The Supreme Court of South Carolina

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CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

In the Matter of Sidney Jones

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on May 21, 2019, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

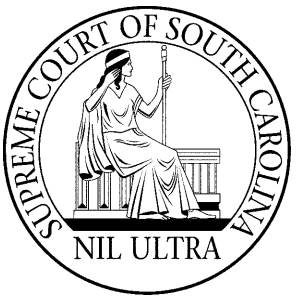
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

April 22, 2019

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 24, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of Fulton Casey Dale Cornwell,
Respondent.

Appellate Case No. 2018-001660

ORDER

By opinion dated February 27, 2019, respondent was disbarred from the practice of law, retroactive to the date of his interim suspension.[1] *In re Cornwell*, Op. No. 27864 (S.C. Sup. Ct. filed Feb. 27, 2019) (Shearouse Adv. Sh. No. 9). The Office of Disciplinary Counsel (ODC) has filed a petition for rehearing. Respondent did not file a response. After careful consideration of ODC's petition for rehearing, we grant the petition for rehearing, dispense with further briefing, and substitute the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

April 24, 2019

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[1] On February 17, 2017, this Court placed respondent on interim suspension. *In re Cornwell*, 419 S.C. 238, 797 S.E.2d 395 (2017).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Fulton Casey Dale Cornwell,
Respondent.

Appellate Case No. 2018-001660

Opinion No. 27864
Submitted February 6, 2019 – Filed February 27, 2019
Withdrawn, Substituted, and Refiled April 24, 2019

DISBARRED

John S. Nichols, Disciplinary Counsel, and Ericka McCants Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Fulton Casey Dale Cornwell, of Columbia, *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 (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a three-year suspension or disbarment. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension.[2] The facts, as set forth in the Agreement, are as follows.

[2] Respondent was placed on interim suspension on February 17, 2017. *In re Cornwell*, 419 S.C. 238, 797 S.E.2d 395 (2017).

Facts

Matter I

After being appointed to represent a client in a post-conviction relief (PCR) matter, respondent failed to keep his client reasonably informed of the status of the matter and failed to respond to reasonable requests for information.

Matters II, IV, VI, & VIII[3]

Respondent was appointed or retained to represent various clients in PCR matters. During respondent's representation of the clients in Matters II, IV, and VI, respondent failed to keep the clients reasonably informed as to the status of their cases. In Matters VI and VIII, respondent failed to respond to the clients' reasonable requests for information.

Additionally, in Matters II, IV, and VIII, respondent failed to respond to the initial notices of investigation (NOI) and to the *Treacy*[4] letters from ODC seeking responses to the complaints.[5] In Matter VI, respondent initially failed to respond to the NOI but later filed a written response to the NOI upon a written inquiry from ODC.

Matter III

Although the underlying complaint in this matter was ultimately determined to be without merit, respondent failed to respond to the NOI.

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[3] Respondent appeared before ODC and answered questions on the record as they related to Matters III, IV, V, VI, and VIII.

[4] *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

[5] Regarding Matter II, respondent called ODC about a different matter and ODC informed him that it was waiting for his response to this matter. Respondent stated he had not received a NOI or *Treacy* letter. ODC resent the NOI and received a response a week later.

Matter V

In February 2013, respondent was appointed to represent a client in a PCR matter. Following an adverse ruling at an evidentiary hearing, the client mailed a letter seeking an appeal to an incorrect address for respondent. Respondent asserts he did not receive the client's letter. The client later mailed a letter to this Court requesting an appeal and attached a copy of the original letter he sent to respondent. This Court forwarded a copy of the client's request to respondent. Respondent contends he first learned of the request for an appeal when he received this Court's letter. However, respondent did not contact the client or serve the requested notice of appeal.

Additionally, respondent did not respond to the NOI or the *Treacy* letter from ODC seeking a response.

Matters VII & IX

Respondent was appointed to represent clients in PCR matters, but failed to respond to the clients' requests for information regarding their cases. Additionally, in Matter IX, respondent failed to keep the client reasonably informed as to the status of the case. Both clients' PCR actions were dismissed and they filed *pro se* notices of appeal.

After receiving the *pro se* notice of appeal in Matter VII, this Court mailed respondent a letter requesting the date on which respondent received written notice of the order of dismissal of the client's PCR matter. Respondent failed to respond. The Court then directed respondent to respond by January 15, 2016, and to include an explanation as to why he failed to respond initially. Respondent eventually responded to the Court's inquiries but failed to provide the date on which he received written notice of the dismissal of the client's PCR matter. The Court again requested the information and gave respondent ten days to respond. Respondent failed to respond to the Court's inquiry, and the Court dismissed the appeal without prejudice.

After receiving a *pro se* notice of appeal in Matter IX, this Court notified respondent and requested that he provide an explanation as required by Rule 243(c), SCACR. Respondent informed the Court that he had been relieved as counsel. After determining that respondent had not been relieved as counsel, the Court sent respondent another letter requesting he provide the required

explanation. Respondent did not respond within the fifteen-day timeframe. Thereafter, the Court, by order dated September 22, 2016, requested respondent provide a written explanation within ten days of the Court's order. On October 14, 2016, the Court received respondent's explanation, which it found insufficient under Rule 243(c), SCACR. The Court then required respondent to file a response that complied with *Dennison v. State*, 371 S.C. 221, 639 S.E.2d 35 (2006) (allowing counsel to inform the Court if counsel is unable to set forth an arguable basis for asserting the PCR court's determination was improper). Respondent did not respond within the ten-day timeframe. The Court relieved respondent as counsel and directed Appellate Defense to represent the client.

Matter X

Respondent was appointed to represent a client in a PCR matter, and a hearing was conducted on April 14, 2015. After the hearing, the client requested a copy of his PCR transcript from respondent and that an order be drafted regarding the hearing. Respondent did not respond to the client's requests.

ODC sent respondent a NOI, followed by a *Treacy* letter, to which respondent did not respond. Thereafter, ODC sent respondent a notice of additional allegations and requested a response within fifteen days. Respondent did not respond.[6]

Matter XI

In May 2016, respondent was retained to represent a client in a domestic relations action. Respondent failed to (1) adequately communicate with the client regarding the status of the case; (2) comply with reasonable requests for information; and (3) respond to the client's request for a refund of his fee after terminating respondent's representation. In response to the allegations, respondent asserts he did not return the fee because the case was a flat rate case and he had earned the fee. While respondent contends he drafted documents on the client's behalf, he never entered a notice of appearance on behalf of the client or filed any documents on the client's behalf.

Additionally, there was conflicting language in the fee agreement regarding when the fees were due to be paid by the client and when the fees would be treated as earned. The fee agreement also did not include language notifying the client that

[6] Respondent appeared before ODC and answered questions on the record.

he might be entitled to a partial or full refund if the agreed-upon legal services were not provided.

Matter XII

In November 2015, BB&T informed ODC that a check was presented against insufficient funds on respondent's trust account. ODC mailed a NOI to respondent requesting the following: (1) a written response; (2) checks related to the overdraft; (3) copies of his bank statements; (4) documentation that funds were fully restored to the trust account; and (5) a complete copy of his trust account reconciliation. Respondent did not respond.

Thereafter, ODC sent respondent a *Treacy* letter via certified mail to his address on file with the Attorney Information System. However, the letter was returned as unclaimed. ODC later received a response, which failed to include the information requested in the NOI. ODC then subpoenaed BB&T for copies of respondent's bank statements relating to his trust account. Upon ODC's review of the statements, ODC discovered respondent's trust account contained withdrawals for several items made payable to cash as well as payments for personal expenses.

In response, respondent asserted the trust account was set up only for the deposit of a settlement for one case and any additional deposits into the trust account were from earned fees. However, respondent admits he improperly used his trust account. Respondent cannot demonstrate that the funds in his trust account were handled properly because he did not maintain accurate records as required by the rules for financial recordkeeping.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.5 (fees); Rule 1.15(a) (safeguarding client property); Rule 1.15(b) (commingling funds); Rule 1.15(c) (keeping of unearned legal fees in trust account); Rule 1.16 (declining or terminating representation); Rule 3.3(a) (making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer); Rule 3.4(c) (disobeying an obligation under the rules of a tribunal); Rule 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary investigation); Rule 8.1(b) (failing

to respond to a demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent further admits he violated the following rules regarding Financial Recordkeeping, Rule 417, SCACR: Rule 1 (financial recordkeeping); Rule 2 (client trust account safeguards); Rule 3 (requiring Rule 1 records to be readily accessible to the lawyer); and Rule 6 (precluding cash withdrawals from trust accounts).

Respondent also admits his conduct constitutes grounds for discipline under the following provision of the RLDE: Rule 7(a)(1) ("It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers . . . .").

Conclusion

We accept the Agreement and disbar respondent from the practice of law in this state. Respondent is ordered to enter into a payment plan with the Commission on Lawyer Conduct to pay the costs incurred in the investigation and prosecution of these matters within thirty (30) days of the date of this opinion. Respondent is also ordered to complete the Legal Ethics and Practice Program Law Office Management School and Trust Account School prior to seeking reinstatement.

Additionally, prior to seeking reinstatement, respondent must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension for nine months or more or disbarment), including completion of Legal Ethics and Practice Program Ethics School within the preceding year.

Within fifteen (15) 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, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

BEATTY, C.J. KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Steven Otts, Respondent.

Appellate Case No. 2018-001671

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Saluda County
Thomas A. Russo, Circuit Court Judge

Opinion No. 27880
Heard April 17, 2019 – Filed April 24, 2019

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody J. Brown, Assistant Attorney General J. Anthony Mabry and Assistant Attorney General Susannah R. Cole, all of Columbia and Solicitor S.R. Hubbard, III, of Lexington, for Petitioner

Appellate Defender Susan B. Hackett, of Columbia, for Respondent.

PER CURIUM: We granted certiorari to review whether the court of appeals erred in reversing the trial court and remanding for a new trial. *State v. Otts*, 424 S.C. 150, 817 S.E.2d 540 (Ct. App. 2018). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Farzad Naderi, Respondent.

Appellate Case No. 2019-000061

Opinion No. 27881
Submitted March 27, 2019 – Filed April 24, 2019

DEBARRED

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Senior Assistant Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

Farzad Naderi, of California, *pro se*.

PER CURIAM: Respondent, a licensed California attorney, provided legal services in South Carolina to a South Carolina resident without having been admitted or authorized to practice law in this state, in violation of the Rules of Professional Conduct. Following an evidentiary hearing at which respondent did not appear, the Hearing Panel of the Commission on Lawyer Conduct (the Panel) recommended debarring respondent and ordering respondent pay the cost of the proceedings and restitution to his South Carolina client. As neither party sought review of the Panel's report, the matter is now submitted for the Court's consideration. We impose the sanctions recommended by the Panel.

FACTS

Despite never having been admitted to practice law in South Carolina or applying for pro hac vice admission, respondent provided legal services in the state operating as the Pacific National Law Center (PNLC).

The J.H. Matter

In December 2013, J.H., a South Carolina resident, homeowner, and veteran, hired respondent to assist him in negotiating a modification of his home loan. Individuals at PNLC assured J.H. the firm could get his loan modified and decrease his mortgage payments by securing both a balance reduction and a lower, fixed interest rate. PNLC employees also promised J.H. the firm would work diligently and return his calls within 48 hours.

J.H. signed several forms provided to him by PNLC staff, including an "Attorney Client Retainer Agreement" and a "Third Party Authorization and Release Form." The release form permitted J.H.'s lender to discuss his home loan with PNLC. Respondent was specifically named as the individual permitted to discuss the loan on behalf of J.H. The form listed respondent's title as "Paralegal."

The retainer agreement provided that, in exchange for a fee of $2,995, PNLC would provide "legal services," including "representation . . . for negotiation and resolution of disputes with current lender(s) regarding the subject real property and mortgage loan(s)." Pursuant to the retainer agreement, litigation and litigation services were excluded from the scope of the representation.

The retainer agreement also provided that the fees paid by J.H. were not conditioned on the outcome of his case, and restricted J.H.'s ability to cancel the agreement and seek a refund outside of the first five days after he signed the agreement. After the five-day refund window, the agreement required disputes over fees to be arbitrated pursuant to the guidelines and standards adopted by the State Bar of California. Other disputes would be resolved though binding arbitration in accordance with the arbitration rules of the bar association of Orange County, California. Finally, the retainer agreement also indicated PNLC had no obligation to retain J.H.'s file for any period of time following the end of representation.

In January, February, and March of 2014, J.H. made payments pursuant to the retainer agreement totaling $2,995, via counter deposits into PNLC's bank account. J.H. provided PNLC with all information and documentation they requested, and

PNLC told J.H. not to worry, the law firm would secure the loan modification, and his lender would not take his home. However, shortly after making his last payment, J.H. began experiencing difficulties reaching anyone at PNLC. PNLC never obtained a loan modification or offered J.H. any other solutions.

When J.H. received notice of the foreclosure hearing, he was again unable to reach anyone at PNLC. J.H. appeared by himself at the foreclosure hearing, and eventually had to hire another attorney and file for bankruptcy in order to save his home. At the evidentiary hearing before the Panel, J.H. testified that keeping up with his home loan payments had been a struggle, but his home had not been foreclosed. J.H. further testified he was unaware of any contact PNLC made with his lender, and he believed he had been scammed and the wrongdoer should be in jail or disbarred.

Related Claims against Respondent in Other Jurisdictions

In February 2016, the State Bar Court of California accepted a stipulation signed by respondent for a ninety-day suspension and two years' probation for engaging in the unauthorized practice of law in Florida and Washington. *In re Naderi*, Nos. 14-O-04421 & 14-O-06302 (Los Angeles, Cal., State Bar Ct. of Cal. Hearing Dep't, Feb. 10, 2016). As part of the stipulation, respondent agreed that he, acting as PNLC, was hired and paid to complete loan modifications for a resident of Florida and a resident of Washington. *Id.* Respondent conceded he accepted illegal fees in both cases. *Id.* The Florida client did not receive a loan modification. *Id.*

The Division of Consumer Services for the State of Washington also brought an administrative action against respondent, doing business as PNLC. Respondent did not cooperate or participate in the matter despite having been served by mail to his post office box. Respondent was ordered to cease and desist from offering loan modification services to Washington consumers, ordered to pay restitution to a Washington resident, fined, and ordered to pay costs. *In re Naderi*, No. C-14-1593-16-FO01 (Olympia, Wash., Dep't of Fin. Insts., Div. of Consumer Servs., May 26, 2016).

ANALYSIS

Respondent failed to cooperate with the Office of Disciplinary Counsel's (ODC) investigation, did not answer ODC's formal charges, and was found to be in default. Therefore, respondent is deemed to have admitted the factual allegations made against him in the charges. *See* Rule 24(a), RLDE, Rule 413, SCACR ("Failure to answer the formal charges shall constitute an admission of the allegations.").

Further, although not licensed in South Carolina, respondent is subject to discipline by this Court. By providing legal services in South Carolina, respondent meets the definition of "lawyer" provided in Rule 2(r), RLDE, Rule 413, SCACR, which includes "a lawyer not admitted in this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction; or anyone whose advertisements or solicitations are subject to regulation by Rule 418, SCACR." As such, pursuant to Rule 8.5(a), RPC, Rule 407, SCACR,[1] respondent is subject to the disciplinary authority of this Court and the Commission on Lawyer Conduct, and to the provisions of the Rules of Professional Conduct to the same extent as a lawyer admitted to practice law in this state.

Respondent's actions and inactions described above constitute a number of violations of South Carolina law and the Rules of Professional Conduct. First, by agreeing to represent J.H. in the negotiation of a modification of his home loan, respondent provided legal services on a temporary basis in South Carolina as contemplated by Rule 5.5(c), RPC, Rule 407, SCACR. However, respondent failed to meet any of the requirements outlined in Rule 5.5(c) that would have allowed him to engage in the temporary practice of law in this state. Respondent's representation of J.H. was: (1) not undertaken in association with an attorney admitted to practice in South Carolina; (2) not reasonably related to a matter in which respondent was reasonably expected to be authorized to appear because the terms of respondent's fee agreement specifically excluded litigation; (3) not reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in South Carolina or California; and (4)

[1] "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." Rule 8.5(a), RPC, Rule 407, SCACR.

did not arise out of or relate to respondent's representation of a client in California because J.H. was a South Carolina resident with a South Carolina legal issue.

Accordingly, respondent violated section 40-5-310 (practicing law or soliciting legal cause of another without being enrolled as a member of the South Carolina Bar), and section 40-5-370 (soliciting legal business unlawfully) of the South Carolina Code (2011). Additionally, respondent's conduct violated Rules 5.5(a) (unauthorized practice of law) and 8.4(b) (committing a criminal act that reflects adversely on an attorney's honesty, trustworthiness, or fitness), RPC, Rule 407, SCACR.

Second, respondent acted as a credit counseling organization and provided consumer credit counseling services to J.H. as defined in section 37-7-101 of the South Carolina Code.[2] Respondent's providing of these counseling services without a license and without filing a surety bond as required by statute,[3] and respondent's collecting of a fee from J.H. prior to earning that fee,[4] constituted a violation of Rule 8.4(e), RPC, Rule 407, SCACR (engaging in conduct prejudicial to the administration of justice).

Third, by limiting J.H.'s ability to rescind the retainer agreement and by failing to

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[2] Section 37-7-101 defines a "credit counseling organization" as "a person providing or offering to provide to consumers credit counseling services for a fee, compensation, or gain, in the expectation of a fee, compensation or gain." S.C. Code Ann. § 37-7-101(2) (2015). The same statute defines "credit counsel services" as "negotiating or offering to negotiate to defer or reduce a consumer's obligation with respect to credit extended by others." S.C. Code Ann. § 37-7-101(3)(c) (2015).

[3] *See* S.C. Code Ann. §§ 37-7-102 and -103 (2015) (requiring a person engaged in credit counseling services in South Carolina to obtain a license from and file a surety bond with the South Carolina Department of Consumer Affairs).

[4] *See* S.C. Code Ann. § 37-7-116(A)(11) (2015) (stating a licensee providing credit counseling services may not "collect a payment from a consumer before the payment being earned as specifically defined in the contract between the licensee and the consumer").

provide a clear and reasonable avenue for J.H. to seek a refund if respondent failed to perform the work, respondent violated Rule 1.5(a), RPC, Rule 407, SCACR (unreasonable fees). By stating in the retainer agreement that PNLC had no obligation to retain J.H's file, respondent violated Rule 1.15(i), RPC, Rule 407, SCACR (safekeeping of client property). Requiring J.H. resolve any disputes that arose out of the retainer agreement in accordance with procedures established in respondent's jurisdiction, not South Carolina, violated Rule 8.4(e), RPC, Rule 407, SCACR (engaging in conduct that is prejudicial to the administration of justice).

Fourth, respondent failed to provide competent and diligent representation to J.H. and failed to maintain reasonable communication with J.H. in violation of Rules 1.1 (competence), 1.3 (diligence), and 1.4 (communications), RPC, Rule 407, SCACR.

Finally, respondent's failure to cooperate in any fashion with ODC's investigation and prosecution of these matters violated Rule 8.1(b), RPC, Rule 407, SCACR (knowingly failing to respond to a lawful demand for information from a disciplinary authority).

Accordingly, respondent is hereby debarred from the practice of law in this state. Respondent is prohibited from practicing law or seeking any form of admission to the practice law in South Carolina, including pro hac vice admission, without first obtaining an order from this Court. *See* Rule 2(g), RLDE, Rule 413, SCACR (describing the sanction of "debarment"). Further, respondent shall, within thirty (30) days of the filing of this opinion, pay $1,112.13 for the costs of the proceedings to the Commission on Lawyer Conduct and restitution in the amount of $2,995 to J.H. If respondent is unable to pay these amounts in full within thirty (30) days of the filing of this opinion, within the same timeframe, he must enter into a reasonable payment plan with the Commission on Lawyer Conduct.

DEBARRED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Christopher Michael Ochoa, Respondent.

Appellate Case No. 2019-000040

Opinion No. 27882
Submitted March 27, 2019 – Filed April 24, 2019

DEBARRED

John S. Nichols, Disciplinary Counsel, and Ericka M. Williams, Senior Assistant Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

Christopher Michael Ochoa, of Florida, *pro se*.

PER CURIAM: Respondent, previously licensed in Florida[1] but not in South Carolina, entered into an agreement with a non-attorney owned company (NVA) to market his legal services on the internet. Although respondent operated a solo practice in Florida, through NVA's advertisements, he specifically targeted South Carolina residents seeking to negotiate modifications of their home loans in violation of provisions of Rules 7.1 and 7.5, RPC, Rule 407 SCACR. Further, respondent provided legal services to numerous South Carolina residents regarding South Carolina legal matters without being licensed or otherwise authorized to practice law in in this state in violation of Rule 5.5, RPC, Rule 407, SCACR, and Rule 7(a)(1), RLDE, Rule 413, SCACR.

[1] On May 2, 2018, respondent was disbarred by the Supreme Court of Florida for misconduct involving lack of competence, failure to safe keep property, and conduct involving dishonesty, fraud, deceit, or misrepresentation. *The Fla. Bar v. Ochoa*, No. SC17-1632, 2018 WL 2073195, at *1 (Fla. May 3, 2018).

Following an evidentiary hearing at which respondent did not appear, the Commission Hearing Panel (the Panel) recommended debarring respondent and ordering respondent pay the cost of the proceedings and restitution to two of his South Carolina clients. Neither party sought review of the Panel's report, and the matter is now submitted for the Court's consideration. We impose the sanctions recommended by the Panel.

FACTS

Although he identified himself as "licensed in the State of Florida," stated his law office was located at a Florida address, and he was not licensed to practice law in South Carolina, respondent offered legal services in thirty-five specified states, including South Carolina, through the law firm's "national network of attorneys." Respondent recruited attorneys in South Carolina and other states to handle legal matters as "of counsel" to respondent's firm. In exchange for legal services, clients were required to pay an up-front retainer and agree to monthly bank drafts, which were electronically deposited directly into respondent's operating account. Fee payments to NVA and local counsel were then paid by respondent from the operating account.

The V.S. Matter

In October 2013, a foreclosure action was filed against South Carolina homeowner V.S. by her mortgage lender. In response, V.S. retained respondent through NVA. V.S. signed electronic forms, including an "Engagement Agreement for Limited Representation" and a "Payer Services Agreement." Pursuant to the Payer Services Agreement, respondent collected two initial payments of $550 each and monthly payments of $605 via electronic funds transfers from V.S.'s personal bank account. Under the Engagement Agreement, respondent agreed to provide "legal services" including "representation to help the Client(s) achieve a satisfactory resolution with a mortgage that is in, or about to enter, default," and to "perform all legal services rendered herein, in accordance with the Florida Rules of Professional Conduct, and other applicable standards of law and ethics, as may be required in different jurisdictions."

V.S.'s daughter spoke with respondent twice over the phone and both times

respondent assured her he was an attorney and could help V.S. However, in late December 2013 or early January 2014, after V.S. received notice of a January 2014 hearing date in her pending foreclosure action, V.S.'s daughter contacted respondent to inform him about the court date. According to V.S.'s daughter, respondent stated that for an additional $300 per month he could have retained a South Carolina lawyer to represent V.S. in court but, "due to time constraints," there would not be enough time to do so.

Unknown to V.S. or her daughter and contrary to the information provided to them, respondent retained the services of a South Carolina attorney as "of counsel" in October 2013. The South Carolina attorney was never notified of the filing of the foreclosure action against V.S. or of the hearing date. After repeated failed attempts to obtain information from respondent's office about the status of V.S.'s representation, the South Carolina attorney ended her relationship with respondent's law firm in January 2014.[2]

During the course of respondent's representation of V.S., respondent's non-lawyer employees sent V.S. repeated requests for the same paperwork. In February 2014, V.S.'s daughter spoke with one of respondent's non-lawyer employees and complained about the duplicate paperwork requests. In response, respondent sent V.S. a form letter terminating the attorney-client relationship. The letter provided no explanation for the termination, no information regarding the status of the matter, no advice regarding how to proceed, and no refund of fees, which by that time totaled $2,310.

The W.W. Matter

In May 2014, South Carolina homeowner W.W. retained respondent through NVA. W.W. signed forms provided to him by an NVA employee via email, including the same Engagement and Payer Services agreements discussed above. Respondent collected an initial payment of $900 and monthly payments of $550 via electronic fund transfers from W.W.'s personal bank account. Within a month of being retained, respondent was informed a foreclosure action had been filed

[2] At no time during the representation did the South Carolina attorney have any contact with V.S. or her daughter, nor did the South Carolina attorney perform any services for or on behalf of V.S.

against W.W. Respondent retained South Carolina counsel; however, counsel's only involvement with the case was to review the file once in May 2014 and once in December 2014.

During the course of the representation, W.W.'s case was assigned numerous non-attorney NVA case managers with whom W.W. had difficulty communicating. By the end of September 2014, W.W. had become dissatisfied with the lack of progress on his loan modification and informed NVA and/or respondent he did not wish to make any further monthly payments. However, respondent continued to draw the payments from W.W.'s bank account until the end of December 2014, when respondent sent a letter to W.W. terminating the attorney-client relationship. Like the form letter V.S. received, W.W.'s form letter provided no explanation for the termination, no information regarding the status of the matter, no advice regarding how to proceed, and no refund of fees, which by that time totaled $4,750.

Advertising and Solicitation

Respondent provided legal services on a systematic and continuous basis in South Carolina by agreeing to represent V.S. and W.W. and numerous other South Carolina residents in the negotiations of modifications for their home loans. Respondent engaged in the unauthorized practice of law in South Carolina by providing legal services to South Carolina residents regarding South Carolina legal matters without being licensed or otherwise authorized to practice law in this state.

Further, respondent specifically targeted South Carolina residents via his website. Additionally, respondent's website contained the following advertising statements in violation of Rule 7, RPC, Rule 407, SCACR:

1. Statements that attorneys would be handling clients' legal matters when, in fact, non-attorney "case managers" handled all of the negotiations and almost all of the client contact;

2. Statements that implied the local attorneys were members of or employed by respondent's law firm when, in fact, the local attorneys were paid on a piecemeal or contractual basis;

3. Statements that created unjustified expectations, such as "we ensure that you get the best possible solution when it comes to your home foreclosure," and "[t]he attorneys . . . are dedicated to helping homeowners receive the best possible resolution to their mortgage issues";

4. The use of stock photos depicting a variety of attorneys and the use of phrases referring to multiple attorneys, implying respondent practiced in a partnership when that was not the case, such as "our attorneys work with all servicers and lenders"; "the firm employs an extensive network of attorneys"; "we are your advocates"; "our team of attorneys"; and "our foreclosure attorneys at the Law Office of Chris Ochoa, P.A."

ANALYSIS

Respondent failed to cooperate with the Office of Disciplinary Counsel's (ODC) investigation, did not answer ODC's formal charges, and was found to be in default. Therefore, respondent is deemed to have admitted the factual allegations made against him in the charges. *See* Rule 24(a), RLDE, Rule 413, SCACR ("Failure to answer the formal charges shall constitute an admission of the allegations.").

Further, although not licensed in South Carolina, respondent is subject to discipline by this Court. By providing legal services in South Carolina and targeting advertisements and solicitations to this state, respondent meets the definition of "lawyer" provided in Rule 2(r), RLDE, Rule 413, SCACR, which includes "a lawyer not admitted in this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction; or anyone whose advertisements or solicitations are subject to regulation by Rule 418, SCACR."[3] As such, pursuant to Rule 8.5(a), RPC, Rule 407, SCACR, and Rule 418(d), SCACR, respondent is subject to the disciplinary authority of this Court and the Commission and to the

[3] Rule 418, SCACR, entitled "Advertising and Solicitation by Unlicensed Lawyers," defines an "unlicensed lawyer" as an individual "who is admitted to practice law in another jurisdiction but who is not admitted to practice law in South Carolina . . . ." Rule 418 also provides this Court with jurisdiction over allegations of misconduct by foreign lawyers and procedures for determining misconduct charges and sanctions. Rule 418(d), SCACR.

provisions of the Rules of Professional Conduct to the same extent as a lawyer admitted to practice law in this state.

Respondent's conduct violated Rule 7(a)(1), RLDE, Rule 413, SCACR (violating the Rules of Professional Conduct). Specifically, respondent's representation of V.S. and W.W. violated Rules 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.5(a) (unreasonable fees), and 1.16(d) (protection of client's interest upon terminating representation), RPC, Rule 407, SCACR. In relation to his representation of South Carolina residents while not licensed or otherwise authorized, respondent violated Rules 5.5(a) (unauthorized practice of law), 5.5(b) (establishing a systematic and continuous presence in the jurisdiction for the unauthorized practice of law), and 8.4(b) (misconduct), RPC, Rule 407, SCACR. Finally, respondent's website and advertisements violated Rules 7.1 (communication concerning a lawyer's services) and 7.5 (firm names and letterheads), RPC, Rule 407, SCACR.

Accordingly, respondent is hereby debarred from the practice of law in this state. Respondent is prohibited from practicing law or seeking any form of admission to practice law in South Carolina, including pro hac vice admission, without first obtaining an order from this Court. *See* Rule 2(g), RLDE, Rule 413, SCACR (describing the sanction of "debarment"). Further, respondent shall, within thirty days of the filing of this opinion, pay $869.11 for the costs of these proceedings to the Commission and restitution in the amount of $2,310 to V.S. and $3,750 to W.W.[4] If respondent is unable to pay these amounts in full within thirty days of the filing of this opinion, within the same time frame, he must enter into a reasonable payment plan with the Commission.

DEBARRED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[4] At the panel hearing, ODC advised the Panel respondent had made payments totaling $1,000 to W.W., reducing the remaining amount of restitution owed W.W. to $3,750.

The Supreme Court of South Carolina

In the Matter of John F. Martin, Respondent.

Appellate Case No. 2018-001518

AMENDED ORDER

Respondent has submitted a Motion to Resign in Lieu of Discipline pursuant to Rule 35, RLDE, Rule 413, SCACR. In light of Respondent's serious misconduct which demonstrates an unfitness to practice law, we grant the Motion to Resign in Lieu of Discipline. In accordance with the provisions of Rule 35, RLDE, Respondent "acknowledges that disciplinary counsel can prove" the allegations of misconduct. Moreover, Rule 35 provides Respondent's resignation shall be *permanent*, and he will never be eligible to apply, and will not be considered, for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

Within fifteen (15) days of the date of this order, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court. Additionally, Respondent must continue to comply with the restitution plan entered into with the Commission on Lawyer Conduct or face further proceedings to enforce this Court's directive.[1]

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

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[1] *See* Rule 2(r), RLDE, Rule 413, SCACR (definition of lawyer includes "any formerly admitted lawyer with respect to acts committed prior to resignation"); Rule 5, RLDE, Rule 413, SCACR (disciplinary counsel has authority and duty to initiate and prosecute proceedings before this Court to enforce orders related to disciplinary proceedings).

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

April 24, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jean P. Derrick, Respondent,

v.

Lisa C. Moore, Appellant.

Appellate Case No. 2016-000804

Appeal From Kershaw County
DeAndrea G. Benjamin, Circuit Court Judge,

Opinion No. 5618
Submitted September 19, 2018 – Filed January 23, 2019
Withdrawn, Substituted, and Refiled April 24, 2019

AFFIRMED

Robert Daniel Dodson, of Law Offices of Robert Dodson, PA, of Columbia, for Appellant.

William S. Tetterton, of Tetterton Law Firm, LLC, of Camden, and Katherine Carruth Goode, of Winnsboro, for Respondent.

LOCKEMY C.J.: This is an appeal from a circuit court order compelling Lisa Moore (Client) to resolve a fee dispute through the Resolution of Fee Disputes Board of the South Carolina Bar (the Board). Client argues (1) Jean Derrick (Attorney) waived the right to compel her appearance before the Board by first

filing an action in the circuit court, (2) the circuit court lacked authority to compel Client's appearance before the Board, and (3) Attorney's fee agreement is unenforceable under the South Carolina Uniform Arbitration Act.[1] We affirm.[2]

I. FACTS

Client retained Attorney in April 2011 to represent her in a family court matter in Kershaw County. At the onset of the representation, Client and Attorney signed a fee agreement, which provided: "ANY DISPUTE CONCERNING THE FEE DUE PURSUANT TO THIS AGREEMENT SHALL BE SUBMITTED BY THE DISSATISFIED PARTY FOR A FULL, FINAL RESOLUTION TO [THE BOARD], PURSUANT TO RULE 416 OF THE SOUTH CAROLINA APPELLATE COURT RULES."

Attorney's representation of Client continued from April 2011 through April 2014. On March 6, 2014, the family court entered a final order largely favoring Client and awarding her attorney's fees.[3] The family court found the litigation was "relatively complex," Attorney had "obtained beneficial results across the board for [Client]," the number of hours expended on the case was reasonable, and Attorney's hourly fee was reasonable for a practitioner with thirty-six years' experience. Based on these findings, the family court ordered the opposing party to pay $12,000 in attorney's fees—or roughly sixty percent of Client's $20,509.55 legal bill—directly to Client by July 4, 2014. This order was not appealed.

Client's last payment to Attorney was in May 2014; however, there still remained an outstanding balance of $10,484.40. Client did not object to the amount of the bill and repeatedly assured Attorney she would pay, although this evidently never happened. On October 6, 2014, Attorney commenced an action against Client in the circuit court to recover the unpaid fees.

Client answered, and by way of an affirmative defense, asserted Attorney had failed to comply with the provision of the fee agreement that required all fee disputes to be resolved by the Board. Client also submitted counterclaims for

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[1] S.C. Code Ann. §§ 15-48-10 through -240 (2005).
[2] We decide this case without oral argument pursuant to Rule 215, SCACR.
[3] It is not disputed the outcome was favorable to Client.

breach of contract accompanied by a fraudulent act, violation of the South Carolina Unfair Trade Practices Act, abuse of process, and conversion. Attorney answered and moved for an order compelling Client to submit the fee dispute to the Board pursuant to the fee agreement and Rule 416, SCACR.
At a hearing on Attorney's motion, Client contended the circuit court lacked the authority to send a fee dispute to the Board without her consent. Client also argued Attorney waived the right to have the fee dispute settled before the Board by electing instead to file a lawsuit in the circuit court.

On December 4, 2015, the circuit court granted Attorney's motion, concluding the fee agreement bound Client to adjudicate any fee disputes before the Board. Client filed a motion to reconsider, arguing (1) the circuit court lacked the authority to compel Client to arbitrate fee disputes through the Board, (2) Client did not consent to the Board's jurisdiction, (3) the fee agreement was unlawful under the Uniform Arbitration Act, and (4) Attorney waived the right to compel arbitration by filing a lawsuit in the circuit court. The court denied the motion by form order. This appeal followed.

II. DISCUSSION

Rule 416, SCACR, vests the Board with jurisdiction to hear certain fee disputes. A fee dispute arises "when the parties to an employment agreement between lawyer and client have a genuine difference as to the fair and proper amount of a fee." Rule 416, SCACR, Rule 2. The "amount in dispute" is defined as the difference in the dollar amount between the attorney and client's determination of the appropriate fee. *Id.* But, "[a] dispute does not exist solely because of the failure of the client to pay a fee." *Id.*

Rule 2 of Rule 416, SCACR, further states that the Board may not undertake to resolve: "(1) a fee dispute involving an amount in dispute of $50,000 or more; [or] (2) disputes over fees which by law must be determined or approved, as between lawyer and client, by a court, commission, judge, or other tribunal," Additionally, no fee disputes "may be filed more than three years after the dispute arose." *Id.*

Rule 9 of Rule 416, SCACR, provides:

> (a) Any client-applicant for the services of the Board must consent in writing to be bound by a final decision of the Board. Thereafter, the attorney is also bound.
>
> (b) No application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board. Thereafter, both parties are bound.
>
> (c) Upon consent of the client-applicant to be bound by the final decision of the Board, exclusive jurisdiction over the fee dispute vests in the Board.

A. Waiver by Attorney

Client first argues Attorney waived the right to compel her appearance before the Board by electing instead to file a lawsuit in the circuit court. Client relies on the case of *Hyload, Inc. v. Pre-Engineered Prod., Inc.*, for the proposition that a party may waive a contractual right to arbitrate by bringing a suit on the underlying contract rather than the arbitration provision. 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). Attorney contends that under the fee agreement and Rule 416, SCACR, only a "dissatisfied party" could submit a fee dispute to the Board; because Attorney believed her fee to be fair and reasonable, she was not a dissatisfied party and therefore could not institute a fee dispute proceeding.

We find Attorney did not waive the right to resolve the fee dispute before the Board by filing a collection action in the circuit court. Neither the plain language of the fee agreement nor Rule 416, SCACR, mandates that a party must initiate a proceeding before the Board prior to filing an action to recover unpaid attorney's fees. The fee agreement provides that "any dispute concerning the fee due" shall be submitted by the "dissatisfied party" to the Board. There is no evidence suggesting Client was dissatisfied with Attorney's performance or that Client contested the amount or reasonableness of Attorney's bill prior to the present action. To the contrary, the family court's unappealed final order found Attorney's performance supported an award of attorney's fees. Only when Client disputed the amount of the bill and refused to pay, could Attorney become a "dissatisfied party" under the fee agreement.

Moreover, Rule 2 of Rule 416, SCACR, provides that a "fee dispute" does not exist until after the attorney and client "have a genuine difference as to the fair and proper amount of a fee." Nothing in Rule 416 precludes an attorney from filing a civil suit to collect a delinquent fee from a client who has not contested the validity of the fee; rather, Rule 2 of Rule 416 explicitly states "[a] dispute does not exist solely because of the failure of the client to pay a fee." Here, Client allegedly failed to pay her fee, but under Rule 416, that alone was insufficient to bring the matter before the Board. Importantly, Client did not actually dispute the fee until she filed an answer to Attorney's complaint and invoked the fee dispute provision as an affirmative defense.

Furthermore, we find *Hyload, Inc. v. Pre-Engineered Prod., Inc.* distinguishable from the present case.[4] In that case, a distributor sued Hyload for breach of contract, but when Hyload sought to enforce an arbitration provision in the contract, the distributor complied by sending the arbitration documents to Hyload's office for its signature. 308 S.C. at 279, 417 S.E.2d at 623-24. After receiving the arbitration documents, however, Hyload refused to sign and instead commenced a claim and delivery action against the distributor under a different section of the agreement. *Id*. When the distributor reinstituted its original action for breach of contract, Hyload again asserted the breach of contract action was subject to the arbitration provision. *Id*. at 280, 417 S.E.2d at 624. This court held that under those facts, Hyload waived its contractual right to arbitrate by bringing a suit on the underlying contract rather than seeking to enforce the arbitration provision. *Id*.

Additionally, both *Hyload* and subsequent cases have required the party opposing arbitration to show actual prejudice before a waiver is found. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) ("In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration."); *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003) ("South Carolina has primarily . . . followed the approach adopted by the federal courts of the Fourth Circuit and other

[4] We also note the procedure under Rule 416, SCACR, for resolving a fee dispute before the Board is inconsistent with the arbitration procedures outlined in the Uniform Arbitration Act. For this reason, we believe Client's reliance on arbitration decisions is misplaced.

jurisdictions which require a showing of actual prejudice before finding waiver."); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003) ("Mere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate."). Here, Client has not alleged any prejudice she will suffer if required to resolve the fee dispute through the Board. *See Rich*, 357 S.C. at 72, 590 S.E.2d at 510 ("The party seeking to establish waiver has the burden of showing prejudice."). Client will still be able to litigate her counterclaims against Attorney, as they are still under the jurisdiction of the circuit court. Furthermore, if dissatisfied with the decision of the Board, Client will be able to seek review of the decision with the circuit court. *See* Rule 416, SCACR, Rule 20; *Wright v. Dickey*, 370 S.C. 517, 521, 636 S.E.2d 1, 2 (Ct. App. 2006) "[Rule 416, SCACR] provides that a party may appeal a final decision of the Board to the circuit court on certain limited grounds.").

B. Withdrawal of Consent

Client next argues the circuit court lacked legal authority to compel Client to appear before the Board because Client did not consent to the Board's jurisdiction. Specifically, Client asserts Rule 416, SCACR, requires the client to give written consent to the Board's jurisdiction *after* the fee dispute arises.

We find Client consented to the jurisdiction of the Board as required under Rule 9 of Rule 416, SCACR, by signing the fee agreement. The rule does not draw a distinction between a client who consents to jurisdiction prior to the representation and one who gives consent after a fee dispute arises. *See* Rule 416, SCACR, Rule 9(b) ("No application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board."). Here, Client entered into a valid contract, the plain language of which contemplated that when a fee dispute arises it would be sent to the Board for a resolution. *See Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."). By signing the contract and agreeing to be bound by the terms of the fee agreement, the parties conferred exclusive jurisdiction to the Board over fee disputes. *See Bailey v. Bailey*, 312 S.C. 454, 459, 441 S.E.2d 325, 327 (1997) (noting exclusive jurisdiction over a fee dispute vests in the Board upon a client's

consent to be bound). Accordingly, we find the circuit court was within its authority to enforce the contractual provision and send the fee dispute to the Board.

C. Applicability of the Uniform Arbitration Act

Finally, Client argues that because the Board is effectively an arbitral body, the fee dispute provision was required to comply with the portions of the Uniform Arbitration Act that require all arbitration clauses to appear conspicuously on the first page of a contract. Client argues the fee dispute provision here is unenforceable because it appears on the second page of the fee agreement.

Section 15-48-10(a) of the South Carolina Code (2005) requires certain arbitration agreements to be "typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract." Otherwise, the provision is unenforceable. The Uniform Arbitration Act does not apply, however, to "pre-agreement[s] entered into when the relationship of the contracting parties is such that of lawyer-client." S.C. Code Ann. § 15-48-10(b)(3) (2005).

While we acknowledge the resolution of a fee dispute before the Board is similar to arbitration, section 15-48-10(b)(3) of the Uniform Arbitration Act explicitly states that pre-agreements between an attorney and a client are not subject to the requirements of the Uniform Arbitration Act. In the present case, the agreement between Attorney and Client cannot fairly be categorized as anything other than a "pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client." Furthermore, even if we were to accept Client's argument—that the fee agreement falls under the purview of the Uniform Arbitration Act—we note that orders compelling arbitration are not immediately appealable. *See* section 15-48-200(a) of the South Carolina Code (2005) (listing orders related to arbitration that are subject to immediate appeal); *Toler's Cove Homeowners Ass'n, Inc.*, 355 S.C. at 610, 586 S.E.2d at 584 (2003) (stating that all orders relating to arbitration not mentioned in section 15-48-200(a) are not immediately appealable). Accordingly, we find the circuit court correctly found the Uniform Arbitration Act was inapplicable to the current case.

III. CONCLUSION

Based on the foregoing, we find no error in the circuit court order compelling Client and Attorney to resolve their fee dispute before the Board. We further find the Uniform Arbitration Act is inapplicable to fee agreements entered into between an attorney and client. Therefore, the order of the circuit court is

AFFIRMED

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Benjamin C. Gecy, River City Developers, LLC and River City Real Estate, LLC, Appellants,

v.

Somerset Point at Lady's Island Homeowners Association, Inc., f/k/a Coosaw River Estates Homeowners Association, LLC; Hilton C. Smith, Jr., Coosaw Investments, LLC; Hilton C. Smith Jr., Inc. of South Carolina and Manorhouse Builders of South Carolina, LLC, Defendants,

Of which Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina are Respondents.

Appellate Case No. 2016-001113

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5622
Heard November 5, 2018 – Filed January 30, 2019
Withdrawn, Substituted, and Refiled April 24, 2019

AFFIRMED

William G. Jenkins, Jr., of Jenkins, Esquivel & Fuentes, P.A., of Hilton Head Island, for Appellants.

Morgan S. Templeton, Graham Pollock Powell, William Wharton Watkins Jr., and John Joseph Dodds, IV, all of Wall Templeton & Haldrup, PA, of Charleston; Duke Raleigh Highfield and Jeffrey J. Wiseman, both of Young Clement Rivers, of Charleston; and Ernest Mitchell Griffith and Kelly Dennis Dean, both of Griffith Freeman & Liipfert, LLC, of Beaufort, for Respondents.

WILLIAMS, J.: In this civil case, Benjamin C. Gecy, River City Developers, LLC, and River City Real Estate, LLC (collectively, River City) appeal the circuit court's order granting partial summary judgment to Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina (collectively, Coosaw) on River City's malicious prosecution claim. On appeal, River City argues the circuit court erred in finding River City was unable to prove the element of favorable termination of proceedings. We affirm.

FACTS/PROCEDURAL HISTORY

River City is a residential construction company owned by Benjamin C. Gecy. Coosaw was the real estate developer of Somerset Point at Lady's Island (Somerset Point), a subdivision in Beaufort, South Carolina. River City built several homes and improvements on lots in Somerset Point. As developer, Coosaw created and controlled the Somerset Point Homeowner's Association (HOA). In 2011, River City allegedly informed the HOA it believed Coosaw, and the construction companies it controlled, deviated from and modified the design and construction standards mandated for the subdivision. River City claims Hilton C. Smith, Jr., as agent for the HOA, responded to these allegations by accusing River City of deviating from new design standards the HOA issued for the subdivision and demanding payment of fees and fines from River City.

As a result of this dispute, River City filed a lawsuit against Coosaw on September 20, 2011 (the 2011 action), which alleged causes of action for breach of fiduciary duty, breach of contract, and unfair trade practices. Coosaw counterclaimed and crossclaimed against River City for violating the HOA's design standards and sought a temporary injunction to block River City from continuing construction in

Somerset Point. Coosaw also filed a notice of lis pendens that described a piece of property in Somerset Point—Lot 16—as affected by the litigation.

River City moved to strike the notice of lis pendens on the ground that Coosaw never included any information about Lot 16 in its counterclaim and crossclaim for injunctive relief. The master-in-equity agreed, and struck the notice of lis pendens finding "the [c]ounterclaim and [c]rossclaim do not seek to affect the title to the subject real property in this litigation." Coosaw filed a motion seeking reconsideration of the master's decision to strike the notice of lis pendens. During the hearing on Coosaw's motion to reconsider, the master also considered a motion from River City to strike an assessment lien placed on Lot 16 by Coosaw. The master ultimately denied both Coosaw's motion to reconsider the master's decision to strike the notice of lis pendens and River City's motion to strike the assessment lien placed on Lot 16 by Coosaw. The master issued a written order explaining his findings:

> I find that the harm to River City in granting [Coosaw]'s Motion to Reconsider outweighs the benefit to [Coosaw] if the [notice of] Lis Pendens remains in place. Striking the [notice of] Lis Pendens will allow River City's lender to resume providing construction draws and River City's project can then be completed. [Coosaw's assessment] lien, however, is subordinate to River City's loan which should not prohibit the lender from dispensing construction draws to River City. I find that balancing the equities in this case is appropriate.

Coosaw appealed the master's order to this Court, but it ultimately withdrew the appeal after River City's sale of Lot 16 rendered the issue moot.

On October 23, 2014, River City filed the lawsuit at issue in this appeal, alleging causes of action for malicious prosecution and abuse of process based on Coosaw's filing of the notice of lis pendens in the 2011 action. As to its malicious prosecution cause of action, River City asserted in its complaint, "With respect to the unlawful [notice of] Lis Pendens . . . th[ose] proceedings have been terminated in [River City]'s favor." However, all of the causes of action alleged by both parties in the 2011 action remain pending before the circuit court.

Coosaw filed a motion for summary judgment on River City's malicious prosecution claim, arguing there was never a favorable termination of proceedings for River City. At the motion hearing, River City specifically argued it received a favorable termination of proceedings: the master's removal of the notice of lis pendens. Coosaw asserted there was no favorable termination for River City because the master removed the notice of lis pendens on equitable, not substantive grounds. The circuit court granted Coosaw's summary judgment motion on River City's malicious prosecution claim finding, "[River City] is unable to prove the element of termination of [the underlying] proceeding in [River City]'s favor." The circuit court determined the master based his removal of the notice of lis pendens on equitable, not substantive grounds and found there was no favorable termination. River City filed a motion seeking reconsideration, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

I. Will the favorable termination of a notice of lis pendens support an action for malicious prosecution?

II. Must the party who obtains the favorable termination of a notice of lis pendens also obtain favorable termination of the cause of action for which the notice of lis pendens was issued before and in order to bring an action for malicious prosecution?

III. Was there a favorable termination of the notice of lis pendens in this case?

IV. Should novel questions of law have been decided without the opportunity to develop the facts fully?[1]

STANDARD OF REVIEW

[1] Because River City's first three issues all focus on interpreting the same element of a malicious prosecution action, we address these issues together.

"In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the [circuit] court under Rule 56(c), SCRCP." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "Summary judgment is proper whe[n] plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). "[The appellate court is] free to decide a question of law with no particular deference to the circuit court." *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

LAW/ANALYSIS

I. Malicious Prosecution - Favorable Termination

River City argues the circuit court erred in finding River City failed to establish the third element—favorable termination of proceedings—required to bring a claim for malicious prosecution.[2] We disagree.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law,* 368 S.C. at 435, 629 S.E.2d at 648 (quoting *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965)). "An action for malicious prosecution fails if the plaintiff cannot prove each of the

[2] Coosaw concedes the filing of a notice of lis pendens can support a malicious prosecution action once the underlying action is terminated provided that the party filing the malicious prosecution action meets all of the elements of the claim.

required elements by a preponderance of the evidence, including malice and lack of probable cause." *Law*, 368 S.C. at 435, 629 S.E.2d at 648.

A. Ancillary Proceedings

First, River City asserts the master's removal of the notice of lis pendens constituted a favorable termination because (1) the filing of a notice of lis pendens is an ancillary proceeding and (2) a favorable termination of ancillary proceedings will support a malicious prosecution claim. River City quotes Professor Prosser and the Restatement (Second) of Torts as authority to support its argument that a favorable termination of ancillary proceedings can support a malicious prosecution claim.[3]

In South Carolina, lis pendens is a statutory doctrine designed to inform prospective purchasers or encumbrancers that a particular piece of property is subject to litigation. *See* S.C. Code Ann. § 15-11-10 (2005); *Shelley Constr. Co., v. Sea Garden Homes, Inc.*, 287 S.C. 24, 30, 336 S.E.2d 488, 491 (Ct. App. 1985). "A properly filed [notice of] lis pendens binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 889 (Ct. App. 2002) (quoting *S.C. Nat'l Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 562 (1987)). "Generally, the filing of a [notice of] lis pendens places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved." *Id.* at 17, 567 S.E.2d at 889.

> The lis pendens mechanism is not designed to aid either side in a dispute between private parties. Rather, [the notice of] lis pendens is designed primarily to protect unidentified third parties by alerting prospective

[3] Restatement (Second) of Torts § 674 (Am. Law Inst. 1977) ("Even though the principal proceedings are properly brought, the ancillary proceedings may be wrongfully initiated. In this case the wrongful procurement and execution of the ancillary process subjects the person procuring it to liability."); *Robert E. Keeton et al.*, *Prosser and Keeton on The Law of Torts* 892 (W. Page Keeton ed., 5th ed. 1984) (discussing the ancillary proceedings exception to the rule requiring proof of favorable termination).

> purchasers of property as to what is already on public record, that is, the fact of a suit involving property. Thus, it notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights.

Id. (quoting 51 Am. Jur. 2d *Lis Pendens* § 2 (2000)). "Whe[n] no real property is implicated . . . a notice of [lis pendens] need not be filed." *Id.* at 18, 567 S.E.2d at 890. "The jurisdictions are in agreement that the proper action against a maliciously filed [notice of] lis pendens is under abuse of process or malicious prosecution." *Id.* at 31, 567 S.E.2d at 897.

River City contends the filing of a notice of lis pendens should be considered an ancillary proceeding because of its similarity to attachment proceedings. We do not agree with this comparison. "Attachments are statutory proceedings . . . intended to summarily dispossess a party of his property, and to hold it subject to the result of an action in progress." *Wando Phosphate Co. v. Rosenberg*, 31 S.C. 301, 301, 9 S.E. 969, 970 (1889). The notice of lis pendens does not dispossess anyone of property; it is merely another form of pleading that does not provide any substantive right. *See Pond Place*, 351 S.C. at 30, 567 S.E.2d at 896 ("We find a lis pendens filed in conjunction with an action involving the same real estate is merely another form of pleading."); *see also Adhin v. First Horizon Home Loans*, 44 So.3d 1245, 1251–52 (Fla. Dist. Ct. App. 5th Dist. 2010) ("The filing of a notice of lis pendens does not create an interest in property, nor does it create any superior substantive property rights."). In fact, a notice of lis pendens does not initiate any proceedings, it is simply a notice, typically filed with a complaint, containing the names of the parties, the object of the action, and a description of the property affected by the lawsuit. *See* § 15-11-10.

River City cites an opinion from the Intermediate Court of Appeals of Hawaii on whether the filing of a notice of lis pendens is an ancillary proceeding. *See Isobe v. Sakatani*, 279 P.3d 33 (Haw. Ct. App. 2012). The court in *Isobe* found a notice of lis pendens was an ancillary proceeding due to a concern that a notice of lis pendens could operate as a burden on property separate and apart from the underlying claim. *Id.* at 52. We find a notice of lis pendens differs from ancillary proceedings based on our precedent that a notice of lis pendens "has no existence

separate and apart from the litigation of which it gives notice." *Pond Place*, 351 S.C. at 32, 567 S.E.2d at 897. The notice of lis pendens is "designed primarily to *protect* unidentified third parties by alerting prospective purchasers of property as to what is already on public record, that is, the fact of a suit involving property." *Id.* at 17, 567 S.E.2d at 889 (quoting 51 Am.Jur.2d *Lis Pendens* § 2 (2000) (emphasis added)). Although a notice of lis pendens could burden a third party attempting to purchase the affected property, that burden is directly related to the underlying litigation associated with the notice of lis pendens. As this Court has recognized, a notice of lis pendens is merely another form of pleading in the litigation of which it gives notice. *See id.* at 30, 567 S.E.2d at 896. Ancillary proceedings are defined as "[o]ne growing out of or auxiliary to another action or suit, or which is subordinate to or in aid of a primary action, either at law or in equity." *Ancillary Proceeding*, *Black's Law Dictionary* (5th ed. 1979). Because the listing of a notice of lis pendens only acts as a "republication of the proceedings" initiated in the underlying action, we find the filing of a notice of lis pendens is not an ancillary proceeding. *Pond Place*, 351 S.C. at 25, 567 S.E.2d at 894.

B. Removal of the Notice of Lis Pendens

Second, River City argues it proved the favorable termination element because the master's decision to remove the notice of lis pendens was "final, substantive, and on the merits." River City claims the master made a clear decision to remove the notice of lis pendens based on the applicable law.

South Carolina courts have not specifically addressed the favorable termination element of a malicious prosecution claim arising out of a civil proceeding. In *Cisson v. Pickens Savings & Loan Association*, our supreme court recognized a cause of action for malicious prosecution "founded upon any ordinary civil proceeding." 258 S.C. 37, 43, 186 S.E.2d 822, 825 (1972). Although the *Cisson* court did not specifically address the favorable termination element, the court did state "the action for malicious prosecution of an ordinary civil proceeding is governed by the same general rules and limitations as the action based upon criminal proceedings." *Id*. In criminal proceedings, our supreme court has found a favorable termination of proceedings was established to support a malicious

prosecution claim when (1) criminal charges were dismissed;[4] (2) a defendant was charged with commission of a crime and exonerated;[5] and (3) criminal charges were *nolle prossed* for reasons which imply or are consistent with innocence.[6] Conversely, our supreme court found a favorable termination *did not* occur when a defendant voluntarily entered into and successfully completed a pretrial intervention program,[7] or when a defendant entered into a voluntary settlement of criminal charges.[8] In the criminal cases involving a favorable termination, the favorable termination was on the merits of the dispute underlying the malicious prosecution claim.

The *Cisson* court noted "[s]ome of the differences in the application of these principles to [malicious prosecution] actions based upon civil proceedings and those based upon criminal prosecutions are pointed out in *Prosser on Torts*, (3d) Ed., Section 114 . . . and in the comments to Section 674 of the Restatement of the Law of Torts." 258 S.C. at 43, 186 S.E.2d at 825. In their discussion of the favorable termination element, Professors Prosser and Keeton explain some jurisdictions have found, "[T]he termination must not only be favorable to the accused, but must also reflect the merits and not merely a procedural victory." *Prosser and Keeton on The Law of Torts* at 874; *see also* 3 *Dan B. Dobbs et al., The Law of Torts* 414 (2nd ed. 2011) ("Favorable termination is not necessarily a termination on the merits, but it is usually a termination that tends to reflect on the probable merits."). The requirement that a favorable termination reflect the merits of the underlying action is also found in other secondary sources. *See* 54 C.J.S. *Malicious Prosecution* § 60 (2018) ("For the termination of the underlying action to be deemed favorable to the defendant in the underlying action, as an element of malicious prosecution, the termination must reflect on the merits of the underlying action."); 52 Am. Jur. 2d *Malicious Prosecution* § 29 (2018) ("[A]ll that is required is that the termination reflect on the merits of the [underlying] action."). South Carolina courts have repeatedly cited to these sources when examining malicious prosecution claims. *See Cisson*, 258 S.C. at 42, 186 S.E.2d at 825; *McKenney*, 304 S.C. at 22, 402 S.E.2d at 888; *Elletson*, 231 S.C. at 575, 99 S.E.2d at 389.

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[4] *Jennings v. Clearwater Mfg. Co.*, 171 S.C. 498, 172 S.E. 870 (1934).
[5] *Elletson v. Dixie Home Stores*, 231 S.C. 565, 99 S.E.2d 384 (1957).
[6] *McKenney v. Jack Eckerd Co.*, 304 S.C. 21, 402 S.E.2d 887 (1991).
[7] *Jordan v. Deese*, 317 S.C. 260, 262, 452 S.E.2d 838, 839 (1995).
[8] *Jennings*, 171 S.C. at 498, 172 S.E. at 870.

From a policy perspective, the requirement that a favorable termination reflect the merits of an action fosters the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (quoting 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* § 28:5, p. 24 (1991)). Without the requirement that a termination reflect the merits, a party could obtain a favorable result in a malicious prosecution action while the claim underlying the malicious prosecution action was still pending. This could theoretically result in a party receiving two conflicting decisions arising from the same case: a favorable decision on the malicious prosecution action and an unfavorable decision on the underlying claim.

Based on our review of the sources addressing this element, we interpret the element of favorable termination of proceedings to mean a termination reflective of the merits. *See Prosser and Keeton on The Law of Torts* at 874; 54 C.J.S. *Malicious Prosecution* § 60 (2018); 52 Am. Jur. 2d *Malicious Prosecution* § 29 (2018). This interpretation means a termination consistent with a finding for the defendant on substantive grounds and not based solely on technical or procedural considerations. *See* 52 Am. Jur. 2d *Malicious Prosecution* § 42 (2018); Vitauts M. Gulbis, Annotation, *Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution*, 30 A.L.R.4th Art. 3 (1984). For example, a case's dismissal based on the statute of limitations would not be a favorable termination because a decision on the statute of limitations does not reflect the merits of the action. *Palmer Dev. Corp. v. Gordon*, 723 A.2d 881, 885 (Me. 1999). We believe this holding is in accordance with the aforementioned criminal cases because the terminations in these criminal cases reflected on the innocence of the accused. *See Jennings*, 171 S.C. at 498, 172 S.E. at 873 (finding a favorable termination when criminal charges against a defendant were dismissed); *Elletson*, 231 S.C. at 570, 99 S.E.2d at 386 (finding a favorable termination when a defendant was charged with commission of a crime and exonerated); *McKenney*, 304 S.C. at 21, 402 S.E.2d at 888 (finding a favorable termination when criminal charges were *nolle prossed* for reasons which imply or are consistent with innocence). Finally, we caution that our interpretation of this element only applies to a malicious prosecution claim founded upon a civil proceeding.

Turning to the present case, we find River City failed to establish the favorable termination element of its malicious prosecution claim because we find a party's successful removal of a notice of lis pendens alone does not constitute a favorable termination to support a malicious prosecution claim. The underlying action on the merits remains pending; thus, this action is premature. River City's success in striking the notice of lis pendens alone does not equate to a finding in its favor on any substantive ground. *See* 52 Am. Jur. 2d *Malicious Prosecution* § 42 (2018). A notice of lis pendens is fundamentally procedural because it merely serves as another form of pleading and does not confer any substantive right. *See Pond Place*, 351 S.C. at 30, 567 S.E.2d at 896 ("We find a lis pendens filed in conjunction with an action involving the same real estate is merely another form of pleading."); *see also Adhin*, 44 So. 3d at 1251–52 ("The filing of a notice of lis pendens does not create . . . any superior substantive property rights."). A notice of lis pendens is typically filed with a complaint, and only contains the names of the parties, the object of the action, and a description of the property affected by the lawsuit. *See* § 15-11-10 (2005). The notice "has no existence separate and apart from the litigation of which it gives notice." *Pond Place*, 351 S.C. at 32, 567 S.E.2d at 897. Therefore, we find River City needs to obtain a favorable termination reflecting the merits of the action associated with the notice of lis pendens before it can assert a malicious prosecution claim founded upon the filing of the notice of lis pendens.

We caution that we do not find a maliciously filed notice of lis pendens can never operate as the primary basis for a malicious prosecution claim. We still agree, as this Court found in *Pond Place*, that "the proper action against a maliciously filed [notice of] lis pendens is under abuse of process or malicious prosecution." *Id.* at 31, 567 S.E.2d at 897. Our finding is that a maliciously filed notice of lis pendens can act as the primary basis for a malicious prosecution claim, provided the party bringing the claim can establish *a favorable termination reflective of the merits of the underlying action associated with the filing of the notice of lis pendens.*

Other jurisdictions have also required favorable termination of the action underlying the filing of a notice of lis pendens before a defendant can file a malicious prosecution claim founded on the filing of the notice of lis pendens. *See Whyburn v. Norwood*, 267 S.E.2d 374, 377 (N.C. Ct. App. 1980) (finding defendant's cause of action for malicious prosecution based on filing of a notice of lis pendens was premature because there was no termination of the former claim

favorable to the defendant); *N. Triphammer Dev. Corp. v. Itacha Assocs.*, 704 F.Supp. 422, 428 (S.D.N.Y. 1989) (finding a cause of action for the malicious filing of a notice of lis pendens first requires a favorable termination of the claim underlying the filing of the notice of lis pendens); *Hewitt v. Rice*, 154 P.3d 408, 412 (Colo. 2007) (en banc) ("We have consistently held that whe[n] a lis pendens forms the basis of a malicious prosecution claim, the lis pendens action must be terminated in favor of the plaintiff."); *Palmer Dev. Corp.*, 723 A.2d at 884 ("[T]here is a requirement in the malicious prosecution action that the proceeding has terminated favorably to the plaintiff, and that the favorable termination be on the merits, or at least reflect the merits, of the action.").

Here, the circuit court's order granting summary judgment to Coosaw explained the master based his removal of the notice of lis pendens on equitable, not substantive grounds. Specifically, the master weighed the benefits and burdens on the parties of keeping the notice of lis pendens in place. Neither the master's order striking the notice of lis pendens nor the master's order denying Coosaw's motion for reconsideration address the merits of the claims in the underlying action. Without a favorable termination reflecting the merits of the underlying action, we find River City's malicious prosecution claim premature. *See Law*, 368 S.C. at 435, 629 S.E.2d at 648 ("An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence."). Therefore, we affirm the circuit court's order granting summary judgment to Coosaw because the removal of a notice of lis pendens does not reflect the merits of the underlying action and thus cannot serve as a favorable termination for the purposes of a malicious prosecution claim.[9]

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[9] Lastly, we note our finding here does not impact River City's cause of action for abuse of process still pending before the circuit court. *See Pond Place*, 351 S.C. at 31, 567 S.E.2d at 897 ("The jurisdictions are in agreement that the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution."). Moreover, "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). We find this tort to be the more appropriate action to take against an alleged maliciously filed notice of lis pendens when there has not yet been a favorable termination that reflects the merits of the underlying claim.

II. Novel Questions of Law

River City contends summary judgment was inappropriate because this case presents novel questions of law and the circuit court should have afforded the parties the opportunity to fully develop the facts. We disagree.

In granting summary judgment, the circuit court considered each party's arguments, memoranda, and exhibits on all of the elements of River City's cause of action for malicious prosecution. The circuit court also reviewed the master's order removing the notice of lis pendens to determine the exact reasons for the master's decision. We find the parties could not have developed any additional facts on the issue of favorable termination of proceedings. *Law*, 368 S.C. at 435, 629 S.E.2d at 648 ("An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence."). Moreover, "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." *Houck v. State Farm Fire & Cas. Ins.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). We affirm.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

HUFF and SHORT, JJ., concur.