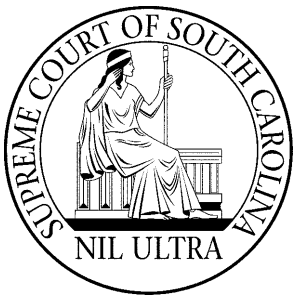

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 9, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Emily S. Brown, Respondent,

v.

Grady C. Odom, Appellant.

Appellate Case No. 2015-002628

Appeal From Barnwell County
Vicki J. Snelgrove, Family Court Judge

Opinion No. 5598
Heard May 8, 2018 – Filed September 19, 2018
Withdrawn, Substituted, and Refiled January 9, 2019

AFFIRMED

William E. Bird, of Bird & Smith, PA, of Columbia, for Appellant.

Robert N. Hill, of The Law Office of Robert Hill, of Lexington, and H. Edward Smith, of Brown, Jefferies & Boulware, of Barnwell, for Respondent.

WILLIAMS, J.: In this domestic relations matter, Grady C. Odom (Husband) appeals the family court's divorce decree, arguing the family court erred in (1) finding that Husband's limited liability company, Twin Oaks Villas, LLC (the LLC), transmuted into marital property; (2) imposing a constructive trust on the

LLC; and (3) including property in the marital estate that the parties did not own as of the date of filing. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on April 27, 2006. This was both parties' third marriage. They had no children together during their eight-year marriage; however, each party had two adult children from prior marriages. Wife filed for divorce on May 30, 2013, citing a one-year continuous separation as of December 15, 2012.

Prior to the parties' marriage, Husband formed two businesses: the LLC and Twin Oaks Personal Care, Inc. (the Corporation). The LLC owned a building in North Charleston, South Carolina. The Corporation managed and ran an assisted living facility in the LLC's building. Husband was the sole member of the LLC and the sole stockholder in the Corporation. In 1994, Husband approached Wife, a family friend at the time, for a $60,000 loan to refinance the entities. In 2003, Wife left college to work for the entities.

Wife testified that during the marriage she assisted Husband in making business decisions for the LLC, worked without pay at times, invested in the entities in lieu of putting funds in a retirement account, and assisted in obtaining a $2.4 million Housing and Urban Development (HUD) loan for the LLC. She also testified that during the marriage she devoted her time and money into the entities as an investment for herself and her children and believed Husband regarded the entities as marital property. Wife and Wife's son (Son) testified Husband held Wife out as a fifty-fifty partner in the Corporation and the LLC during the marriage. Wife testified Husband assured her he would complete the necessary paperwork to transfer fifty percent ownership to Wife after he obtained a HUD loan during the marriage; however, Husband never transferred the shares to Wife. Husband claimed that when the parties separated on December 15, 2012, Wife's involvement with the Corporation and the LLC ceased.

On May 15, 2008, Husband entered into an installment sales contract with Husband's Uncle, Ruben Odom (Uncle), for Husband to acquire 30.05 acres of land (the Ruben Odom Property) from Uncle for $60,092.[1] Husband used marital

[1] This land is unrelated to the LLC property.

funds to pay a $10,000 down payment and for two of the three $16,679.99 monthly installment payments to Uncle, as lienholder. In June 2010, Husband notified Uncle of his inability to pay the outstanding $17,522.31 balance, and the parties refinanced the monthly payments to $282.20. However, Husband again defaulted on monthly payments, and Uncle filed a complaint for foreclosure on the Ruben Odom Property. Using marital funds, Husband paid Uncle a total of $48,445 under the installment contract but still owed $11,647.46. On April 18, 2013, Husband, without Wife's knowledge, executed a quitclaim deed which conveyed the Ruben Odom Property to Uncle in lieu of foreclosure. On July 3, 2013, Husband filed a corrective quitclaim deed, to correct the property description on the Ruben Odom Property deed. Prior to Uncle's April 3, 2013 complaint for foreclosure, Husband, without Wife's knowledge, conveyed 251 acres of nonmarital property—worth $452,939—to SJW Holdings, LLC, his ex-wife's LLC, to hold in trust for Husband's daughters.

On July 9, 2013, the family court entered an order restraining the parties from disposing of or encumbering or reducing in value, any properties or assets, including the LLC. However, on December 18, 2013, Husband entered into an agreement to sublease the entities' operations, building, and land for $6,250 a month without Wife's knowledge. On October 28, 2014, prior to the conclusion of mediation, Husband abruptly left the mediation and willfully failed to disclose his whereabouts during litigation. Husband failed to appear for the merits hearing, present evidence, or respond to Wife's requests for admissions.[2] On August 17, 2015, the family court issued a final order, including both entities and the Ruben Odom Property in the marital estate.

On January 7, 2016, in response to a motion by Husband to alter or set aside the judgment, the family court entered an amended final order. The court found the Ruben Odom Property constituted marital property and awarded Wife a $48,445—equal to the total marital funds invested in the property—interest in the property. Based on evidence that the parties worked jointly as partners throughout the marriage and that Husband promised Wife an interest in the business, the court

[2] Wife's requests for admissions included the admissions that Wife assisted Husband in making business decisions for the LLC, she used personal funds to improve the LLC, she worked without pay at times, she assisted in obtaining a $2.4 million HUD loan for the LLC, the LLC was valued at $1,130,649 in 2012, and Husband used marital funds to purchase the Ruben Odom Property.

found the Corporation and the LLC each transmuted into marital property, as well as the $6,250 monthly rent payment. The court awarded Husband possession, use, and ownership of the entities; awarded Wife a one-half interest in the entities; and ordered a judgment in favor of Wife in the amount of $590,018 to effectuate a fifty-fifty division. The court awarded Wife an equitable interest in the entities by virtue of a constructive trust and imposed a judicial lien on the entities, in favor of Wife, to secure the $590,018 judgment. This appeal followed.

ISSUES ON APPEAL

I. Did the family court err in finding the LLC transmuted into marital property?

II. Did the family court err in imposing a constructive trust on the LLC?

III. Did the family court err in including property in the marital estate that the parties did not own as of the date of filing?

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). In a de novo review, the appellate court is free to make its own findings of fact but must remember the family court was in a better position to make credibility determinations. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011). "Consistent with this de novo review, the appellant retains the burden to show that the family court's findings are not supported by a preponderance of the evidence; otherwise, the findings will be affirmed." *Ashburn v. Rogers*, 420 S.C. 411, 416, 803 S.E.2d 469, 471 (Ct. App. 2017). On the other hand, evidentiary and procedural rulings of the family court are reviewed for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2.

An action to declare a constructive trust is one in equity, and the appellate court may find facts in accordance with its own view of the evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987).

LAW/ANALYSIS

I. Transmutation of the Entities

Husband argues the family court erred in finding the LLC transmuted into marital property. We disagree.

A. Preservation

As an initial matter, on appeal, Wife argues Husband's entity distinction argument is not preserved for our review because Husband first raised the argument in his motion to alter or set aside the judgment. We find this issue is preserved.

"Post-trial motions are . . . utilized to raise issues that could not have been raised at trial." Jean Toal et al., *Appellate Practice in South Carolina* 189 (3d ed. 2016). "A post-trial motion must be made when the [family] court either grants relief not requested or rules on an issue not raised at trial." *Fryer v. S.C. Law Enf't Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006).

The first time the family court ruled on whether the Corporation and the LLC transmuted into marital property was in the final order. Husband filed a motion to alter or set aside the judgment and argued for the first time that the evidence did not support the family court's finding that both the Corporation and the LLC transmuted into marital property. In its amended final order, the family court addressed this issue on the merits and found sufficient evidence supported its finding that both the Corporation and the LLC transmuted into marital property.

We find Husband properly raised the argument that the LLC and the Corporation are two separate entities through his Rule 59(e), SCRCP, motion. The family court's ruling, which treated Wife's involvement with the entities as a whole, rather than separate entities, created the distinction issue. *See Buist v. Buist*, 410 S.C. 569, 576, 766 S.E.2d 381, 384 (2014) (holding an alleged error in awarding attorney's fees can be raised for the first time in a motion to reconsider, in order to preserve the error for appellate review); *Anderson Cty. v. Preston*, 420 S.C. 546, 569, 804 S.E.2d 282, 294 (Ct. App. 2017) (finding the issue of whether a quorum at a county council meeting was destroyed by council members' conflicts of interest was not raised prior to trial or ruled upon during trial, and therefore the county's post-trial motion raising the issue was sufficient to preserve it for appeal,

when the circuit court never ruled at trial whether votes in question were invalid based upon conflict of interest, and the court did not find, until issuance of its final order, that council members who made those votes were disqualified from voting due to conflicts of interest), *cert. granted*, S.C. Sup. Ct. order dated March 29, 2018; *cf. Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

Because we find Husband's motion to alter or set aside the judgment constituted a timely challenge to the family court's finding of transmutation of both entities, the issue is preserved for our review.

B. Transmutation

Husband argues the LLC did not transmute into marital property and Wife only contributed to the Corporation, not the LLC.[3] We disagree.

With certain exceptions, marital property is "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." S.C. Code Ann. § 20-3-630(A) (2014). "Equitable distribution of marital property 'is based on the recognition that marriage is, among other things, an economic partnership.'" *Crossland v. Crossland*, 408 S.C. 443, 456, 759 S.E.2d 419, 426 (2014) (quoting *Morris v. Morris*, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999)). "Upon dissolution of the marriage, marital property should be divided and distributed in a manner [that] fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." *Id.* (quoting *Morris*, 335 S.C. at 531, 517 S.E.2d at 723).

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[3] On appeal, Husband does not contest the family court's ruling that the Corporation transmuted into marital property. This ruling is the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding an unchallenged ruling becomes the law of the case regardless of whether the ruling is correct); *Sanders v. Sanders*, 396 S.C. 410, 423 n.2, 722 S.E.2d 15, 21 n.2 (Ct. App. 2011) (holding an unappealed allocation of assets becomes the law of the case).

Nonmarital property may transmute into marital property if "[1] it becomes so commingled with marital property that it is no longer traceable, [2] is titled jointly, or [3] is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property." *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013). "Transmutation is a matter of intent to be gleaned from the facts of each case. 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." *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "If the [spouse] presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." *Wilburn*, 403 S.C. at 382, 743 S.E.2d at 740. Evidence of transmutation "may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 111 (Ct. App. 1988). "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Id.* at 295–96, 372 S.E.2d at 111.

Here, Husband adamantly contends he never intended the LLC to become marital property; however, transmutation is ultimately a matter of discerning the parties' intent from the facts of the case. *See Pittman v. Pittman*, 407 S.C. 141, 151, 754 S.E.2d 501, 506 (2014) ("[T]ransmutation is ultimately a matter of discerning the *parties'* intent." (emphasis added)). Husband failed to appear at trial, call witnesses to rebut Wife's transmutation testimony, or respond to Wife's requests for admissions. *See* Rule 220(c), SCACR (stating the appellate court may affirm for any reason appearing in the record); Rule 36, SCRCP (stating a matter is deemed admitted when the party served fails to respond with a written answer or objection regarding the admission). "[A] party cannot sit back at trial without offering proof, then come to this [c]ourt complaining of the insufficiency of the evidence to support the family court's findings." *Honea v. Honea*, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987); *see also Wilburn*, 403 S.C. at 386, 743 S.E.2d at 741 ("[The h]usband did not contest [the w]ife's testimony that the assets in her accounts were nonmarital. His failure to offer evidence controverting [the w]ife's testimony is sufficient justification to affirm the family court."). Husband's memorandum in support of his motion to alter or set aside the judgment is the only

item in the record supporting Husband's argument that he lacked the intent to transmute the LLC into marital property because Wife was involved with the Corporation, not the LLC. However, a memorandum in support of a motion is not evidence. *McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011); *see also Lewis*, 392 S.C. at 384, 709 S.E.2d at 651 (finding the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the *evidence*).

Upon de novo review, we find the preponderance of the evidence supports the family court's finding that the parties' actions during the marriage objectively demonstrated a mutual intent to regard the LLC as a marital asset. For instance, Wife testified extensively about her financial and non-financial marital contributions to the entities, including:

1. Loaning the entities over $200,000[4] during the marriage—including $25,000 to upgrade the LLC's building's telephone system and $17,400 to make noncritical repairs to the building;
2. Assisting in obtaining loans, including a HUD loan, and refinancing loans for the entities;
3. Consulting with architects and engineers to implement Department of Health and Environmental Control (DHEC) regulatory codes;
4. Overseeing compliance with structural standards;
5. Purchasing sheetrock and iron needed for DHEC building upgrades;
6. Coordinating with governmental agencies and participating in DHEC inspections;
7. Attending staff meetings;
8. Overseeing all accounts payable;
9. Assuming responsibility for three bank accounts related to the businesses—which listed her as the LLC's business advisor—and acting as signatory on the parties' personal bank account and the Corporation's bank account;
10. Authorizing and issuing maintenance checks;

[4] Wife testified she invested $210,464 of personal funds into the entities, of which she invested $6,000 prior to the marriage. Wife also testified that in 1994 she loaned Husband $60,000 to refinance the entities; however, Husband repaid the 1994 loan, and Wife did not include the loan in the $210,464.

11. Handling all correspondence for the entities during 2004, 2005, 2006, 2009, and 2010, including correspondence for the HUD loan;
12. Painting walls and installing ceiling fans; and
13. Purchasing planters and patio furniture.

Additionally, Wife and Son testified Husband introduced Wife as his partner and owner in the entities and intended the LLC to be marital property. Wife testified she worked without pay at times and, in lieu of putting funds in a retirement account, she invested in the entities and had no retirement accounts as a result. *See Pittman*, 407 S.C. at 151, 754 S.E.2d at 506–07 (finding both parties' significant day-to-day involvement in the business—including the wife's credible testimony that all major business decisions were made jointly, including the parties' decision to structure the wife's pay to benefit both parties at the time and upon the wife's retirement—demonstrated the parties' intent to treat the business as a marital asset); *Jenkins*, 345 S.C. at 99–100, 545 S.E.2d at 537 (finding both acreage and a rental home the husband inherited transmuted into marital property due in part to the wife's substantial involvement in the general care and maintenance of the property and the parties' strategic plan to make the property part of their joint retirement plan); *Wyatt v. Wyatt*, 293 S.C. 495, 497, 361 S.E.2d 777, 779 (Ct. App. 1987) ("Though one spouse acquires legal title to property prior to marriage, the discharge of indebtedness by both the husband and wife may transmute the property into marital property.").

Husband failed to respond to Wife's requests for admissions, which included the admissions that Wife assisted in making business decisions for the LLC, she used personal funds to improve the LLC, she worked without pay at times, and she assisted in obtaining a $2.4 million HUD loan for the LLC. Due to Husband's failure to act, the matters contained in Wife's requests for admissions are deemed admitted under Rule 36, SCRCP. *See* Rule 36, SCRCP (stating matters contained in a request for admission are deemed admitted when the party served fails to respond with a written answer or objection regarding the admission). For the foregoing reasons, we find the LLC transmuted into marital property.

II. Constructive Trust

Husband argues there is no clear and convincing evidence that Wife's actions conferred a benefit on the LLC. We disagree.

A constructive trust arises when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it." *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990). "A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. Fraud is an essential element, although it need not be actual fraud." *Lollis*, 291 S.C. at 529, 354 S.E.2d at 561. "In order to establish a constructive trust, the evidence must be clear and convincing." *Cox*, 301 S.C. at 500, 392 S.E.2d at 794.

On appeal, Husband contends Wife's investments were for the benefit of the Corporation, not the LLC. The record reflects Wife provided a benefit to the LLC in the form of a HUD loan. Wife testified the $25,000 she invested to upgrade the LLC's buildings' telephone system and the $17,400 she invested to make noncritical building repairs were both necessary to procure the HUD loan. The HUD loan, which Wife helped procure and later repay, was obtained for the benefit of the LLC, because the LLC, not the Corporation, was appraised in connection with the HUD loan in 2009. Based on the 2009 appraisal of $3.2 million, the parties obtained a $2.4 million HUD loan. Taking into account all debts, the LLC was valued at $1,130,649 in 2012. By failing to respond to Wife's requests for admissions, the matters contained therein—that Wife used personal funds to improve the LLC and that Wife assisted in making business decisions for the LLC—are admitted. *See* Rule 36, SCRCP (stating matters contained in a request for admission are deemed admitted when the party served fails to respond with a written answer or objection regarding the admission). The evidence supports the family court's finding that Wife's efforts and investments conferred a benefit on the LLC.

Husband also argues no clear and convincing evidence of fraud exists to impose a constructive trust on the LLC. Wife and Son testified Husband held Wife out as a fifty-fifty partner in the LLC and Wife believed she was making an investment for herself and her children by investing her time and money into the LLC. Wife testified Husband assured her he would complete the necessary paperwork for a share change after the completion of the HUD loan. Husband failed to rebut Wife's testimony on this issue. *See Wilburn*, 403 S.C. at 386, 743 S.E.2d at 741 ("[The h]usband did not contest Wife's testimony that the assets in her accounts were nonmarital. His failure to offer evidence controverting [the w]ife's testimony is sufficient justification to affirm the family court."). The record contains clear and

convincing evidence that Husband fraudulently led Wife to believe she was a partner in the LLC and that Wife, in reliance of Husband's promise of equity in the LLC, devoted efforts that significantly enhanced the LLC's value. Allowing Husband to retain ownership of the LLC to the exclusion of Wife is inequitable. We affirm the imposition of a constructive trust.

III. Ruben Odom Property

Husband argues the family court erred by including property in the marital estate that the parties did not own as of the date of filing. Specifically, Husband argues that because he recorded the quitclaim deed in lieu of foreclosure on April 18, 2013, prior to Wife's May 30, 2013 filing, the property was not in existence on the date of filing and was not subject to equitable distribution.[5] We disagree.

"For the family court to properly include property within the marital estate, two factors must coincide." *Shorb v. Shorb*, 372 S.C. 623, 632, 643 S.E.2d 124, 129 (Ct. App. 2007); *see also* S.C. Code Ann. § 20-3-630(A) (2014). "First, the property must be acquired during the marriage" and "[s]econd, the property must be owned on the date of filing or commencement of marital litigation." *Shorb*, 372 S.C. at 632, 643 S.E.2d at 129. The ownership prong may present problematic issues if the family court overlooks assets that should have been included in the marital estate, but were non-existent on the date of filing due to a party's misconduct. *Id.* "Consequently, if a party attempts to unfairly extinguish ownership of marital property before the date of filing or to improperly delay

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[5] Husband argues two additional grounds warrant overruling the inclusion of the Ruben Odom Property in the marital estate. First, Husband argues the family court erroneously found Husband conveyed the property to his daughter after the foreclosure action. This issue is unpreserved because Husband failed to raise this issue in his Rule 59(e) motion. *See Nicholson v. Nicholson*, 378 S.C. 523, 537, 663 S.E.2d 74, 81–82 (Ct. App. 2008) (stating an issue must have been raised to and ruled upon by the circuit court to be preserved on appeal, and if the circuit court does not rule on an issue and the appellant does not raise it in a Rule 59(e) motion, it is unpreserved). Second, Husband argues the date of valuation of the Ruben Odom Property should be the date of filing. This issue is unpreserved because Husband failed to include the issue in the statement of issues on appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

ownership of marital property until after litigation is commenced, the family court must include that property in the marital estate." *Id.*; *see also Bowman v. Bowman*, 357 S.C. 146, 156, 591 S.E.2d 654, 659 (Ct. App. 2004) ("[W]here lack of ownership status as of the date of marital litigation is attributable to any purposeful act or omission by the spouse, the property shall be deemed 'owned' within the meaning of [section 20-3-630] so as to include the marital portion in the marital estate."). Concluding otherwise would "promote fraud, reward misconduct, and contravene legislative intent." *Bowman*, 357 S.C. at 155, 591 S.E.2d at 659.

However, the family court will include such property in the marital estate only if the party seeking to classify the property as marital property introduces clear and convincing evidence of fraud in relation to the disposal of the property. *See Shorb* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options."); *see also Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) ("Fraud must be shown by clear and convincing evidence."). "[F]raud will not be presumed, but [one] who alleges it must prove it." *Devlin v. Devlin*, 89 S.C. 268, 272, 71 S.E. 966, 968 (1911).

As to the first prong, both parties concede that Husband acquired the property during the marriage with marital funds. *See Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."). With regard to the second prong, Husband's quitclaim deed to Uncle before the date of filing negated the ownership prong necessary to classify the funds as marital property. *See Shorb*, 372 S.C. at 633, 643 S.E.2d at 130 (finding the sale of stock options, which were acquired during the marriage but sold before the date of filing, negated the ownership prong, which was necessary to classify the proceeds from the sale of the options as marital). Thus, the property is marital property only if Wife introduced clear and convincing evidence of fraud in relation to Husband's disposal of the property. *See id.* at 633, 643 S.E.2d at 129 ("Proceeds from [the h]usband's stock options will be considered marital only if the [w]ife introduces clear and convincing evidence to establish fraud in relation to [the h]usband's sale of the options.").

The record contains clear and convincing evidence Husband fraudulently executed the quitclaim deed to Uncle in anticipation of divorce. Husband executed the quitclaim deed on April 18, 2013, prior to Wife's May 30, 2013 divorce filing, but

more than five months after the parties December 15, 2012 separation.[6] On August 5, 2013, three months after Wife filed for divorce, Husband filed a corrective quitclaim deed. Husband did not afford Wife the opportunity to make the $282 monthly installment payments and avoid foreclosure; rather, he executed the quitclaim deed to Uncle without Wife's knowledge. The $48,445 Husband paid to Uncle under the installment contract came from marital funds, and the funds were lost when Husband executed the quitclaim deed.

Husband claims the quitclaim deed resulted from his inability to make the $282 monthly payments on the $11,647 loan balance. However, we find that prior to Husband claiming he could not afford the installment payments, Husband purposefully divested himself of nonmarital property in anticipation of marital litigation. On January 2, 2013—prior to Uncle's April 3, 2013 complaint for foreclosure—Husband recorded a deed to his daughters through SJW Holdings, LLC, which conveyed nonmarital property with a market value of $452,939. On May 15, 2014, Husband deeded his remainder interest in another plot of land, worth approximately $51,900, to one of his daughters.[7] Husband also retained his ownership interest in the Corporation and the LLC, collectively valued at $1,239,820 in 2012. The record contains clear and convincing evidence Husband intentionally divested himself of nonmarital property, which hindered his ability to avoid foreclosure of the Ruben Odom Property. *See Smith v. Smith*, 327 S.C. 448, 458–59, 486 S.E.2d 516, 521 (Ct. App. 1997) (holding the family court, in dividing the marital property, properly considered actions taken by the husband before the parties' actual separation, including opening and closing accounts and transferring money).

We find Wife introduced clear and convincing evidence of fraud in relation to Husband's disposal of the Ruben Odom Property. We affirm the inclusion of the Ruben Odom Property in the marital estate.

CONCLUSION

Based on the foregoing analysis, the family court's decision is

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[6] In his amended answer, Husband claimed he left the home in November 2012.

[7] On September 25, 2012, Uncle conveyed this property to Husband, as remainderman, and reserved a life estate.

AFFIRMED.

LOCKEMY, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda A. Gibson, individually and in capacity as Trustee of the Paul William Gibson Family Trust; Heritage Seven, LLC; Seven Oaks Apartments, LLC; and 3205 Palm Boulevard, LLC, Appellants,

v.

Andrew K. Epting, Jr., LLC; Andrew K. Epting, Jr.; George J. Kefalos, P.A.; George J. Kefalos; Gedney M. Howe, III, P.A.; Gedney M. Howe, III; John S. West, Attorney-at-Law, LLC; and John S. West, Respondents.

Appellate Case No. 2016-000432

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

Opinion No. 5612
Heard October 10, 2018 – Filed January 9, 2019

AFFIRMED

Thomas A. Pendarvis and Christopher W. Lempesis, Jr., both of Pendarvis Law Offices, PC, of Beaufort; and James R. Davis, of J. Davis Law Firm, P.C., of Daniel Island, for Appellants.

M. Dawes Cooke, Jr. and Jeremy E. Bowers, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Respondents.

HILL, J.: Linda Gibson and several of her companies—Heritage Seven, LLC, Seven Oaks Apartments, LLC, and 3205 Palm Boulevard, LLC (collectively, Gibson)—appeal the circuit court order granting summary judgment to Andrew Epting, Jr., George J. Kefalos, Gedney M. Howe, III, John S. West, and their respective law firms (collectively, Respondents). We affirm.

I.

In 2007, Gibson retained a ReMax real estate broker to assist her in the purchase and management of an apartment complex. In 2008, she sued ReMax Professional Realty and the broker, alleging they committed various wrongs and torts related to the management. In late 2009, Gibson defaulted on a loan with Ameris Bank (Ameris), which was secured by a mortgage on several properties she owned, including the complex. When it appeared Gibson might have a lender liability claim against Ameris, her lawyer in the ReMax case withdrew due to a conflict of interest. Gibson then retained lawyer Robert L. Papa, who advised her she was not a candidate for bankruptcy and tried, unsuccessfully, to negotiate with Ameris. Papa approached Kefalos about representing Gibson on her issues with Ameris. Kefalos expressed interest in taking the case but asked that Epting also be brought on. After Gibson and Papa met with Kefalos and Epting, Papa advised them that Gibson wished to retain Kefalos to represent her in the ReMax case and Epting to represent her in negotiations with Ameris. Correspondence and discussions ensued between Epting and Papa concerning the fee structure. Epting emphasized Gibson might benefit from a contingency fee rather than an hourly rate given her financial stress, particularly if Ameris began a "protracted battle with no result certain" by suing for foreclosure. In April 2010, Gibson signed a contingency fee agreement that referenced a February 4 email she claims she did not receive or see.

On June 14, 2010, Ameris sued Gibson, alleging she owed $2,796,466.75 plus interest on the loan and seeking foreclosure of the mortgage as well as a deficiency judgment. On July 9, 2010, Epting emailed Gibson asking permission to associate Howe and West for no additional fee. Epting also filed an answer and counterclaim on Gibson's behalf.

Ameris sold the note on the apartment complex to Galt Valley, LLC, which was substituted for Ameris as the plaintiff in the foreclosure action. Ameris remained the defendant on Gibson's counterclaims. Galt Valley's counsel began negotiations with Epting and moved for appointment of a receiver. Respondents opposed the motion, and the Master-in-Equity later denied it after a hearing. Continuing to press for foreclosure, Galt Valley sent Epting a settlement offer, noting Gibson's potential exposure to a $1,697,678.10 deficiency judgment and offering to resolve the case by

having Gibson deed them the collateral properties and sign a $1.5 million note. Epting rejected the offer on Gibson's behalf.

Respondents asked Gibson to consult an independent lawyer to advise her on their calculation of the proposed fee, as well as the prospect of securing the fee by granting Respondents a mortgage on other property Gibson owned. Gibson chose Paul Tecklenburg, who had represented her and her family in the past, to review Respondents' proposals. On November 8, 2010, Galt Valley offered to accept the deeds to the collateral properties in lieu of foreclosure, waive any deficiency, and allow Gibson to retain her counterclaims against Ameris. Tecklenburg testified he knew the Galt Valley offer had either been made or was imminent, and he negotiated with Respondents to reduce the calculated fee from over $700,000 to $566,666.66. Tecklenburg then drafted the fee agreement that all parties signed on November 18, 2010, in which Gibson agreed to pay Respondents "[o]ne-third (1/3) of all sums saved from the deficiency amount claimed by Ameris, in the amount of $1,700,000."

Gibson later settled the ReMax matter for $850,000, and she paid the costs of the foreclosure case and the $566,666.66 attorneys' fee out of these funds. Epting and Kefalos also tried Gibson's counterclaims against Ameris, receiving a judgment of over $2.9 million dollars. After Ameris appealed, Gibson engaged different counsel. This court reversed the judgment. *See Gibson v. Ameris Bank*, 420 S.C. 536, 538, 804 S.E.2d 276, 277 (Ct. App. 2017), *cert. denied*, S.C. Sup. Ct. Order dated Feb. 1, 2018.

On July 30, 2013, Gibson brought this action against Respondents over the attorneys' fee in the foreclosure case. As amended, her complaint included causes of action for *inter alia* legal malpractice, breach of fiduciary duty, conversion, violation of the South Carolina Unfair Trade Practices Act (SCUTPA), fraud, rescission, and negligent misrepresentation. After a hearing, the circuit court granted Respondents summary judgment, which Gibson now asks us to overturn.

II.

We review grants of summary judgment using the same yardstick as the trial court. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). We view the facts in the light most favorable to Gibson, the non-moving party, and draw all reasonable inferences in her favor. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). Respondents are entitled to summary judgment only if "there is no genuine issue as to any material fact . . . ." Rule 56(c), SCRCP. Summary judgment is a drastic remedy to be invoked cautiously and must

be denied if Gibson demonstrates a scintilla of evidence in support of her claims. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

i. Ambiguity of the November 18, 2010 Fee Agreement

Gibson claims the November 18, 2010 fee agreement is ambiguous, emphasizing her appeal "focuses on the circuit court's errors in resolving—in favor of the Lawyers who drafted the fee documents—disputed questions of fact concerning the terms of the fee agreement." Of course, we now know Tecklenburg wrote the fee agreement, not Respondents. We also know Gibson and her two experts framed their arguments on a mirage: that Gibson was unaware of Galt Valley's settlement offer to waive the deficiency when she signed the November 18 fee agreement. Gibson was aware.

Gibson's next point is set on another phantom foundation: that the November 18 agreement was ambiguous because Respondents interpreted it as creating a dual contingency fee, entitling them to not only one-third of the $1.7 million savings in the foreclosure action but also a percentage of whatever Gibson collected on the counterclaims against Ameris. If this appeal concerned whether the November 18 agreement created a dual contingency fee, we might agree with Gibson that ambiguity exists because the Agreement can be read as limiting the fee for both the "defense of and pursuit of a counterclaim in a foreclosure action brought by Ameris Bank . . ." to one-third of the deficiency amount saved. The material facts in this case, however, are confined to what the parties agreed to regarding the fee for defending the foreclosure action. Whether the Agreement created a dual contingency fee is immaterial to our inquiry.

Even if relevant, any issue concerning whether the alleged dual contingency fee rendered the November 18 agreement ambiguous is now moot. When the November 18 agreement was signed, Gibson's contingency fee obligation on the counterclaims was hypothetical. When this court reversed that judgment, any issue that the November 18 fee agreement created or supplemented a contingency fee obligation to Respondents for their work trying the counterclaims became moot, as her recovery became zero. *See* W. Shakespeare, *King Lear* act I, sc. 1 ("Nothing will come of nothing.").

Ambiguity of a contract is a question of law, which we review de novo. *Callawassie Island Members Club, Inc. v. Dennis*, Op. No. 27835 (S.C. Sup. Ct. filed Nov. 14, 2018) (Shearouse Adv. Sh. No. 45 at 13–14). The essential terms of the November agreement are plain and straightforward, and we discern no ambiguity in the language used to calculate the fee. Because the issue of whether the alleged dual contingency fee rendered the November 18 agreement ambiguous is irrelevant and

moot, there is no escaping the conclusion that Gibson agreed to pay a one-third contingency fee to Respondents based on the $1.7 million amount saved on the deficiency claim against her. The language is not susceptible to any other rational interpretation.

Gibson claims she was confused by the terms and did not understand the concept of a reverse contingency fee. This creates no genuine issue of material fact because one who has signed a contract is presumed to have read, understood, and assented to its terms. *See Wachovia Bank Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 333, 755 S.E.2d 437, 443 (2014); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39–40, 340 S.E.2d 786, 789–90 (1986). And unambiguous terms of a written contract may not be altered by parol evidence. *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) ("Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties.").

Gibson has a host of other reasons she believes the fee agreement was unclear, but they all hinge on either the existence of a dual contingency fee, parol evidence, or allegations concerning events occurring after the date of the contract. None of these reasons concern facts that are material in the sense intended by Rule 56, SCRCP. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment.").

The summary judgment standard governing Gibson's claims requires her to produce only a "scintilla" of evidence to avoid judgment as a matter of law, but a scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows. *Bethea v. Floyd*, 177 S.C. 521, 529, 181 S.E. 721, 724 (1935) ("'Scintilla' means, according to 56 C. J. 863, 'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.'"); *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31–32, 61 S.E. 1064, 1067 (1908) ("[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror."); *Scintilla*, The Oxford English Dictionary (2nd ed. 2018) ("A spark … a minute particle, an atom."); *see Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) ("When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" (citations omitted)); *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 42, 780 S.E.2d 897, 901 (2015) (affirming trial court's grant of summary judgment and noting court of appeals improperly "cherry-picked" an isolated portion of the record, placed it out of context, and "elevated what is, at best, a metaphysical doubt into a genuine issue of material fact"); *Main v. Corley*, 281 S.C. 525, 527, 316

S.E.2d 406, 407 (1984) ("The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine."); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) (explaining that party opposing summary judgment "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another").

ii. Breach of Fiduciary Duty and Legal Malpractice

Gibson asserts Respondents breached their fiduciary duty to her in numerous ways, all of which duplicate her legal malpractice claim because the duties arose out of the attorney-client relationship and she alleges the same facts as to both claims. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 336–37, 732 S.E.2d 166, 173 (2012) (providing when breach of fiduciary duty and legal malpractice claims both arise out of the duties inherent to the attorney-client relationship and the same factual allegations, the claim for breach of fiduciary duty is duplicative of and encompassed by the claim for legal malpractice). Accordingly, we only address Gibson's claim for legal malpractice.

Gibson primarily contends Respondents committed legal malpractice by charging an unreasonable and excessive fee and failing to ensure the presentation, content and execution of the fee agreement conformed to ethical rules. She bases this claim on the affidavits of her two expert witnesses, which rely on standards established by the South Carolina Rules of Professional Conduct (SCRPC). The SCRPC can be relevant in assessing the legal duty of an attorney in a malpractice action, but neither our supreme court nor this court has ever held a violation of the SCRPC in itself constitutes legal malpractice. *See Spence v. Wingate*, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) ("[T]he Rules of Professional Conduct do not, in themselves, create a cause of action or establish evidence of negligence per se . . . . A review of the Scope of Rule 407, SCACR clearly indicates that the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation."). The SCRPC provide criteria for disciplining members of the bar for ethical transgressions. This discipline occurs under the control of our supreme court and is therefore a public regulatory check. The ethical rules were not designed to be weaponized for the use of private litigants. *See* Rule 407 Scope [7], SCACR ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . [The Rules] are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an

antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule."). We therefore affirm the grant of summary judgment as to Gibson's malpractice claim based on Respondents' failure to conform to the SCRPC.

For the same reasons, we affirm summary judgment as to the malpractice claim for allegedly excessive fees. Charging an unreasonable fee may expose a lawyer to discipline, but it does not equate to legal malpractice. *See* 1 Ronald E. Mallen, *Legal Malpractice* § 1.2 (2018 ed.) ("The test to distinguish malpractice from other wrongs is whether the claim primarily concerns the quality of the legal services."); *id*. ("Fee disputes concerning the quality and value of legal services rendered by the client's lawyer are frequent. When the issue concerns the reasonableness of the fee, with no complaint about the lawyer's competence, the claim should not be characterized as legal malpractice . . . ."); *see also Dadic v. Schneider*, 722 So. 2d 921, 923 (Fla. Dist. Ct. App. 1998) ("We further affirm the summary judgment as to the malpractice count for excessive fees. No authority supports a cause of action on this theory."); *Davis v. Findley*, 422 S.E.2d 859, 860–61 (Ga. 1992) (holding the violation of ethics rules regarding excessive fees does not create a cause of action); *Luddy v. Osborn*, 186 A.D.2d 1069, 1069-70 (N.Y. App. Div. 1992) (over-billing does not support cause of action for negligence).

To the extent the experts allege Respondents somehow committed malpractice by successfully defending the foreclosure action, this is also insufficient to create a genuine issue of material fact. Given the extraordinarily beneficial result she received, Gibson cannot demonstrate any damages proximately flowing from Respondents' representation. *See Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570–71, 183 S.E.2d 438, 444 (1971) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation."). Despite the experts' armchair critique of Respondents' complete victory on Gibson's behalf, Gibson's only evidence of the essential element of damages relates to the setting and collection of a fee she now claims was excessive, which we have held cannot in itself constitute legal malpractice. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010) (affirming summary judgment on legal malpractice claim due in part to lack of expert testimony necessary to prove proximate cause).

iii. Unjust Enrichment

Gibson also claims quantum meruit, the equitable remedy for unjust enrichment, but that cause of action cannot undo what she agreed to do in the fee agreement. Although Gibson pled rescission, there is no evidence of mutual mistake, fraud, coercion, or duress, nor is the rescission claim preserved for appellate review. As we have held the November fee unambiguous as a matter of law, Gibson cannot now

claim unjust enrichment. A party cannot disavow a binding contract and pursue quantum meruit, no matter how green the grass of equity may seem. *Swanson v. Stratos*, 350 S.C. 116, 122, 564 S.E.2d 117, 120 (Ct. App. 2002); *see* 66 Am. Jur. 2d *Restitution and Implied Contracts* § 68 (2018) ("[I]t is a defense to an action in quantum meruit that there is a valid express contract covering the supplied services or material furnished." (footnotes omitted)).

iv. Remaining Claims

Although Gibson's brief states genuine issues of material fact exist as to all of her causes of action, the only claims we have not already addressed that she offers substantive argument and authority on are negligent misrepresentation and violation of SCUTPA. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Neither of these claims were preserved for appellate review. They were not argued at the summary judgment hearing, and the trial court did not rule on them specifically in its order. From the record we have been furnished, it appears Gibson did not ask the court to address them in her reconsideration motion. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [appellate courts] with a platform for meaningful appellate review." (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))). Accordingly, the trial court's grant of summary judgment to Respondents is

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Quicken Loans, Inc., Appellant,

v.

Wayne D. Wilson; Calvin O. Wilson, III; any other Heirs-in-Law or devisees of Ezekiel (Ellen) T. Wilson, deceased, their heirs, personal representatives, administrators, successors and assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in a class designated as John Doe; any unknown minors or persons under a disability being a class designated as Richard Roe; and Park Sterling Bank, Respondents.

Appellate Case No. 2016-001214

Appeal From Barnwell County
James Martin Harvey, Jr., Special Referee

Opinion No. 5613
Heard September 10, 2018 – Filed January 9, 2019

REVERSED

Benjamin Rush Smith, III, Allen Mattison Bogan, Carmen Harper Thomas, and Brian Montgomery Barnwell, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Charles L. Dibble, of Dibble Law Offices, and Steven W. Hamm, of Richardson Plowden & Robinson, PA, both of Columbia, Daniel Webster Williams, of Bedingfield & Williams, of Barnwell, and C. Bradley Hutto, of Williams & Williams, of Orangeburg, all for Respondents.

Carolyn Grube Lybarker and Kelly H. Rainsford, both of Columbia, for Amicus Curiae South Carolina Department of Consumer Affairs.

SHORT, J: Quicken Loans, Inc. (Quicken) filed this foreclosure action against Wayne D. Wilson; Calvin O. Wilson, III; any other Heirs-in-Law or devisees of Ezekiel (Ellen) T. Wilson, deceased, their heirs, personal representatives, administrators, successors and assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in a class designated as John Doe; any unknown minors or persons under a disability being a class designated as Richard Roe; and Park Sterling Bank (collectively, Respondent). Quicken appeals the special referee's order granting Respondent's motion for partial summary judgment, arguing the special referee erred in (1) holding Quicken violated the Attorney Preference Statute (the Act); (2) finding unconscionability is a remedy for a violation of the Act; (3) failing to find Respondent's counterclaim time-barred by the statute of limitations; (4) denying Quicken's jury trial demand and motion to amend the pleadings; and (5) relying on confidential information subject to a protective order in an unrelated case. We reverse.

BACKGROUND FACTS

On November 7, 2011, Calvin and Ezekiel (Ellen) T. Wilson applied to Quicken for a loan to be secured by a mortgage on their residence. Mr. Wilson died on September 20, 2013, and Mrs. Wilson died on November 17, 2014. Wayne D. Wilson is the personal representative of Mrs. Wilson's estate.

Quicken telephonically takes information for the loan application from the borrower. Quicken's operating system prompts Quicken's banker to ask the borrower the following question, "Will the borrower select legal counsel to

represent them in this transaction?" If the borrower responds, "no," the attorney preference form is prepopulated to read, "I/We will not use the services of legal counsel." There is no list of acceptable attorneys provided to the borrower in the event he does not have a preference. If the borrower responds, "yes," the system populates the form to read: "Please contact lender with preference." Quicken's system does not permit an attorney name to be entered at the time of the telephonic application. The system cannot generate an application package without asking the attorney preference question. Once the application is completed, it is sent electronically or by mail to the borrower. Any applications in which the form is prepopulated with "I/We will not use the services of legal counsel" is forwarded to Quicken's affiliate company, Title Source, Inc., which acts as the settlement agent in the transaction and subcontracts with attorneys to perform the settlement services.

The Wilsons signed the prepopulated form, entitled "Attorney/Insurance Preference Check List," and declined services of legal counsel. This form appears nearly identical to the form promulgated by the South Carolina Department of Consumer Affairs (DOCA), except Quicken's form is prepopulated with responses. Similar to the DOCA form, Part 1 of the Quicken form states, "I(We) have been informed by the lender that I (we) have a right to select legal counsel to represent me (us) in all matters of this transaction relating to the closing of the loan." Unlike the DOCA form, however, Part 1(a) of the Quicken form is prepopulated to read, "I/We will not use the services of legal counsel." Under Part 1(b), the Quicken form, similar to the DOCA form, initially states, "Having been informed of this right, and having no preference, I asked for assistance from the lender and was referred to a list of acceptable attorneys. From that list I select: . . . ." Unlike the DOCA form, which provides blank lines to fill in an attorney's name and the borrower's signature, the Quicken form is prepopulated with the responses, "Not Applicable."

Quicken presented the affidavit of Carlton D. Robinson, the closing attorney, who averred he explained it was his practice to explain the legal effect of the Attorney/Insurance Preference Checklist to borrowers, and he would not have proceeded with the closing if the Wilsons had any dissatisfaction with him representing them during the closing. The transaction was completed on December 14, 2011.

Quicken filed this mortgage foreclosure action in March 2015. Respondent answered and counterclaimed, arguing Quicken waived its right to foreclose by using a prepopulated form for the loan and mortgage in violation of South Carolina common law and statutes.[1] Quicken filed an answer to the counterclaim, denying the allegations.

Quicken moved for an order of reference to the special referee, which was granted on September 1, 2015. Quicken subsequently demanded a jury trial and moved to transfer the case to the general docket. Respondent moved for partial summary judgment, arguing it was entitled to judgment as a matter of law based on Quicken's use, at the closing of the loan and mortgage, of an attorney preference form that violated South Carolina law. Quicken cross-moved for summary judgment and responded to the motion, arguing (1) Respondent's claims were barred by the statute of limitations; (2) it complied with the statute governing the attorney preference form; (3) an alleged violation of the statute does not render the note and mortgage unconscionable; (4) Respondent could not establish unconscionability in any event; and (5) the borrower's claim did not survive her death. Quicken also moved to amend the pleadings to assert additional claims and renew its request for a jury trial and transfer to the general docket.

After hearing argument on the motions, the special referee granted Respondent's motion for partial summary judgment, denied Quicken's motion for summary judgment, denied Quicken's requests for a jury trial and transfer to the general docket, and granted in part and denied in part Quicken's motion to amend. This appeal followed. Respondent moved to certify and transfer the case to our supreme court. Quicken filed a return, objecting to certification. By order dated August 4, 2016, the supreme court denied the motion.

STANDARD OF REVIEW

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Whether a form complies with the requirements of the Act is a question of law. *See id.* (finding the question of whether a form complied with section 38-77-350(A) regarding the meaningful

[1] Respondents Wayne D. Wilson and Calvin Wilson, III, filed a separate answer and counterclaim. Quicken moved to strike the pleading as untimely filed.

offer of underinsured motorist coverage was a question of law). "Questions of law may be decided with no particular deference to the trial court." *Id.* (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008)).

LAW/ANALYSIS

I. ATTORNEY PREFERENCE STATUTE

Quicken argues it did not violate the Act. We agree.

The Attorney Preference Statute (the Act) provides in part the following:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose:
>
> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction.

S.C. Code Ann. § 37-10-102(a) (2015). The Act, part of the Consumer Protection Code, is to be liberally construed. *See* § 37-1-102 (2015) (providing the Consumer Protection Code "shall be liberally construed and applied to promote its underlying purposes and policies"). The purpose of the Act is to protect consumers. *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993). The Act provides a "creditor may comply with this section" by performing one of the following:

> (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a

> preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

§ 37-10-102(a) (2015); *see Davis v. NationsCredit Fin. Serv. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (holding that "a lender substantially complies with section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information").

The form distributed by the administrator, DOCA, provides a safe harbor for the creditor. § 37-10-102(a). In this case, Quicken used the DOCA form, but prepopulated the form according to the borrower's telephonic responses during the pre-application process. DOCA interpreted the legislative intent of section 37-10-102(a) in 1983 as follows:

> [I]t would appear that in enacting [the Act,] the General Assembly had two main objectives: (1) to provide the borrower with the right to legal counsel of his choosing . . . and (2) to make th[is] right[] known to the borrower (applicant) by a conspicuous disclosure and have the borrower make his preference known before he is inundated with other documents related to the transaction.

S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 10.102(a)-8302 at 2 (1983). DOCA described the penalties for "[a] creditor that fails to ascertain the preference of the borrower as to the choice of attorney" by reference to section 37-10-105, which provides for the creditor's forfeiture of the finance charges and other penalties. *Id.* No. 10.102(a)-9301 at 3 (1993).

Although DOCA argues Quicken violated the Act in its amicus brief, DOCA also noted, "In some circumstances, emails from a borrower have been deemed sufficient to show the lender ascertained the borrower's preference. However, notes in a company data processing system have not been deemed sufficient to evidence the borrower is the one who chose the attorney . . . ." We are mindful of the respectful consideration we must give to an agency's interpretation of a statute within its purview. *See Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) (noting that an agency's

construction of a statute within its purview is entitled to respectful consideration and, absent compelling reasons, should not be rejected). However, we find Quicken did more than simply update its data processing system. Quicken verbally ascertained the Wilsons did not have an attorney preference and received confirmation from them in writing.

We find Quicken complied with the Act because an agent of Quicken asked the Wilsons if they would be using preferred legal counsel and only prepopulated the form after the Wilsons responded they did not have counsel of preference. Quicken sent the prepopulated form, and the Wilsons signed it and sent it back without indicating they had any questions. There is nothing in the Act requiring Quicken to provide a list of available attorneys or to ascertain an applicant's preference in writing. We conclude Quicken's telephonic ascertainment as to preference, including the subsequent delivery of the form for signature, satisfies the requirements of the Act.

II. REMAINING ISSUES

Based on our finding Quicken did not violate the attorney preference statute, we decline to address its remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

Based on the foregoing, the order on appeal is

REVERSED.

HUFF and WILLIAMS, JJ., concur.