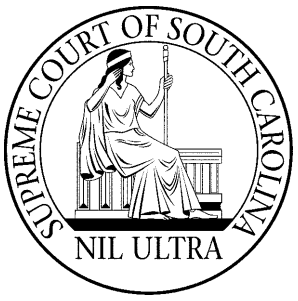

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
October 7, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard G. Wern, Respondent

Appellate Case No. 2020-000125

Opinion No. 27998
Heard August 27, 2020 – Filed October 7, 2020

DISBARRED

John S. Nichols, Disciplinary Counsel, and Julie Kay Martino, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard, of Ballard & Watson, of West Columbia, for Respondent.

CHIEF JUSTICE BEATTY: In this attorney discipline matter, Respondent Richard G. Wern admitted misconduct in failing to perform monthly reconciliations of his trust account, failing to keep adequate records, disbursing before deposit on 735 client ledgers, failing to adequately supervise his non-lawyer staff, comingling funds, and running trust-account shortages ranging from $110,907 to $425,926. Following a hearing, a panel of the Commission on Lawyer Conduct (the Panel) recommended Respondent receive a six-week definite suspension in light of Respondent's repayment of the missing client funds and unexplained delay by the Office of Disciplinary Counsel (ODC) in prosecuting this matter. Although we find the inordinate delay by ODC troubling, we nevertheless disbar Respondent.

I.

Respondent was placed on interim suspension on November 6, 2013, after one of his former associates filed a complaint against him alleging operational and case management issues, including concerns related to the mismanagement of his trust account. *In re Wern*, 406 S.C. 222, 750 S.E.2d 212 (2013). Respondent filed a petition for reconsideration, and following a hearing, this Court lifted Respondent's interim suspension upon several conditions. Notably, Respondent was prohibited from accessing or controlling the law firm's trust or operating accounts. Instead, his associate was responsible for ensuring all of the requirements of Rule 417, SCACR, were met and for filing monthly reports with the Office of Disciplinary Counsel certifying compliance. *In re Wern*, S.C. Sup. Ct. Order dated Dec. 23, 2013 (Shearouse Adv. Sh. No. 1 at 104). Respondent's law license has remained active since December 2013.

Formal Charges were not filed against Respondent until May 6, 2019. The reason for this delay is unclear.[1] In his Answer, Respondent admitted the factual allegations and rule violations alleged in the Formal Charges, which are detailed below.

A. Failing to Perform Monthly Reconciliations and Failing to Keep Proper Records

Prior to 2012, Respondent was not performing monthly three-way reconciliations of his trust account. Rather, at the end of the year, a member of Respondent's staff would perform a two-way reconciliation in preparation for filing the firm's tax return. Respondent admitted never having read Rule 417, SCACR,[2] and did not actively participate in the reconciliations of his trust account until late 2012, after the underlying disciplinary complaint was filed. Because Respondent failed to perform three-way reconciliations, he did not have adequate records to show that he held in trust monies he was required to maintain for each of his clients. He also failed to maintain client trust account ledgers and adequate receipts of deposits. These actions violated Rule 1 of Rule 417, SCACR, and Rule 1.15, RPC, Rule 407, SCACR.

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[1] We explore the factor of delay in Section III *infra*.

[2] Rule 417 governs financial recordkeeping and enumerates basic financial records and minimal accounting controls lawyers must maintain for lawyer trust accounts.

B. Disbursing Before Deposit, Comingling Funds, and Failing to Supervise Staff

Respondent delegated to his office manager the responsibility for determining when to withdraw earned fees from the trust account. The office manager would routinely authorize and direct the transfer of money from the trust account to the operating account or the payroll account. From January 2011 to September 2013, there were more than 290 transfers from the trust account, which occurred with no notation of the associated client file and no documentation that any of the money being transferred was, in fact, earned fees. These bulk transfers of money resulted in disbursement before deposit on 735 client ledgers. Some deficits were tens of thousands of dollars, and many of the disbursements occurred months before deposit. In addition, Respondent routinely deposited funds into his trust account without proper attribution, and from time to time, he intentionally left earned fees in his trust account to ensure it was not overdrawn.

Respondent knew or should have known about his staff's actions in transferring money from the trust account to cover law firm expenses, payroll, and other distributions; however, Respondent failed to implement any measures to ensure the handling of the trust account complied with Rule 417, SCACR, and failed to ensure his non-lawyer staff's conduct was compatible with his professional obligations regarding handling client funds. These actions violated Rules 1.15(a), 1.15(f), 1.15(g), and Rule 5.3, RPC, Rule 407, SCACR.

C. Trust Account Shortages

On January 19, 2012, a law firm formed by lawyers who formerly worked for Respondent requested that Respondent transfer client funds held in trust for his former client J.F. The client ledger balance indicated Respondent should have held in trust a total of $679,153, of which $347,335 was to be held in trust for J.F. However, the balance of Respondent's trust account was $253,227. Thus, Respondent's trust account was short by $425,926.

Around this time, Respondent liquidated some personal assets and made deposits into his trust account totaling $250,000. Despite these infusions of cash, his trust account was still short. After transferring monies held for J.F. to the successor law

firm, Respondent's trust account balance should have been $358,067; however, the balance was only $37,641—a shortage of $320,426.

Respondent began performing the required three-way reconciliations beginning in October 2012. However, from November 2012 through August 2013, Respondent's trust account was short every month by $110,907. These actions violated Rule 1.15(f), RPC, Rule 407, SCACR. Respondent also violated Rule 2(c) of Rule 417, SCACR, by writing checks on the trust account to cash.

II.

A hearing before the Panel was held on August 28, 2019, to consider evidence in mitigation and aggravation and determine the proper sanction to recommend to this Court. As aggravating factors, the Panel considered Respondent's substantial experience in the practice of law and lengthy pattern of misconduct resulting in multiple rule violations, finding "Respondent undoubtedly should have known about and understood his ethical obligations to properly oversee the operation of his trust account and to protect and preserve the client funds that were entrusted to him." The Panel also highlighted Respondent's admission that he had never read Rule 417, SCACR, prior to ODC's investigation or performed any three-way reconciliations of his trust account before October 2013.

In mitigation, the Panel focused primarily on ODC's delay in bringing the disciplinary proceedings. The Panel observed the investigation was initiated in 2012, and Formal Charges were authorized in 2013; however, Formal Charges were not filed with the Commission on Lawyer Conduct until May 2019. In considering the appropriate sanction, the Panel observed:

> Had this case come before the Hearing Panel shortly after Formal Charges were authorized in 2013, then it is likely that this Hearing Panel would have considered a recommendation of disbarment due to the gravity of Respondent's misconduct and the risk of significant client harm caused by the misconduct. However, the Hearing Panel has struggled greatly with the length of time that this matter has been pending. Approximately seven years have passed since the misconduct occurred and, in the meantime, Respondent has continued to practice law without any additional disciplinary issues . . . .

The Panel ultimately recommended that Respondent receive a six-week suspension for the misconduct and be credited "time served" for the six weeks of interim suspension in 2013. The Panel further recommended Respondent be ordered to pay the costs of the proceedings and that the conditions prohibiting Respondent's trust account access and requiring monthly reports be lifted.

ODC takes exception to the Panel's analysis of aggravating and mitigating factors, as well as the sanction the Panel recommended.

III.

"The sole authority to discipline attorneys and decide appropriate sanctions rests with this Court." *In re Davidson*, 409 S.C. 321, 327, 762 S.E.2d 556, 559 (2014) (citations omitted). "The Supreme Court may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the [Panel]." Rule 27(e)(2), RLDE, Rule 413, SCACR. "This Court has never regarded financial misconduct lightly, particularly when such misconduct concerns expenditure of client funds or other improper use of trust funds." *In re Taylor*, 396 S.C. 627, 631, 723 S.E.2d 366, 367 (2012) (citation and quotations omitted). Consistent with Respondent's admission of misconduct in his Answer to the Formal Charges, we find Respondent committed misconduct as set forth above. Thus, the remaining issue before this Court is the appropriate sanction. *See* Rule 7(b), RLDE, Rule 413, SCACR (misconduct shall be grounds for one or more sanctions).

Even though the investigation into Respondent's financial misconduct was complex and time-consuming, ODC's delay in prosecuting this matter is inexcusable. ODC has offered no specific explanation, much less a reasonable one, for the five-and-a-half year delay between the authorization and the filing of Formal Charges. However, the question remains to what extent, if any, this unjustified delay mitigates the gravity of Respondent's financial misconduct. The parties have not cited, and our research has not revealed, any South Carolina case on point.

Other jurisdictions handle delay in disciplinary prosecution in varying ways. Some treat it as a mitigating factor to be considered like any other, even in the absence of a showing of prejudice to the respondent, and others consider delay only if it results in prejudice or *unfair* prejudice to the respondent. *See, e.g.*, *In re Howes*, 52 A.3d 1, 18 n.22 (D.C. Ct. App. 2012) (observing a twelve-year delay between the misconduct and the disciplinary hearing did not demonstrate the requisite prejudice

to warrant mitigation of sanction); *Hayes v. Alabama State Bar*, 719 So.2d 787, 790–91 (Ala. 1998) (finding the bar's unexplained "inordinate delay" in pursuing charges warranted dismissal of the charges); *In re Peasley*, 90 P.3d 764, 777–78 nn.20-21 (Ariz. 2004) (finding a three-year delay from the filing of the initial complaint until a formal complaint was filed to be a mitigating factor but finding the remaining four-year delay was attributable to the complexity of the case and the Respondent's own litigation tactics and therefore was not a mitigating factor); *People v. Albani*, 276 P.3d 64, 76 (Colo. 2011) (finding a five-year delay in disciplinary proceedings that impacted witnesses' ability to recall underlying events and statements resulted in prejudice, but not unfair prejudice, and therefore concluding delay "will not be weighed heavily"); *In re LiBassi*, 867 N.E.2d 332, 336 (Mass. 2007) (finding "delay in the prosecution of attorney misconduct does not constitute a mitigating factor absent proof that the delay has substantially prejudiced the defense, or evidence of the resulting public opprobrium." (citation and quotations omitted)); *In re Preszler*, 232 P.3d 1118, 1133 (Wash. 2010) (explaining "[d]elay is a mitigating circumstance when the respondent attorney is able to establish that the proceeding's time span resulted in unfair prejudice to him or her, or is caused by unjustified prosecutorial delay").

We find unjustified delay on the part of ODC may properly be considered as a mitigating factor where a Respondent demonstrates unfair prejudice as a result thereof. However, we find Respondent did not suffer any prejudice under the facts of this case. To the contrary, during the pendency of these proceedings, Respondent benefitted by continuing to practice law and practicing without the concomitant responsibility of overseeing his trust account, as this Court had reassigned that task to his associate. Further, it does not appear Respondent suffered any public opprobrium or detriment to his practice, as Respondent repeatedly noted that more than $21.5 million passed through his trust account since 2013.

To be clear, we do not condone, in any respect, the inordinate delay caused by ODC in this case. However, we cannot ignore Respondent's longstanding pattern of using money that was not his from his trust account, and we conclude this misconduct warrants disbarment. *See In re Beck*, 412 S.C. 585, 587, 773 S.E.2d 576, 577 (2015) (disbarring an attorney who, for approximately eleven years, used funds from his trust account for purposes for which those funds were not intended "including funding other clients' litigation, cash advances to clients, office operating expenses, payroll, and personal expenses"). Accordingly, we reject the Panel's recommendation and disbar Respondent from the practice of law in this state.

Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Within thirty (30) days of the date of this opinion, Respondent shall pay or enter into a payment plan with the Commission on Lawyer Conduct to pay the costs of these disciplinary proceedings, which total $13,141.66.

DISBARRED.

KITTREDGE and JAMES, JJ., concur. FEW, J., concurring in a separate opinion. HEARN, J., dissenting in a separate opinion.

JUSTICE FEW: I concur in the majority's decision to disbar Mr. Wern. However, there are two important aspects of this case as to which my perspective differs from that of the majority. First, in my opinion, this case has absolutely nothing to do with Rule 417, SCACR. Mr. Wern intentionally took his clients' money out of his trust account, and he knew doing so was stealing. He directed the withdrawals from the account with full knowledge of the crimes he was committing, and at other times he delayed legitimate withdrawals to cover up his crimes. The fact he accomplished the crimes by directing an employee to do the necessary acts does not implicate Rule 417. The record-keeping requirements of Rule 417 were designed to protect a law-abiding attorney and her clients from having trust funds stolen by a third party, or if funds are lost or stolen, to ensure early detection. When the attorney is the person doing the stealing, no record-keeping rule is going to stop him. Mr. Wern's attempt to hide his thefts behind Rule 417 is disingenuous.

Second, I have a different perspective on ODC's delay in bringing formal charges against Mr. Wern. Initially, I agree with the majority's characterization of the delay as "inexcusable." However, ODC is an agency of this Court. ODC is set up under Rule 413 of the South Carolina Appellate Court Rules, which we wrote. If ODC engaged in inexcusable delay—and the entire Court agrees it has—then the responsibility for the failure falls ultimately to this Court. *See* Rule 5(a), RLDE, Rule 413, SCACR ("The Supreme Court shall appoint a member of the South Carolina Bar who has been admitted under Rule 402, SCACR, as the disciplinary counsel."). It is simply not enough for this Court to say "we do not condone . . . the inordinate delay caused by ODC in this case." To say merely this is to blame the current disciplinary counsel for *our* failure,[3] and effectively to "condone" our own lack of supervision over the professionals we employ. The delay is ours, and we must take the necessary steps—through rulemaking, staffing, and other means—to improve the operations of ODC to prevent this delay from ever happening again.

[3] The current disciplinary counsel is relatively new to the job, and if anything, is the person responsible for getting this case and others in the backlog of the office moving toward resolution.

JUSTICE HEARN: I respectfully dissent as to the decision to disbar Respondent because I believe that sanction is excessive, particularly in light of Respondent's lengthy, unblemished disciplinary history as well as the prejudice he sustained due to the delay by the Office of Disciplinary Counsel (ODC) in resolving this matter. Accordingly, I would impose a one-year suspension.

Respondent cannot be excused for his extreme carelessness and inattention to his responsibilities with respect to his trust account, and I do not excuse him. However, as soon as he became aware of the gravity of his ethical infractions, Respondent took immediate steps to rectify the situation and replenish the funds in his trust account. Shortly thereafter, he also hired an associate who was responsible for ensuring his trust account was in full compliance with the disciplinary rules from that point forward, a period of nearly six years. While I certainly appreciate that his clients were harmed in the sense that their monies were being used for Respondent's personal and office expenses, there is no evidence in this record that any client was actually harmed or ever complained about Respondent's conduct. Moreover, the inexplicable delay by ODC in resolving the complaint against Respondent most assuredly prejudiced him. Therefore, in my view, the extreme sanction of disbarment is not warranted, and I believe our prior jurisprudence bears this out. *See In re Murph*, 350 S.C. 1, 5, 564 S.E.2d 673, 675 (2002) (describing disbarment as a "severe sanction"). For example, we issued a two-year suspension for an attorney who mismanaged his trust account, delegated responsibilities to his spouse/bookkeeper whom he failed to adequately train, had negative client ledger balances, attempted to restore the trust account with personal funds and earned fees, and hired an accountant to reconcile his records. *In re Swanner*, 408 S.C. 191, 192-94, 758 S.E.2d 711, 712-13 (2014). Swanner also improperly issued loans to clients and failed to diligently pursue the appeal of a decision denying his client's claim, and he had received two prior admonitions and a letter of caution. *Id*. at 195-97 n.1, 758 S.E.2d at 713-14 n.1. Despite these facts, which are similar to those presented here but also included cognizable harm to clients and an extensive prior disciplinary history, this Court did not disbar.

Conversely, we have found disbarment warranted when clients sustained concrete harm as a result of more egregious conduct, accompanied by serious prior disciplinary infractions. In *In re Johnson*, this Court disbarred an attorney who not only misappropriated client funds and failed to maintain his trust and escrow accounts, but also neglected client matters, pled guilty to assault and battery and willful tax avoidance, failed to pay an expert witness and a court reporter, and

previously received a private reprimand, a public reprimand, and an interim suspension. 385 S.C. 501, 504-05, 685 S.E.2d 610, 611 (2009). Mr. Wern's conduct here in no way approaches the delicts committed by Johnson, nor does he have any prior disciplinary history, yet the majority votes to disbar. More recently, in *In re Beck*, we disbarred an attorney who violated approximately five ethical rules including the misappropriation of client funds for over eleven years and had a prior disciplinary history wherein he had received a letter of caution but yet admittedly continued to violate the same rule. 412 S.C. 585, 588-89, 773 S.E.2d 576, 578 (2015). *See also In re Warren*, 416 S.C. 613, 614-15, 787 S.E.2d 528, 529 (2016) (disbarring an attorney who, among other things, stole money from a trust for which he served as trustee and accepted over $40,000 in fees but did not complete work as promised or reimburse fees for the incomplete work); *In re Pennington*, 393 S.C. 300, 301-02, 713 S.E.2d 261, 261-62 (2011) (concluding disbarment was warranted where an attorney, in addition to other violations, accepted fees for representing clients but did no work on the clients' matters, contributed to a client going to jail after the attorney failed to make payments for the client who had entrusted the attorney to pay the checks at issue in the client's pending fraudulent check charges, and did not pay a client's medical providers and insurers out of the client's settlement funds). I find it significant that in all these cited cases, clients sustained concrete injury because of the attorney's misconduct. Here, however, the complaint was lodged by an associate who left Mr. Wern's employ and *no client ever complained*. Most importantly, I believe it should matter that Respondent practiced law for thirty-three years without any complaint against him. In my view, Respondent's grievance-free disciplinary history for over three decades is a factor which should strongly mitigate against disbarment.

Finally, I am admittedly troubled by ODC's lengthy delay in prosecuting this matter. Respondent was in his mid-sixties when the allegations of misconduct initially arose. Even accepting the Panel's assumption that Respondent would have been disbarred at that time, the prejudice to him resulting from ODC's delay is readily apparent—the passage of time has now rendered the possibility of Respondent obtaining other employment extremely unlikely.

Accordingly, I would suspend Respondent for one year.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kimberly L. Smith, Respondent.

Appellate Case No. 2020-000493

Opinion No. 27999
Submitted September 4, 2020 – Filed October 7, 2020

DISBARRED

John S. Nichols, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Respondent, of Beaufort, *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 (the Agreement), pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension of one to three years or disbarment. Respondent also agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline. We accept the Agreement and disbar Respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

On March 28, 2009, KG, a resident of Syracuse, New York, was a passenger in a car traveling through Sea Pines Resort in Beaufort when a tree fell on the car. KG

was injured and, in May 2009, she contacted the South Carolina law firm of Moss, Kuhn & Fleming to represent her in a personal injury lawsuit. KG signed a representation agreement with the firm in August 2009, and the firm assigned the case to Respondent.

Because KG lived in New York, she and Respondent communicated through telephone conversations and emails for several months. Respondent filed suit on behalf of KG on March 26, 2012, with two days remaining on the statute of limitations. Because Respondent failed to properly name all defendants in the suit, only one of the four defendants (SPCC) answered the complaint. Respondent failed to respond to SPCC's interrogatories, resulting in SPCC filing a motion to dismiss the case for failure to prosecute and a motion for summary judgment.

A hearing on the motion for summary judgment was scheduled for September 4, 2013, but was continued to allow for KG's deposition. During the following months, KG experienced repeated problems making contact with and receiving follow-up communications from Respondent. On September 10, 2013, KG traveled from New York to Beaufort to be deposed. The day after her deposition, KG traveled back home and repeatedly tried to contact Respondent to ask how Respondent thought the deposition went and what KG should expect going forward. Respondent did not respond.

On September 30, 2013, Judge Craig Brown held a hearing on SPCC's motion for summary judgment. Respondent was present at the hearing but did not inform KG of the hearing before or after it occurred. Respondent ignored KG's repeated requests for information regarding her case and the potential trial.

On October 22, 2013, Judge Brown granted SPCC's motion for summary judgment and dismissed the case with prejudice. On October 25, 2013, the Beaufort County Clerk of Court emailed the order granting summary judgment to SPCC's counsel and Respondent. Respondent did not send the order to, call, email, or contact KG in any way to inform her about the decision.

Throughout 2014, KG attempted to contact Respondent about her case. In March 2014, Respondent met in-person with KG in Hilton Head, but she did not tell KG the case had been dismissed. Instead, Respondent told KG the case was moving forward. At some point, Respondent told KG the case would be called for trial the week of November 10, 2014, and set up a time with KG for a phone call.

Respondent later canceled the call, claiming she was in a deposition. In late October and early November 2014, KG contacted Respondent five times to discuss the supposed upcoming trial. Respondent told KG there were problems setting a trial date and did not tell KG the case had been dismissed a year earlier.

During November 2014, KG sent Respondent five more emails requesting an update. Respondent claimed she was in discussions with Judge Carmen Mullen[1] and in a double murder trial, but she promised she would contact KG as soon as possible.

KG emailed and called Respondent or her office various times in early 2015. On the occasions Respondent responded to KG, she continued to claim the case was proceeding and led KG to believe she would testify during trial via Skype. In May 2015, KG again asked Respondent about the trial. Respondent told KG the trial would begin that same week, and she would keep KG updated. The day the trial supposedly began, Respondent emailed KG to tell her the trial would probably be over the next day and that she would call KG when the trial ended. The next day, Respondent texted KG and told her the trial was continued to the following week because Judge Mullen had an emergency hearing in another case.

The following week, Respondent told KG the trial went well and Judge Mullen would rule by the end of the week. KG emailed Respondent the following day noting how stressful the case had been and thanking Respondent for her reassurances.

On June 4, 5, 8, 9, and 10, 2015, KG emailed Respondent about her case. Respondent told KG there was no news but she should remain positive. Throughout the rest of June, KG emailed Respondent several times asking whether Judge Mullen had ruled. Respondent made several promises to call KG but did not do so, repeatedly claiming she was in a trial or mediation.

In July 2015, Respondent emailed KG, told her Judge Mullen had ruled, and told her she would call KG as soon as she left the courthouse. Respondent apparently did not call KG as promised because, three weeks later, KG asked Respondent if Judge Mullen had ruled. Respondent responded a few days later, telling KG she had been out of the country but that she had a conference scheduled with Judge

[1] Respondent claimed KG's case had been assigned to Judge Mullen.

Mullen the following morning. KG responded she would be waiting to hear from Respondent.

Throughout August and September 2015, KG continued to ask Respondent for updates but was repeatedly put off by Respondent, who claimed to be in depositions, unexpectedly away from work, or waiting for word from Judge Mullen. At this point, the case had been dismissed for almost two years.

In November 2015, December 2015, and early January 2016, KG repeatedly contacted Respondent about her case. KG told Respondent she was going through a divorce and a potential settlement from the case could affect her soon-to-be ex-husband. On January 11, 2016, a paralegal from a New York law firm called Respondent on KG's behalf.[2] The paralegal told Respondent KG had heard nothing from Respondent in over two months despite KG's repeated requests for information about her case.

KG emailed Respondent in February 2016, noting she had tried unsuccessfully to reach Respondent several times and conveying her frustration about the delay in resolving her case. Respondent told KG she would call, but she did not call. KG contacted Respondent again and asked if Respondent had forgotten to call. Respondent emailed KG and told KG she had lost her voice but would call the next morning.

Approximately two weeks later, KG sent a lengthy email to Respondent expressing exasperation about how long the case had been going on and how stressful it was to her. In a responding email, Respondent claimed she was out of work with the flu, thanked KG for her patience, and asked when would be a good time for Respondent to call her. Although they apparently scheduled a phone call, Respondent failed to call KG.

In early March 2016, Respondent put off KG's repeated requests for contact, claiming she was taking a friend to the hospital and, later, flying out of town. In early April, Respondent told KG she had "[s]o much to tell" KG but postponed a scheduled call, claiming she had a sinus headache.

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[2] The paralegal worked for KG's New York attorney. The New York attorney remained associated with the case after KG hired Respondent in South Carolina.

Around this time, KG began including her friend and financial adviser (BS) in her emails and telephone communications with Respondent. After another series of rescheduled appointments, the three women held a conference call. BS sent a follow-up email to Respondent and KG summarizing the conference call as follows: Respondent informed KG and BS Judge Mullen had yet to determine which defendant would be held liable to KG; Respondent "got the sense that the judge was near making her decision"; Respondent thought the decision would be announced April 15, 2016; and Respondent would follow up with KG and BS. However, in the following days, Respondent continued to reschedule phone calls, claiming she was behind on appointments or unexpectedly covering court appearances.

Respondent subsequently contacted KG and BS and told them she would meet with Judge Mullen in chambers on May 3, 2016, and the "responsible party will be determined as well as the amount of settlement." KG and BS said they would call Respondent at 4:30 p.m. on May 3, 2016, to learn the results. However, twenty-six minutes before the scheduled call, Respondent emailed, claiming she was still at the courthouse. The call was rescheduled for the following day. Of course, none of the statements made by Respondent about meeting with Judge Mullen were true, as the case had been dismissed almost three years before.

During the rescheduled call, Respondent claimed Judge Mullen indicated she was inclined to find SPCC responsible for KG's injuries and reject SPCC's defense. Respondent indicated she felt optimistic Judge Mullen would rule in favor of KG, but she believed an additional hearing might be necessary to determine KG's damages. Respondent further claimed SPCC's counsel submitted additional case law, and she claimed Judge Mullen advised she would consider the case law and resume her meeting with the attorneys via conference call on Friday, May 6, 2016, at 10:00 a.m. KG and BS said they would call Respondent to hear the results of the conference call at noon on May 6, 2016. Respondent's statements about activity in the case were complete falsehoods.

On May 6, 2016, Respondent emailed KG and BS and claimed the conference call with Judge Mullen was rescheduled for the following Monday, but Respondent provided no explanation as to why. According to BS's notes, during the rescheduled call, Respondent claimed Judge Mullen ruled SPCC was responsible for KG's accident, SPCC's counsel had ten days to file a motion to reconsider, Judge Mullen would likely rule on that motion within a week, and Judge Mullen's

clerk would contact the parties with the final decision. Respondent further claimed that, after she received the ruling on the motion, Respondent would contact an economist to calculate the monetary impact of the accident on KG. Respondent told KG and BS that KG's $120,000 in medical costs would be multiplied by three and the economist's calculations would be added to that number. Respondent explained KG would likely receive the settlement in mid- to late August, with KG receiving two-thirds of the total settlement amount, and Respondent's firm receiving the remaining third and compensating the referring attorney in New York. All of Respondent's statements were false.

In late May, BS recapped another conversation between the three women during which Respondent claimed SPCC's counsel had filed a motion to reconsider, but Judge Mullen was out of the country and had not ruled on the motion. Respondent stated she expected a ruling soon, and Respondent, KG, and BS scheduled a conference call for June 1, 2016. Again, Respondent's statements were false.

During the June 1, 2016 conference call, Respondent stated she expected a decision from Judge Mullen within twenty days and promised to email KG and BS on June 13, 2016. When Respondent failed to do so, KG and BS attempted to contact her. Respondent claimed she had been out of town and would be in trial the next week and asked if they could talk on a later date. However, on the scheduled day, Respondent emailed KG and BS, claiming she was still in a trial, had been informed there would be a decision in KG's case on Monday, and would contact KG and BS on Tuesday.

During a June 29, 2016 conference call, Respondent told KG and BS a conference had been scheduled with Judge Mullen and SPCC's counsel two days prior but claimed opposing counsel had a conflict and the conference did not occur. Respondent claimed the conference was rescheduled for July 1, 2016, but, "unofficially," Respondent "spoke to Judge Mullen and she feels this is now a formality." The group scheduled another call for July 8, 2016. Respondent also stated she spoke to the economist and, once he was "officially engaged," he would give an estimate for the completion of his work. Respondent claimed that, after she received the economist's assessment, she would submit it to the court and SPCC's counsel. Because the case had been dismissed in October 2013, none of this was true.

KG expressed concern the case would continue for another seven years and asked if Respondent could request additional help with the case. Respondent stated that there were only four attorneys in her firm and one was ill.

In early July 2016, Respondent missed a scheduled call with KG and BS, claiming she had to undergo a medical procedure. Respondent missed another call, claiming she was tied up in a mediation conference. In mid-July, Respondent told KG and BS she expected to hear from the economist the following week, and she represented to KG and BS she would schedule a trial for mid-August. However, she later emailed KG and BS, claiming she had a medical scan and needed to discuss treatment options with her doctor, after which she would have a better idea about scheduling her court appearances.

At the end of July 2016, KG emailed Respondent noting the numerous times Respondent had canceled scheduled phone calls and failed to respond to emails, and noting Respondent had yet to inform her of the economist's findings. KG told Respondent she was "extremely frustrated" and the stress the situation was putting her under was "unacceptable."

In early August 2016, KG faxed a letter to Fred Kuhn, one of the partners at Respondent's firm, expressing her frustration with Respondent, noting Respondent's litany of excuses, and asking why her case remained unresolved. KG told Kuhn the case was decided in her favor a year earlier but damages remained undetermined. KG asked Kuhn to reassign her case to another attorney in the firm.

In a follow-up email to Kuhn, KG copied James Moss, another partner at the firm. In response to this email, Moss told KG he would review her file and provide her with an update. That same day, Kuhn emailed KG and BS and confirmed Moss would review the file and provide an update.

Kuhn later emailed KG and BS, copying his paralegal and Moss—but not Respondent—stating, "[Respondent] is back in the office and I understand that she is going to directly contact [KG] in the near future." BS replied, stating, "[Respondent] is the problem. [KG] made it very clear that she wants her case reassigned."

After several more emails, a telephone conference was scheduled with Kuhn, KG, and BS. During the call, Kuhn informed KG and BS his review of court records

indicated the case ended in January 2014, when Judge Brown's amended Form 4 Order was filed. Kuhn called KG a few days later to confirm the case was indeed dismissed in October 2013.

Matter II

In fall 2014, TR met with Respondent about a potential lawsuit against his son (Son) for breach of contract. TR met with Respondent several times, and Respondent led TR to believe the possibility of recovery was strong. After their first few meetings, TR asked Respondent what their fee arrangement would be. Respondent told TR her firm would receive 33.3% of any settlement but that no contract regarding the representation was necessary at that point.

Respondent told TR she served Son with the summons and complaint but, because Son did not answer, she had to serve Son a second time. These statements were false, because Respondent never filed suit on TR's behalf. TR asked Respondent several times for proof of service on Son, but Respondent never provided TR with proof of service.

TR and Respondent met several more times and spoke on the phone. Respondent falsely told TR a court date was scheduled for December 15, 2016. A few days before December 15, TR called Moss, Kuhn & Fleming to get instructions regarding the trial. During this call, TR was told by firm personnel Respondent no longer worked at the firm and the firm could not find a file for TR's case.

Matter III

In 2010, SH hired Respondent to represent her in a medical malpractice action. Over the following years, Respondent told SH she was waiting to hear from a doctor or that the case was close to being resolved, but Respondent never provided SH with details. At the beginning of the representation, SH had frequent contact with Respondent, and Respondent led SH to believe the case was going well and the lawsuit was progressing. As time passed, SH heard from Respondent less frequently and began having trouble reaching Respondent and getting updates about her case.

For years, SH believed the case was proceeding; however, in July 2015, Respondent told SH the judge had dismissed the case but she would appeal the

decision. SH believed Respondent was pursuing the appeal but never heard from Respondent again. In February 2017, Moss, Kuhn & Fleming notified SH Respondent had not attended any court hearings on her behalf and no lawsuit had been filed.

Matter IV

In February 2012, KP reported to the Beaufort County Sheriff's Office that her vehicle had been stolen. KP later learned Title Max of South Carolina (Title Max) repossessed the vehicle based on what Title Max asserted was KP's non-payment of her loan. Title Max then sold the vehicle. KP believed the repossession was illegal because she had a title to the vehicle showing Title Max released the lien in October 2011. KP hired Attorney A to represent her in a lawsuit against Title Max. Because bankruptcy was the primary focus of Attorney A's practice, he asked Respondent to join the representation.

In the same pattern described in *Matters I*, *II*, and *III* above, problems arose as soon as Respondent became involved in the case. From 2013 through 2018, Respondent told KP and Attorney A the case was progressing. Respondent claimed to have filed suit, but no suit was ever filed. Respondent repeatedly scheduled meetings with KP she did not appear for and failed to respond to numerous phone calls and emails from KP. Respondent lied to KP and claimed there was still time on the statute of limitations, when, in fact, the statute of limitations had expired a year earlier. Despite knowing the statute had expired, Respondent repeatedly lied to KP about the progress and status of the case, telling KP she was working hard on the matter, speaking to witnesses, and having discussions with Judge Mullen, to whom Respondent falsely claimed KP's case was assigned.

In October 2017, KP texted Respondent and asked about some money Respondent had previously loaned her. KP asked if the money had come "out of Respondent's pocket or from somewhere else," and asked if she could get more to help her get back on her feet. Respondent told KP Title Max had agreed to pay and would have money at the courthouse the following Friday. Of course, that statement was false.

In late October 2017, Respondent sent a text message to KP saying she could give KP $100. In early November 2017, Respondent sent another text message to KP saying she was trying to "move some things around" so she could loan KP "some

money." Sometime later that month, Respondent messaged KP she would be paid the following day and would have some money for KP to help her out for the rest of the year.

Respondent testified during an interview with ODC that she loaned KP approximately $500. KP alleged Respondent loaned her $300. No writing existed confirming the terms of the loan, and KP never paid Respondent back. In December 2017, Respondent asked KP her shoe size and later brought her several pairs of shoes and gave her a bag full of clothes.

Also in December 2017, KP and Respondent exchanged several text messages regarding a "light pole case."[3] In these messages, Respondent told KP she would bring "it" to her and that KP needed to sign something in connection with the case. Respondent made several promises to bring the paperwork to KP, but canceled each time, claiming she had a personal health reason or was due in court.

In February 2018, Respondent scheduled a meeting with KP about the Title Max case; however, Respondent later sent a message saying she did not feel well and could not meet. That same day, KP emailed Respondent and Attorney A, said she was confused about the representation, and requested an update about her case. Attorney A responded to KP that Respondent told him she had filed suit. Attorney A further stated when he told Respondent he could not find the case in the county public index, Respondent told him she had filed the case in federal court.

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[3] In 2017, KP asked Respondent to help her with a second matter. While replacing KP's mother's trailer that had been destroyed in a storm, the pole supporting the electric lines for the trailer was damaged when a truck hit the pole. KP paid to repair the pole and wanted to recover the cost of repairs from the company that owned the truck that hit the pole. Respondent agreed to help KP.

In a May 2017 text message, Respondent told KP, "Should have check to fix pole by Friday. I am going to call and verify that with the defendant this afternoon." Nevertheless, in October 2017, Respondent told KP in text message that she had secured a court date for the "light pole case." However, Respondent never filed suit, there was never any court date, and KP never received any compensation in the matter.

In mid-February 2018, KP emailed Respondent and Attorney A and asked Respondent to provide her with the case number, status, and disposition of the Title Max case. KP also texted Respondent individually and asked for the case number. Respondent never sent this information to KP because Respondent never filed suit.

Attorney A emailed both Respondent and KP, explaining he was not the attorney of record in any proceedings for KP and noting he had not received any filed pleadings in the case even though he had prepared drafts several years earlier and had given those drafts to Respondent when he transferred the case to her. Attorney A stated that when he communicated with Respondent over the last few years on an informal basis on KP's behalf, Respondent claimed she filed the lawsuit, and he believed the case was removed to federal court. Respondent responded solely to KP and suggested they meet.

In late February 2018, KP emailed Attorney A and Respondent. She thanked Attorney A for his earlier email. Addressing Respondent, KP stated she was not interested in any more canceled meetings or small talk, again requested copies of the filed pleadings, and stated she had searched "the Beaufort, Charleston, and Columbia websites" and found no record of her case.

Attorney A emailed both KP and Respondent and told Respondent she could talk to him about the case. Attorney A stated he, too, had searched online and had found no case filed for KP, told Respondent she owed KP an explanation, and offered to act as a liaison. In response, Respondent told Attorney A and KP she was in a kidnapping trial in Beaufort but she would get in touch with them later.

KP emailed Respondent in a "final attempt" to have Respondent turn over her file no later than February 26, 2018. Later the same morning, KP emailed Respondent again to reiterate she expected her file by Monday, February 26, 2018.

KP filed a complaint with ODC on March 2, 2018, and provided hundreds of text messages and emails showing numerous missed and rescheduled meetings. Respondent's excuses included she had court, meetings, the flu, sinus infections, a popped hip, vomiting episodes, stomach issues, personal family issues, migraines, physical therapy, strep throat, and more. KP told ODC that, on many occasions, when she asked for updates on the Title Max case, Respondent would set up a meeting, she and Respondent would meet, but Respondent only wanted to chat and gossip about things happening on the islands around Beaufort. KP stated, when

she pressed Respondent for information about her Title Max case, Respondent would tell her everything was fine and the case was moving forward, or that she still had to interview a few more people.

KP also provided ODC with a set of interrogatories in the Title Max matter Respondent sent to KP asking her to provide the necessary information so Respondent could answer the interrogatories. KP did not remember the date Respondent sent the document to her, but KP answered all the questions and hand delivered her responses to Moss, Kuhn & Fleming. However, because the Title Max suit was never filed, no defendant ever sent interrogatories to Respondent.

Law

Respondent admits her conduct violated Rules 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.5(b) (requiring the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible to be communicated to the client, preferably in writing, before or within a reasonable time after commencing representation); 1.5(c) (stating a contingent fee agreement must be in writing signed by the client and must state the method by which the fee is to be determined); 1.5(e) (requiring a division of a fee between lawyers who are not in the same firm be in proportion to the services performed by each; agreed to by the client, including the share each lawyer will receive; in writing; and for a reasonable total fee); 1.8(e) (forbidding the provision of financial assistance to a client in connection with a pending or contemplated litigation except in certain circumstances); 1.16(d) (requiring a lawyer take steps to protect a client's interests upon termination of representation); 3.2 (expediting litigation); 3.4 (fairness to opposing counsel and parties); 4.1 (truthfulness in statements to others); 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 8.4(e) (engaging in conduct prejudicial to the administration of justice); 8.4(f) (stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law), RPC, Rule 407, SCACR, and Rule 402(h), SCACR (the lawyer's oath).

Respondent further admits her conduct constitutes grounds for discipline under Rule 7(a)(1), (5), and (6), RLDE, Rule 413, SCACR (violating the Rules of Professional Conduct; engaging in conduct tending to pollute the administration of

justice or bringing the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law; and violating the lawyer's oath).

Conclusion

We accept the Agreement and disbar Respondent from the practice of law in this state. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission, or enter into a reasonable payment plan with the Commission, within thirty (30) days of the date of this opinion. Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing she has complied with Rule 30, RLDE, Rule 413, SCACR (duties following disbarment), and shall surrender her 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 Court of Appeals

Jericho State Capital Corp. of Florida, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

AND

Lynx Jericho Partners, LLC, Plaintiff,

v.

Chicago Title Insurance Company, Defendant,

Of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC are the Appellants,

and Chicago Title Insurance Company is the Respondent.

Appellate Case No. 2017-001646

Appeal From Horry County
Karl A. Folkens, Special Referee

Opinion No. 5731
Heard February 6, 2020 – Filed June 10, 2020
Withdrawn, Substituted, and Refiled October 7, 2020

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Fred B. Newby, Sr., and C. Scott Masel, both of Newby Sartip & Masel LLC, of Myrtle Beach, for Appellants.

Demetri K. Koutrakos, of Callison Tighe & Robinson, LLC, of Columbia, for Respondent.

HILL, J.: We are presented with the question of whether a reservation of a right-of-way on an official county map—as authorized by section 6-7-1220 of the South Carolina Code (2004) and a county ordinance—constitutes a defect in or encumbrance on the title to the affected land or renders its title unmarketable so as to come within the coverage of two title insurance policies. Based on the specific circumstances of this case, we hold it does. We further conclude none of the policies' coverage exclusions apply. We therefore reverse the order of the special referee granting Chicago Title Insurance Company (Chicago Title) summary judgment as to Jericho State Capital Corporation of Florida's (Jericho's) and Lynx Jericho Partners, LLC's (Lynx Jericho's) (collectively Appellants) claims for breach of contract. We affirm, however, the order granting summary judgment to Chicago Title on Appellants' bad faith claim.

I. FACTS

South Carolina law allows counties and municipalities to "establish official maps to reserve future locations of any street, highway, or public utility rights-of-way, public building site or public space open for future public acquisition and to regulate structures or changes in land use in such rights-of-way, building sites or open spaces." § 6-7-1220. In 1999, the Horry County Council established an official map by passing Ordinance 107-98 or the Official Map Ordinance (Ordinance).

The Ordinance created the official map to "show the location of existing or proposed public streets, highways and utility right-of-ways, public building sites and public open spaces." The Ordinance further provided that after the official map was adopted, "no building, structure, or other improvement, shall hereinafter be erected, constructed, enlarged or placed within the reservation area . . . without prior exemption or exception . . . ." The purpose of the Ordinance and the official map was to provide for the public welfare and Horry County's financial convenience by "designating and reserving" such locations. The Ordinance established a procedure for landowners to appeal land use restrictions and provided a criminal penalty for violating the Ordinance. Later in 1999, Horry County created the index map, which included the proposed locations for segments of the Carolina Bays Parkway.

In 2002, Horry County Council adopted Ordinance 88-202 (the 2002 Amendment), which amended the official map to add "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway . . . as shown in the document entitled 'Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans.'" The roadway plan was attached to the 2002 Amendment, and the amended index map showed the Parkway bisecting the property at issue in this appeal and crossing the intracoastal waterway. Both the Ordinance and the 2002 Amendment were recorded with the Register of Deeds and indexed under Horry County.

In 2006, Peachtree Properties of North Myrtle Beach, LLC (Peachtree) purchased 131.40 acres in Horry County (the Property), which it planned to develop as a residential subdivision along the waterway, from the McClam family for $22,500,000. Peachtree financed the purchase with two mortgage loans, granting a first mortgage to R.E. Loans, LLC (REL) and a second mortgage to Jericho. Both REL and Jericho received title insurance from Chicago Title. The title insurance policies are printed on the 1992 standard form of the American Land Title Association and contain the following identical language and provisions:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE . . . AND THE CONDITIONS AND STIPULATIONS, CHICAGO TITLE INSURANCE COMPANY . . . insures, as of Date of Policy . . . against loss or damage . . . sustained or incurred by the insured by reason of: . . .
>
> ***
>
> 2. Any defect in or lien or encumbrance on the title;
>
> 3. Unmarketability of the title . . . .

In 2007, Peachtree defaulted on its loans. Jericho foreclosed, successfully bid on the Property at sale, and received a master's deed subject to the REL mortgage. In 2009, the South Carolina Department of Transportation (SCDOT) filed an eminent domain action against Jericho to take 10.18 acres of the Property for the Carolina Bay Parkway. Meanwhile, for reasons not pertinent here, the REL mortgage was assigned to Lynx Jericho. In 2014, a jury awarded Jericho and Lynx Jericho $2.1 million as just compensation for the taking. During the five-year condemnation litigation, Jericho and Lynx Jericho submitted title insurance claims to Chicago Title, which Chicago Title denied.

In response to the denial of coverage, Jericho and Lynx Jericho sued Chicago Title for breach of contract, breach of the covenant of good faith and fair dealing, and bad faith refusal to pay insurance benefits. The cases were consolidated and referred to the special referee, who heard arguments on the parties' cross motions for summary judgment and conducted the proceedings expertly. The special referee denied Appellants' motion for summary judgment and granted Chicago Title summary judgment, ruling: 1) the Ordinance did not create a defect or encumbrance on the Property; 2) the Ordinance did not make title to the Property unmarketable; 3) exclusions 1, 2 and 3(d) barred coverage; and 4) Chicago Title did not act in bad faith by contesting Appellants' claims. This appeal followed.

II. STANDARD OF REVIEW

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 Appellants, the non-moving parties, and draw all reasonable inferences in their favor. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). Chicago Title is 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 Appellants demonstrate a scintilla of evidence in support of their claims. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

III. COVERAGE UNDER THE TITLE INSURANCE POLICIES

A. General considerations regarding title insurance policy coverage

Title insurance is designed to protect a real estate purchaser or mortgagee against defects in or encumbrances on the title; the purpose of title insurance is to "place the insured in the position he thought he occupied when the policy was issued." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 260 (2013). "Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981) (quoting *Nat'l Mortg. Corp. v. Am. Title Ins. Co.*, 261 S.E.2d 844, 847–48 (N.C. 1980)); *see also Loflin v. BMP Dev., LP*, 427 S.C. 580, 595–96, 832 S.E.2d 294, 302 (Ct. App. 2019). One court has well explained:

> The sole object of title insurance is to cover possibilities of loss through defects that may cloud the title. . . . Some defects will be disclosed by a search of the public transfer records; others will be disclosed only by a physical examination or a survey of the property itself. Often the existence of title defects will depend upon legal doctrines and judicial interpretations of various applicable statutes. Since the average purchaser has neither the skill nor the means to discover or protect himself against the myriad of defects, he must rely upon an institution holding itself out as a title insurer.

United States v. City of Flint, 346 F. Supp. 1282, 1285 (E.D. Mich. 1972).

As a leading commentator notes:

> [T]itle insurance policies usually cover risks arising from errors in title examination, some known defects, defects that would be disclosed by examination, and some undisclosed defects that would remain hidden even after competent examination of public records . . . . In that sense, title insurance is "all-risks" coverage, under which a loss must fall within the basic description of the covered peril—such as a "defect in or a lien or encumbrance on the title"—and not be within any explicit exclusions.

11A Maldonado et al., *Couch on Ins*. § 159:20 (3d ed. 2019) (footnotes omitted).

We interpret the language of title insurance policies like other contracts and enforce plain and unambiguous language as written, giving the words their common meaning. *Williams v. Gov't Ins. Co. (Geico)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014). Whether coverage exists under an insurance policy is a matter of law. *Id.* at 593, 762 S.E.2d at 709. The insured bears the burden of proving its claim falls within the policy's coverage. *Gamble v. Travelers Ins. Co*., 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

B. Defect, lien, or encumbrance

The policies insure Appellants from damages incurred by any "defect in or lien or encumbrance on the title." Appellants assert the Ordinance caused a defect in or encumbrance on the title because it created a third-party interest in the Property in favor of the County, which burdened the land and depreciated its value. We agree.

The policies do not define the term "encumbrance," but we have. An early case, noting encumbrance was a catch-all term found in English conveyances, defined it as any weight on the land that lowers its value without conflicting with passing of the fee. *Grice v. Scarborough*, 29 S.C.L. (2 Speers) 649, 652–53 (1844). More recent decisions have said the same thing in different ways, defining an encumbrance as "a right or interest in the land granted 'which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.'" *Truck S., Inc. v. Patel*, 339 S.C. 40, 48, 528 S.E.2d 424, 428–29 (2000) (quoting *Martin v. Floyd*, 282 S.C. 47, 51, 317 S.E.2d 133, 136 (Ct. App. 1984)); *see also Pres. Capital Consultants, LLC*, 406 S.C. at 316, 751 S.E.2d at 259 ("[D]efects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value."). An encumbrance is a burden on the land that is adverse to the landowner's interest and impairs the value of the land but does not defeat the owner's title. *Butler v. Butler*, 67 S.C. 211, 45 S.E. 184, 185 (1903); *see* 21 C.J.S. Covenants § 18 (2020) ("[A]n 'encumbrance' is any right or interest held by someone other than the grantee or grantor which diminishes the value of the estate but not so much that it leaves the grantee with no title at all. That is, an 'encumbrance,' within the meaning of a covenant against encumbrances, is any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of property or constitutes a burden or limitation upon the rights of the fee title holder." (footnotes omitted)).

The Ordinance described the location of the highway as a "right-of-way," and defined "right-of-way" as "land reserved . . . for a road." The Ordinance declared its intention to "reserve" future locations of highways and proscribed any use of the Property that would interfere with the County's future acquisition of the highway parcel, and the Ordinance and amended map showing the location of the proposed highway were publicly recorded. As Chicago Title argues, the Ordinance allowed affected property owners to appeal their property's inclusion on the map, but that proves Appellants' point that the Ordinance encumbered the Property.

Ordinances may regulate land use without encumbering title, but the Ordinance here went beyond regulating use and created a third-party interest in the property in favor of the County. The enabling statute separates the concept of right-of-way from land use. *See* § 6-7-1220 (noting one purpose of official map is to "regulate structures or changes in land use in such rights-of-way"). We agree with Appellants that the Ordinance, including its provisions regarding the appeal procedures and penalties for violations, constituted an encumbrance within the meaning of the policy coverage. Although Chicago Title is correct that the Ordinance did not create a right-of-way, the policy coverage turns not on whether the Ordinance created a legal right-of-way but whether it created a defect or encumbrance.

We find the Ordinance similar to the acquisition map at issue in *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 237 N.Y.S.2d 179, 180–81 (N.Y. Sup. Ct. 1962). There, a 1949 county map marked a strip of certain land for public acquisition. When Plaintiff purchased the land in 1960, he applied to the zoning authority for a building permit. The permit was denied because, without the marked strip, plaintiff's lot was not large enough to meet setback requirements. When plaintiff then tried to sell the land, a purchaser refused to close, citing the map. Plaintiff's title insurer denied his claim, pointing to the exclusion from coverage for "[z]oning restrictions or ordinances imposed by any governmental body." The court, however, held plaintiff's loss was covered because the acquisition map qualified as a lien or encumbrance not excepted by the policy.

Ascot Homes is cited in a standard title insurance law treatise. Palomar, *Title Insurance Law* §§ 5.9, 6.3, 6.9 (2020 ed.). It has also been analyzed in a work published by the drafter of the policy forms and language at issue here. Nielsen, *Title and Escrow Clams Guide* § 11.1.5 (American Land Title Association, 2020). The analysis describes the import of *Ascot Homes* in detail and contends the decision prompted a 1970 change in the standard title insurance policy language to allow coverage for eminent domain as long as the "notice of the exercise thereof" appeared in the public records as of the date of the policy (this same language appears in Exclusion 2 of the policy here, as we later discuss in section IV.B). Yet, as the author points out, the acquisition map in *Ascot Homes* "did not 'exercise' the condemnation power," so its relationship to eminent domain coverage is inapposite. *Id*. Like the map in *Ascot Homes*, the Ordinance here is a different creature than an eminent domain proceeding, but it is still a defect or encumbrance triggering coverage.

Chicago Title also argues the policies provide no coverage to Appellants because a title examination of the subject property would not have revealed the Ordinance or map. We can find no support for this position in the policy. The coverage the policy promises is not limited to what a title examination reveals. The policy does not

define a covered defect, lien, or encumbrance as something that can only exist if it resides in the chain of title.

According to Chicago Title, a ruling that the Ordinance constitutes a defect, lien, or encumbrance will saddle real estate lawyers and title abstractors with the risk of liability for title defects that cannot be found in the chain of title. We are confident real estate practitioners know how to draft explanations of and exceptions to their title opinions. And this appeal is not about the scope of title opinions but the scope of coverage of a title insurance policy. Chicago Title may wish to shift the risk of loss to real estate lawyers or others, but that is not where the policy here places it.

The special referee warned that if the map and Ordinance constituted a defect, lien, or encumbrance, the entire world of warranty deeds would be upended. We find no justification for such a dystopian view. When Appellants bought the Property, the sellers presumably had notice of the map and the Ordinance showing the county's plan to build a highway through the Property, for the Ordinance declared that a "letter of notification" of the public hearing would be sent to all "property owners whose property lies within an area to be reserved for public use." Whether the sellers had a duty to disclose this knowledge to Appellants—and whether, if they did not disclose it, their silence violated any warranties they gave in the deed—are not questions before us.

We conclude the Ordinance constituted a defect and an encumbrance. We therefore reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

C. Unmarketability of title

The policies define unmarketability of title as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle . . . the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." This opaque definition—a model of circularity—is unenlightening. We are confident, though, that a purchaser who discovered a portion of the real estate he was about to buy purportedly in fee simple absolute had been reserved by ordinance in favor of a governmental right-of-way may be entitled to rescind the sale. "To be marketable, a title need not be flawless. Rather, a marketable title is one free from encumbrances and any reasonable doubt to its validity. It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Delivery of marketable title requires title be free of not only defects and encumbrances but also the reasonable probability of litigation. *Sales Int'l Ltd. v. Black River Farms, Inc.*, 270 S.C. 391, 398, 242 S.E.2d 432, 435 (1978) (providing a "reasonable probability of litigation" renders title unmarketable). The Ordinance created a reasonable probability of litigation concerning the title because the right-of-way was reserved for acquisition, making future condemnation reasonably probable.

The Ordinance differs from land use and zoning regulations, which can restrict development and impose an economic burden on the owner but do not create a third-party interest in property. *See McMaster v. Strickland*, 305 S.C. 527, 530, 409 S.E.2d 440, 442 (Ct. App. 1991) (holding wetlands designation did not render title unmarketable); *Patel*, 339 S.C. at 49, 528 S.E.2d at 429 ("Because the wetland designation does not render the title unmarketable, Patel cannot rescind the contract based upon an encumbrance."); *Martin*, 282 S.C. at 52, 317 S.E.2d at 136 ("While marsh or water might be a burden upon property, it is certainly not a lien, easement, or a right existing in a third party."). We recognize the Ordinance resembled zoning and other land use tools, given it was to be enforced by the zoning administrator and the enabling statute described the official maps as "instruments of land use control." § 6-7-1220. In substance, though, the Ordinance created a third party interest in the property and is so foreign from typical land use measures that there is no genuine issue of material fact that it rendered Appellant's title unmarketable.

A marketable title is one free from doubt and any reasonable threat of litigation. Unmarketability cannot be based on just any doubt or defect, for almost any title can be flyspecked. But if the doubt is an objectively reasonable one concerning a material defect, then the title is unmarketable. A material defect is one that interferes or conflicts with the rights and incidents of title—the insured's fee simple absolute's "bundle of rights"—to the extent that an ordinary and prudent purchaser would not buy the title, or only buy it at a discount reflecting the defect. 1 Palomar, *Title Ins. Law* § 5.7 (2019 ed.). This meshes with the policy definition of marketability, which explains coverage extends to any "alleged or apparent" matter affecting title.

Chicago Title argues the Ordinance did not affect marketability of the title because it only regulates use of the Property. We conclude, however, that the Ordinance interferes with the insured's title because it limits the rights and incidents of ownership. It is true that matters that affect only the use of land are not title matters, but it does not follow that a matter that affects use cannot also affect title. *Id*. No one would contend, for example, that a covenant restricting use does not also affect title and, therefore, marketability. Because the Ordinance created an interest in the land by reserving a right-of-way and restricting use of the reserved land, we conclude

it diminished the owner's bundle of rights and, consequently, affected title. And the diminishment was enough to cause a reasonable buyer to decline or discount a sale for a price less than what an unclouded title would demand on the market.

There is no factual dispute the Ordinance created a reasonable probability of litigation, thereby making the title unmarketable as a matter of law. The Ordinance, which, again, was publicly recorded, reserved the future site of the highway and took steps to minimize the County's future acquisition costs. Although we agree with Chicago Title that in general all landowners are at risk of eminent domain proceedings at any given time, the County's intent and preliminary steps set forth in the Ordinance foreshadowed a reasonable probability of condemnation. *Black River Farms, Inc.*, 270 S.C. at 398, 242 S.E.2d at 435 (mere possibility or remote probability of litigation is not sufficient to make title unmarketable). Therefore, we hold the Ordinance rendered Appellants' title unmarketable and reverse the special referee's grant of summary judgment to Chicago Title.

IV. EXCLUSIONS FROM COVERAGE

In deciding whether a policy exclusion bars coverage, the burden of proof flips: the insurer must prove the exclusion applies. *Owners Ins. Co. v. Clayton*, 364 S.C.555, 560, 614 S.E.2d 611, 614 (2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.").

A. Exclusion 1

In relevant part, Exclusion 1 bars coverage for losses arising by reason of:

> Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land . . . .

In granting Chicago Title summary judgment, the special referee ruled Exclusion 1 excluded coverage because the Ordinance merely affected the use of the land. As we have just discussed, the Ordinance related to and affected the title of the land, not just its use. Exclusion 1 therefore does not apply as a matter of law. We reverse the special referee's grant of summary judgment to Chicago Title as to this issue.

B. Exclusion 2

Exclusion 2 bars coverage for losses arising by reason of:

> Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to the Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

Neither Appellants nor Chicago Title claim the Ordinance constitutes an eminent domain action, and Appellants are not seeking coverage for the 2009 condemnation action, which began after the effective date of the policies. The special referee noted the exclusive procedure for eminent domain in this state is the Eminent Domain Procedure Act, S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2018). But this misses the mark. Appellants are not seeking recovery of loss for the 2009 condemnation action but for loss the Ordinance caused to the value of their title when they took it in 2007. Appellants contend these losses exceed and are different in kind from those sought in the condemnation action. Therefore, Exclusion 2 does not apply, and the special referee erred in granting Chicago Title summary judgment based on Exclusion 2.

Chicago Title maintains that if the Ordinance constitutes a "defect, lien, or encumbrance" then it necessarily also constituted a taking for which Exclusion 2 excludes coverage. We see several flaws in this logic, the fundamental one being the false equivalency between an encumbrance and a taking. We doubt Chicago Title means that every encumbrance is also a taking, but that is the cul-de-sac where its argument leads.

The issue of whether an Ordinance reserving of a right of way on an official county map adopted pursuant to § 6-7-1220 constitutes a taking has not been decided in South Carolina and is not before us now. The special referee did not rule on the issue. Neither Appellant nor Chicago Title filed a motion to reconsider requesting the Special Referee to make such a ruling, nor have they appealed on this ground. Accordingly, this issue is not preserved for our review. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled 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.").

C. Exclusion 3(d)

Exclusion 3(d) excludes coverage for "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created subsequent to Date of the Policy." The Ordinance and the 2002 Amendment were filed years before the effective date

of the policies, and therefore clouded the title as of the Date of the Policy. The special referee therefore erred in finding this exclusion applied.

Parties to title insurance contracts are free, within the bounds of public policy, to allocate risks as they see fit. Chicago Title's inability to pigeonhole this unique Ordinance into an exclusion to coverage is unsurprising. Real estate investors buy title insurance to protect against such unforeseen "off the record" risks. Old soldiers say it is the bullet you never hear that kills you, and the fundamental idea behind title insurance is to cover rather than exclude unforeseen and unknown risks; otherwise, title insurance would not provide the peace of mind it touts.

V. BAD FAITH

The special referee ruled Chicago Title had a reasonable, good faith basis for contesting Appellants' claims. We agree.

Appellants' bad faith cause of action fails because they did not demonstrate Chicago Title acted unreasonably in denying Appellants' claims. *See Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992) ("The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured."). The unusual nature of the Ordinance presented close policy interpretation issues. Chicago Title had a reasonable basis for denying the claims, and we affirm summary judgment to them as to this issue. *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012) ("[W]here an insurer has a reasonable ground for contesting a claim, there is no bad faith.").

VI. CONCLUSION

Accordingly, we affirm the special referee's grant of summary judgment to Chicago Title on Appellants' cause of action for bad faith, but we reverse the grant of summary judgment to Chicago Title on Appellants' remaining claims and remand to the special referee for proceedings consistent with this opinion. Appellants have not appealed, and we therefore do not address, the grant of summary judgment to Chicago Title on Appellants' breach of covenant of good faith and fair dealing claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mack Seal Washington, Appellant.

Appellate Case No. 2017-001111

Appeal From Charleston County
Roger L. Couch, Circuit Court Judge

Opinion No. 5773
Heard September 16, 2019 – Filed September 16, 2020
Withdrawn, Substituted and Refiled October 7, 2020

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

HILL, J.: Mack Seal Washington appeals his convictions for first-degree burglary, malicious injury to property, and obtaining goods by false pretenses, arguing the trial court erred in admitting an audio recording of certain hearsay statements a police

detective made while interrogating him. We agree this was error and reverse and remand for a new trial.

I. FACTS

On August 21, 2015, someone broke into a Johns Island home and stole several items, including a rifle and a Husqvarna weed eater. Police began focusing on Washington as a suspect when his fingerprints matched a latent print found on a washing machine at the burgled home. They later discovered that on the day of the burglary, Washington pawned a Winchester rifle at a pawnshop in North Charleston and a Husqvarna weed eater at a different branch of the same pawn shop. Washington was arrested on March 23, 2016, and Detective Timothy McCauley interviewed him the next day. After giving Washington *Miranda* warnings, McCauley began the interview, which largely consisted of McCauley asking Washington to explain how his fingerprints ended up at the crime scene and whether he could prove his innocence.

Before trial, Washington objected to the admissibility of the audio recording of the interview on three grounds: hearsay, improper bolstering of the State's fingerprint expert's testimony, and that it contained improper opinion evidence. The trial court excluded a few of McCauley's comments on bolstering grounds but admitted a redacted version of the audio. Listening to this redacted version, the jury heard McCauley make such comments to Washington as:

> "[C]an you explain why your fingerprints would have been inside the house?"
>
> "Were you on any kind of drugs or anything in any point of time back in the summer when you would have forgotten doing something? That might explain why you did it."
>
> "This is from the state law enforcement division where we send all our fingerprints . . . . It shows right here two fingerprints were taken. Identified as [Mack Seal] Washington with that specific state ID number which is assigned to you"

> "I'll call him [Washington's employer] up but how do you explain your fingerprints inside this man's house? . . . [T]here's no if, and, or buts about it"
>
> "[B]ut you can't be at work and your fingerprint be inside the house at the same time"
>
> "[T]hen how'd your fingerprint end up there?"
>
> "[Y]ou still have to explain why your fingerprints [are] in that man's house."
>
> "[W]ell then it still doesn't explain why your fingerprints are there and why you had a stolen gun, a stolen rifle. There was a second gun stolen, it was a pistol, which is why I think you're trying to put the story together of a person you ran into on Bees Ferry in the parking lot of Walmart. You're trying to put some story together to justify why you had access to those"
>
> "[Y]ou also pawned a weed eater . . . . I'm saying you pawned that same day, the same day you pawned that rifle at a different pawn shop which is what people do when they're trying to spread out stuff that's stolen."

In addition to McCauley's testimony, the State's case included the testimony of the victims and the responding officer, the fingerprint evidence, and evidence relating to pawn tickets. The jury convicted Washington on all counts.

II. HEARSAY

Detective McCauley's interrogation method may have been a proper investigative technique, but every word he uttered during the out of court interview was inadmissible hearsay. Any doubt about its inadmissibility was removed by *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), decided more than two years before Washington's trial, which held similar remarks made by a detective during an interrogation to be "unmistakable hearsay." 411 S.C. at 406–07, 768 S.E.2d at 659. While we acknowledge *Brewer* did not create a "categorical rule" that any statement made by a police officer during an interrogation is inadmissible, we also acknowledge such statements "will rarely be proper for a jury's consideration." *Id*.

For hearsay purposes, there is no daylight between the detective's remarks in *Brewer* and McCauley's remarks here.

Washington's statements during the interview are not hearsay because they are admissions of a party offered against that party. Rule 801(d)(2)(A), SCRE. Therefore, when McCauley testified, the State could have admitted Washington's statements by asking McCauley about them, avoiding the hearsay taint of McCauley's statements in the recording.

At the trial, the assistant solicitor contended McCauley's statements were not hearsay because they were not offered for their truth but to give Washington's answers "context." There is no "context" exception to the hearsay rule. *Brewer* rejected this same argument as "patently without merit," finding it had "no support in the law." *Id*. Undeterred, the State recycles the argument before us, still unaccompanied by any authority to support it. The statements were inadmissible hearsay, and we reverse the trial court's ruling admitting them.

III. BURDEN SHIFTING

As in *Brewer*, here there was no objection made to the recording on burden-shifting grounds. Nevertheless, as in *Brewer*, Detective McCauley's repeated requests that Washington explain why he was not guilty amounted to a "grave constitutional error." *Id*. at 408, 768 S.E.2d at 659. As Justice Kittredge so well put it, "Law enforcement's *ad nauseam* insistence that Brewer prove his innocence has *no* place before the jury. It is chilling that we have to remind the State that an accused is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt." *Id*.

We respect our good dissenting colleague's contention that Washington did not adequately preserve his hearsay objection on appeal. We are convinced, though, that Washington preserved the hearsay issue given his specific hearsay objection to the trial court, and his extensive reliance on *Brewer* in his brief and at oral argument. *See* Toal et al., *Appellate Practice in South Carolina* 75 (3d ed. 2016) ("[W]here an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments."). While Washington may not have wrapped his issues up in a neat categorical box, we do not believe he abandoned the hearsay argument on appeal or that we should not address it. *See Calhoun v. Calhoun*, 339 S.C. 96, 105–06, 529 S.E.2d 14, 19–20 (2000) (holding a party did not limit claim by failing to use "transmutation" in her

statement of issues on appeal where her argument discussed and cited to authority on transmutation); *Eubank v. Eubank*, 347 S.C. 367, 374 n.2, 555 S.E.2d 413, 417 (2001); cf. 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.") (emphasis added).

The State did not raise preservation in its brief. Although the issue was raised by the panel at oral argument, the State spent considerable time in its brief and at oral argument claiming the recording is not hearsay. While we may invoke preservation rules on our own, we should not be quick to disturb the parties' silence. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) ("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indication to the court of the obscurity of the purported procedural flaw.") (Toal, C.J., concurring).

IV. HARMLESS ERROR

The error was not harmless. *State v. Young*, 420 S.C. 608, 625, 803 S.E.2d 888, 897 (Ct. App. 2017) (providing improper admission of hearsay may be deemed harmless if it appears beyond a reasonable doubt it did not contribute to the verdict). In *Brewer*, the defendant was tried on charges related to two shootings occurring the same night. A majority of the court found the error harmless as to the charges related to the first shooting (which had numerous eyewitnesses to Brewer firing shots, a photograph of Brewer at the scene with a gun, and evidence of there being only one shooter), but not harmless as to the murder charge related to the second shooting (of which there was only "thin, circumstantial" evidence against Brewer, and testimony that at least two shooters were present). *Brewer*, 411 S.C. at 409–10, 768 S.E.2d at 660.

The prosecution's case against Washington was strong but circumstantial, led by the fingerprint evidence. The State acknowledges fingerprint evidence alone is often not enough to get a burglary case to a jury. *See State v. Bennett*, 415 S.C. 232, 781 S.E.2d 352 (2016); *State v. Mitchell*, 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998). In its brief, the State argues it was important to present the recording of McCauley's interview of Washington because it allowed the State to bolster the fingerprint evidence and attack Washington's alibi in detail. The State explained the recording gave them the opportunity to do both, without which their case would have been, in their words, "vulnerable to a directed verdict."

Washington told Detective McCauley he was working at the time of the burglary, but the State called his employer, who testified they had no record of Washington's attendance at work that day. The pawn tickets were incriminating, but there was evidence the victim first described the missing rifle as a Savage, not a Winchester. The weed eater was sold before the victim could verify its identity.

The State highlighted the recorded interview in its closing, and the jury later interrupted its deliberations to ask for a transcript of the interview. The trial court sent the seventeen-minute recording back to the jury room. Twenty minutes later, the jury found Washington guilty. Under the circumstances, it appears to us that the hearsay figured so prominently in Washington's trial that its "reverberating clang . . . would drown all weaker sounds." *Shepard v. United States*, 290 U.S. 96, 104 (1933) (Cardozo, J.). We are therefore sure erroneously admitted hearsay evidence contributed to the jury verdict and was not harmless.

REVERSED AND REMANDED.

LOCKEMY, C.J., concurs.

KONDUROS, J., dissenting: I respectfully dissent from my learned colleagues' opinion. While allowing Detective McCauley's statements made during his interrogation of Washington to be presented to the jury may have constituted a violation of *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), by possibly shifting the burden of proof, this issue is not preserved. As the majority acknowledges, Washington's objection to the statements did not concern an alleged burden shifting nor mention a *Brewer* violation. The majority points out the objection to burden shifting in *Brewer* was not preserved. However, in *Brewer*, the defendant objected at trial on the basis that the interrogator's statements were hearsay *and renewed this argument on appeal*. *Id.* at 406, 768 S.E.2d at 658. The supreme court found the "evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." *Id.* at 406-07, 768 S.E.2d at 659.

In the present case, the majority finds, "The statements were inadmissible hearsay, and we reverse the trial court's ruling admitting them." However, Washington's *sole* issue on appeal is the inclusion of the statements shifted the burden of proof and constituted improper opinion evidence. While the argument section of Washington's brief includes a quote from *Brewer* that the statements in that case were hearsay, the section does not include any argument that Detective McCauley's statements constituted hearsay. The sole reference to the statements constituting

hearsay is in the facts section of Washington's brief, stating, "When the officer discussed the pawn tickets, the officer's statements were hearsay and improperly bolstered the testimony of the pawn shop dealers." Accordingly, I do not believe Washington has sufficiently raised any argument regarding hearsay to this court. *See State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001))); *id.* ("An issue is also deemed abandoned if the argument in the brief is merely conclusory." (quoting *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000))).

Because Washington has not raised the issue of hearsay to this court, I believe it is not properly before us and therefore, not appropriate for us to address on appeal. "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) (alteration by court) (quoting *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), *rev'd*, 286 S.C. 85, 332 S.E.2d 100 (1985), *but cited with approval in Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991)). "The appellants have the responsibility to identify errors on appeal, not the [c]ourt." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001). Therefore, I disagree with the majority's reversing Washington's convictions on this basis.

Likewise, Washington's burden shifting argument is not preserved for our consideration. As previously discussed, Washington objected to the disputed statements on the grounds of hearsay and improper bolstering. During the pretrial hearing, Washington argued Detective McCauley "g[a]ve[] opinions as to the strength of the evidence in t[he] case." Washington further argued Detective McCauley repeatedly stated Washington's fingerprint was inside the home and noted the defense disputed this assertion. Washington also argued the disputed statements constituted hearsay and improper bolstering. In response, the State argued Detective McCauley's questions were not hearsay because they were not offered for the truth of the matter asserted and did not constitute bolstering but instead would provide context for the responses Washington gave during the interrogation. When the State moved at trial to admit the recording of Washington's interrogation, Washington simply indicated he had the same objection as he did pretrial. Washington never mentioned *Brewer* nor the more

general argument of burden shifting.[1] Therefore, the issue was not raised to nor ruled upon by the trial court.

"The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." *State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010). "Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments." *Id.* at 38, 698 S.E.2d at 242. "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (citation omitted). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Because Washington never argued to the trial court that inclusion of the statements/questions by Detective McCauley improperly shifted the burden, I would find this issue unpreserved.

Even if the issues were preserved, I believe admission of Detective McCauley's statements constitutes harmless error in light of the other overwhelming evidence of Washington's guilt including the fingerprint evidence showing he had been inside the dwelling, the pawn tickets showing he was in possession of the stolen items on the day of the burglary, and his assertion of a spurious alibi. *See Brewer*, 411 S.C. at 408-09, 768 S.E.2d at 660 (holding the error in the admission of evidence in regards to certain charges was harmless in view of the overwhelming evidence of the defendant's guilt); *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence."); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it 'could not reasonably have affected the result of the trial.'" (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971))).

[1] The *Brewer* opinion was published January 28, 2015. Washington's trial took place over two years later on April 17-18, 2017.

Further, in its opening and closing statements, the State acknowledged that it bore the entire burden to prove Washington guilty. The trial court issued similar admonishments in its jury charge.

Therefore, I would find the trial court did not abuse its discretion in admitting Detective McCauley's statements and would affirm Washington's convictions.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lucius Simuel, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001607

Appeal From Beaufort County
Roger L. Couch, Circuit Court Judge

Opinion No. 5774
Heard March 9, 2020 – Filed October 7, 2020

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General Benjamin Hunter Limbaugh, and Assistant Attorney General Sara Elyssa Gunton, all of Columbia, for Respondent.

MCDONALD, J.: In this action for post-conviction relief (PCR), Lucius Simuel argues the PCR court erred in finding trial counsel provided effective assistance of counsel despite counsel's erroneous belief that Simuel's prior Georgia conviction for false imprisonment should not qualify as a predicate offense for sentencing purposes in South Carolina. Thus, Petitioner alleges, trial counsel failed to advise

him to accept the State's plea offer or inform him that, if convicted,[1] he would be exposed to a mandatory sentence of life in prison without the possibility of parole (LWOP) under section 17-25-45 of the South Carolina Code.[2] We affirm.

"Our standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Id.* "We review questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839.

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[1] Petitioner was indicted for assault and battery with intent to kill (ABWIK), possession of a weapon during the commission of a violent crime, and first-degree burglary following a home invasion and shooting in Bluffton. He was later indicted for possession of a firearm by a prohibited person. Based on Petitioner's prior record, the State served a timely notice that it would seek life without the possibility of parole should Petitioner be convicted of ABWIK or burglary.

[2] Section 17-25-45 is a recidivist offender statute requiring the imposition of an LWOP sentence for a person convicted of a "most serious" offense when the person has "one or more prior convictions for: (a) a most serious offense; or (b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section."). On direct appeal, our supreme court affirmed the trial court's application of § 17-25-45 to Petitioner's case. *See State v. Simuel*, Op. No. 2012-MO-031 (S.C. Sup. Ct. filed July 25, 2012) (affirming Petitioner's sentence "because the Georgia crime of false imprisonment would be categorized as the 'most serious' offense of kidnapping under South Carolina law."). *See also* Ga. Code Ann. § 16-5-41(A) (West 2011) ("A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority."); S.C. Code Ann. § 16-3-910 (Supp. 2011) ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law . . . is guilty of a felony. . . ."); *State v. Phillips*, 400 S.C. 460, 462, 734 S.E.2d 650, 651 (2012) ("When a prior conviction is for an offense not found in § 17-25-45, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement.").

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). The right to effective assistance of counsel extends to the plea bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To prove ineffective assistance, a petitioner must prove trial counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability that the result would have been different. *Strickland*, 466 U.S. at 691–94. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

"[T]he Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). "[A]n accused is entitled to counsel's considered and reasonable judgment." *Id.* "In fact, uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State." *Id.*

In *Lafler*, the key issue before the United States Supreme Court was how to apply *Strickland's* prejudice test when trial counsel failed to sufficiently evaluate and convey the State's plea offer to the petitioner. 566 U.S. at 163. The Court held that in these circumstances, a petitioner must show that but for the ineffective assistance, there is a reasonable probability that the plea offer would have been presented to the court, the court would have accepted its terms, and the conviction or sentence, or both, would have been less severe under the terms of the offer than under the judgment and sentence imposed. *Id.* at 164.

On the same day the Supreme Court issued *Lafler*, it released *Missouri v. Frye*, 566 U.S. 134, 147 (2012), holding "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." To establish prejudice, it is necessary for a defendant to "show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id*. A defendant "must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id.*

Here, Petitioner testified the State's plea offer "was never negotiated" but would have been conditioned on his future testimony against his co-defendant. As to a plea offer of twenty years, Petitioner stated, "Well he [trial counsel] told me that he possibly, possibly could." When asked about any erroneous sentencing advice, Petitioner responded trial counsel never gave him an opinion as to the possibility that the prior Georgia conviction could trigger the LWOP statute because "[w]e never discussed it." He did, however, admit that he "received a letter that the State was seeking life without parole, but I didn't fully understand it."

By contrast, when trial counsel was asked whether he and Petitioner discussed the "very issue" of whether Petitioner's prior Georgia false imprisonment conviction "would count as a most serious offense and therefore trigger the life without parole mandatory sentencing," trial counsel responded succinctly: "We did." He then explained he advised Petitioner that while he did not believe the prior Georgia conviction *should* qualify as a predicate "most serious" offense—and he would oppose an LWOP sentence if Petitioner were convicted—he also recognized it was possible the trial court would disagree with his position. Trial counsel stated, "And yes, if I lose on that issue and he's convicted, life without parole, nothing that the Judge can do about it."[3] Trial counsel also informed Petitioner that even if the trial court determined the State's LWOP notice was invalid, it could impose a sentence of fifteen years up to life imprisonment based on the statutory sentencing range for first-degree burglary. *See* § 16-11-311(B) ("Burglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, 'life' means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen years."). To trial counsel, this distinction was "[e]xtremely, important" because without the triggering of the LWOP statute, it was possible Petitioner could receive as little as fifteen years if convicted on the burglary charge.[4]

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[3] Counsel further testified, "I mean, I shared with him my, my belief that the law didn't support the triggering of the life without parole statute. I mean, it was obvious that the Solicitor believed that it did and he and I had a difference of opinion."

[4] Standing alone, Petitioner's maximum exposure on the ABWIK charge was twenty years. *See* § 16-3-620 (Supp. 2009) ("The crime of assault and battery with

Thus, evidence supports that trial counsel informed Petitioner he could receive a life sentence in one of two ways: through the potential application of the LWOP statute, or if the court imposed the maximum sentence for a burglary conviction. This differs from the situation in *Lafler*, *supra*, which went to the Supreme Court "with the concession that counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment, applicable to the States through the Fourteenth Amendment." *Lafler*, 566 U.S. at 160. Counsel's testimony as to his analysis of the LWOP exposure supports the PCR court's finding that Petitioner made an informed decision to reject State's twenty-year offer and proceed to trial, hoping for as little as fifteen years, but knowing he faced the possibility of LWOP, or a life sentence for burglary.[5] *See Smalls*, 422 S.C. at 180, 810 S.E.2d at 839 ("We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them.").

Evidence also supports the PCR court's finding that Petitioner failed to prove he was prejudiced by any failure of trial counsel to properly advise him. Petitioner admitted he received the State's LWOP notice; however, he provided no evidence to the PCR court, such as a self-serving statement, that he would have pled guilty had he been advised the trial court would reject trial counsel's argument and determine the prior Georgia conviction qualified as a predicate offense. *See Bell v. State*, 410 S.C. 436, 443, 765 S.E.2d 4, 7 (Ct. App. 2014) ("[I]t is not always necessary for a[n applicant] to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a[n applicant's] self-serving statement may be sufficient to establish actual prejudice.").

Finally, Petitioner's statements denying the plea offer was ever "negotiated" to him—while recognizing the offer would be conditioned upon his cooperation against his co-defendant—cast doubt upon Petitioner's credibility. Although the

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intent to kill shall be a felony in this State and any person convicted of such crime shall be punished by imprisonment not to exceed twenty years.").

[5] Petitioner did not make a separate claim that trial counsel failed to communicate the plea offer to him. Trial counsel testified that the twenty-year plea deal was offered and Petitioner rejected it. Counsel did not recall that the State conditioned the plea offer on Petitioner's testimony against his co-defendant, "but if he [Petitioner] says that is what it was, then I'm pretty sure that it was."

PCR court made no specific credibility findings, trial counsel's testimony contradicting Petitioner's claim that he and trial counsel "never discussed" the LWOP risk at all further supports the PCR court's determination that trial counsel "properly advised [Petitioner] as to life without parole." Accordingly, we affirm the PCR court's denial of post-conviction relief.

AFFIRMED.

HUFF and THOMAS, JJ., concur.