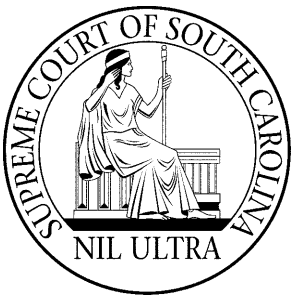

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 42
November 8, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

27685 - Louis Michael Winkler, Jr. v. The State Denied 10/2/2017

27701 - Bobby Wayne Stone v. The State Denied 10/30/2017

27706 - The State v. Alphonso Thompso Pending

PETITIONS FOR REHEARING

27728 - Jane Doe v. The State Pending

27731 - Protestant Episcopal v. Episcopal Church Pending

27734 - In the Matter of William Ashley Jordan Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27744 - The State v. Raheem King Granted until 11/20/ 2017

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2017-UP-415-Directory Assistants, Inc. v. Dennis Shay

2017-UP-416-State v. Brandon Hunter Kenny Rivers

2017-UP-417-State v. Christopher Jermaine Wells

2017-UP-418-State v. Shameen Coker

2017-UP-419-In the interest of Malik S., a juvenile under the age of seventeen

2017-UP-420-State v. Emmanuel Bashan Elleby

2017-UP-421-State v. Brandon Jermaine Benson

2017-UP-422-Estate of Edward Mims v. S.C. Dep't of Disabilities and Special Needs

2017-UP-423-In the matter of the care and treatment of John. H. Dorsey

PETITIONS FOR REHEARING

5498-State v. Sandy Lynn Westmoreland	Pending
5500-Willliam Huck v. Avtex Commercial	Pending
5506-State v. Marvin R. Brown	Pending
5510-State v. Stanley L. Wrapp	Pending
5512-State v. Robert L. Moore	Denied 11/02/17
5513-DIRECTV, Inc. v. S.C. Dep't of Revenue	Pending
5514-State v. Robert Jared Prather	Pending

5517-Kiawah Resort v. Kiawah Island	Pending
5518-State v. Derek V. Collier	Pending
2017-UP-342-State v. Bryant Christopher Gurley	Pending
2017-UP-344-Brent E. Bentrim v. Wells Fargo	Pending
2017-UP-355-George Hood v. Jasper County	Pending
2017-UP-358-Jeffrey D. Allen v. SCBCB	Pending
2017-UP-359-Emily Carlson v. John Dockery	Pending
2017-UP-362-Edward Spears v. SCDEW	Pending
2017-UP-378-Ronald Coulter v. State	Pending
2017-UP-379-Johnny Tucker v. SCDOT	Pending
2017-UP-383-State v. Vincent Missouri	Pending
2017-UP-385-Antonio Gordon v. State	Pending
2017-UP-387-In the matter of the care and treatment of Kenneth Burris	Pending
2017-UP-391-State v. Sean Robert Kelly	Pending
2017-UP-403-Preservation Society of Charleston v. SCDHEC	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5382-State v. Marc A. Palmer	Pending
5387-Richard Wilson v. Laura B. Willis	Pending
5391-Paggy D. Conits v. Spiro E. Conits	Pending
5419-Arkay, LLC v. City of Charleston	Pending
5431-Lori Stoney v. Richard Stoney	Pending

5432-Daniel Dorn v. Paul Cohen	Pending
5433-The Winthrop University Trustees v. Pickens Roofing	Pending
5438-The Gates at Williams-Brice v. DDC Construction Inc.	Pending
5441-State v. David A. Land	Pending
5442-Otha Delaney v. First Financial	Pending
5447-Rent-A-Center v. SCDOR	Pending
5448-Shanna Kranchick v. State	Pending
5449-A. Marion Stone III v. Susan B. Thompson	Pending
5450-Tzvetelina Miteva v. Nicholas Robinson	Pending
5451-Pee Dee Health v. Estate of Hugh Thompson, III (3)	Pending
5452-Frank Gordon, Jr. v. Donald W. Lancaster	Pending
5453-Karen Forman v. SCDLLLR (3)	Pending
5454-Todd Olds v. City of Goose Creek	Pending
5455-William Montgomery v. Spartanburg County	Pending
5456-State v. Devin Johnson	Denied 11/02/17
5458-William Turner v. SAIIA Construction	Pending
5460-Frank Mead, III, v. Beaufort Cty. Assessor	Pending
5462-In the matter of the Estate of Eris Singletary Smith	Pending
5467-Belle Hall Plantation v. John Murray (David Keys)	Pending
5469-First Citizens Bank v. Park at Durbin Creek	Pending
5471-Joshua Fay v. Total Quality Logistics	Pending
5473-State v. Alexander Carmichael Huckabee, III	Pending

5475-Sara Y. Wilson v. Charleston Co. School District	Pending
5476-State v. Clyde B. Davis	Pending
5477-Otis Nero v. SCDOT	Pending
5479-Mark M. Sweeny v. Irene M. Sweeney	Pending
5483-State v. Shannon Scott	Pending
5485-State v. Courtney S. Thompson and Robert Antonio Guinyard	Pending
5486-SC Public Interest v. John Courson	Pending
5487-State v. Toaby Alexander Trapp	Pending
5488-Linda Gibson v. Ameris Bank	Pending
5489-State v. Eric T. Spears	Pending
5490-Anderson County v. Joey Preston	Pending
5492-State v. Demario Monte Thompson	Pending
5499-State v. Jo Pradubsri	Pending
5502-State v. Preston Ryan Oates	Pending
5503-State v. Wallace Steve Perry	Pending
5504-John Doe 2 v. The Citadel	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2016-UP-395-Darrell Efird v. The State	Pending
2016-UP-402-Coves Darden v. Francisco Ibanez	Pending
2016-UP-408-Rebecca Jackson v. OSI Restaurant Partners	Pending

2016-UP-424-State v. Daniel Martinez Herrera	Pending
2016-UP-473-State v. James K. Bethel, Jr.	Pending
2016-UP-475-Melissa Spalt v. SCDMV	Pending
2016-UP-485-Johnson Koola v. Cambridge Two (2)	Pending
2016-UP-486-State v. Kathy Revan	Pending
2016-UP-515-Tommy S. Adams v. The State	Pending
2016-UP-519-Live Oak Village HOA v. Thomas Morris	Pending
2016-UP-528-Betty Fisher v. Bessie Huckabee and Lisa Fisher v. Betty Huckabee	Pending
2016-UP-529-Kimberly Walker v. Sunbelt	Pending
2017-UP-002-Woodruff Road v. SC Greenville Hwy. 146	Pending
2017-UP-009-In the matter of Daryl Snow	Pending
2017-UP-013-Amisub of South Carolina, Inc. v. SCDHEC	Pending
2017-UP-015-State v. Jalann Williams	Pending
2017-UP-017-State v. Quartis Hemingway	Pending
2017-UP-021-State v. Wayne Polite	Pending
2017-UP-025-State v. David Glover	Pending
2017-UP-026-State v. Michael E. Williams	Pending
2017-UP-028-State v. Demetrice R. James	Pending
2017-UP-029-State v. Robert D. Hughes	Pending
2017-UP-031-FV-I, Inc. v. Bryon J. Dolan	Pending
2017-UP-037-State v. Curtis Brent Gorny	Pending

2017-UP-040-Jeffrey Kennedy v. Richland Sch. Dist. Two	Pending
2017-UP-043-Ex parte: Mickey Ray Carter, Jr. and Nila Collean Carter	Pending
2017-UP-046-Wells Fargo v. Delores Prescott	Pending
2017-UP-054-Bernard McFadden v. SCDC	Pending
2017-UP-059-Gernaris Hamilton v. Henry Scott	Pending
2017-UP-065-State v. Stephon Robinson	Pending
2017-UP-067-William McFarland v. Mansour Rashtchian	Pending
2017-UP-068-Rick Still v. SCDHEC	Pending
2017-UP-070-State v. Calvert Myers	Pending
2017-UP-071-State v. Ralph Martin	Pending
2017-UP-082-Kenneth Green v. SCDPPPS	Pending
2017-UP-096-Robert Wilkes v. Town of Pawleys Island	Pending
2017-UP-103-State v. Jujuan A. Habersham	Pending
2017-UP-108-State v. Michael Gentile	Pending
2017-UP-118-Skydive Myrtle Beach, Inc. v. Horry County	Pending
2017-UP-124-Rudy Almazan v. Henson & Associates	Pending
2017-UP-137-In the matter of Calvin J. Miller	Pending
2017-UP-139-State v. Jeffrey Lynn Chronister	Pending
2017-UP-145-Cory McMillan v. UCI Medical Affiliates	Pending
2017-UP-158-State v. Rion M. Rutledge	Pending
2017-UP-169-State v. David Lee Walker	Pending

2017-UP-209-Jose Maldonado v. SCDC (2)	Pending
2017-UP-217-Clarence B. Jenkins v. SCDEW	Pending
2017-UP-228-Arrowpoint Capital v. SC Second Injury Fund	Pending
2017-UP-229-Arrowpoint Capital v. SC Second Injury Fund	Pending
2017-UP-233-Martha Perez v. Alice Manufacturing	Pending
2017-UP-234-SunTrust v. Mark Ostendorff	Pending
2017-UP-236-State v. Dennis E. Hoover	Pending
2017-UP-237-State v. Shane Adam Burdette	Pending
2017-UP-241-Robert Lester, Jr. v. Marco and Timea Sanchez	Pending
2017-UP-245-State v. Dameon L. Thompson	Pending
2017-UP-249-Charles Taylor v. Stop 'N' Save	Pending
2017-UP-258-State v. Dennis Cervantes-Pavon	Pending
2017-UP-262-In the matter of Carl M. Asquith	Pending
2017-UP-263-State v. Dean Nelson Seagers	Pending
2017-UP-264-Jerry Hogan v. Corder and Sons, Inc.	Pending
2017-UP-265-Genesie Fulton v. L. William Goldstein	Pending
2017-UP-272-State v. Wayland Purnell	Pending
2017-UP-279-Jose Jimenez v. Kohler Company	Pending
2017-UP-282-Mother Doe A v. The Citadel	Pending
2017-UP-289-Marion Stone v. Susan Thompson	Pending
2017-UP-300-TD Bank v. David H. Jacobs	Pending
2017-UP-324-State v. Mario Valerio Gonzalez Hernandez	Pending

2017-UP-331-SCDSS v. Nina Ward	Pending
2017-UP-336-Clarence Winfrey v. Archway Services, Inc.	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2017-UP-340-Jimmy Boykin v. Zady Burton	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Andrew T. Looper, Petitioner.

Appellate Case No. 2015-001493

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 27746
Heard June 15, 2017 – Filed November 8, 2017

AFFIRMED AS MODIFIED

J. Falkner Wilkes and Steve W. Sumner, both of Greenville, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia, for Respondent.

JUSTICE KITTREDGE: Petitioner Andrew T. Looper challenges the court of

appeals' dismissal of his appeal from an interlocutory circuit court order. We affirm as modified, and in doing so clarify our rules regarding appealability.

I.

Petitioner was charged with driving under the influence (DUI) after being pulled over by a Greenville County Sheriff's Deputy for speeding. At a pretrial hearing before a magistrate, Petitioner moved to suppress evidence of field sobriety tests and breath analysis, arguing they were the fruits of an unconstitutionally prolonged traffic stop. The magistrate granted Petitioner's motion to suppress the evidence and dismissed the DUI charge.

The State appealed to the circuit court.[1] The circuit court held the magistrate erred in granting Petitioner's motion and reversed and remanded for further proceedings.

Thereafter, Petitioner appealed to the court of appeals, which analogized the circuit court's order to an interlocutory order denying a motion to suppress evidence. *State v. Looper*, 412 S.C. 363, 366, 772 S.E.2d 516, 517 (Ct. App. 2015). The court of appeals therefore dismissed the appeal, finding Petitioner was not "aggrieved" in a legal sense because he had not been convicted and sentenced. *Id.* at 365–66, 772 S.E.2d at 517.

We issued a writ of certiorari to review the court of appeals' decision.

II.

Petitioner now argues the court of appeals erred by concluding that, because he had not been convicted below, he was not aggrieved and not entitled to appeal the circuit court's decision. We disagree, and we take this opportunity to clarify our appealability jurisprudence.

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[1] An appeal from a magistrate's court is to "the circuit court of the county where the judgment was rendered." Rule 18(a), SCRMC.

A.

In South Carolina, the State may immediately appeal an interlocutory order "granting the suppression of evidence which significantly impairs the prosecution of a criminal case." *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985); *see* S.C. Code Ann. § 14-3-330(2)(a) (2017) (giving the Court appellate jurisdiction to review an intermediate order that "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action"). In contrast, typically "a criminal defendant may not appeal 'except from the final sentence imposed by the court.'" *State v. Gregorie*, 339 S.C. 2, 3, 528 S.E.2d 77, 78 (2000) (quoting *State v. Timmons*, 68 S.C. 258, 259, 47 S.E. 140, 141 (1904)); *see also State v. Miller*, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986) ("In South Carolina, a criminal defendant may not appeal until sentence has been imposed.").

In *Gregorie*, we held that once an appeal has been taken to the circuit court and "that court renders its final judgment, the right to further appellate review is controlled by statute: Any aggrieved party may appeal the circuit court's final judgment." 339 S.C. at 4, 528 S.E.2d at 78; *see* S.C. Code Ann. § 18-1-30 (2014) ("Any party aggrieved may appeal in the cases prescribed in this title."); *id.* § 18-9-10 (2014) (providing for appeals to this Court or the court of appeals in cases that are appealed pursuant to section 14-3-330).

"'[A]n aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property.'" *State v. Rearick*, 417 S.C. 391, 398 n.9, 790 S.E.2d 192, 196 n.9 (2016) (alteration in original) (quoting *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997)), *cert. denied*, 137 S. Ct. 1582 (2017). "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

B.

Relying on *Gregorie*, Petitioner contends that once the appellate process was properly begun by the State, it could be continued by any party that received an adverse decision from the reviewing court. Therefore, because the circuit court

ruled against him, Petitioner argues he was entitled to an immediate appeal.

While the result in *Gregorie* is correct, the language in the opinion can be parsed in a manner that is at odds with our well-established appealability rules. That language, which Petitioner understandably focuses on, suggests that the test for appealability is "whether the party bringing the appeal is aggrieved." *Gregorie*, 339 S.C. at 4, 528 S.E.2d at 78. We acknowledge that this language may be read to suggest that being aggrieved is the only requirement to appeal from a circuit court's order. However, understood in context, we do not view *Gregorie* as a departure from the general requirements for appealability: being aggrieved *by a final judgment*. This is so because Gregorie had been convicted and sentenced, and under the facts and procedural posture of that case, any retrial was barred by double jeopardy as a matter of law, rendering the order of the circuit court effectively a final judgment by which Gregorie was unquestionably aggrieved. *See id.* at 3–4, 528 S.E.2d at 78. Thus, the twin pillars of appealability, *aggrieved* and *a final judgment*, were present.

Here, in contrast, as the court of appeals noted, Petitioner has not been convicted and sentenced. *See Looper*, 412 S.C. at 365, 772 S.E.2d at 517. We, of course, take no exception to the notion that Petitioner was adversely impacted by the circuit court's order remanding the case for trial, but he was not aggrieved in a legal sense. *Cf. Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) ("Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order."). Moreover, because the circuit court's order did not purport to determine Petitioner's guilt or impose any sentence on him, it was not a final judgment. *Cf. State v. Isaac*, 405 S.C. 177, 182–83, 187, 747 S.E.2d 677, 679–80, 682 (2013) (construing the denial of an immunity request pursuant to the Protection of Persons and Property Act and dismissing an appeal on the basis that "an order denying a request for immunity is not a final order in the case" and recognizing that "[t]his Court has held that, generally, a criminal defendant may not appeal until sentence is imposed" (emphasis removed)).

Relying on selected language in *Gregorie*, Petitioner additionally advances section 18-1-30 of the South Carolina Code as a standalone basis in support of his purported right to appeal the circuit court's order.[2] Section 18-1-30 provides, "Any

[2] *See Gregorie*, 339 S.C. at 4, 528 S.E.2d at 78 ("Once th[e] [circuit] court renders

party aggrieved may appeal in the cases prescribed in this title." S.C. Code Ann. § 18-1-30. However, this statute cannot be construed in isolation to permit an appeal as a matter of right on the sole basis of being aggrieved. Indeed, this is self-evident from the statute's reference to "the cases prescribed in this title." *Id.* Elsewhere in title 18, section 18-1-10 expressly references "the mode [of reviewing a judgment or order] prescribed for particular matters in Titles 14, 15, and 17 [of the South Carolina Code]." *Id.* § 18-1-10 (2014). And section 18-9-10 specifically refers to appeals brought pursuant to section 14-3-330. *Id.* § 18-9-10. Naturally, then, courts frequently turn to section 14-3-330 in analyzing whether an interlocutory order may be appealed.[3] *See, e.g.*, *Brown v. County of Berkeley*, 366 S.C. 354, 361–62, 622 S.E.2d 533, 537–38 (2005) (reviewing the denial of a motion to dismiss and finding it not immediately appealable).

Whether based on statute or case law, the overarching point remains—absent the presence of an exception to the final judgment rule, appealability is determined by a final judgment and an aggrieved party. *See also* Rule 201, SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order[,] or decision. . . . Only a party aggrieved by an order, judgment, sentence[,] or decision may appeal."). As noted, in the criminal context, a judgment is final when sentence is imposed. *See, e.g.*, *Gregorie*, 339 S.C. at 4, 528 S.E.2d at 78. As Petitioner has not been convicted and sentenced, there has been no final judgment, and as no exception to the requirement of a final judgment is applicable under the facts of this case, Petitioner's appeal is premature and must be dismissed.

III.

To the extent *Gregorie* may be read to imply that any party aggrieved by an order of the circuit court is entitled to appeal, it is hereby modified. We reiterate that a party may appeal from a decision not amounting to a final judgment only where provided by statute. *See Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208

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its final judgment, the right to further appellate review is controlled by statute: Any aggrieved party may appeal the circuit court's final judgment.").

[3] Petitioner makes no argument that section 14-3-330 authorizes his appeal from the order of the circuit court.

(2005) ("Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [section] 14-3-330."). We therefore affirm as modified the court of appeals' dismissal of Petitioner's appeal.[4]

AFFIRMED AS MODIFIED.

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

[4] If Petitioner is convicted and sentenced in the magistrate's court, he may then challenge on appeal the circuit court's reversal of the magistrate's order suppressing evidence and dismissing the charge.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Deangelo Mitchell, Defendant,

and

AA Ace Bail by Frances and Palmetto Surety Corp., as Surety, Petitioners.

Appellate Case No. 2016-000980

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 27747
Heard April 12, 2017 – Filed November 8, 2017

AFFIRMED

Robert T. Williams, Sr. and Benjamin Allen Stitely, both of Williams, Stitely & Brink, PC, of Lexington, for Petitioners.

Attorney General Alan McCrory Wilson and Assistant Attorney General V. Henry Gunter, Jr., both of Columbia, and Solicitor Scarlett A. Wilson, of Charleston, for Respondent.

JUSTICE JAMES: This appeal arises from an order estreating a surety bond and remitting one-half of the bond forfeiture. The court of appeals affirmed in an unpublished opinion. *State v. Mitchell*, Op. No. 2016-UP-070 (S.C. Ct. App. filed Feb. 17, 2016). We affirm the court of appeals' holding that the bond estreatment was proper and that the amount of forfeiture remitted was not arbitrary or capricious. We hold that the circuit court may consider the willfulness of a bondsperson's actions, in addition to the willfulness of a defendant's actions, when determining whether, and to what extent, to remit a bond forfeiture.

FACTUAL AND PROCEDURAL HISTORY

Deangelo Mitchell was arrested for possession with intent to distribute cocaine and was released on a $25,000 surety bond. Subsequently, Mitchell was arrested for trafficking in cocaine, distribution of cocaine, and involuntary manslaughter; bond was set at $400,000. Mitchell's bonds were then consolidated for all his pending charges and the circuit court set a $150,000 surety bond. Bond conditions included a standard good behavior condition, plus house arrest and electronic monitoring. AA Ace Bail by Frances and Palmetto Surety Corporation (collectively, Bond Company) executed the $150,000 surety bond and Mitchell was released.

Thereafter, the State moved to revoke Mitchell's bond on the basis that Mitchell blatantly disregarded the house arrest and electronic monitoring provisions of his bond and thus, violated the "good behavior" requirement of the bond contract.[1]

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[1] The parties have concentrated their arguments upon Mitchell's repeated electronic monitoring violations as being violations of the "good behavior" condition of his bond. Arguably, a good behavior violation is committed only when the defendant has committed another crime while out on bond. Even if repeated violations of the electronic monitoring provisions are not "good behavior" violations, the bond covering Mitchell (and most other defendants) clearly includes a provision that the defendant shall comply with all conditions of bond; since this bond included a

Mitchell appeared at the revocation hearing and testified that he was never informed of the conditions of his bond and that he was never informed he was violating a condition of his bond.

Mitchell's bondsperson, Frances Jenkins, testified at the revocation hearing that she has been a bondsperson for almost twenty years. She testified she was aware electronic monitoring was a condition of Mitchell's bond. Jenkins admitted the monitoring company contacted her two to three times to inform her that Mitchell was violating the electronic monitoring conditions; she testified that she in turn contacted Mitchell and told him to "tighten up." Concerning her responsibilities as a bondsperson, Jenkins initially testified, "I write appearance bonds, not behavior bonds." Later during her testimony, she conceded that her responsibilities as a bondsperson include helping to enforce bond conditions other than the defendant's appearance in court.

James Robinson, the owner of the monitoring company, testified at the revocation hearing that his office contacted Mitchell and Jenkins on several occasions regarding the electronic monitoring violations, and that after continuing violations, his office notified Jenkins she needed to arrest Mitchell because "it was very obvious" that he was staying out all night. Robinson testified "it got to where there was just no compliance" and that Mitchell committed daily house arrest and electronic monitoring violations. Robinson testified he advised Jenkins that it appeared Mitchell was "out there doing drug transactions." Robinson testified that Jenkins refused to pick Mitchell up and responded, "well, that's how he makes a living." Jenkins denied telling Robinson that she knew Mitchell made money dealing drugs.

The circuit court found Mitchell's claims of ignorance as to the conditions of his bond were not credible and revoked the bond for repeated violations of the terms and conditions of the bond. Mitchell was placed in custody until he pled guilty and was sentenced to a term of incarceration.

On August 8, 2012, the State filed a Notice of Forfeited Recognizance seeking estreatment of the bond posted by Bond Company. The circuit court held two

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provision that Mitchell would comply with all conditions of bond, and since house arrest and electronic monitoring were conditions of bond, the result is the same.

hearings on the motion, and on July 9, 2014, the circuit court issued its order estreating $75,000 of the $150,000 bond.

In its order, the circuit court first noted that pursuant to *Ex parte Polk*, 354 S.C. 8, 579 S.E.2d 329 (Ct. App. 2003), the purpose of the bond "was to assure not only Mr. Mitchell's appearance, but also his good behavior while out on bond," noting the additional conditions of the bond order imposing house arrest and electronic monitoring. Second, the court found Mitchell's violations, "as well as Ms. Jenkins' admitted failure to fulfill her obligations as the bondsperson and take appropriate action to address them, were clearly willful." Finally, the court found that the State incurred expenses in addressing this matter and that the State was prejudiced because this case, in addition to other cases brought to the court's attention, resulted in the issuance of a moratorium on the use of electronic monitoring in the circuit. The court of appeals affirmed both the circuit court's decision to estreat the bond and the amount estreated. *Mitchell*, Op. No. 2016-UP-070.

STANDARD OF REVIEW

"An appellate court reviews the circuit court's ruling on the forfeiture or remission of a bail bond for abuse of discretion." *State v. McClinton*, 369 S.C. 167, 170, 631 S.E.2d 895, 896 (2006).

> An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

Id.

DISCUSSION

Bond Company contends estreatment was improper because the sole purpose of a surety is to insure the defendant's appearance for court, not the defendant's

behavior. Bond Company concedes that a bond may be estreated for a violation of a bond condition but argues that once the defendant is surrendered to the State, the entire amount of estreatment must be remitted, as long as the State has suffered no prejudice. Bond Company further contends that even if estreatment were proper, the amount remitted was arbitrary and capricious because Mitchell appeared for court, the State incurred no costs from locating or prosecuting Mitchell, and the State otherwise suffered no prejudice. We disagree.[2]

An appearance recognizance bond:

> must be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what is enjoined by the court, and not to leave the State, and be of good behavior toward all the citizens of the State, or especially toward a person or persons specified by the court.

S.C. Code Ann. § 17-15-20(A) (2014). Upon breach of a condition of the recognizance, the recognizance is forfeited and the liability of the surety to pay the amount of the penalty becomes fixed, "unless relieved or exonerated by action of the court." *Pride v. Anders*, 266 S.C. 338, 340, 223 S.E.2d 184, 185 (1976) (citing *State v. Edens*, 88 S.C. 302, 70 S.E. 609 (1911)).

The procedure for estreatment of bonds in the instant case is controlled by South Carolina Code § 17-15-170 (2014). *See State v. Holloway*, 262 S.C. 552, 554, 206 S.E.2d 822, 823 (1974). The circuit court followed the requisite procedure. Section 17-15-170 provides that whenever the recognizance is forfeited by noncompliance with its conditions, the State shall immediately notify any party

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[2] Bond company also contends that any estreatment must be conditional upon the surrender of the defendant to the State under S.C. Code Ann. § 38-53-70 (2015) and that they are relieved of liability because Mitchell appeared in court. We hold this issue is not preserved for this Court's review. Even if the issue was preserved, section 38-53-70 is inapplicable to this case because it only applies to an estreatment being paid in installments resulting from a defendant's failure to appear in court. Here, Mitchell appeared for court and estreatment was ordered based upon Mitchell's violation of the good behavior condition and upon the willful noncompliance of Mitchell and Jenkins.

bound in the forfeited recognizance to appear and show cause "why judgment should not be confirmed against him." At the show cause hearing, if the person so bound "does not give a reason for not performing the condition of the recognizance as the court considers sufficient, then the judgment on the recognizance is confirmed." S.C. Code Ann. § 17-15-170.

Thereafter, a second hearing may be held to determine the amount, if any, to be remitted. *Holloway*, 262 S.C. at 555, 206 S.E.2d at 823. The court may "remit the whole or any part of the forfeiture as may be deemed reasonable" upon affidavit sufficiently stating the forfeiture resulted "from ignorance or unavoidable impediment and not from wilful default." S.C. Code Ann. § 17-15-180 (2014).

The circuit court is vested with discretionary power to determine whether a bond forfeiture should be remitted, and if so, to what extent. *State v. Workman*, 274 S.C. 341, 343, 263 S.E.2d 865, 866 (1980). *But see United States v. Parr*, 560 F.2d 1221, 1224 (5th Cir. 1977) ("Neither frustration nor its kinsman vindictiveness should be of weight in tipping the scales by which the elements of the court's discretion is weighed."). "[I]n determining whether any remission of the judgment is warranted, the trial court is not limited to considering only the actual cost to the State." *Ex parte Polk*, 354 S.C. at 12–13, 579 S.E.2d at 331. "[T]he following factors, *at the least*, should be considered in determining whether, and to what extent, the bond should be remitted: (1) the purpose of the bond; (2) the nature and wilfulness of the default; (3) any prejudice or additional expense resulting to the State." *Id.* at 13, 579 S.E.2d at 331 (emphasis added).

We respectfully reject Bond Company's argument that a surety is relieved of all liability upon the surrender of a defendant to the State. The obligation of a surety is not to the State to produce the defendant, but is rather "an obligation to answer, to the extent of the penalty, for the default of the defendants, as principals." *Pride*, 266 S.C. at 341, 223 S.E.2d at 186. The surrender of a defendant after default does not entitle a surety to a remission of the forfeiture "as a matter of right." *Holloway*, 262 S.C. at 555–56, 206 S.E.2d at 824.

Although this Court most frequently addresses conditions of a bond breached by a defendant's failure to appear, a professional bondsperson "is certainly aware that an appearance bond carries conditions beyond the defendant's appearance in court." *State v. Boatwright*, 310 S.C. 281, 283, 423 S.E.2d 139, 141 (1992). "The

bond may also be estreated if the defendant breaches terms or conditions of the bond other than appearance." *Id.* at 286, 423 S.E.2d at 142 (Toal, J., dissenting).

Here, despite Bond Company's procurement of Mitchell's appearance in court, the record supports the circuit court's finding that Mitchell committed daily violations of the house arrest and electronic monitoring conditions of his bond. Accordingly, we conclude the circuit court did not abuse its discretion in estreating Mitchell's bond for repeated noncompliance with a condition of bond.

We further conclude that the three factors enumerated in *Polk*, *supra*, are not the exclusive considerations of the circuit court in determining whether to remit a bond forfeiture and, if so, to what extent the forfeiture should be remitted. Indeed, in *Polk*, the court of appeals correctly noted that the circuit court may consider other relevant factors. We hold that in the bond estreatment setting, it is proper for a circuit court to consider the bondsperson's willful failure to monitor the defendant's compliance with conditions of bond in determining whether justice requires the enforcement of a forfeiture order.

Here, the circuit court properly considered the bondsperson's willful failure to fulfill her obligations as the bondsperson, in addition to the *Polk* factors. The circuit court deliberately analyzed each relevant factor pertinent to the circumstances of this case, including: (1) Mitchell's willful daily violations of the condition of house arrest and (2) the bondsperson's total failure to supervise Mitchell and do her part to remedy his noncompliance. Though some circuit judges might have remitted more, and though some might have remitted less, the circuit court weighed the relevant factors and set forth clear factual findings. In adherence to our standard of review, we hold the circuit court did not abuse its discretion in ordering estreatment and in remitting $75,000 of the amount forfeited.

CONCLUSION

We hold that in an estreatment proceeding, the circuit court may consider evidence of a bondsperson's willful failure to fulfill their obligations as the bondsperson, in addition to the factors expressed in *Polk*, in determining whether, and to what extent, a bond forfeiture should be remitted. We hold the circuit court acted within its discretion in determining the amount of the bond forfeiture to be remitted. The court of appeals' decision is affirmed.

AFFIRMED.

BEATTY, C.J., KITTREDGE, J., and Acting Justices James E. Moore and William P. Keesley, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jacquelin S. Bennett, Genevieve S. Felder, and Kathleen S. Turner, individually, as Co-Trustees and Beneficiaries of the Marital Trust and the Qualified Terminable Interest Trust created by the Thomas Stevenson Will, and Jacquelin S. Bennett, and Kathleen S. Turner, as Co-Personal Representatives on behalf of the Estate of Jacquelin K. Stevenson, Respondents,

v.

T. Heyward Carter Jr., Evans, Carter, Kunes & Bennett, P.A., Douglas Capital Management, Inc., Dixon Hughes f/k/a Pratt-Thomas Gumb & Co., P.A., and Lynne L. Kerrison, Defendants,

Of Whom Dixon Hughes f/k/a Pratt-Thomas Gumb & Co., and Lynne L. Kerrison are the Petitioners.

Appellate Case No. 2016-000065

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young Sr., Circuit Court Judge

Opinion No. 27748
Heard May 24, 2017 – Filed November 8, 2017

AFFIRMED AS MODIFIED

M. Dawes Cooke Jr., of Barnwell Whaley Patterson & Helms, LLC, of Charleston, and Frederick K. Sharpless, of Greensboro, both for Petitioners.

Keith M. Babcock, A. Camden Lewis, James Mixon Griffin, and Ariail Elizabeth King, all of Lewis Babcock & Griffin, LLP, of Columbia, for Respondents.

JUSTICE JAMES: We granted certiorari to review the court of appeals' decision reversing in part a circuit court order which granted Petitioners summary judgment on Respondents' individual cause of action for aiding and abetting a breach of fiduciary duty. *Bennett v. Carter*, Op. No. 2015-UP-491 (S.C. Ct. App. filed Oct. 14, 2015). The sole issue before the Court is whether this cause of action survives summary judgment. We affirm as modified.

FACTUAL AND PROCEDURAL HISTORY

Jacquelin Stevenson (Mother) was the sole lifetime beneficiary of two trusts created by the will of her husband, who died in 1988.[1] The residual beneficiaries of the two trusts were her sons, Thomas Stevenson III and Daniel Stevenson II (collectively, the Stevenson brothers), and her daughters, Respondents.

The Stevenson brothers were also co-trustees of the two trusts from 1999 to 2006. Respondents allege that while the Stevenson brothers were co-trustees, they violated their fiduciary duties by unlawfully taking money from the trusts. Respondents claim the Stevenson brothers stole approximately five million dollars from the two trusts.

In 1997, Lynne Kerrison and her accounting firm Dixon Hughes (collectively, Petitioners) began preparing the income tax returns of Mother and the two subject

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[1] The factual recitations herein are in the light most favorable to Respondents, as this is an appeal from a grant of summary judgment. These findings are not binding on the fact-finder on remand.

trusts. Mother's personal bookkeeper, Pat Neapolitan, provided Kerrison with the information needed to complete Mother's tax returns and those of the trusts. In 2001, while preparing Mother's tax returns, Kerrison noticed the records reflected loans to one of the Stevenson brothers and had concerns about the propriety of the transactions. She contacted Mother's attorney, Heyward Carter Jr., and informed him of the transactions. In October of 2001, Kerrison, Carter, and the Stevenson brothers met to discuss the suspect transactions. At this meeting, the Stevenson brothers were advised about the impropriety of these transactions, and they were advised to tell Respondents about their actions. Neither Carter nor Kerrison had any discussions with Respondents about Mother's finances or the finances of the trusts. The Stevenson brothers did not tell Respondents about the transactions until a meeting in 2006.

After the meeting in 2001, the Stevenson brothers continued to withdraw money from the trusts. Neapolitan died, and at some point in 2003, Petitioners began performing the bookkeeping for Mother and the trusts. Petitioners had possession of the trust checkbooks and would write checks from the trusts to the Stevenson brothers. The Stevenson brothers held sole check-signing authority.

To obtain checks from the trusts, the Stevenson brothers would request a withdrawal at Petitioners' office, and Petitioners' employees would then write the checks as requested. Petitioners knew the Stevenson brothers continued to withdraw money from the trusts after the October 2001 meeting. Petitioners were aware some of the checks written for the Stevenson brothers were to the Stevenson brothers' companies, and Petitioners were aware one of Petitioners' partners was personally investing in one of those businesses, as well as sitting on its board.

In 2006, Respondent Kathleen S. Turner (Turner) attended a meeting with Kerrison, Carter, and the Stevenson brothers. At this meeting, Turner learned for the first time that the Stevenson brothers had withdrawn money from the two trusts over a five year period. Mother passed away in 2007. In 2008, Respondents brought suit against the Stevenson brothers, resulting in a settlement with Thomas Stevenson and a judgment against Daniel Stevenson. In 2009, Respondents filed the present action against Petitioners for professional negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty.

The circuit court granted Petitioners' motion for summary judgment on the basis that the three-year statute of limitations had expired on all causes of action. The circuit court also ruled Respondents had not presented sufficient evidence to withstand summary judgment on their claim for aiding and abetting a breach of fiduciary duty. The court of appeals reversed in an unpublished decision, holding there was a question of fact as to when the statute began to run on the cause of action for aiding and abetting a breach of fiduciary duty, and holding Respondents presented sufficient evidence in support of that claim to withstand summary judgment. *Bennett v. Carter*, Op. No. 2015-UP-491 (S.C. Ct. App. filed Oct. 14, 2015). Petitioners do not challenge the statute of limitations holding; therefore, the only issues before the Court are (1) whether the court of appeals erred in holding Petitioners presented sufficient evidence to allow the aiding and abetting claim to survive summary judgment, and (2) whether the aiding and abetting claim abated upon Mother's death in 2007.

DISCUSSION

We review the granting of summary judgment under the same standard applied by the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). The trial court shall grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC*, 387 S.C. at 235, 692 S.E.2d at 505 (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). When the trial court grants summary judgment on a question of law, we review the ruling de novo. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

The elements for aiding and abetting a breach of fiduciary duty are (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. *Future Grp., II v. Nationsbank*, 324

S.C. 89, 99, 478 S.E.2d 45, 50 (1996). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Id.*

A. There is Sufficient Evidence to Allow the Aiding and Abetting Claim to Survive Summary Judgment.

In finding Respondents presented sufficient evidence to withstand summary judgment, the court of appeals wrote, "In addition to taking no further action regarding [the Stevenson brothers'] activities, Kerrison's firm actually had possession of the trust checkbooks and wrote the checks for [the Stevenson brothers'] withdrawals of funds from the trusts." *Bennett v. Carter*, Op. No. 2015-UP-491. We agree Respondents presented evidence from which a jury could reasonably conclude Petitioners knowingly participated in the Stevenson brothers' breach through Petitioners' possession of the trust checkbooks and writing checks to the Stevenson brothers.[2] However, to the extent the "in addition to taking no further action" language employed by the court of appeals can be interpreted to hold that Petitioners' non-disclosure is evidence of Petitioners' knowing participation, we modify the court of appeals' opinion.

Petitioners contend the "in addition to" language employed by the court of appeals allows Respondents to pursue their aiding and abetting claim on the theory Petitioners should have disclosed the Stevenson brothers' withdrawals to Respondents, or at least to Turner. Petitioners argue such disclosure is prohibited by 26 U.S.C. § 7216 (2000) and S.C. Code Ann. § 40-2-190 (Supp. 2004).[3]

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[2] We take no position as to whether other facts, if proven, would also support a claim for aiding and abetting a breach of fiduciary duty.

[3] Petitioners cite section 40-2-190(A) of the South Carolina Code for the proposition that their disclosure of the withdrawals to Respondents was prohibited. Respondents contend Petitioners failed to cite this statute in their arguments before the trial court and the court of appeals, and, therefore, Petitioners are unable to now rely on this statute as authority. We first note the effective date of current section 40-2-190(A) was July 22, 2004—several years after the allegedly improper withdrawals began but more than a year before they ended. It appears the text of current section 40-2-190(A) did not exist elsewhere in the South Carolina Code prior to July 22, 2004; at the least, Petitioners have not cited to any similar statutory language existing prior

Respondents argue the "related taxpayer" exception in 26 C.F.R. § 301.7216-2(b)(1)-(2) (2001)[4] allowed Petitioners to make the disclosure to Respondents. We agree with Petitioners.

Petitioners were prohibited by 26 U.S.C. § 7216 from disclosing the Stevenson brothers' withdrawals to Respondents because this statute prohibits any person who is engaged in the business of preparing tax returns—here, Petitioners—from disclosing to a third party any information furnished for, or in connection with, the preparation of any such return and imposes criminal sanctions for a violation of this prohibition. Respondents contend the "related taxpayer" exception set forth in 26 C.F.R. § 301.7216-2(b)(1)-(2)[5] allowed for disclosure to Turner, as Petitioners also prepared her individual tax returns. We disagree. The exception does not apply, as the exception is triggered only when the tax preparer is engaged in "preparing a tax return of a second taxpayer" *and* when the subject information was used in preparing the second taxpayer's returns. 26 C.F.R. § 301.7216-2(b)(1)-(2). While Turner may have been a "second taxpayer," there is no evidence any information pertaining to the illicit withdrawals was used "in preparing" her personal returns.

Respondents also claim Petitioners should have disclosed the withdrawals to Turner because she was designated as Mother's attorney-in-fact under Mother's 2001 power of attorney. Respondents correctly state that the holder of a power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor. *See Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. Ct. App. 2000) (citing 3 Am. Jur. 2d, *Agency* § 23). However, since Kerrison notified Carter, Mother's personal attorney, of the withdrawals, that was sufficient to notify Mother. *See Crystal Ice*

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to this date, and we have been unable to find any such language. Whatever the case, we find the applicable federal authority as discussed herein is sufficient to support our conclusions.

[4] Parties cite to the "related taxpayer" exception as 26 C.F.R. § 301.7216-2(e)(1)-(2); however, during the time period in which the alleged aiding and abetting occurred, the "related taxpayer" exception was located in subsection (b)(1)-(2). The "related taxpayer" exception was not moved to subsection (e)(1)-(2) until the 2008 version of the Code of Federal Regulations. *See* 26 C.F.R. § 301.7216-2(e)(1)-(2) (2008). Nevertheless, the language is substantially the same.

[5] *See* note 4.

Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979) ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority."). Mother was Carter's client and was competent at the time Kerrison informed Carter about the withdrawals. While Kerrison *could have* disclosed any information to Turner that was disclosed to Mother through Carter, the power of attorney did not create a separate and independent obligation on the part of Petitioners to disclose the withdrawals to Turner in her capacity as Mother's attorney-in-fact. The fact that disclosure to Turner as attorney-in-fact would have resulted in her being individually aware of the withdrawals is of no import.

B. The Aiding and Abetting Claim Survives Mother's Death.

Petitioners contend they are entitled to summary judgment on the ground that Respondents' claim for aiding and abetting a breach of fiduciary duty abated on the death of Mother because the claim rests on a theory of fraud and deceit.[6] We disagree.

Section 15-5-90 of the South Carolina Code (2005) provides "[c]auses of action for and in respect to . . . any and all injuries to the person or to personal property shall survive both to and against the personal or real representative . . . of a deceased person . . . any law or rule to the contrary notwithstanding." However, South Carolina recognizes several exceptions to the survivability of a claim, including an exception for fraud. *See Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941).

Petitioners first argue Respondents' claim for aiding and abetting does not survive Mother's death because the essence of the claim is that Petitioners fraudulently failed to disclose to Respondents the Stevenson brothers' fraud and deceit. This argument is unavailing, as we have determined Petitioners had no obligation to disclose the Stevenson brothers' withdrawals to Respondents.

[6] Petitioners asserted this ground in their original motion, but it was not ruled upon by the trial judge. Petitioners asserted it as an additional sustaining ground before the court of appeals and then again in their petition for rehearing, but it was not ruled upon by the court of appeals. They have raised the issue again before this Court.

Nondisclosure to Respondents—fraudulent or otherwise—is not part of Respondents' aiding and abetting claim.

Second, Petitioners argue the aiding and abetting claim does not survive Mother's death because the claim is based on the Stevenson brothers' fraudulent conduct against Mother, the sole lifetime beneficiary of the trusts. That argument is likewise unavailing. While the Stevenson brothers' alleged fraud and deceit committed against Mother will be in evidence, Respondents' claim for aiding and abetting is based on the Stevenson brothers' fraud and deceit committed against Respondents. The issues framed to this Court have been with regard to Respondents' *individual* claims as beneficiaries, not their claims as co-trustees or co-personal representatives of Mother's estate. Within the context of abatement, the fact that Mother may have been a victim of the Stevenson brothers' fraud and deceit does not impact the viability of Respondents' individual claims. Their individual claims do not derive from damage sustained by Mother during her lifetime, but rather from damage they must prove they individually sustained as residual beneficiaries.

CONCLUSION

The decision of the court of appeals reversing the grant of summary judgment to Petitioners is affirmed as modified.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE, HEARN, JJ., and Acting Justice Clifton Newman, concur.