pay invoices submitted by Kemp's agency over a period of several months, eventually accumulating a total account balance of approximately $1,534. Respondent refused to communicate with the agency about payment of the invoices. Respondent failed to respond to Disciplinary Counsel's notices regarding the complaint and the initiation of a full investigation.

Matter 14

Karen L. Teixeira retained respondent to represent her in a domestic matter. Respondent failed to properly communicate with Teixeira. Although Disciplinary Counsel notified respondent about the complaint and the initiation of a full investigation, respondent failed to respond to the notices.

Matter 15

In December 1996, respondent was retained to handle a real estate closing for Sergio B. Mendoza and Jose Boyzo. After the closing, respondent forwarded the original note to the lender as required, but failed to forward the original mortgage, the bank fees, or any other original documents executed in connection with the closing. Thereafter, respondent refused to respond to numerous inquiries from the lender. Respondent failed to file the deed and mortgage after closing.

Additionally, respondent retained funds to satisfy property taxes assessed against the closing property, but failed to satisfy the property tax bill. As a result, the property was sold for non-payment of taxes. Respondent failed to respond to numerous inquiries from the seller regarding the property tax situation. Because of respondent's actions, the buyers were forced to pay another attorney to conduct a second closing, causing them to incur additional costs to redeem the property from the tax sale.

Respondent failed to respond to Disciplinary Counsel's notices regarding the complaint and the initiation of a full investigation.

Matter 16

In 1992, Icyean R. Wallace retained respondent for the purpose of instituting an action against GMC Corporation. Respondent failed to diligently attend to Wallace's case and failed to take appropriate legal action on her behalf. As a result, Wallace's case was dismissed. Moreover, respondent failed to notify Wallace when he relocated his law practice, and failed on several occasions to appear for scheduled court dates. Respondent has refused to release Wallace's file to her. In addition, respondent failed to notify Wallace of his suspension from the practice of law, as required by Rule 30, RLDE, Rule 413, SCACR.

Respondent failed to respond to Disciplinary Counsel's notices regarding the complaint and the initiation of a full investigation.

Panel's Findings

The Panel[3] found several grounds for discipline and recommended disbarment. Specifically, the Panel found respondent has violated the following subsections of Rule 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: (1) violating the Rules of Professional Conduct; (5) engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law; and (6) violating the oath of office taken upon admission to practice law in this state.

In addition, respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: (1) Rule 1.1, failing to provide competent representation; (2) Rule 1.2, failing to abide by a client's decisions regarding the

[3]The full panel adopted the report of the sub-panel.

scope of representation; (3) Rule 1.3, failing to diligently represent a client; (4) Rule 1.4, failing to properly communicate with a client; (5) Rule 1.5, failing to charge a reasonable fee; (6) Rule 1.15, failing to safekeep a client's property; (7) Rule 1.16, failing to take proper steps upon termination of representation of a client; (8) Rule 3.2, failing to properly expedite litigation; (9) Rule 8.1, failing to respond to a lawful demand for information from a disciplinary authority; and (10) Rule 8.4, violating the rules of professional conduct; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct prejudicial to the administration of justice.

Finally, the panel found respondent violated the financial recordkeeping provisions of Rule 417, SCACR.

DISCUSSION

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with the Supreme Court. E.g., In re Yarborough, 337 S.C. 245, 524 S.E.2d 100 (1999). Because respondent failed to answer the formal charges against him, this failure constitutes an admission of the factual allegations. Rule 24(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. Moreover, because respondent failed to appear at the hearing before the sub-panel, he is deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any recommendation to be considered at the hearing. Rule 24(b) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. As a result, we only have to determine the appropriate sanction for respondent. In re Rast, 337 S.C. 588, 524 S.E.2d 619 (1999) (attorney's failure to answer the formal charges against him constitutes default; the only issue is the proper sanction); In re Thornton, 327 S.C. 193, 489 S.E.2d 198 (1997) (same).

Respondent has demonstrated a persistent pattern of misconduct, including neglect, failure to communicate with clients, misappropriation, dishonest conduct, and failure to respond to disciplinary authority. The sanction of disbarment has been imposed by this Court in similar cases involving

multiple acts of misconduct. See, e.g., Matter of Driggers, 334 S.C. 40, 512 S.E.2d 112 (1999) (attorney disbarred for failing to provide competent representation, keep clients informed, consult with clients, promptly account for and deliver funds and documents, misappropriation of funds, and knowing failure to respond to disciplinary proceedings); Matter of Godbold, 336 S.C. 568, 521 S.E.2d 160 (1999) (attorney disbarred for failing to remit settlement funds to clients, remit funds to clients' medical providers, failing to pay bills, and failing to file state and federal tax returns); Matter of Glee, 333 S.C. 9, 507 S.E.2d 326 (1998) (attorney disbarred for converting client funds for his own purposes, failing to provide competent representation, failing to comply with demand for payment, failing to act with reasonable diligence, failing to keep client informed about status of case, and engaging in conduct involving dishonesty).

Consequently, we disbar respondent and order him to pay the costs of the disciplinary proceedings. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of the Rules for Lawyer Disciplinary Enforcement.

DISBARRED.

s/James E. Moore AC.J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

s/George T. Gregory, Jr. A.J.

The Supreme Court of South Carolina

In the Matter of Donald Loren Smith, Respondent

O R D E R

Respondent was suspended on December 3, 2001, for a period of six months, retroactive to March 1, 2001. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: Daniel E. Shearouse
Clerk

Columbia, South Carolina

December 5, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dale P. Widman,

Respondent/Appellant,

v.

Richard T. Widman,

Appellant/Respondent.

Appeal From Charleston County
Jack A. Landis, Family Court Judge

Opinion No. 3416
Heard October 4, 2001 - Filed December 10, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Robert N. Rosen, of Rosen, Goodstein & Hagood, of Charleston, for appellant/respondent.

Margaret D. Fabri, of Charleston, for respondent/appellant.

HUFF, J.: This is a cross appeal in a divorce action. The issues on appeal concern identification and valuation of marital property, equitable apportionment, child support, and contempt. We affirm in part, reverse in part and remand.

FACTUAL/PROCEDURAL BACKGROUND

Richard T. Widman (Husband) and Dale Poulnot Widman (Wife) were married in 1981 on Valentine's Day. When they married, Husband was thirty-two years old and Wife was twenty-five years old. Husband earned a Masters of Business Administration in hotel and restaurant management at Michigan State University and worked as the General Manager of the Mills House Hotel in Charleston, South Carolina. Wife graduated magna cum laude from Duke University and worked in her family's business, Kerrison's Department Store.

Husband, who worked for Holiday Inn in a management position, received a job transfer to Detroit, Michigan, and after they were married, Wife joined Husband in Detroit. Wife's father subsequently requested that Wife come back to the family business. The parties agreed, and Wife moved back to Charleston in August of 1981. Husband continued to work for Holiday Inn, and the parties commuted for a period of time, until Husband quit his job and moved back to Charleston in the summer of 1982. After his return, Husband joined a venture to build King's Courtyard Inn in downtown Charleston. The inn was opened in November 1983 and was managed by Husband. During the early years, Husband earned money through some consulting work and drew a minimal salary for managing the inn. Thus, toward the beginning of the marriage, Wife generally earned greater income than Husband. This changed drastically, however, after Husband's venture in King's Courtyard Inn and several subsequent hotel inns began to reap substantial profits.

During the marriage, the parties accumulated a $6,720,000.00 marital estate consisting of numerous inns and related businesses worth more than $5,000,000.00, two marital homes with equity of more than $900,000.00, as well as various stocks, bonds, life insurance, and pension plans. Additionally,

Husband's annual income grew to approximately $450,000.00 while Wife's annual income remained around $40,000.00. During the development years of the inns, Husband used earned income of the parties and distributions from ownership of the inns to reinvest into the businesses in order to promote their growth and viability. The inns are set up as limited partnerships with Husband as the general partner, which gives Husband the discretion of when to make a distribution from revenues and the amount of each distribution. Husband maintained control of the businesses' cash flow and the parties' income. Even after the inns were established and producing significant income, Husband continued to use his income and distributions to support the business. Money flowed freely between the business and personal accounts of the parties. Loans were made to the businesses from the parties' joint personal checking account; partnership shares were purchased out of the parties' joint personal checking account; and money was borrowed from the businesses to keep the family finances afloat. In addition, the personal and business accounts of the parties were used interchangeably by the parties.

Wife had no day-to-day responsibilities for the inns; however, she hosted several openings of new inns and entertained Husband's business associates. At Husband's insistence, Wife traveled with him out of the country, at the expense of her own professional responsibilities to Kerrison's. Wife also participated in the designing and writing of marketing brochures for the inns, and worked on a project for the Rutledge House Inn. Husband continually assured Wife that "the inns were their retirement."

Husband's parents made significant investments in the inns and advanced $75,000.00 to the parties for development of one of the businesses. However, these were arm's length transactions. Husband's parents appear to have profited from the investments, and they obtained a note and mortgage on the parties' beach home as collateral for the $75,000.00 loan. At the time of trial, the parties were still obligated to make monthly payments to repay this loan. Additionally, Husband's parents made generous monetary gifts over the years to Husband, Wife and the parties' children. Husband's father testified as to the various monetary gifts made to the parties over the years, and stated that many of the gifts were intended to help Husband in his business ventures. Husband's father testified, however, that all of the gifts were joint gifts to

Husband and Wife. The gifted monies were not kept separate and apart from marital funds. The check registers of various accounts show that money was used from any and all sources to support the cash flow of the businesses. Moreover, Husband's parents never asserted prior to litigation that the gifted monies were for anything other than the benefit of both parties and the support of the marriage.

During the marriage, Husband inherited $192,000.00 from his aunt's estate. Husband testified he used some of these funds to purchase two shares of stock in the inn businesses. One share of stock was purchased from Ronald Hutcherson in the John Rutledge House. The other share was purchased from the Gary Olin Trust in the King's Courtyard Inn. Wife also owned nonmarital property which included 26 shares of Kerrison's stock, valued at $100,000.00, a 1/3rd interest in the carriage house located behind her parent's home in downtown Charleston, and a 1/9th interest in an unimproved lot on Sullivan's Island.

Husband and Wife have three daughters, all three of whom were minors at the time of trial. Husband also has an adult daughter from a prior marriage. The parties employed a housekeeper/nanny to assist with the children and housework, but both parties contributed substantially to the needs of the children in the home. All three girls attend a private school, Ashley Hall School, where Wife is currently employed as the Director of Development. The tuition for all three girls is $2,050.00 per month. The children also attend summer camps in North Carolina every year, which cost between $1,815.00 and $2,810.00 per child each summer.

Husband instituted this action in November 1997, after Wife's investigator confirmed Husband's adulterous affair with Linn Lesesne, the Director of Sales and Marketing for the management company formed by Husband to manage all the inns. Wife first became suspicious of the affair in October 1996 and confronted Husband on several occasions, but Husband continued to deny the relationship. Husband and Wife separated in April 1997, but began going to marriage counseling in an effort to save their marriage. However, Husband continued his affair with Linn Lesesne. Upon receiving the report from the investigator in August of 1997, Wife waited until Husband

returned from a trip to confront him with the report. Husband continued to deny the affair until a couple of weeks later. The marriage counselor testified that he believed Wife had been emotionally abused by Husband during the marriage and that Wife was more active in attempting to save the marriage.

Husband filed this action seeking, inter alia, joint custody of the parties' three minor children, or in the alternative extensive visitation, a determination of reasonable child support, and equitable division of the marital property. Husband also sought a temporary order restraining Wife from harassing him or interfering with his right to a peaceful existence, as well as from using vulgar, profane language or making disparaging remarks about him in the presence of his children.

Wife answered and counter-claimed seeking, among other things, a divorce on the ground of adultery, custody, child support, alimony, equitable apportionment of marital property, and an order restraining Husband from exposing their children to his extramarital relationship and from selling or encumbering marital property. Wife also sought attorneys' fees and costs for litigation of the divorce.

By temporary order dated June 23, 1998, the court awarded Wife temporary custody of the children, $15,000.00 monthly in temporary total support, and $25,000.00 for attorney and expert fees. The court also awarded visitation for Husband as agreed to between the parties and required Husband to keep the minor children out of the presence or proximity of his paramour pending the divorce and to attend and complete a session of the "Consider the Children" program.

Each side filed motions to hold the other in contempt for failure to comply with the court's orders compelling discovery and for violating orders of protection. The parties agreed to have these issues addressed at the final hearing. Additionally, the parties agreed to bifurcate the issue of attorneys' fees and costs.

The final hearing began on February 16, 1999 and concluded on February 19, 1999. By final order dated March 19, 1999, the trial judge granted

Wife a divorce on the ground of adultery. Wife was also awarded one-half of the marital estate, which the court valued at $6,720,000.00, custody of the minor children, and child support in the amount of $3,500.00 per month. Wife did not receive an alimony award. However, Husband was ordered to execute a note and mortgage payable to Wife covering the majority of Wife's share of the marital estate, totaling $2,451,042. The court further ordered Husband to pay the note and mortgage over a 240-month period at 6% interest. To satisfy the remainder of Wife's share of the marital estate, Husband was ordered to immediately transfer certain property in his possession to Wife.

In the final divorce decree, the court included judgment on the outstanding rules to show cause and motions for contempt. In its decree, the trial court found Wife to be in willful violation of the court's order for (1) failing to file proper financial declarations as previously ordered, (2) disclosing information to Husband's parents and adult daughter regarding Husband's prior adulterous conduct, and (3) intentionally withholding the existence of a trust which was the subject of a motion to compel. Consequently, the trial judge sentenced Wife to 30 days in jail on each of the first two violations, but suspended that sentence upon "strict compliance with the terms of this order" and that Wife refrain from further denigration of Husband or damage to his reputation, and from further use of discovery information except for purposes of enforcing the court's order. The court further required Wife to pay "attorneys' fees and costs for the prosecution of these Rules to Show Cause." For the failure to disclose the existence of a trust, the court ordered Wife to reimburse Husband "for the cost of compelling the disclosure of same."

Following Husband's motion to alter or amend, the trial court issued an order on November 3, 1999, modifying the final order. In this supplemental order, the court corrected certain mathematical errors and clarified that the interest paid on the note should be designated as lump-sum alimony for taxation purposes. The order further provided as follows:

> By agreement of the parties, the court was authorized to approve the language of the Note and Mortgage to be executed by [Husband] in favor of [Wife] to secure

[Wife's] equitable apportionment of marital assets. The Final Decree and Order provided for the Note and Mortgage and instructed that the parties agree upon the appropriate language. Due to the complexity of the Note and Mortgage and upon reconsideration, the court finds it appropriate that the attorneys for [Husband] and [Wife] agree upon an independent attorney practiced and well versed in real estate and business transactions to prepare the terms of the Note and Mortgage being guided by this Court's order. Should the attorneys not agree on an individual attorney, each attorney is to submit the name of two attorneys from which the Court shall select the individual to prepare the terms of the Note and Mortgage. . . . In addition to the language in the Order and other normal language of a commercial Note and Mortgage, there should be included a due on sale clause, an acceleration clause, a refinance clause, [and] language indicating that a default in first Mortgage would result in default of second Mortgage. The acceleration, due on sale and default clauses need to be established on a pro rata basis. There shall also be provisions for the substitution of collateral to allow [Husband] to refinance the mortgaged property in a commercially reasonable manner which does not affect the interest of [Wife]. The Family Court retains jurisdiction to grant relief to either party in

> the interpretation of and practical application of the Note and Mortgage.

To date the note and mortgage have not been signed because the terms are in dispute. Husband filed a notice of appeal and Wife has cross-appealed.

STANDARD OF REVIEW

When reviewing an appeal from the family court, this court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). We are not, however, required to disregard the findings of the trial judge, who saw and heard the witnesses and was in a better position to evaluate their credibility and assign comparative weight to their testimony. Wilson v. Walker, 340 S.C. 531, 537, 532 S.E.2d 19, 22 (Ct. App. 2000); Mazzone v. Miles, 341 S.C. 203, 207, 532 S.E.2d 890, 892 (Ct. App. 2000).

LAW/ANALYSIS

I. Husband's Appeal

A. Equitable Apportionment

1. Division of Marital Estate

Husband first argues that the trial judge abused his discretion in awarding one-half of the marital estate to Wife, because he failed to give any weight to the financial contributions of Husband's family and gave too much weight to Husband's fault in the break-up of the marriage. He asserts the trial judge used the equitable division award to punish Husband, and the judge failed to acknowledge his family's contributions to the marital estate. We disagree.

The apportionment of marital property is within the discretion of the family court judge and will not be disturbed on appeal absent an abuse of discretion. Morris v. Morris, 295 S.C. 37, 39, 367 S.E.2d 24, 25 (1988); Bungener v. Bungener, 291 S.C. 247, 251, 353 S.E.2d 147, 150 (Ct. App. 1987). South Carolina Code Ann. § 20-7-472 (Supp. 2000) enumerates fifteen factors applicable to a determination of equitable distribution. These factors are as follows: (1) duration of the marriage, (2) marital misconduct or fault and its effect on the break-up of the marriage, (3) the value of the marital property and the contribution of each spouse to the acquisition or appreciation in value of the marital property, including the contribution of the spouse as homemaker, (4) the income and earning potential of each spouse and opportunity for future acquisition of assets, (5) the health, both physical and emotional, of each spouse, (6) need of either spouse for additional training or education, (7) the nonmarital property of each spouse, (8) the existence or nonexistence of vested retirement benefits for each spouse, (9) whether alimony has been awarded, (10) desirability of awarding the family home, (11) the tax consequence to each spouse as a result of the apportionment, (12) the existence and extent of any support obligations of either party, (13) liens and encumbrances on marital and separate property and other existing debts, (14) child custody arrangements and obligations, and (15) any other relevant factors as the trial court shall expressly enumerate in its order. The statute vests in the family court the discretion to decide what weight should be assigned to the various factors. On review, this court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact that this court might have weighed specific factors differently than the family court is irrelevant. Johnson v. Johnson, 296 S.C. 289, 300-01, 372 S.E.2d 107, 113 (Ct. App. 1988); see also Ball v. Ball, 314 S.C. 445, 448, 445 S.E.2d 449, 451 (1994) (the family court has wide discretion in determining the contributions made by each spouse to the marital estate; the weight to be accorded evidence of marital misconduct is for the court to determine in the exercise of its discretion); Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996) (the reviewing court will affirm the family court judge's apportionment of marital property if it can be determined that the judge addressed factors under statute governing apportionment with sufficiency for the reviewing court to conclude that judge was cognizant of statutory factors).

Here, the family court set forth several facts relevant to its equitable division of the marital estate. The court considered, among other things (1) the length of this 18-year marriage, (2) the Husband's adulterous affair and its contribution to the break-up of the marriage as well as its effect on the economic circumstances of the parties, (3) the value of the marital property and the direct and indirect contributions of both parties to the marital estate, (4) the disparity of income and earning potential of Wife, (5) the devastating effect of the break-up of the marriage on Wife, (6) the nonmarital property of each party, (7) the nonexistence of vested retirement benefits, and (8) tax ramifications in allowing Husband to designate the interest paid on the note and mortgage to Wife as alimony for tax purposes only. Further, we note the court expressly recognized the generosity of the Husband's parents to the parties over the years.

Our review of the record convinces us the family court addressed factors under the statute governing apportionment with sufficiency to indicate the court was cognizant of those factors. Furthermore, in considering the overall fairness of the apportionment we find the end result to be equitable. Accordingly, we are not persuaded Husband has established an abuse of discretion by the family court in its apportionment of the marital estate. Finally, giving due deference to the court's authority to assign such weight to the relevant factors as it deems appropriate, we will not second-guess the trial court's consideration of Husband's marital misconduct, its impact on the dissolution of the marriage, and the subsequent economic effect on the parties. Therefore, we affirm the trial court's apportionment of the marital estate.

2. Execution of Mortgage

Next, Husband argues the trial court abused its discretion in requiring him to execute a mortgage "which had the effect of making Wife a co-owner of his business, [preventing] Husband from operating his business and [possibly forcing] him into bankruptcy." He does not take issue with the trial court's authority to order the execution of the mortgage, but asserts rather that

the method of division of the property, i.e., the inclusion of the mortgage, was not reasonable.[1] We disagree.

The trial court has wide discretion in determining how to distribute marital property, and it may use any reasonable means to divide the property equitably. Murphy v. Murphy, 319 S.C. 324, 329, 461 S.E.2d 39, 41-42 (1995). The trial court determined that Wife was entitled to one-half of the entire marital estate. Although Wife received a portion of her property in kind, including a home, a car, and certain personal property, the bulk of her share of the property, more than $2,400,000.00, is invested in the inns. It is apparent from the record that Husband desired to maintain control of all the inns rather than transfer ownership or interest in any of the inns to Wife. The court therefore ordered Husband to make payments on the $2,400,000.00 debt to Wife over a period of 240 months at 6% interest. The court further ordered Husband to execute a note, secured by a mortgage on all properties in which Husband had an interest, with the exception of the residence awarded Husband in the divorce. In return, Husband was declared by the courts to be the sole owner of the marital interests in the inns. The court determined this would be the most equitable way to effect the distribution of Wife's remaining share of the marital property.

The court had the option of forcing the parties to sell the inns and split the proceeds, or dividing the inns between the parties. Husband, however, apparently sought ownership of all the inns. Further, it is an inescapable conclusion that Husband's continued ownership and management of the inns would allow the parties to reap the full financial benefits of the businesses. A distribution of the assets in kind to the parties would leave Wife at a severe disadvantage, as the inns would not have the value for her that they do for Husband. By structuring the division in this manner, the trial court enabled the parties to maintain their optimal stream of income. In doing so, however, Wife has to wait twenty years to receive her full share of the marital property. Having

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[1] Alternatively, Husband requests this court approve a mortgage as prepared by Husband's counsel. As is more fully discussed in Wife's appeal, we find the issue of the proper form of the mortgage should be remanded for consideration by the trial judge pursuant to his November 3, 1999 order on reconsideration.

reviewed the overall fairness of the apportionment, we find the end result to be equitable and thus must affirm the trial court's apportionment of the marital estate.

B. Valuation of Gary Olin Stock

Husband contends the trial court erred in valuing his share of the Gary Olin stock, purchased with funds from an inheritance, at only $30,000.00. He argues, although the share was purchased for $30,000.00, the record shows the value of that one share was actually $122,821.00. Wife asserts the trial court's evaluation correctly incorporated the value of the Olin share in King's Courtyard Inn as stipulated to by the parties' experts.

The record shows the parties stipulated to the values of the various business entities belonging to Husband and Wife, as jointly determined by the parties' two experts. The experts prepared a schedule of the various businesses which contained breakdowns of the values based on the general and limited partnership interests. In valuing the property as of November 30, 1998, the schedule placed a value of $245,644.00 on the parties' 24.81% limited partnership interest in King's Courtyard Inn. A Footnote to this value indicates it was determined based on the payment of $30,000.00 in May of 1997 for a 3.03% limited partnership interest.[2] In other words, if a 3.03% interest were worth $30,000.00, a 24.81% interest would be worth $245,644.00.

One of Husband's witnesses, Mr. Feinberg, placed a value of $90,000.00 on the Olin share in King's Courtyard Inn, based on the 3% share developing into a 9% interest in the business. However, Mr. Feinberg stated Husband's expert witness, Dr. Perry Woodside, would be better able to testify to the value of that share. Wife's expert, Francis Humphries, who worked on the stipulated values with Dr. Woodside, testified the Olin share in King's

[2] Although the schedule indicates it is a 3.03% interest, the parties agree this was error and it was actually a 3.33% interest. Following the experts' formula for calculating the value, an error in this percentage amount would lower the total value of the limited partnership interest ($30,000.00 divided by 3.33% times 24.81% equals $223,513.51).

Courtyard Inn was used to purchase "a 19/54th interest in 75 percent of the Wentworth Mansion equity," leaving a 5.5555% interest in the Wentworth Mansion valued at $14,355.00. There is nothing in the record from Dr. Woodside's testimony indicating he ever placed a value on the Olin share.

On direct examination, Husband testified he purchased a share in King's Courtyard Inn from the widow of Gary Olin with money he received from his aunt's estate. He stated the Olin limited partnership share remained in King's Courtyard Inn. Subsequently, Husband was recalled to the stand to discuss why he disagreed with the valuation of the share as determined by Mr. Humphries. He explained that he purchased a 3.33% interest in the inn from Olin's widow and that refinancing occurred, moving nineteen shares in King's Courtyard Inn to Wentworth Mansion. He stated there were only two limited partnership shares remaining, one of which was the Olin share, the other being one he had previously purchased. According to Husband, he held a limited partnership interest of a little more than 24% and half of that, or 12%, was the Olin share. Accordingly, he determined the value of that one share to be around $122,000.00, representing half of the total value of the limited partnership as stipulated to by the parties.

The trial court found the value of the Gary Olin stock was $30,000.00, based on Husband's testimony that it stayed in King's Courtyard Inn and was not transferred to Wentworth Mansion, and based on "the value of a share of stock in the King's Courtyard Inn, as stipulated to by the parties."

According to Husband, the one share of stock purchased in May of 1997 for $30,000.00 increased in value to $122,821.00 by November of 1998. Husband makes a compelling argument that, if there are only two shares of limited partnership stock remaining, the value of one share is half of the total value of the limited partnership interest. However, in reviewing the record, it is impossible to discern whether the experts contemplated the 24.82% limited partnership interest comprised only two shares of stock. There is no evidence of record the experts deemed the Olin share of stock transformed from a little more than 3% to more than 12% and represented half of the stipulated $245,644.00 total value of the limited partnership interest. While there is testimony from Husband that only two shares of limited partnership stock

remained in King's Courtyard Inn, there is no evidence as to when the twenty-one shares were reduced down to two shares and whether this occurred before or after the November 1998 valuation date. Neither is there any evidence as to whether the experts took the total number of limited partnership shares outstanding into consideration. It is clear they valued the total interest at $245,644.00 and based that value on a purchase price of $30,000.00 for one share representing a little more than 3%, but it is less clear as to whether they would then equate that one share into a 12% interest at the critical time of valuation.

Both parties rely, at least in part, on the experts' stipulated schedule in arguing their values for the stock. This court is not comfortable, however, making a determination that the one share of stock has aggrandized from a $30,000.00 value to more than $122,000.00 in only a year and a half, based in part on the experts' stipulation and in part on Husband's testimony. This is especially so in light of the fact that the full extent of the experts' opinions on this matter was not detailed by document or by testimony, other than testimony from Wife's expert that the Olin share was transformed into an interest in Wentworth Mansion and was valued at only $14,355.00.[3] However, neither is it clear that the experts would value the Olin share at only $30,000.00 in November of 1998, based on the purchase made in May of 1997. Because we find no clear indication from the experts' stipulated documents as to what value they would have placed on one share of the limited partnership stock at the time of valuation in November 1998, we remand this issue to the lower court for redetermination of the value. In so doing, the court may take additional testimony as offered by the parties on the issue.

C. Marital vs. Non-Marital Property

Next, Husband argues that the family court erred in including the Merrill Lynch account in the marital estate, arguing it is his nonmarital property traced to an inheritance from his aunt. We disagree.

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[3] As previously noted, the trial court found the Olin share remained in King's Courtyard Inn and was not transferred to Wentworth Mansion.

Marital property is defined by S.C. Code Ann. § 20-7-473 (Supp. 2000) as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held, except the following, which constitute[s] nonmarital property: (1) property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse." The burden of showing an exemption under § 20-7-473 is upon the party claiming that property acquired during the marriage is nonmarital. Pool v. Pool, 321 S.C. 84, 89, 467 S.E.2d 753, 757 (Ct. App. 1996), aff'd as modified, 329 S.C. 324, 494 S.E.2d 820 (1998).

In this case, Husband claims that three stocks in the Merrill Lynch account are part of his inheritance from his Aunt Kathryn. He asserts, because the account is listed in his name only, and is included in his financial declaration and financial statement provided to banks, the stocks must be deemed his nonmarital property. However, Husband points to no testimony indicating the three stocks in question came from this inheritance, and the paper trails he provided are woefully inadequate to support his assertion. Appellant has the burden of convincing this court that the trial judge committed error in his findings. In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001); Shirley v. Shirley, 342 S.C. 324, 329, 536 S.E.2d 427, 429 (Ct. App. 2000).

Further, while property acquired by either party by inheritance from a party other than the spouse is generally considered nonmarital property, nonmarital property may be transmuted into marital property if: (1) it becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property. Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 536-37 (Ct. App. 2001). Transmutation is a matter of intent to be gleaned from the facts of each case, and the spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage. Id.

The evidence here shows that funds from the Merrill Lynch account were used by Husband in support of the marriage or in some other manner, evidencing his intent to make it marital property. Funds from the account were used to pay down the equity line on one of their homes. Funds were used from the account to pay off loans on the inns, as well as purchase more stock in the inns from other investors. The account was also used for improvements to one of the homes, and to pay on the parties' personal credit card. Based on this evidence, the court found that "assets . . . listed in the parties' names individually had been co-mingled to an extent as to result in transmutation" and that the parties' "stocks and bonds, with the exception of the stocks held by Wife in the Kerrison's Company, are all marital properties." We find that by commingling the inheritance funds with funds from the parties' marital account so as to become untraceable, and generally using funds from the account to support the marriage, any such assets from the inheritance were transmuted into marital property. We therefore find no error.

D. Miscalculation of the Wife's Share

Finally, Husband argues that the family court made a mathematical error in dividing the marital estate. We find this issue is not preserved for our review.

During the hearing on Husband's motion to amend, Wife pointed out several mathematical errors in the final order. Specifically, she indicated the order reflected a $6,700,000.00 marital estate, when the exact figure should have been $6,720,906.00. She further noted the proper computations on the division of the individual assets would give Husband a total valuation of marital property of $5,739,255.00, and Wife a total valuation of $889,651.00. The trial judge indicated he had simply used the $6,700,000.00 figure as an estimate in some places of the order, but agreed all references to the value could be changed in the order to reflect the exact figure. Husband agreed to the proposed change. The judge also stated he had made an error in arithmetic in the valuation of the total assets awarded to both Husband and Wife, and those figures should be changed to reflect the proper amounts. Again, Husband agreed. The court issued an order modifying the final order and addressing Husband's motion to amend on November 3, 1999. In this supplemental order, the court made the

correction involving the total value of the marital estate, finding it should reflect a figure of $6,720,000.00. As well, the court corrected the figures for the total values of the properties awarded to Husband and to Wife, finding they were $5,739,255.00 and $889,651.00, respectively.

On appeal, Husband claims that the November 3, 1999 order modifying the final order contains a mathematical mistake in valuing the entire marital estate at $6,720,000.00. He argues the totals of the properties awarded to Husband ($5,739,255.00) and Wife ($889,651.00) equal $6,628,906.00, not $6,720,000.00. However, these inconsistencies were never brought to the family court's attention. Husband never asserted the $6,720,000.00 figure should be adjusted based on the corrections to the other figures, but conceded at the hearing on his motion to amend that the order should be modified to reflect the $6,720,000.00 figure. The errors complained of by Husband here are being raised for the first time on appeal. The family court has not had an opportunity to rule upon the issue and therefore, it is not preserved for appellate review. As a general rule, an issue may not be raised for the first time on appeal, but must have been raised to and ruled upon by the court below to be preserved for appellate review. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding an issue not preserved where the trial court does not explicitly rule on an argument and the appellant fails to make a Rule 59(e), SCRCP motion to alter or amend the judgment on that ground). See also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Because Husband failed to argue this position below, and because he conceded the valuation of which he now complains, we find no preserved error.

II. Wife's Appeal

A. Contempt

Wife contends that the trial court abused its discretion by finding her in contempt of court, arguing there is no clear and convincing evidence that she willfully violated any court order. Specifically, she asserts error in the court's findings of contempt for her (1) failure to file proper financial declarations as

previously ordered, (2) disclosure of information to Husband's parents and adult daughter regarding Husband's prior adulterous conduct, and (3) intentional withholding of the existence of a trust which was the subject of a motion to compel.

"The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings." In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct. Henderson v. Henderson, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989). A willful act is one which is "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Spartanburg County Dept of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988). "In a proceeding for contempt for violation of a court order, the moving party must show the existence of the order, and the facts establishing the respondent's noncompliance." Brasington v. Shannon, 288 S.C. 183, 184, 341 S.E.2d 130, 131 (1986). Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order. Henderson, 298 S.C. at 197, 379 S.E.2d at 129. A determination of contempt is within the sound discretion of the trial judge, but his decision will be reversed when the finding is without evidentiary support or there is an abuse of discretion. Wilson v. Walker, 340 S.C. 531, 538, 532 S.E.2d 19, 22 (Ct. App. 2000).

1. Financial Declaration

A pretrial order was filed on January 11, 1999, which directed the parties, in part, to "provide current financial declarations within ten days," and to have all real property appraised, with the appraisals to be completed by January 30, 1999. Husband subsequently filed a motion to compel Wife to submit a complete and updated financial declaration, "indicating the values of assets." Following a hearing on the matter, the court, by order filed January 25, 1999, ordered Wife to "provide a current, complete financial declaration,

including an assets addendum, to [Husband's] attorney within twenty-four (24) hours." Wife submitted a financial declaration signed January 26 which included valuations for some of the assets, but noted the appraisals were not complete as to the values of the real estate, and therefore did not include those values nor the total value of all assets. At trial, Wife submitted a final financial declaration, which included all property values of the assets.

Wife asserts she complied with the January 25 order "as best she could," given that the appraisals were incomplete. According to the January 11 order, Wife had until January 30 to complete the appraisals of the real property. However, Wife offers no excuse as to why she did not submit an updated financial declaration, complete with an asset addendum including the appraised values, as of January 30. The January 11 and January 25 orders clearly instructed the Wife to provide this information by that date. Further, there is no evidence Wife requested additional time from Husband or moved the court for additional time, based on an inability to complete the appraisals as ordered. In spite of the clear orders of the court, Wife waited to submit the proper financial declaration at the trial on February 16, thereby depriving Husband of an opportunity to completely prepare his case. Accordingly, we find the evidence supports the trial judge's finding of willful contempt as to the financial declaration.

2. Disclosure of Information

On December 11, 1998, the court ordered Husband's psychiatrist to produce Husband's file to Wife and ordered that "the contents of the file shall not be disseminated except as needed in the course of this litigation and under no circumstances are the parties' minor children to be told any of the information in [Husband's] file." On January 27, 1999, the court issued a protective order restraining the parties "from disseminating any information learned in any deposition in this case which relates in any way to, or is derived from, information contained in the records of the parties' therapists, with any person except his or her lawyer, his or her expert, and his or her parents and siblings."

Notwithstanding these orders, during a very emotional phone conversation with Husband's parents, Wife disclosed information of an affair Husband had in 1983, which she discovered after reviewing his psychological records. Wife stated during her cross-examination testimony that she told Husband's parents about the previous affair because they had accused her of stalling the case, and she was hurt and "felt so slammed" by the conversation with his parents. She admitted, however, that she knew she was under a court order not to disclose this information, and that she was guilty of violating the order.

On appeal, Wife asserts she only disclosed this information to Husband's parents while defending herself against unwarranted attacks, and she "believed she was within her rights to divulge this information as necessary to the litigation." This position is directly contrary, however, to her admission at trial that she knew she was under a court order not to disclose the information and that she was in violation of the order. Accordingly, there is evidentiary support for the trial court's finding on this issue, and we find no abuse of discretion.

Wife also asserts on appeal that the trial court erred in finding her in contempt for disclosing Husband's prior adulterous conduct to Husband's adult daughter from a previous marriage. We agree. The record shows Wife informed Husband's adult daughter as to Husband's ongoing adulterous relationship with Linn Lesesne, not the prior adulterous conduct of Husband that occurred in 1983. Further, there is no evidence the orders in question had even been issued at the time of Wife's conversation with her stepdaughter. There is simply no evidence that Wife disclosed anything to the Husband's daughter which she was prohibited from disclosing by court order. Accordingly, we reverse so much of the court's order as finds Wife in contempt for disclosing information to Husband's daughter, for lack of evidentiary support.

3. Failure to Disclose the Trust

On January 20, 1999, Husband filed a motion to compel T. Heyward Carter, Jr., one of the estate planning attorneys for Wife's parents, to fully comply with the subpoena which demanded that he produce any trust documents

involving Wife. Husband argued he was trying to find "a present existing trust from which [Wife was] deriving real money, which . . . would affect [Husband's] alimony payment." On February 5, 1999, the family court filed its order requiring Mr. Carter to produce any original trust documents in which Wife was named as a beneficiary. Thereafter, Husband discovered an insurance trust on Wife's parents naming Wife and her siblings as beneficiaries. This trust was established to pay the estate taxes of Wife's parents' estate, effective only upon the death of both her parents. Consequently, on February 14, 1999, Husband filed a motion to hold Wife in contempt for failing to disclose the existence of this trust.

Wife argues on appeal that the family court erred in finding her in contempt for failing to disclose the existence of this trust. We agree. In the final order, the court held, "I find the Wife to be in wilful contempt for intentionally withholding the existence" of "a trust which was subject to the Motion to Compel heard by this Judge." However, there is no evidence that Wife willfully withheld this information because nothing in the record indicates that she was even aware of the existence of the trust. Wife testified at trial that she was not aware of the existence of the trust, and the record contains no evidence that the existence of the trust was ever communicated to her or that she tried to conceal it. Moreover, Wife was not the subject of Husband's motion to compel, nor was she included in the court's order compelling disclosure of the trust documents. Accordingly, we find that the court erred in holding Wife in contempt on this basis.

B. Uncovered Medical Expenses

Wife argues that the trial court erred or abused its discretion by ordering her to be responsible for all uncovered medical, dental and orthodontic expenses.[4] She argues the family court undertook to apply the Child Support

[4] Husband concedes, notwithstanding the language of the order making Wife responsible for **all** uncovered medical, dental and orthodontic expenses, Wife would be entitled to seek contribution from Husband in the event of some exceptional circumstance resulting in inordinate expenses.

Guidelines and, thus, should not have deviated from them by requiring her to be responsible for the uncovered expenses. We disagree.

According to 27 S.C. Code Ann. Reg. 114-4710(A)(3) (Supp. 2000), where the combined parental gross income is higher than $15,000.00 per month, or $180,000.00 per year, the family court should determine child support awards on a case-by-case basis. In this case, the combined gross income of the parties is $490,000.00 per year. Thus, the Child Support Guidelines do not cover this case. The family court referenced the child support guidelines and concluded, by extrapolation, Husband would have been responsible for monthly child support of $4,400.00. However, the court determined, based on the equitable division award Wife received, Husband should pay only $3,500.00 per month in child support. The court further ordered "Husband shall continue to carry medical and dental insurance for the benefit of the minor children, but that the Wife shall be responsible for all uncovered medical, dental and/or orthodontic expenses of the children."

Contrary to Wife's assertion, the court did not apply the Child Support Guidelines. Further, the court properly considered the specific facts of this case in determining an appropriate award. The court acted within its statutory authority and the overall award was reasonable and equitable. Accordingly, we find no error.

C. Alimony and Child Support

Wife next argues that the issues of alimony and child support must be revisited if Husband prevails in his appeal of the apportionment of the marital property. Because we have affirmed the family court's apportionment of the marital estate, it is not necessary to address this issue.

D. Note and Mortgage

Finally, Wife argues that the trial court abused its discretion by not ordering Husband to execute a note and mortgage similar to those provided by Husband to his commercial creditors. We find no error.

Following the court's amended final order, Husband filed an emergency motion to require the note and mortgage pursuant to the final order be executed and recorded, to lift any stay which may exist pertaining to said note and mortgage, and for attorneys' fees and costs. However, because notice of appeal had already been filed, the family court determined it was without jurisdiction to hear the motion. Thus, the last order addressing the issue of the note to be executed is the November 3, 1999 order modifying the final order. In that order, the court directed the preparation of the note and mortgage by "an independent attorney practiced and well versed in real estate and business transactions." On the same date, the trial judge notified the parties he had chosen Attorney Tom Buist to draft the documents. According to both parties, the note and mortgage were never drawn.

Because appeal was taken before preparation of the note and mortgage, it is impossible to say whether the lower court erred in failing to order the execution of the same pursuant to the parties' individual desires. Indeed, both parties assert on appeal that the court erred in failing to choose the type of note and mortgage they requested; however, we do not yet know if the executed documents will comply with their wishes. The court's final order on this matter has never been followed, and we cannot find error where there is no final determination on the matter. We find the appeal of this issue to be premature and therefore remand it to the family court to take the appropriate actions necessary to enforce the ordered distribution of the marital estate.

Based upon the foregoing, the decision of the trial court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary F. Hardee,
Respondent,

v.

Jerry N. Hardee, and Hardee Construction Company, Inc.,
Appellants.

Appeal From Sumter County
Marion D. Myers, Family Court Judge

Opinion No. 3417
Heard September 5, 2001 - Filed December 10, 2001

AFFIRMED IN PART & REVERSED IN PART

Harry C. Wilson, Jr., of Lee, Erter, Wilson, Holler & Smith, of Sumter, for appellants.

James T. McLauren, C. Dixon Lee, III, both of McLauren & Lee and Jan L. Warner, all of Columbia, for respondent.

HEARN, C.J.: Jerry Hardee (Husband) appeals from a family court order concerning the enforcement of a premarital agreement, equitable distribution of property, alimony, and attorney fees. We affirm in part and reverse in part.

FACTS

Mary Alessandro Hardee (Wife) met Husband while she was working for the attorney representing Husband in his second divorce. The two began dating, and Wife moved into Husband's home in July 1987. Shortly after the couple began living together, Wife reduced her hours at work, sold her home, and terminated her car lease.

In December 1988, Husband proposed to Wife. Wife accepted, and the couple began planning a March wedding. Wife testified that they joked about a premarital agreement but that Husband never mentioned having her sign one until after he proposed. Around February 1, 1989, Husband presented Wife with a premarital agreement. In the draft agreement, each party waived all rights to the other's property in the event of divorce, as well as any rights to alimony or attorney fees. The agreement also contained a clause providing that Husband would pay Wife $3,000 for each year of their marriage should they divorce. Wife took the agreement to her attorney, who was also her long-time employer, for his review. The attorney and another lawyer in his firm recommended Wife not sign it.

The parties continued to negotiate. After reviewing the final agreement, Wife's attorney again advised her not to sign. He testified that he thought the agreement was unfair and that he told her it was a "terrible agreement," considering her health problems and she would be "left out in the cold" if the marriage failed.[1] Wife testified that she was represented by an attorney when the agreement was executed and that he fully explained the agreement's terms to her.

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[1]Before marrying Husband, Wife suffered from diabetes and sponge kidney disease. Wife's health has continued to deteriorate. At the time of the divorce proceedings, Wife used an insulin pump to control her diabetes, and her primary physician had treated her for a variety of medical problems including diabetic mellitus, chest pain, anxiety, and diabetic neuropathy. Wife's physician also testified that Wife suffers from systemic lupus and cannot engage in gainful employment.

Despite Wife's attorney's advice, the parties executed an agreement on February 22, 1989, providing: "That each party, in the event of separation or divorce, shall have no right against the other by way of claims for support, alimony, attorney's fees, costs, or division of property, except as specifically stated hereinafter." The agreement also required Husband to pay Wife $5,000 for each year of their marriage and $2,000 for moving expenses on separation. Husband and Wife each completed financial statements which were attached to the agreement. At that time, Husband's assets totaled $1,536,642, and Wife showed assets of $48,200.

Following the wedding, Husband continued working as the owner of Hardee Construction Company, and Wife worked part time as a paralegal until 1991 when she and Husband bought a diet business for her to operate. In 1993, the parties sold the business, and Wife did not work outside the home for the rest of the marriage.

Wife alleged Husband abused her physically and emotionally. She testified to several incidents, including an evening when Husband allegedly hit her in the eye with his fist. Husband denied that he physically abused Wife and maintained that her eye injury resulted from a collision with a door frame. Wife also contended Husband committed adultery. In 1990, a young woman and her husband confronted Wife and accused Husband of having an affair with the young woman. In June 1995, Wife learned Husband was having another affair. Wife confronted Husband about the relationship, and Husband left the marital home. He admitted to the affair and continued the relationship after the parties separated.

Wife commenced this action seeking a divorce from Husband on the ground of adultery, spousal support, equitable apportionment of property, restraining orders, and attorney fees. Husband filed a motion to dismiss, an answer and counterclaim, and a motion for temporary relief. He asserted that the premarital agreement divested the family court of subject matter jurisdiction and barred Wife's claims. A temporary hearing was held and the family court issued an order granting Wife exclusive use of the marital home, the use of a car, and requiring Husband to pay Wife's health insurance premiums and

$20,000.[2] The order also reserved jurisdiction to determine the validity of the parties' premarital agreement.

On Husband's motion, the family court bifurcated the issues in this action. An initial hearing was held to determine the impact of the premarital agreement. The family court found the provisions of the agreement relating to grounds for divorce void, the provisions waiving alimony and attorney fees invalid if found unconscionable at the time of enforcement in the later divorce hearing, and the provision regarding equitable division invalid with respect to property acquired during the marriage. The order reserved jurisdiction to determine alimony, equitable division, and attorney fees.

The family court then heard the case on its merits and issued a final decree and judgment of divorce for Wife on the statutory ground of adultery. Additionally, the order declared that the waivers of spousal support and attorney fees were unconscionable and void and that the agreement did not bar equitable division of property acquired during the marriage.

The family court found Wife totally disabled and unable to support herself and awarded her permanent periodic alimony of $4,250 per month. The order contemplated that Wife would pay her health insurance premiums from the alimony award. The family court ordered that property acquired by the parties during the marriage be divided with Husband receiving 70% of the assets and Wife receiving 30%. Lastly, the family court awarded Wife $85,000 in attorney fees and $15,000 in accounting fees.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992); Owens v. Owens, 320 S.C. 543, 546, 466 S.E.2d 373, 375 (Ct. App. 1996). However, this broad scope of review does not require us to disregard the family court's findings.

[2]The relief awarded at the temporary hearing was not appealed.

Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Nor do we 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).

DISCUSSION

I. Equitable Distribution of Property

Husband argues the family court erred in finding the premarital agreement did not bar the equitable division of property acquired by the parties during the marriage. We disagree.

The premarital agreement contains the following provisions governing the disposition of property:

> 1. That all properties of any kind or nature, real, personal or mixed, wheresoever the same may be located, which belongs to each party, shall be and forever remain the personal estate of the said party, including all interest, rents, and properties which may accrue therefrom *unless otherwise so stated in this Agreement*.
>
> . . .
>
> 4. That each party, in the event of separation or divorce, shall have no right against the other by way of claims for support, alimony, attorney fees, cost, or division of property, *except as specifically stated hereinafter*.
>
> . . .
>
> 7. It is specifically understood and agreed that should a separation or divorce occur between the parties, each

> of the parties would maintain all of their property as if the marriage had never occurred and each of the parties will have no interest whatsoever in the property of the other *except as hereinafter provided*.
>
> . . .
>
> 9. **The provisions contained herein shall in no way affect the property, whether real, personal or mixed which shall be acquired by the parties, whether titled separately or jointly, subsequent to the date of this Agreement.**
>
> 10. . . . Each party acknowledges that they shall have no right against the other by way of claim for support, alimony, attorney fees, costs or division of property, *except as stated within this agreement*.

(emphasis added).

Husband argues that paragraph 9 applies exclusively to property that he and Wife purchased jointly and that the agreement prevented the property in question from being classified as marital property subject to equitable division. Wife argues paragraph 9 indicates that all property acquired during the marriage is subject to equitable division, irrespective of title.

Marital property is defined as "all real and personal property which has been acquired by the parties during the marriage. . . ." S.C. Code Ann. § 20-7-473 (Supp. 2000). This definition is subject to several exceptions, including "property excluded by written contract of the parties." S.C. Code Ann. § 20-7-473(4) (Supp. 2000). Therefore, we must look to the agreement to determine whether the family court properly determined the property acquired during this marriage was marital.

Questions of construction, operation, and effect of domestic agreements are decided using the same rules as other contracts. See Henderson v. Henderson, 298 S.C. 190, 193, 379 S.E.2d 125, 127 (1989) (finding that

interpretation of separation agreements is "governed by the same general rules and provisions applicable to other contracts"). In construing a contract, "the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001). Moreover, this court must consider the contract in its entirety and employ a construction that gives effect "to the whole instrument and to each of its various parts and provisions. . . ." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). We find the language of paragraph 9 plainly and unambiguously carves out an exception to the limitations imposed in paragraphs 1, 4, 7, and 10 and allows the equitable division of property acquired during the marriage. The agreement when read as a whole consistently contemplates that the onerous provisions relied on by Husband may be limited as provided within the agreement. Accordingly, we hold the premarital agreement did not bar Wife from receiving an equitable division of property acquired during the marriage, and we affirm the family court's award.

II. Waiver of Alimony and Attorney Fees in the Premarital Agreement

Husband argues the family court erred in finding the waivers of alimony and attorney fees were void and unconscionable.[3] We agree.[4]

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[3]We note that the agreement contained a severability clause; therefore, the family court could find certain provisions unenforceable while upholding the agreement as a whole.

[4]Husband also argues the family court's finding that the provisions of the premarital agreement waiving alimony and attorney fees were unconscionable, constituted gender bias, and violated his constitutional rights to equal protection. He further asserts that by treating the premarital contract differently than a commercial contract, the family court violated his equal protection rights by affording different treatment to his contract than would be afforded to the contract of an unmarried person. We disagree. The Equal Protection Clause of the Fourteenth Amendment prohibits discrimination based upon gender and provides that people be treated alike under similar circumstances and conditions.

South Carolina recognizes the validity of antenuptial agreements "if made voluntarily and in good faith and if fair and equitable." Stork v. First Nat'l Bank of S.C., 281 S.C. 515, 516, 316 S.E.2d 400, 401 (1984). These agreements are "not opposed to public policy but are highly beneficial to serving the best interest of the marriage relationship." Id. Additionally, our supreme court has held that parties may waive alimony in separation agreements. Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983). "The parties may specifically agree that the amount of alimony may not ever be modified by the court; they may contract out of any continuing judicial supervision of their relationship by the court; . . . they may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily, and reasonably." Id. at 353, 306 S.E.2d at 627. Although our courts have provided this broad language, no South Carolina authority directly addresses whether parties may waive alimony or attorney fees in premarital agreements.[5]

U.S. Const. amend XIV, § 1; S.C. Const. art. I, § 3. Here, the family court did not base its findings on gender but rather on theories of law that apply equally to men and women, married and unmarried.

[5]There are South Carolina cases mentioning waivers of support or attorney fees; however, in these cases, the enforcement of the agreement has not been at issue on appeal. See Gilley v. Gilley, 327 S.C. 8, 488 S.E.2d 310 (1997) (finding jurisdiction over property claims between former spouses who waived equitable division in antenuptial agreement was in circuit court); Bowen v. Bowen, 327 S.C. 561, 490 S.E.2d 271 (Ct. App. 1997) (addressing attorney fees and property division pursuant to uncontested prenuptial agreement). In determining the waivers were against public policy, the family court relied in part on Towles v. Towles, 256 S.C. 307, 312, 182 S.E.2d 53, 55 (1971) (finding an agreement relieving the husband of his support obligation as a condition of continuing the marital relationship was void as against public policy) and Crawford v. Crawford, 301 S.C. 476, 482, 392 S.E.2d 675, 679 (Ct. App. 1990) ("[T]he public policy of this state recognizes the reconciliation of the parties nullified the provisions of the separation and reconciliation agreements regarding the parties' agreements not to be liable for the support of each other."). We find the family court's reliance on these authorities is misplaced.

In the absence of South Carolina authority on point, we find it helpful to look to other jurisdictions for guidance. The current trend and majority rule allows parties to prospectively contract to limit or eliminate spousal support. See generally Pendleton v. Fireman, 5 P.3d 839, 845-46 (Cal. 2000); Allison A. Marston, Planning for Love: The Politics of Premarital Agreements, 49 Stan. L. Rev. 887, 897-99 (1997). But see Connolly v. Connolly, 270 N.W.2d 44, 46 (S.D. 1978) (finding waiver of spousal support unenforceable and contrary to public policy).

Twenty-six jurisdictions have adopted all or a substantial portion of the Uniform Premarital Agreement Act (UPA). Unif. Premarital Agreement Act, 9B U.L.A. 369 (Supp. 2001).[6] The UPA expressly allows parties to contract with respect to the modification or elimination of spousal support. Id. at § 3(a)(4). The UPA further provides: "If the provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility." UPA § 6 (b). California, New Mexico, and South Dakota adopted the UPA without the

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Unlike this case, Towles and Crawford involved attempts to enforce reconciliation agreements made in contemplation of a continuing marital relationship. The "general law in South Carolina, is that, at least as to matters of support, a separation agreement is annulled by the reconciliation of the parties." Bourne v. Bourne, 336 S.C. 642, 646, 521 S.E.2d 519, 521 (Ct. App. 1999). Nothing in Towles or Crawford suggests that the same policy considerations applicable to reconciliation agreements also apply to premarital agreements, and we decline to so hold.

[6]We note that legislation to adopt the UPA has been introduced to but not passed by the South Carolina General Assembly. See Roy T. Stuckey & F. Glenn Smith, Marital Litigation in South Carolina Substantive Law 678 (2nd ed. 1997).

provision authorizing the modification or elimination of spousal support. Id.; see also Pendleton, 5 P.3d at 845-846 n. 9,11.

Many jurisdictions that have not adopted the UPA have found such waivers valid and enforceable under certain circumstances. See Robert Roy, Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Fairness or Adequacy of Those Terms – Modern Status, 53 A.L.R. 4th 161 (1987 & Supp. 2000); see also Pendleton, 5 P.3d at 846 n.11 (surveying case law from other jurisdictions addressing spousal support waivers); Cary v. Cary, 937 S.W.2d 777, 779 (Tenn. 1996) (recognizing the majority rule is to uphold the validity of provisions in antenuptial agreements waiving or limiting alimony). Generally, a waiver of spousal support in a premarital agreement will be enforced unless the court finds the waiver unconscionable. We find the majority position best comports with the language in Stork and hold that antenuptial provisions waiving alimony and attorney fees are not per se void as against public policy.

Among states that have not adopted the UPA but do allow waivers of spousal support and attorney fees, a common framework for analyzing prenuptial agreements has arisen. See Scherer v. Scherer, 292 S.E.2d 662, 666 (Ga. 1982) (finding in jurisdictions that enforce antenuptial agreements, these contracts "should not be given carte-blanche enforcement"). The test to determine whether such a provision should be enforced has three prongs: "(1) [W]as the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts? (2) [I]s the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?" Id., cited with approval in Brooks v. Brooks, 733 P.2d 1044, 1049 (Alaska 1987); Gentry v. Gentry, 798 S.W.2d 928, 936 (Ky. 1990); Rinvelt v. Rinvelt, 475 N.W.2d 478, 482 (Mich. Ct. App. 1991). We believe this test respects the parties' freedom to contract while allowing the family court to refuse to enforce the agreement if equity so requires and apply it to our analysis here.

With respect to the first prong, no party has alleged Wife signed under fraud or duress, and the record is clear that the parties had full and fair

financial disclosure and both were represented by counsel. The second element has been hotly contested during this litigation. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed. See Restatement (Second) of Contracts § 208 (1981); see also Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998) ("If the court finds that a contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result."). We find the family court erred in considering facts and circumstances existing at the time of enforcement in assessing unconscionability. However, we agree with the family court's determination that Wife was not threatened or coerced to sign the agreement and she received sufficient legal advice and financial disclosure to make a reasonable and informed decision about the agreement. She had time to read the agreement, negotiated some of its terms, and had it reviewed more than once by an attorney. In addition, although the parties had vastly different financial resources, the agreement bound each party equally. Therefore, we find the clauses in question were not unconscionable at the time the agreement was executed.

We now shift our analysis to whether the facts and circumstances at the time of enforcement had changed such that it was unfair or unreasonable to enforce the agreement. At the time Wife signed the agreement, she had serious health problems, including diabetes and sponge kidney disease. The premarital agreement specifically noted Wife's health problems. It was completely foreseeable to Wife that her health would worsen. Wife's attorney advised Wife not to sign the agreement because of her health problems. Although it is unfortunate that Wife's health has deteriorated, we do not find that fact alone sufficient to justify nullifying a contract Wife freely and voluntarily signed, fully aware that under its terms she would not receive any

spousal support. Under these circumstances, we decline to find that the waiver of alimony was unenforceable and reverse the family court's support award.[7]

We find that the same analysis applies to waivers of attorney fees. This court has previously held that despite the general rule that attorney fees are within the discretion of the family court, if an agreement is "clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to them." Bowen v. Bowen, 327 S.C. 561, 563, 490 S.E.2d 271, 272 (Ct. App. 1997).[8] Because we find the agreement and its provisions were enforceable, we reverse the family court's award of attorney and accounting fees.

CONCLUSION

We find that Wife waived all rights to alimony and attorney fees by operation of the premarital agreement. Therefore, the family court erred in awarding her alimony and attorney fees and accounting costs. However, we find that the premarital agreement does not bar equitable division of property acquired during the marriage and that the family court properly divided the marital estate.

AFFIRMED IN PART AND REVERSED IN PART.

CURETON and HOWARD, JJ., concur.

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[7]Because we reverse the family court's finding that the waiver of alimony was unenforceable, we need not reach Husband's argument that Wife is capable of working. Were we to reach the issue, we would uphold the family court's finding based on the testimony of Doctors Lilavivat and Brandt. If the agreement were unenforceable, we would also affirm the amount of the family court's awards of alimony and attorney fees and costs.

[8]As noted previously, neither party in Bowen contested the enforceability of the antenuptial agreement.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 96-CP-32-0968

Wannelle Hedgepath, Andrew Hedgepath, and Kristin Hedgepath,

Appellants/Respondents,

v.

American Telephone and Telegraph Company, a corporation, AT&T Nassau Metals Corporation,

Respondents/Appellants,

and

Gaston Copper Recycling Corporation, and Southwire Company,

Respondents.

Case No. 96-CP-32-1016

Karen Mack as Personal Representative of the Estate of Toby L. Sharpe, Sr.,

Appellant/Respondent,

v.

American Telephone and Telegraph Company, a corporation, AT&T Nassau Metals Corporation,

Respondents/Appellants,

and

Gaston Copper Recycling Corporation, and Southwire Company,

Respondents.

Case No. 96-CP-32-2573

Maggie Banyard, Brenda Brooks for herself and as guardian for her incapacitated son Meredyth Brooks, Brenda L. Brooks, Herbert H. Brooks, Joe L . Brooks, Joseph Brooks on behalf of his minor child Brandi C. Brooks, Mary H. Brooks; Marvin Brooks for himself and as guardian for his minor children Monica, Amanda Tasiras, Marvin II, Sharine Q. and Markita S. Brooks; Nathaniel Brooks, Jr.; Gertrude Chiles for herself and as guardian for her minor grandson Stefano L. McKnight; Azalee Colter, Nathaniel Colter, Thelma D. Colter; Merdis Davis for herself and as guardian for her invalid husband Chessie D. Davis; Muriel Davis, Shanetra N. Davis, Patricia Dease, Eric S. Dibble, Henrietta Dibble, Ivory Dibble; Louella Dibble on behalf of herself and her minor daughter Shakira Dibble; Margaret Dibble of behalf of herself and her minor child Ronrico L. Dibble; Steven L. Dibble, Tronda M. Dibble, Walter Dibble, Benjamin Edmond, Rosa Mae Glover, Floyd Hall, Iva M. Hall; Priscilla Hamm on behalf of herself and her minor child Dominique C. Hamm; Cynthia Harrison, Melvin Harrison, Jettie James; Augustus James, Jr., for himself and as guardian for his minor children Augustus James, III and Marrisa

Ann James; Andrew Jeffcoat, Betty Jeffcoat, Daisey Jeffcoat, Marshall Jeffcoat, Stephanie S. Jeffcoat, Gloria Lou Jenkins, Wanda Jenkins, Brenda K. Johnson, Carrie B. Johnson; Debra Johnson, as guardian for her minor child Joshua Johnson; Frances Johnson, Jettie Mae Johnson, Leroy Johnson, Sam Johnson, Jr., Pandora Jones, Verdia Mae Jones, Ruby Knight, Nancy A. Knott; Barbara Ann Lowman for herself and as guardian for her minor child Marcell Lowman; Eloise Lowman, Nettie Mack, Mamie Lou Manigault, Naomi Manigault, Magnolia Smith Martin, S.L. Martin; Corlette McBride on behalf of her minor child Takila S. McBride; Rogers C. McBride, Ruther M. McBride, Clayton McDaniel, Michael McDaniel, Amos McKnight, Hattie McKnight, Jannie McKnight, Johnnie McKnight, Jr., Rhonda McKnight, Wanda J. McKnight, Willie Mims, Monica Pinckney; Charles Riley on behalf of himself and his minor child Lori Riley; Kia Riley; Patricia Riley on behalf of herself, Swansea Day Care Center, and Swansea Day Care Center, Inc.; Georgia L. Riley; Mildred Riley for herself and as guardian of her minor children Ravenell Riley and Shana Riley; Eunice Robinson; Sonja Robinson for herself and as guardian for her minor child David Robinson; Renee Robinson Scott on behalf of herself and her minor child Jabari Scott; Mary Lee Shiver, John Sipio, Beverly D. Smith; Carol Y. Smith for herself and as guardian for her minor child Tamara Smith; Dedria D. Smith, Hazie L. Smith, Johnnie L. Smith, Lou Bell Smith, Paul Smith, Willie L. Smith, Annie Bell Sutton, Bessie Sutton, Donjinee Sutton, Jasper Sutton; James Sutton for himself and his minor children James Bernard Sutton, and Joshua Jorome Sutton; John

E. Sutton, Nancy Sutton, J.C. Wallery, Elizabeth Wallery, Angela Wallery, Sherry Wannamaker; Rosa Washington for herself and as guardian for her child Nicole L. Washington; Willie Washington, Rochelle S. Wideman, Ben Franklin Williams, Carol D. Williams, Gina B. Williams, Helen Williams, Hercules Williams; Melissa Williams for herself and her minor child Latoya Williams; Rebecca Williams, Robert Williams, Robert Williams, III, Roderick Williams, Sallie Mae Williams, Stacia Williams, Timothy Williams, Tom Williams, Tyrone Williams, Beverly Zeigler, Laymond Zeigler, Wanda Anthony, Martha Barnes, Joan Bennett, Claudia Mae Briggman; Linda E. Briggman on behalf of herself and her minor children Felica Briggman and Sharonda Mills; Venna M. Briggman on behalf of herself and as guardian for her minor granddaughter Andrea Briggman Muller; Alfonza Brooks, Bernetha M. Brooks, Gloria Brooks, Harvey Brooks, Lenell Brooks, Telly Brooks, Betty Brown; Linda Butler on behalf of herself and her minor child Ebony L. Butler; Billie M. Casteal, Mamie Charley, Lorraine E. Culler, Margaret Culler, Audrey M. Davis, Beverly Davis, Elizabeth S. Davis, Frances Davis; Harry W. Davis, Sr. on behalf of himself and his minor daughter Rosheka Latrelle Davis; Rev. John G. Davis, Mary Lee Davis, Mary Loretta Davis, Molly H. Davis, Norvest Davis, Thomas Davis, Willie Mae Davis, Woodrow Davis, Jr., Yolanda R. Davis, Betty Dease, Juanita Dease, Ola Mae Dease, Patricia H. Dease, Thomas Dease, Jr., Tommy Dease, Lewis B. Dibble, John Dublin, Bernice Edmond, Deborah Edmond; Eula Mae Edmond for herself and her minor child Viola Edmond; Nay Edmond, Retia Edmond, Ruby Edmond, Dassie Favor, Sallie J. Favor, Annie

Feeder, Marie S. Fields, Annie Lou Fordhooks, Clemson Fordhooks, Frederick Gilliam, Edna Lee Gladden, Wesley Glover, Robin Golson, Ruby D. Gordon, Dolphis Hall, Ina B. Hall, Inez R. Hall, Tom T. Hall, Sr., Cynthia Hallmon; Jessie Hallmon on behalf of herself and her minor children Kevin, Chad, and Yolanda; Monica Hallmon on behalf of herself and her minor children Steven L. Hallmon, Jr., an Stephen M. Hallmon; Steven L. Hallmon, Thomas Ham, Jr., Earlene Hame, Henrietta B. Hart, John Hart, John H. Hart, Jr., Verta Mae Hart, Willie Mae Hart, Diane Henley, Milo Henley, Eyvonne Hipps, Diane Hook, Dorothy Hook, Dasia B. Houser, Karen Jackson, Perry J. Jackson, Verdaniel Jackson, Kenny L. James, Cornell Jeffcoat, David T. Jeffcoat, Rev. Dennis Jeffcoat, Eddie Lee Jeffcoat, Erica D. Jeffcoat, Erick Jeffcoat, George Jeffcoat, Jr., Gregg M. Jeffcoat, Iris F. Jeffcoat, Louise Jeffcoat, Tom W. Jeffcoat, Vickie Jeffcoat-Hayses; Willie Mae Jeffcoat for herself and for her minor child Salika Jeffcoat; Wykeria Jeffcoat; Darletha Johnson for herself and for her minor child Wallace A. Johnson; Elaine Johnson, Faith Johnson, Julian Johnson, Corey Jones, Gloria Jones, Jamie Jones, Estate of Mary A. Jones through Flossie Lee Stevenson; Sarah M. Jones, Shirley M. Jones, John Lowman, Morris Lowman, Eric Lykes; Loretta Lykes on behalf of herself and her minor son Marcus Lykes; Samuel Lykes; Shirley Lykes on behalf of herself and her minor daughter Tapker Lykes; Juanita McDaniel for herself and for her minor child Whitney McDaniel; Leila McDaniel, Maggie McDaniel, Evelyn A. McNeal, Robert L. McNeal, Tamara McNeal, James Evan Mack, Meredith Mack, R. Marie Mack-Roberts, Luther Manigault; Ronald Manigault, Sr.,

on behalf of himself and his minor children Ronald Manigault, Jr., and Ronnieshia D. Manigault; David W. Martin, Patricia A. Martin; Nadine Milhouse on behalf of herself and her minor sons Tyries, Kerdrick, and Quan; Carolyn Mims, Emma B. Mitchell, David Myers, Sr., Louise Myers, Booker T. Nelson, Ellerweas Paulling, Ellen L. Porterfield; Willor Dean Richardson, on behalf of herself and her minor children Latasha Richardson and Jamal Richardson; Emma Dell Riley, Jannie W. Riley, John C. Riley, Kevin D. Riley; Mary Riley on behalf of herself and her minor children Sharpi and Akeem; Lillie Mae Roach, Jackie Robinson, Judi Robinson; Julia Robinson on behalf of herself and her minor children Somonia and Terri; Robert Robinson, Shandon M. Robinson, Tamata Robinson, Rosetta Ross, Carlisle L. Salley, Elvin Salley, Elvin Salley, Jr., Ethel G. Salley, Jerry Salley, Linda G. Salley, Morris E. Salley, Ola Ree Salley, Walter Salley, Wilbert Salley, Albert Sease, Bertha Sease, Diane Sease; Grovette Sease on behalf of herself and her minor children Everette Sease; James Sease, Jr., Pearline Sease, Tyra Sease, Ruthen Sease, Eugene Seawright; Margaret Seawright on behalf of herself and her minor children Marcia M. Seawright, Marcus E. Seawright, C. Tiwan Seawright, and Antjuan O. Seawright; Brian O'Neal Simmons, Joyce J. Simmons, Ruby Mack Simmons, Zarita S. Simmons; Alice J. Smith for herself and her minor child Mario M. Smith; Altonia G. Smith, Andy Smith, Cornet Smith, Dana Smith, Jerry Smith, Prince O. Smith, Rosa Smith, Samuel C. Smith, Willie C. Smith, Claire L. Stack, Bessie Stenerson; Flossie Lee Stevenson on behalf of herself and her minor child George Dell Stevenson; G. Dell Stevenson, Eileen Stroman, Arthur J.

Sutton, Daisy G. Sutton, Debra Sutton, Henry Sutton, Jr., James L. Sutton, Londell Sutton, Swansea Day Care Center, Swansea Day Care Center, Inc., Eula Mae Walker, Michael Wannamaker, Macy S. Washington, Margaret M. Washington, Felicia Willhoit, Berlene Williams, Gloria S. Williams, Mary A. Williams, Pamela P. Williams, Sammie Williams, Marilyn Wilson, Jean B. Wright, Terry V. Wright, Deatrix Zeigler; Deborah Zeigler on behalf of herself and her minor children Allen Zeigler and Sateria Zeigler; Earline Zeigler for herself and as guardian for Margario Harris; Jimmy Zeigler, Leon Zeigler, Lula M. Zeigler, Mildred Zeigler; Sheila Zeigler on behalf of herself and her minor child Brittany Zeigler; Vernetta Zeigler; Wanda Renee' Zeigler on behalf of her minor children Cierra M. Zeigler and Shareka L. Zeigler; Geneva Adams on behalf of herself and her minor child Michael A. Adams; Jettie Mae Brooks, Mattie Davis, Sarah Davison, Maggie Hamm, Gwendolyn Jackson, Augustus Jones, Terry Jones, Tim Martin, Valerie Martin, Coreletta McBride, Wanda McKnight, Lashonda Smith, John E. Sutton; Nancy Sutton on behalf of her minor child Leslie Sutton; Ronald Taylor, Vernell Taylor; Rosa Washington on behalf of her minor child Destiny Anderson; Loteria Williams, Lateshia Williams, Terry Williams; Gloria Brooks on behalf of her child Jamel Brooks; Debra Brooks, Betty Brooks, Ben Brooks, Carsina Brooks, Laura Fields, Helen Golson; Verdia Jones as guardian for Jermaine Green; Herbert Henley, Lamont McKnight, Willie Mae Porterfield; Sonja Robinson on behalf of her child Lajuana Robinson; Martha Robinson, Cherry Samuel, Abertha Seawright, Dorothy Shivers, Lillie Sutton, Carmell

Washington, Carolyn Williams, Jerod Zeigler, Shane Zeigler; Winifred R. Smith Williams for her minor children Adrienne Williams and Benton R. Williams,

Appellants,

v.

American Telephone and Telegraph Company, a corporation, AT&T Nassau Metals Corporation, Gaston Copper Recycling Corporation, and Southwire Company,

Respondents.

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

Opinion No. 3418
Heard November 7, 2001 - Filed December 10, 2001

AFFIRMED AS ADDRESSED

Raymon E. Lark, Jr., of Austin, Lewis & Rogers, of Columbia, for appellants and appellants/respondents.

L. Walter Tollison, III, of Nelson, Mullins, Riley & Scarborough, of Greenville, for American Telephone and Telegraph Company and AT&T Nassau Metals Corporation; Harold W. Jacobs, of Nexsen, Pruet, Jacobs & Pollard; Mark S. Barrow and William R. Calhoun, both of Sweeny, Wingate & Barrow, all of Columbia; and James H. Bratton, Jr., of Smith, Gambrell & Russell, of Atlanta, Georgia, for Gaston Copper Recycling Corporation and Southwire Company, respondents and respondents/appellants.

ANDERSON, J.: These are environmental pollution cases.[1] The primary issue on appeal in each case is the application of the statute of limitations. Based upon the statute, the trial court granted summary judgment to the defendants in the Banyard case. The court denied AT&T Nassau Metals Corporation's ("Nassau") motion for summary judgment in Hedgepath and Sharpe. Cross appeals were filed. We affirm the decision of the trial court in Banyard. However, we decline to rule whether the trial court properly denied summary judgment in the Hedgepath and Sharpe cases.

THE BANYARD APPEAL

I. Background of the Case

In July 1985, 271 individuals living in the Gaston and Swansea areas of South Carolina instituted several actions in state court claiming personal injury, property damage, and nuisance allegedly caused by pollution from a secondary copper reclamation facility constructed and operated by Nassau. These actions

[1] The cases were designated complex litigation and assigned to one circuit court judge.

were commonly referred to as the Baughman litigation.[2] See Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

After approximately eight years of litigation, the parties in Baughman reached a settlement in August 1993. News of the settlement was reported by the media. Shortly thereafter, a motion to intervene in the Baughman litigation was filed by approximately 400 individuals. In the motion, the prospective intervenors asserted they also lived in the area near the reclamation facility and had claims similar to the Baughman plaintiffs. The motion stated, in part, as follows:

> Intervenor Plaintiffs believed until September 1, 1993 and September 2, 1993, that they were included in this action in a manner that the instant cases protected their interests and injuries and reasonably relied upon that belief.

The prospective intervenors submitted verified affidavits in support of the motion to intervene. Each affidavit was identical and contained the following statements:

> A Petition was circulated protesting the activities of the Defendant AT&T at its Nassau plant in the above entitled action and I was advised that all our interests would thereby be protected regardless of whether I signed the Petition.
>
> I believed that my interests were protected in this action until September 1, 1993, when my counsel I retained on that date advised me that my interests were not going to be protected despite my belief to the contrary and my reliance on that belief.

A hearing was held in state court on the motion to intervene and the

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[2] The Baughman litigation was not a class action. Counsel for the Baughman plaintiffs had an employment contract with each plaintiff.

motion was denied.

In September 1993, the Banyard plaintiffs[3] instituted an action in federal court against Nassau and the Gaston Copper Recycling Corporation ("Gaston Copper").[4] In October 1996, an order was issued by the federal district court, which granted the defendants' motions to dismiss all federal claims and dismissed the pendent state claims without prejudice.

As a result of the federal court dismissal, the Banyard plaintiffs filed an action in state court in November 1996. The complaint alleged causes of action for negligence, trespass, nuisance, and strict liability. Nassau and Gaston Copper filed answers denying the material allegations of the complaint and asserting the statute of limitations as an affirmative defense. A complex case order was entered and a case management order held the initial proceedings would be limited to a determination of whether the plaintiffs' claims were barred by the statute of limitations.

Following a discovery period, Nassau and Gaston Copper filed motions for summary judgment on the statute of limitations defense. The motions were opposed by the Banyard plaintiffs.

After a hearing, the trial court judge issued an order granting the summary judgment motions of Nassau and Gaston Copper. The court found the Banyard plaintiffs were on notice that a claim against Nassau either did exist or might have existed before September 1987. The court's order states, in part, as follows:

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[3] We recognize that some individuals in the federal court litigation may not have been prospective intervenors in the Baughman litigation and vice versa. However, for purposes of this opinion, use of the term "the Banyard plaintiffs" is sufficient.

[4] The facility was sold to Gaston Copper on September 20, 1990. Nassau ceased refining operations on August 13, 1990, in preparation for the sale.

> The record reflects that Plaintiffs were aware of facts and circumstances more than six years before they commenced suit that a claim for property damage might exist.[5] Many of the Plaintiffs were noticing problems about the plant by the late 1970s …. By the mid-1980s, there was widespread concern over the potential harm the Nassau facility's operation was or might be causing to residents in the area. There were community forums, town meetings, government involvement, local political debates, door-to-door communications, media coverage, grassroots organization initiated by local citizens groups, and lawsuits brought by hundreds of residents, such as the Baughman litigation.
>
> The record reflects that the Baughman plaintiffs, who sued in 1985, were friends, neighbors, and, in many instances, relatives of Plaintiffs in the present action …. Many of the current Plaintiffs worked at the facility or had family members who did. Plaintiffs do not dispute that they were on notice of community concerns and allegations that the plant was the alleged source of personal injury and property damage in the surrounding area.
>
> . . . .
>
> When Plaintiffs sought to intervene in Baughman, each Plaintiff filed in support of his or her Motion an affidavit. (footnote omitted). These affidavits affirm that Plaintiffs knew as early as 1985 of the alleged problems concerning the Nassau facility and felt that they had claims arising out of Nassau's operation of the facility for injuries to their person and property. This conclusion is supported by Plaintiffs' admissions that they assumed they were parties in Baughman, that their interests (i.e. injuries) were protected in Baughman, and that they did nothing to pursue those

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[5] All personal injury claims of the Banyard plaintiffs were previously dismissed by court order except the claim of one individual.

> claims until they read about the Baughman settlement in The State in August 1993.
>
> . . . .
>
> Plaintiffs' [discovery] admissions confirm they knew or should have known of facts sufficient to trigger the running of the statute [of limitations]. Plaintiffs admitted in their discovery responses that they observed emissions from the plant prior to 1987, that they became aware of community concern, discussions, and reaction to the Nassau facility prior to 1987, that they participated in such meetings and discussions prior to 1987, that they believed their injuries to their persons or property occurred prior to 1987, and that they were aware of the Baughman litigation prior to 1987 and felt their interests were protected during that litigation . . . . Plaintiffs have not disputed these findings.

The trial court also concluded there was no basis to apply the doctrine of equitable estoppel. The court found there were insufficient facts to support a claim that the statute of limitations should be tolled based upon the alleged "active concealment" of the Dames & Moore Report from the public. This was a private environmental report prepared for Gaston Copper in relation to the sale of the plant by Nassau to it. Gaston Copper later provided a copy of this report to the South Carolina Tax Commission in support of a challenge to the Commission's property assessment for the reclamation facility. Portions of this report were publicly released in 1994 after a Freedom of Information Act request led to a declaratory judgment action. See South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994).

II. Issues

Did the trial court err in granting summary judgment to Nassau and Gaston Cooper because it:

(1) abused its discretion in limiting discovery on the statute of

limitations issue;

(2) misapplied the summary judgment burden of proof standard;

(3) misinterpreted the evidence as to each cause of action pled by the plaintiffs; and
(4) failed to apply the equitable estoppel doctrine.

III. Law/Analysis

A. Limitation of Discovery

These cases were designated complex litigation and assigned to one circuit court judge. The parties consented to a case management order that limited the initial phase of the proceedings to the statute of limitations issue. Discovery was specifically limited to that issue.

During the discovery phase, the plaintiffs filed a motion to compel against Nassau and Gaston Copper based upon objections filed by the defendants to interrogatories and requests for production. Essentially, the defendants objected to the requested discovery on the ground it exceeded the case management order and was directed toward the merits of the case, not the statute of limitations issue. The trial court agreed and denied the plaintiffs' motion to compel.

The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001), cert. denied. An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based upon an error of law. Id.

The plaintiffs contend the trial court abused its discretion by not allowing (1) depositions of defendants' personnel familiar with plant operations; (2) discovery of FBI information on plant operations; (3) discovery of company

production data; and (4) production of confidential portions of the Dames & Moore Report. We agree with the trial court's conclusion that this information may have been relevant to the merits of the case, but it was not relevant to the question of when the plaintiffs knew, or should have known, that they might have had a cause of action against the defendants. Accordingly, we find no abuse of discretion.

B. Summary Judgment and the Statute of Limitations

The Banyard plaintiffs alleged causes of action for negligence, trespass, nuisance, and strict liability. The trial court granted the defense motions for summary judgment as to all causes of action. It found the Banyard plaintiffs were on notice that a claim against Nassau either did exist or might have existed before September 1987 (i.e., for those plaintiffs who originally filed their claims in federal court in 1993) or before November 1993 (i.e., for those plaintiffs who originally filed their claims in state court on November 13, 1996). With respect to Gaston Copper, the court concluded insufficient evidence was presented as to new and different injuries to any plaintiff from any alleged wrongdoing after the sale of the plant to Gaston Copper in 1990. The court noted that every plaintiff who was asked confirmed that he or she was claiming the same injuries against all defendants.

Summary Judgment

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bayle, 344 S.C. at 119, 542 S.E.2d at 738 (Ct. App. 2001); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000) (holding a motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show

there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law).

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party carries its initial burden, the "opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a **genuine issue for trial**.'" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)) (emphasis in original). The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings. Id.; George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001).

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must be submitted to the jury. Young, 333 S.C. at 718, 511 S.E.2d at 415.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

Statute of Limitations

Under the former § 15-3-530, plaintiffs alleging property damage or personal injury were required to bring suit within six (6) years from when the cause of action arose. By a 1988 act of the General Assembly, this time period was shortened to three years for causes of action arising or accruing on or after April 5, 1988. See Annotation, S.C. Code Ann. § 15-3-530 (Supp. 2000) (referencing Act No. 432, 1988 Acts 2891). The causes of action articulated by the Banyard plaintiffs arose before 1988. Therefore, in our appellate review of the trial judge's summary judgment order, we apply the six-year statute of limitations to the dispute.

The parties agree the "discovery rule" is applicable to the statute of limitations question. According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001), cert. denied. In Dean, the Supreme Court stated:

> According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on **notice** that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Id. at 363, 364, 468 S.E.2d at 647 (emphasis in original) (citations omitted); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999) (stating the statute of limitations runs from the date the injured party either knows or should have known by the exercise of reasonable diligence

that a cause of action arises from the wrongful conduct).

The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question. Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000); see also Young, 333 S.C. at 719, 511 S.E.2d at 416 ("In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.").

Reasonable diligence is intrinsically tied to the issue of notice. The Joubert Court explicated: "We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." Id. at 191, 534 S.E.2d at 8 (quoting Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996)); see also Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994) (stating the exercise of reasonable diligence means simply that the injured party must act with some promptness where facts and circumstances of injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed) (citation omitted).

Continuing Trespass or Nuisance

The Banyard plaintiffs contend the trial court erred in granting summary judgment to Nassau and Gaston Copper because the court did not recognize that their claims involved ongoing misconduct and contamination. They also argue their damages are both abatable and permanent.

In order to attack the statute of limitations defense, the plaintiffs seek to bring their property damage claims within the rubric of a continuing trespass or

nuisance. Under South Carolina law, the distinction between trespass and nuisance is that "trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property, whereas nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property." Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001), cert. denied (citing Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993)). A nuisance may be classified as continuing or permanent. Id.

A continuing nuisance is defined as a nuisance that is intermittent or periodical. Id. It is described as one which occurs so often that it is said to be continuing although it is not necessarily constant or unceasing. Id. A nuisance is continuing if abatement is reasonably and practically possible. Id. at 287, 543 S.E.2d at 567.

A permanent nuisance may be expected to continue but is presumed to continue permanently with no possibility of abatement. Id. at 286, 543 S.E.2d at 566-67. With respect to a permanent nuisance, the injury is fixed and goes to the whole value of the land. Id. at 286, 543 S.E.2d at 567.

As to the concept of a nuisance and application of the statute of limitations, where the nuisance is permanent and only one cause of action may be brought for damages, the statute of limitations bars the action if it is not brought within the statutory period after the first actionable injury. Id. Where the nuisance is deemed to be continuing and is abatable, the statute of limitations does not run merely from the original intrusion on the property and cannot be a complete bar. Id. A new statute of limitations begins to run after each separate invasion of the property. Id.

Where, however, the nuisance is classified as continuing, the expiration of the limitations period after the first actionable injury does not effect a complete bar as each new injury gives rise to a new cause of action and a landowner may at any time recover for an injury to his land which occurred within the statutory period. Id. at 287, 543 S.E.2d at 567, cert. denied; Cutchin v. South Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 389 S.E.2d

646 (1990); McCurley v. South Carolina State Highway Dep't, 256 S.C. 332, 182 S.E.2d 299 (1971); Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956).

The plaintiffs' arguments on common law nuisance obfuscate the real issue: when did the plaintiffs know or, by the exercise of reasonable diligence, should have known they might have had a claim against someone for alleged environmental contamination of their property. Approximately 240 of the 278 remaining Banyard plaintiffs submitted affidavits in support of the 1993 motion to intervene in the Baughman litigation. By the affidavits, those plaintiffs affirmatively stated they believed their interests were being protected by the Baughman litigation. They admitted they knew by 1985 (i.e., the year the Baughman litigation was filed) that they might have a claim against someone for alleged environmental contamination. This is an inescapable conclusion. As for the remaining plaintiffs, the trial court correctly concluded the record is replete with uncontested evidence of widespread publicity and awareness of the alleged contamination prior to 1987. See generally United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980) (ruling that where events receive widespread publicity, plaintiffs may be charged with knowledge of their occurrence).

Additionally, Nassau ceased refining operations at the facility on August 13, 1990, in preparation for the sale to Gaston Copper. Assuming, arguendo, that environmental contamination by Nassau continued up to that day, the Banyard plaintiffs did not file their federal court action until September 1993, which is more than three years after Nassau ceased its operations. The plaintiffs' reliance upon Aurora National Bank v. Tri Star Marketing, 990 F. Supp. 1020 (N.D. Ill. 1998) to argue continuing liability by Nassau is misplaced. That case involved an action under the citizen suit provision of the Resource Conservation and Recovery Act. The citizen suit provision allows claims by parties acting as private attorneys-general. Id.

The Banyard plaintiffs are actually claiming a single indivisible injury to their property for alleged permanent injury by pollution. See Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) (stating the

measure of damages for permanent injury to real property by pollution, whether by nuisance, trespass, negligence, or inverse condemnation is the diminution in the market value of the property). The trial court granted summary judgment to Gaston Copper because insufficient evidence was presented as to new and different injuries to any plaintiff from any alleged wrongdoing after the sale of the plant to Gaston Copper in 1990. The court noted that every plaintiff who was asked confirmed that he or she was claiming the same injuries against all defendants. Since the same injuries were claimed, the trial court correctly applied the discovery rule when analyzing the application of the statute of limitations.

Therefore, based upon: (1) the uncontested evidence of the widespread publicity concerning alleged environmental contamination, (2) the affidavits submitted by the vast majority of the Banyard plaintiffs, and (3) the permanency of the claimed property damages, the trial court did not err in granting summary judgment to the defendants under the statute of limitations.

C. Equitable Estoppel Doctrine

The Banyard plaintiffs argue the trial court erred in failing to apply the equitable estoppel doctrine to the statute of limitations. They contend Nassau and Gaston Copper denied allegations of environmental contamination and actively concealed the contents of the Dames & Moore Report until 1994. On these grounds, the plaintiffs assert the defendants should be estopped from relying upon the statute of limitations.

In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit. Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) (citing Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997)); Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000); Republic Contracting Corp. v. South Carolina Dep't of Highways & Pub. Transp., 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998); Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998); Brown v. Pearson, 326 S.C. 409,

483 S.E.2d 477 (Ct. App. 1997); Moates v. Bobb, 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996); Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995); Vines v. Self Memorial Hosp., 314 S.C. 305, 443 S.E.2d 909 (1994); Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994); Rink v. Richland Memorial Hosp., 310 S.C. 193, 422 S.E.2d 747 (1992); Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), overruled in part by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995); Gadsden v. Southern R.R., 262 S.C. 590, 206 S.E.2d 882 (1974).

An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary. Kleckley, 338 S.C. at 136-37, 526 S.E.2d at 220; Vines, 314 S.C. at 308, 443 S.E.2d at 911; Wiggins, 314 S.C. at 130, 442 S.E.2d at 171; Rink, 310 S.C. at 198, 422 S.E.2d at 749. However, settlement negotiations which are commenced, but not finalized, will not bar assertion of the statute of limitations. Gadsden, 262 S.C. at 592, 206 S.E.2d at 883; Vines, 314 S.C. at 308, 443 S.E.2d at 911; Moates, 322 S.C. at 175, 470 S.E.2d at 403.

Application of equitable estoppel does not require an intentional misrepresentation. It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire. Dillon County, 286 S.C. at 218-19, 332 S.E.2d at 561; Brown, 326 S.C. at 419, 483 S.E.2d at 482. Whether the defendant's actions lulled the plaintiff into "a false sense of security" is usually a question of fact. Dillon County, 286 S.C. at 219, 332 S.E.2d at 561. However, summary judgment is proper where there is no evidence of conduct on the defendant's part warranting estoppel. Vines, 314 S.C. at 309, 443 S.E.2d at 911.

The Banyard plaintiffs argue the defendants should be equitably estopped from applying the statute of limitations due to their silence and failure to disclose the extent of environmental contamination, particularly as reflected in the Dames & Moore Report. "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." Southern Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 33, 426

S.E.2d 748, 751 (1993) (citation omitted).

The primary point overlooked by the plaintiffs in their estoppel argument is the existence of an underlying duty to speak or disclose. As the Supreme Court noted, "[e]stoppel by silence arises where a person **owing another a duty to speak** refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." Id. (emphasis added).

A duty to speak or disclose may be found in three distinct scenarios:

> (1) where it arises from a preexisting definite fiduciary relation between the parties;
>
> (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; and
>
> (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967); Kiriakides v. Atlas Food Sys. & Serv. Inc., 338 S.C. 572, 527 S.E.2d 371 (Ct. App. 2000), affirmed as modified and remanded, 343 S.C. 587, 541 S.E.2d 257 (2001).

In this case, there is no factual basis to find a duty to speak or disclose on the part of the defendants. The Dames & Moore Report was a privately commissioned report prepared for Gaston Copper in connection with the sale by Nassau of the reclamation facility. The Banyard plaintiffs have not established a fiduciary or confidential relationship between themselves and the defendants that would impose a duty upon the defendants to disclose the contents of this

private report to the public. Accordingly, the trial court did not err in failing to apply the equitable estoppel doctrine in the Banyard case.

THE HEDGEPATH APPEAL

On April 26, 1996, the Hedgepath complaint was filed in state court. The complaint sought recovery for damage to real property based upon causes of action for negligence, trespass, nuisance, strict liability, and fraud. Nassau and Gaston Copper filed answers denying the material allegations of the complaint and asserting the statute of limitations as a defense. Pursuant to the complex case management order, the initial phase of the litigation was limited to the statute of limitations issue.

Following a discovery period, Nassau and Gaston Copper filed motions for summary judgment based upon the statute of limitations. The Hedgepath plaintiffs opposed the motion. After a hearing, the trial court denied Nassau's motion for summary judgment based upon the equitable estoppel doctrine. However, the court dismissed Gaston Copper from the litigation because it did not have any contact with the Hedgepath family. Nassau appeals the denial of its summary judgment motion.[6]

We must initially determine if this court has subject matter jurisdiction over Nassau's appeal.

Nassau asserts this Court should find it has subject matter jurisdiction over this appeal because there is an appealable issue before the court, i.e., the grant of summary judgment in the Banyard case.

We are aware that generally, the denial of a motion for summary judgment

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[6] The Hedgepath plaintiffs argue in their briefs that the trial court erred in concluding the statute of limitations had run prior to the filing of their suit. Because that argument is connected to the argument on equitable estoppel, the matters will be addressed together.

is not immediately appealable. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). Our appellate courts, however, have recognized an exception to this rule. Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable.

Our examination of the case law regarding this exception begins with the Supreme Court's agreement to consider an appeal of whether a trial court erred in failing to require a party make its complaint more definite in Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979). Additionally appealed to the Court for its review was an issue of whether the trial court erred in overruling the appellant's demurrer. Presented with the question of whether to address the denial of the motion for a more definite complaint, the Briggs Court pronounced: "While not normally appealable, [the] issue [concerning the motion for a more definite complaint] is before the Court due to the appealability of the first issue [regarding the demurrer]." Id. at 379 n.1, 256 S.E.2d at 546 n.1 (citation omitted).

This Court has taken a concordant view concerning the propriety of reviewing interlocutory orders not ordinarily immediately appealable.

In Garrett v. Snedigar, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), partners in a real estate venture brought an action for fraud, breach of contract, and violations of the South Carolina Uniform Securities Act against the organizer, a construction company, and an investment advisor who was retained to market the partnership. The investment advisor was also sued for negligence. The Circuit Court granted the plaintiffs' motion for summary judgment, which concerned the issue of whether their interests in the partnership were securities. The trial court additionally granted the plaintiffs' motion to amend their cause of action for negligence and denied the investment advisor's summary judgment motion pertaining to this claim. On appeal, the investment advisor argued, inter alia, the trial court erred in acting on the plaintiffs' motion to amend without holding a hearing separate from his motion for summary judgment. In response, the Court stated:

> An interlocutory appeal of this issue … is not normally allowed. See Davis-McGee Mule Co. v. Marett, 129 S.C. 36, 37, 123 S.E. 323, 323 (1924) ("No appeal can be made except from a final judgment."). An order denying summary judgment cannot be appealed, even after trial. Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986). **However, these issues are properly before us because the issue of whether the Circuit Court erred in granting the motion of the plaintiffs for partial summary judgment is appealable. See Briggs v. Richardson, 273 S.C. 376, 379, 256 S.E.2d 544, 546 (1979) ("While not normally appealable, this issue is before the Court due to the appealability of the first issue."**).

Id. at 183 n.2, 359 S.E.2d at 287 n.2 (emphasis added).

Numerous reviews of denials of summary judgment motions have occurred since Garrett. See Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992), cited in 4 Am. Jur. 2d Appellate Review § 170 (1995) (in a case where opposing motions for summary judgment resulted in the trial court granting one and denying the other, the Court of Appeals held the party whose motion was denied may have the denial reviewed on the appeal because the question of whether the trial court erred in granting the other motion was appealable); Pruitt v. Bowers, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998) ("[Respondent/Appellant] argues the trial court erred in granting [Appellant/Respondent's] motion to amend her complaint. [Appellant/Respondent] responds that the order granting the motion is interlocutory and thus not appealable. We agree that under the precedent of Briggs v. Richardson … and Garrett v. Snedigar … [Respondent/Appellant's] appeal of the amendment order is interlocutory and generally not appealable, but may be considered by the court because it accompanies the appeal of the grant of [Respondent/Appellant's] motion for summary judgment."); Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct. App. 1999) (This Court ruled: "[A]n order that is not directly appealable will be considered if there is an appealable issue before this court.").

In Davis v. Lunceford, 287 S.C. 242, 335 S.E.2d 798 (1985), the Supreme Court held reviewing the denial of summary judgment was proper to resolve protracted litigation: "Because of the need for final resolution in this [13-year-old medical malpractice] case, we have allowed this direct appeal from the lower court's order denying appellant's motion for summary judgment."). Id. at 243, 335 S.E.2d at 799 (citation omitted). The issue of whether the denial was proper was the only one on appeal.

The continued viability of Garrett is debatable given the recent decisions of Silverman v. Campbell, 326 S.C. 208, 486 S.E.2d 1 (1997) and Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994).

In Ballenger, the Court stated:

> This Court has repeatedly held that the denial of summary judgment is not directly appealable. Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment.

Id. at 476-77, 443 S.E.2d at 380 (citations omitted).

In addition, the Ballenger Court noted that it is "unnecessary [for the trial judge] to make findings of fact and conclusions of law in denying motions for summary judgment." Id. at 478 n.1, 443 S.E.2d at 380 n.1 (citing Rule 52, SCRCP). Thus, there would be no basis on which an appellate court could make its review.

In Silverman, our Supreme Court refused to consider the appellants' claim that the trial court had erred in denying its motion for summary judgment, although it did consider another issue raised by appellants because it was immediately appealable. Thus, the presence of an immediately appealable issue in the order did not make the denial of summary judgment reviewable in that instance. Id. at 211, 486 S.E.2d at 2; cf. Hollman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986) (declining to address denial of summary judgment after trial while addressing other appealable issues); Davis v. Tripp, 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999) (stating denial of summary judgment was not

reviewable either before or after final judgment).

Silverman may represent an attempt to curtail Garrett-style exceptions, thereby requiring a closer inquiry into their continued viability.

Because of the dissonance in the precedent in regard to the appealability of the denial of a motion for summary judgment, we decline to address the issue on the merits.

THE SHARPE APPEAL

On May 2, 1996, Toby Sharpe, a former employee of Nassau and Gaston Copper, filed a complaint against Nassau and Gaston Copper seeking damages for personal injury and property damage.[7] Sharpe alleged causes of action for negligence, trespass, nuisance, and strict liability. Nassau and Gaston Copper denied the material allegations of the complaint and asserted the statute of limitations as an affirmative defense. In May 1997, the trial court granted Nassau's motion to dismiss Sharpe's claim for personal injury arising out of workplace exposure. The trial court held Sharpe's claims for personal injuries arising out of residential exposure and claims for property damage could be pursued by him.

Nassau and Gaston Copper subsequently filed motions for summary judgment based upon the statute of limitations. Sharpe opposed the motions. The trial court denied Nassau's motion, concluding that although the statute of limitations had expired, Nassau was equitably estopped from asserting the defense. The trial court granted Gaston Copper's motion for summary judgment concluding Sharpe alleged he developed cancer while working at the plant during the time it was owned by Nassau. In a later order on a motion to reconsider, the trial court specifically clarified that Sharpe's claims against Nassau were limited to property damage only. Nassau appeals the order denying

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[7] Sharpe died during the pendency of this litigation and his personal representative has been substituted as plaintiff by court order.

summary judgment.

For the reasons stated in the Hedgepath portion of this opinion, we decline to address the merits of Nassau's appeal from the denial of summary judgment.

CONCLUSION

We affirm the decision of the trial court in the Banyard case. However, we decline to address whether the trial court properly denied summary judgment in the Hedgepath and Sharpe cases due to the discord in the case law concerning the appealability of such orders.

AFFIRMED AS ADDRESSED.

CONNOR and SHULER, JJ., concur.