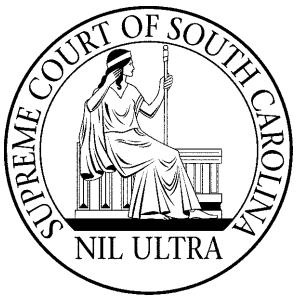

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
December 15, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Brian Austin Katonak, Respondent

Appellate Case No. 2021-001073

Opinion No. 28075
Submitted November 19, 2021 – Filed December 15, 2021

DEFINITE SUSPENSION

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

William O. Higgins, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension not to exceed one year. We accept the Agreement and suspend Respondent from the practice of law in this state for one year.

I.

Respondent was admitted to practice in South Carolina in 1992. Since 2000, he has operated a solo practice in Anderson County handling a variety of matters, including real estate, family, and criminal matters. This Agreement relates to eight disciplinary complaints filed against Respondent between 2014 and 2020, each of which are detailed below.

Matter A

Respondent represented Client A at a four-day bench trial on criminal charges in September 2013. Client A was found guilty and sentenced on September 12, 2013. That same day, Respondent filed and served a Notice of Appeal on behalf of Client A.

On November 19, 2013, the South Carolina Commission on Indigent Defense (SCCID) sent Respondent a letter indicating SCCID would take over representation of Client A if Respondent furnished various documents, including an affidavit of indigency completed by Client A. Respondent forwarded the affidavit of indigency to Client A, indicating he would file the completed affidavit upon receipt.

On March 11, 2014, Respondent wrote to Client A and indicated that he spoke with an individual at SCCID who informed Respondent that Client A's case was assigned to someone in the SCCID office and that the transcript was in the process of being ordered. Respondent represents that based on his conversations with SCCID, he believed he was no longer involved in the appeal.

On April 10, 2014, the South Carolina Court of Appeals dismissed Client A's appeal citing counsel's failure to order the transcript. The case was remitted to the trial court on April 28, 2014. On May 16, 2014, Respondent filed a motion to reopen Client A's case, which was returned without filing due to the court of appeals' lack of appellate jurisdiction.[1]

Respondent believed SCCID had assumed representation of Client A's appeal, but Respondent acknowledges that he was never provided anything in writing indicating that SCCID had assumed actual representation or that Respondent was no longer counsel of record. Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3

[1] Following the court of appeals' dismissal of the direct appeal, a PCR court ultimately granted Client A leave to file a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). In August 2020, the court of appeals affirmed the case on the merits. *In re Whaley*, Op. No. 2020-UP-232 (S.C. Ct. App. filed Aug. 12, 2020).

(requiring diligence); and Rule 1.16(d) (requiring that upon termination of representation, a lawyer must take reasonable steps to protect client interests).

Matter B

Complainant B is a chiropractor who, on June 18, 2010, entered into an agreement with a patient to allow for the patient's attorney to release payment for services to Complainant B. The patient retained Respondent to represent him regarding his personal injury case, and on January 5, 2011, Respondent issued a letter of protection to Complainant B agreeing to protect Complainant B's fees at the time of settlement of the case.

The case eventually settled for $10,000, and a stipulation of dismissal was filed in the case on September 26, 2014. The amount due to Complainant B at the time of settlement was $3,474.

On October 13, 2014, Respondent mailed a letter to Complainant B providing details of the settlement and explaining "I [] neglected that I had sent a letter to your office to protect your bill." In the letter, Respondent also advised Complainant B that the patient/client did not authorize Respondent to pay any medical providers from settlement proceeds. However, Respondent indicated he wanted to "work something out on the matter" and proposed payment of $1,175 of the attorney's fees he received on the case. Respondent further stated he would immediately forward payment if the proposed arrangement was acceptable to Complainant B.

Two days later, on October 15, 2014, Complainant B's office faxed a letter to Respondent advising that Complainant B was willing to accept the offer of $1,175 in satisfaction of the obligation to protect Complainant B's fees. Respondent neither confirmed the arrangement nor forwarded payment of the $1,175 in satisfaction of the arrangement. Respondent admits his conduct in this matter violated Rule 1.15(d), RPC, Rule 407, SCACR (requiring prompt delivery of funds or property to a client or third party).

Matter C

Respondent was hired to render a title opinion regarding a bank loan to a borrower. On February 17, 2011 Respondent issued a preliminary title opinion letter to

SB&T bank disclosing one open mortgage to First Union Bank. On July 12, 2011, Respondent issued a final title opinion to SB&T Bank stating that the prior debt to First Union Bank had been paid and the mortgage to SB&T Bank was the only mortgage or lien on the subject property. The loan was subsequently assigned to Georgia Bank & Trust.

The borrower thereafter defaulted on his payments, and during the foreclosure process, a title abstract revealed three prior mortgages to Regions Bank which had not been canceled. These mortgages were not disclosed in Respondent's title opinion letters to SB&T Bank. Respondent failed to respond to numerous communications from Georgia Bank & Trust's attorney requesting that Respondent take action to satisfy and cancel the prior mortgages.

On August 17, 2015, Georgia Bank & Trust filed a legal malpractice action against Respondent citing his failure to properly conduct a thorough title search prior to issuing the preliminary and final title opinions. Respondent's malpractice carrier subsequently settled the case, and the parties filed a Stipulation of Dismissal on April 27, 2016. Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (requiring competence); Rule 1.3 (requiring diligence); and Rule 1.4 (requiring adequate communication).

Matter D

ODC received a complaint and ultimately determined there was no clear and convincing evidence of misconduct. However, Respondent failed to timely respond to the August 10, 2016 notice of investigation or the subsequent letter pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent admits his conduct in this matter violated Rule 8.1(b), RPC, Rule 407, SCACR (requiring a lawyer to respond to a lawful demand for information from ODC).

Matter E

Husband and Wife purchased a mobile home and land in 2003, and Respondent served as the closing attorney for the transaction. In 2009, the couple discovered they had title to the land but not to the mobile home. Husband and Wife contacted Respondent regarding the title to the mobile home, but Respondent never provided the title information to them. The couple thereafter attempted to resolve the issue

on their own but subsequently discovered the mobile home title remained listed in the name of the previous owners who were now divorced. Husband and Wife were not able to resolve the title issue in 2009.

In 2016, Husband and Wife contacted Respondent again regarding the title issue, as they were in the process of selling the mobile home. Respondent informed the couple that he had found the title to the mobile home. The couple hired another firm to assist them with the title issue, and Respondent's firm delivered the mobile home title to that firm. Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (requiring competence); Rule 1.3 (requiring diligence); and Rule 1.4 (requiring adequate communication).

Matter F

This matter involved two separate issues concerning a deed and Respondent's efforts to form a corporation on behalf of Client F. Based on the facts recited in the Agreement and supplemental letter provided by the parties, we find Respondent's conduct in this matter did not constitute misconduct.

Matter G

Respondent was retained in August 2015 to represent Client G in a domestic action. At times during the representation, Respondent failed to adequately communicate with Client G or timely respond to Client G's request for information about the status of her case. Respondent failed to timely respond to the July 6, 2018 notice of investigation.[2] Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (requiring adequate communication); and 8.1(b) (requiring a lawyer to respond to a lawful demand for information from ODC).[3]

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[2] ODC served Respondent with a *Treacy* letter on August 10, 2018. Respondent's response to the notice of investigation was received on August 15, 2018.

[3] Although the Agreement also references a violation of Rule 1.2(a), RPC, in connection with Matter G, we find the facts recited in the Agreement do not provide an adequate basis for this Court to conclude Rule 1.2(a) was violated in that matter.

Matter H

Respondent was retained in October 2019 to represent Client H in a domestic action. At times during the representation, Respondent failed to adequately

communicate with Client H or timely respond to her request for information about the status of her case.

Additionally, opposing counsel served Respondent with interrogatories and requests for production requiring his answers or objections, if any, within thirty days. Respondent forwarded the interrogatories to Client H who provided her responses via email on March 30, 2020. Respondent failed to timely provide responses to the interrogatories and requests for production to opposing counsel.

On March 31, 2020, opposing counsel filed a motion to compel Respondent to respond to the discovery requests. Based on the Coronavirus pandemic and this Court's related order dated April 3, 2020, the family court issued a memorandum indicating it would not hold a hearing but would review any written arguments from Respondent and opposing counsel. The family court's memorandum required a response from Respondent to the motion to compel no later than May 15, 2020. Respondent failed to respond to the motion to compel by that deadline.

On June 10, 2020, the family court granted opposing counsel's motion to compel and ordered Respondent to comply within thirty days of filing the order. The family court ordered Client H to pay $250 as a portion of opposing counsel's legal fees incurred in bringing the motion to compel. The parties settled the case in mediation in September 2020. Respondent admits his conduct in this matter violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (requiring adequate communication); Rule 3.4(c) (prohibiting knowing disobedience of the rules of a tribunal); and Rule 3.4(d) (requiring reasonably diligent efforts to comply with a legally proper discovery request by an opposing party).[4]

[4] Although the Agreement also references a violation of Rule 1.2(a), RPC, in connection with Matter H, we find the facts recited in the Agreement do not provide an adequate basis for this Court to conclude Rule 1.2(a) was violated in that matter.

II.

Respondent admits his conduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (prohibiting a violation of the Rules of Professional Conduct). We further note Respondent's disciplinary history includes a 2012 public reprimand citing Rule 1.3 (requiring diligence) and Rule 1.4 (requiring adequate communication) of the Rules of Professional Conduct, Rule 407, SCACR. *In re Katonak*, 398 S.C. 147, 728 S.E.2d 30 (2012).

In the Agreement, Respondent consents to the imposition of a public reprimand or a definite suspension not to exceed one year and agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (Commission). Respondent also agrees to complete the Legal Ethics and Practice Program Ethics School within one year of this opinion and to retain and work with a law office management advisor for a period of two years following reinstatement.

Respondent also submitted an affidavit in mitigation in which he acknowledges shortcomings in his organizational skills, office management, and case selection practices. Respondent also noted that five of these eight complaints occurred between 2014 and 2016, during which time he experienced substantial personal and family difficulties which drew his focus away from his law practice.

III.

We hereby accept the Agreement. Although we are sympathetic to Respondent's personal difficulties, in light of the pattern of misconduct involved in these matters, we find a definite suspension is warranted. Accordingly, we suspend Respondent from the practice of law in this state for a period of one year.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. Within thirty days of the date of this opinion, Respondent shall pay or enter into a reasonable plan to repay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Respondent shall complete the Legal Ethics and Practice Program Ethics School within one year of

the date of this opinion, and he shall retain and work with a law office management advisor for a period of two years following reinstatement.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George Constantine Holmes, Respondent

Appellate Case No. 2021-000713

Opinion No. 28076
Submitted November 19, 2021 – Filed December 15, 2021

DISBARRED

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

George Constantine Holmes, of Charleston, Pro Se.

PER CURIAM: Formal charges were filed against Respondent on January 29, 2018, following his drug-related guilty plea in federal court. On these charges, a panel of the Commission on Lawyer Conduct (Panel) recommended disbarment. Neither party has filed exceptions to the Panel report. We accept the Panel's recommendation and disbar Respondent.

I.

On October 24, 2016, Respondent was placed on interim suspension following his 2003 guilty plea in federal court to one count of conspiracy and one count of possession with intent to distribute 5 kilograms or more of cocaine. *In re Holmes*, 418 S.C. 281, 792 S.E.2d 239 (2016). Although Respondent's conviction occurred in 2003, it was not reported to ODC for over thirteen years. Respondent's guilty plea was based on a sealed indictment, and at the time of the plea, Rule 8.3, RPC, Rule 407, SCACR, did not contain a mandatory requirement for lawyers to self-

report serious crimes.[1] Accordingly, ODC was not aware of Respondent's conviction until it was anonymously reported in September 2016, at which point ODC immediately commenced an investigation and sought interim suspension.

The order of interim suspension expressly directed Respondent to file an affidavit pursuant to Rule 30, RLDE; however, despite a follow-up letter from the Clerk reminding Respondent of this obligation, Respondent has never filed the required affidavit. The same day Respondent was placed on interim suspension, the Office of Disciplinary Counsel (ODC) sent Respondent a notice of investigation. Respondent failed to respond to the notice of investigation or subsequent letter sent pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982). Formal charges were filed against Respondent on January 29, 2018. Respondent failed to answer, and an order of default was entered against him on May 17, 2018.

On March 30, 2021, the Panel convened to hear this matter for purposes of recommending a final disposition of the matter to this Court. Despite being properly served with notice of the hearing, Respondent failed to appear.[2] At the hearing, ODC summarized the procedural history of the case, and Respondent's persistent failure to cooperate or respond. ODC also presented, as evidence of an aggravating circumstance, the fact that Respondent had been arrested for

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[1] Rule 8.3, RPC, Rule 407, SCACR, was amended in June 2010 to require an attorney to self-report within fifteen days of any arrest or indictment for a serious crime.

[2] The Panel hearing was initially scheduled for January 21, 2021; however, on January 7, 2021, Respondent emailed ODC requesting that the matter be stayed due to his unspecified health and business problems stemming from the Covid-19 pandemic, which Respondent alleged prevented him from obtaining counsel. The Panel declined to issue a stay but granted a continuance until March 30, 2021, with a pre-hearing conference to be held via WebEx on March 25, 2021. On March 23, 2021, at 8:14 p.m., Respondent emailed ODC to say he would not attend the pre-hearing conference via WebEx or the Panel hearing on March 30, 2021, due to his continuing unspecified Covid-related health and business problems and requested a stay. The Panel denied the request for a stay and ordered Respondent to appear. Respondent failed to appear at either the pre-hearing conference or the Panel hearing.

trafficking marijuana just four months after ODC began investigating the cocaine charges.[3]

In determining the proper sanction, the Panel considered the following aggravating factors: (1) the illegal nature of Respondent's conduct; (2) Respondent's pattern of misconduct involving multiple offenses and rule violations; (3) Respondent's failure to cooperate; (4) Respondent's failure to acknowledge wrongdoing and express remorse; and (5) Respondent's dishonest or selfish motive in engaging in criminal activity. The Panel recommended that Respondent be disbarred, and based on the severity of the misconduct and aggravating factors, the Panel concluded that retroactive disbarment was not appropriate in this situation.

II.

Because Respondent failed to respond to the formal charges, all the allegations of misconduct were deemed admitted. We find Respondent's criminal convictions constituted misconduct under the following Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); and Rule 8.1(b) (knowingly failing to respond to a disciplinary inquiry). We further conclude Respondent's misconduct constituted grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (prohibiting a violation of the Rules of Professional Conduct); Rule 7(a)(3) (prohibiting a willful violation of a Commission order or a willful failure to appear personally as directed); Rule 7(a)(4) (prohibiting a conviction of a crime of moral turpitude); Rule 7(a)(5) (prohibiting conduct tending to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(7) (requiring compliance with valid orders issued by a court of this state).

[3] Respondent was arrested on February 13, 2017, and charged with two counts of trafficking marijuana and one count of possession with intent to distribute THC oil after police found 305 pounds of marijuana and 328 THC cartridges (used in e-cigarettes) in Respondent's home and commercial warehouse.

III.

In light of the severity of Respondent's misconduct and his failure to respond and participate in this process, we accept the Panel's recommendation and disbar Respondent as of the date of this opinion. Within fifteen (15) days, Respondent shall file an affidavit with the Clerk of this Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and surrender his Certificate of Admission to the Practice of Law to the Clerk of this Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shon Turner, as Personal Representative of the Estate of Charles Mikell, deceased, Respondent,

v.

Medical University of South Carolina, Petitioner.

Appellate Case No. 2020-001231

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson Jr., Circuit Court Judge

Opinion No. 28077
Heard December 8, 2021 – Filed December 15, 2021

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

M. Dawes Cooke Jr. and John W. Fletcher, of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Petitioner.

Robert B. Ransom, of Leventis & Ransom, of Columbia; and Alex N. Apostolou, of North Charleston, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *Turner v. Medical Univ. of S.C.*, 430 S.C. 569, 846 S.E.2d 1 (Ct. App. 2020). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

The Supreme Court of South Carolina

In the Matter of Alexia Kyra Niketas, Petitioner.

Appellate Case No. 2021-000969

ORDER

Petitioner was administratively suspended from the practice of law for failing to pay her annual license fees. *In re Admin. Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)*, S.C. Sup. Ct. Order dated Feb. 21, 2017. She has now filed a petition for reinstatement pursuant to Rule 419, SCACR. Following a hearing, the Committee on Character and Fitness recommended the Court reinstate Petitioner to the practice of law.

The petition is granted, and Petitioner is hereby reinstated as an inactive member of the South Carolina Bar.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
December 8, 2021

The Supreme Court of South Carolina

In the Matter of David J. Gundling, Respondent

Appellate Case No. 2021-001427

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
December 13, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr. Irrevocable Family Trust Dated the 15th day of July, 2001, Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC, Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson, and L. Cliff Redd, Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd are Appellants.

Appellate Case No. 2018-001388

Appeal From Saluda County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5880
Heard March 3, 2021 – Filed December 15, 2021

AFFIRMED

Wallace K. Lightsey and William Marvin Wilson, III, both of Wyche Law Firm, of Greenville; and M. Alan Peace, of Harrell, Martin, & Peace, P.A., of Chapin, all for Appellants.

John T. Moore, Allen Mattison Bogan, and Nicholas Andrew Charles, all of Nelson Mullins Riley &

Scarborough, LLP, of Columbia; and Erik Tison Norton, of Harrell, Martin, & Peace, P.A., of Chapin, all for Respondent.

LOCKEMY, C.J.: In this action to enforce a guaranty agreement, Redd Green Investments, LLC, A. Bruce Green, and L. Cliff Redd (collectively, Guarantors) appeal the trial court's grant of a directed verdict in favor of Stephen Wilkinson as Trustee of the George B. Buchanan, Jr. Irrevocable Family Trust dated the 15th of July, 2001 (the Trust). Guarantors argue the trial court erred in finding that as a matter of law the Trust's violation of section 15-39-720 of the South Carolina Code (2005)[1] could not operate as a defense to its enforcement of the guaranty agreements. We affirm.

FACTS

In 2001, George B. Buchanan, Jr. (Buchanan), created and funded the Trust for the benefit of his children. On November 18, 2009, the Trust entered into a loan agreement with Springs North Augusta, LLC, in which the Trust agreed to loan it $7,590,000 to purchase 1,420 acres of real property in Aiken County (the Property). Springs North Augusta executed a promissory note agreeing to repay the loan in full with interest of 15% per annum and executed a mortgage on the Property in favor of the Trust to secure the loan. On November 16, 2010, Springs North Augusta and the Trust signed an amendment to the loan agreement, which capitalized the interest to the principal, bringing the new principal to $8,728,500. Springs North Augusta also signed a modification to the promissory note and agreed to repay the new balance of the loan plus 15% interest per annum.

The loan agreement named Herbert Anderson, Jr., Herbert Keith Anderson, A. Bruce Green, William Otha Bodie, L. Cliff Redd, Redd Green Investments, LLC, and Anderson North Augusta, LLC, as guarantors, and they signed two separate guaranty agreements guaranteeing repayment of the loan. The guaranty agreements gave the Trust the right to obtain payment from Guarantors to satisfy any unpaid debt of Springs North Augusta. Redd Green Investments, LLC and

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[1] Section 15-39-720—also referred to as the "bidding" statute—provides that a "mortgagee or his representative" is permitted to bid only once at a judicial foreclosure sale.

Anderson North Augusta, LLC, signed one agreement; Herbert Anderson, Jr., Herbert Keith Anderson, A. Bruce Green, William Otha Bodie, and L. Cliff Redd signed the other. Redd Green Investments, LLC, and Anderson North Augusta, LLC, owned Springs North Augusta, which they formed to hold title to the Property. A. Bruce Green and L. Cliff Redd formed Redd Green Investments, LLC to hold their ownership interest in Springs North Augusta.[2] The guaranty agreements contained a "Waiver of Appraisal Rights" provision,[3] which stated:

> **TO THE FULLEST EXTENT PERMITTED BY LAW AND AS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN, GUARANTOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

Springs North Augusta defaulted under the terms of the Note, and the Trust filed an action to foreclose its lien on the Property. The Trust named Springs North Augusta—the only other party to the mortgage—as the sole defendant in the action. Springs North Augusta failed to answer, and the circuit court entered an order of default and mandatory order of reference. The master-in-equity entered an order of foreclosure and sale, ordering the Property to be sold at auction and the proceeds applied to the outstanding principal and interest totaling $9,450,622.50.

On September 4, 2012, the Trust bid $6.6 million at the foreclosure sale. The master held the sale open for thirty days for upset bids. The master held the deficiency sale on October 4, 2012, and Second Avenue Holdings, LLC (Second Avenue)—of which Buchanan was the sole member and manager—was the successful bidder in the amount of $7,160,000 and made a deposit of $500,000 towards the bid. Second Avenue and the Trust then "reached an agreement"

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[2] Herbert Anderson Jr. and Herbert Keith Anderson owned Anderson North Augusta, LLC. The Andersons and their company are not parties to this appeal.

[3] *See* S.C. Code Ann. § 29-3-680 (2007) (providing "a defendant against whom a personal judgment may be taken on a real estate secured transaction may waive the appraisal rights as provided by this section").

pursuant to which Second Avenue assigned the bid back to the Trust "for value received." The master entered an order of deficiency against Springs North Augusta for $2,484,163.95 on October 26, 2012, which was amended on February 13, 2013, to $2,753,192.70, plus 15% annual interest.

Thereafter, the Trust brought this action to collect the deficiency judgment from Guarantors. Guarantors asserted several defenses and counterclaims. First, they claimed Second Avenue was created six days after the Trust entered its bid, that it was created for competitive bidding on behalf of the Trust, and that the Trust controlled it. Guarantors alleged the Trust's claims were barred by the equitable doctrines of laches and unclean hands, equitable estoppel, judicial estoppel, and waiver because the Trust violated the provisions of section 15-39-720 by bidding through a "straw man" at the second foreclosure sale. In addition, Guarantors alleged counterclaims for civil conspiracy, constructive fraud, and fraud and deceit. After the trial court denied the Trust's motions to dismiss and for summary judgment, the case proceeded to a jury trial on September 5, 2017. At trial, Guarantors withdrew their counterclaims "as counterclaims, but not as the factual basis for the defenses."

Stephen Wilkinson, who took over as the trustee of the Trust in August 2013, testified Buchanan established the Trust, which was an irrevocable trust, to put aside assets for his children and to eliminate estate taxes. He stated Buchanan could give him financial advice concerning the Trust as needed and could add funds to the Trust but had no other control of the Trust. Wilkinson explained that as of the time of trial, the Property was actively on the market but the Trust had not received any written offers to purchase.

Green testified that when Springs North Augusta first acquired the Property it was worth $30 million. He agreed Springs North Augusta was unable to pay off the loan because the real estate values had been "tanking" and they had no means to repay the loan as a result. Green testified that when the Trust filed the foreclosure action, he assumed the value of the land satisfied the Trust and he believed that he, Redd, and Redd Green Investments were "clear." Redd testified that if asked the same questions, his testimony would be the same as Green's.

Buchanan maintained he formed Second Avenue three or four years before the foreclosure sale. He acknowledged, however, that Second Avenue filed its articles of incorporation with the State of South Carolina on September 10, 2012.

Buchanan testified he met with the trustee after the foreclosure sale and the trustee stated he would like to have the Property back as a long-term investment for the Trust. Second Avenue therefore assigned the bid back to the Trust, and in exchange, the Trust repaid Second Avenue the amount of the $500,000 deposit.

At the conclusion of the testimony, the Trust moved for a directed verdict, arguing (1) Guarantors could not collaterally attack the foreclosure sale, (2) whether the Trust violated the bidding statute was a question of law, (3) a violation of the statute did not excuse the debt, (4) such a violation would only result in an offset, which Guarantors had not established, and (5) at best, the jury could conclude a subsequent breach occurred after the Guarantors were already in default of the guaranty agreement, which would not excuse their performance. Although the trial court initially noted that viewing the evidence in the light most favorable to Guarantors, the jury could infer a violation of section 15-39-720 occurred, the trial court concluded a violation of section 15-39-720 was not a defense on a guaranty of a debt. It therefore directed a verdict in favor of the Trust for $4,781,882.65.[4] Guarantors filed a motion for a new trial, which the trial court denied. This appeal followed.

ISSUE ON APPEAL[5]

Did the trial court err in ruling that as a matter of law a mortgagee's violation of section 15-39-720 in a prior foreclosure action cannot serve as a defense to a subsequent action for breach of guaranty when the guarantor was not a party to the prior foreclosure action?

STANDARD OF REVIEW

"In reviewing a motion for directed verdict, the appellate court applies the same standard as the circuit court. The court must view the evidence and the inferences that can reasonably be drawn in the light most favorable to the nonmoving party." *Coake v. Burt*, 391 S.C. 201, 205-06, 705 S.E.2d 453, 455 (Ct. App. 2010) (citation omitted). "Motions for directed verdict or JNOV should be denied if the evidence

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[4] This figure accounted for the additional $2,028,689.85 in interest that had accrued since the foreclosure sale.

[5] Guarantors' stated issues on appeal are virtually identical; thus, we address both issues as one.

yields more than one reasonable inference or its inference is in doubt." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). "An appellate court will reverse only whe[n] there is no evidence to support the trial judge's ruling, or whe[n] the ruling was controlled by an error of law." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 491, 649 S.E.2d 494, 498 (Ct. App. 2007).

LAW AND ANALYSIS

Guarantors argue the Trust breached the implied obligation of good faith and fair dealing when it violated section 15-39-720, thereby precluding the Trust from collecting a deficiency from Guarantors. They assert section 15-39-720 protects borrowers by permitting a mortgagee to bid only once, on the first day of the foreclosure auction, and by forbidding the mortgagee or anyone acting on its behalf from bidding a second time or offering an upset bid at the final auction. Guarantors contend the Trust's violation of the statute deprived them of the Trust's high bid. Guarantors therefore argue the trial court erred in concluding section 15-39-720 did not provide a defense to a suit to collect a payment obligation on the guaranty. We disagree.

Section 15-39-720 states:

> In all judicial sales of real estate for the foreclosure of mortgages and sales in execution the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale, exclusive of the day of sale. Within such thirty day period *any person other than the highest bidder at the sale or any representative thereof in foreclosure and execution suits may enter a higher bid* upon complying with the terms of sale by making any necessary deposit as a guaranty of his good faith, *and thereafter within such period any person, other than such highest bidder at the sale or any representative thereof, in foreclosure suits may in like manner raise the last highest bid*, and the successful purchaser shall be deemed to be the person who submitted the last highest bid within such period and made the necessary deposit or guaranty. *But the mortgagee or his representative shall*

> *enter such bid as he desires at the time the sale is made, and he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time except the single or last bid made by him or in his behalf at the sale. . . .*
>
> The bidding shall be reopened by the officer making the sale on the thirtieth day after the sale, exclusive of the day of the sale, at eleven o'clock in the forenoon and the bidding shall be allowed to continue until the property shall be knocked down in the usual custom of auction to the successful highest bidder complying with the terms of sale. The sales officer shall announce the sales about to be closed and shall receive the final bids in such sales in the order determined by him.

(emphases added).

We decline to address the question of whether the Trust violated section 15-39-720 because the trial court acknowledged evidence existed from which the jury could find a violation. Nevertheless, we conclude the trial court did not err in ruling Guarantors could not assert a violation of the statute as a defense to the Trust's action to enforce the guaranty. The Guarantors' attempt to challenge the amount of the deficiency judgment is barred by res judicata and even assuming a violation of the statute, Guarantors failed to show such violation prejudiced them such that they should be relieved from their responsibilities under the guaranty agreement.

"The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action." *Venture Eng'g, Inc. v. Tishman Constr. Corp. of S.C.*, 360 S.C. 156, 162, 600 S.E.2d 547, 550 (Ct. App. 2004) (quoting *In re S.N.A. Nut Co.*, 215 B.R. 1004, 1008 (1997)); *see also Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) ("To establish *res judicata*, three elements must be shown: (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction."). "The concept of privity rests not on the relationship between the parties asserting it, but rather on

each party's relationship to the subject matter of the litigation." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). "The term 'privy,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994).

"A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity. Under an absolute guaranty of payment, the creditor may maintain an action against the guarantor immediately upon default of the debtor." *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994) (citation omitted).

> A guaranty is a contract and is to be construed by the principles governing contracts. The construction of a guaranty calls for a reasonable interpretation of the language used in the instrument, and a court has the duty to ascertain the intention of the parties at the time the contract was made. The intention of the parties as expressed in the guaranty should guide the court.

Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc., 300 S.C. 277, 280, 387 S.E.2d 672, 673 (1989) (citation omitted).

This action and the foreclosure action involved the same subject matter: Springs North Augusta's debt to the Trust and the foreclosure sale. In addition, both actions arose from Springs North Augusta's default on the note and mortgage. The master held a foreclosure sale, and no one challenged the foreclosure proceedings. Following the sale, the master entered the deficiency judgment, which determined Springs North Augusta's remaining debt to the Trust. Therefore, the master decided the issue of the amount of the unpaid debt in the prior foreclosure action. Although the Trust did not name Guarantors in the foreclosure action, Guarantors were privies with Springs North Augusta. Both parties had a shared interest in obtaining the lowest deficiency judgment possible because Guarantors were responsible for any unpaid debt of Springs North Augusta. *See Lanford*, 313 S.C. at 543, 443 S.E.2d at 550 ("A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity."). Green and Redd owned Redd Green Investments, and Redd Green Investments was one

of two companies that owned Springs North Augusta. Moreover, Green acknowledged he was aware that Springs North Augusta defaulted on the loan and that there was a pending foreclosure action. As direct or indirect owners of Springs North Augusta, Guarantors had notice of the foreclosure action yet failed to participate in those proceedings. Guarantors could have challenged Second Avenue's participation in the bidding process in the prior action but did not do so. Res judicata bars Guarantors' attempt to challenge the process by way of a defense in this action. Because Guarantors cannot collaterally attack the foreclosure sale, we conclude the trial court did not err in directing the verdict in favor of the Trust.

Further, even assuming a violation, Guarantors have failed to show the alleged violation of the bidding process prejudiced them when no evidence shows what the winning bid would have been had Second Avenue not placed the highest bid. Guarantors concede they did not challenge the amount of the judgment in the foreclosure suit and do not seek to undo the sale. The express terms of the guaranty provided it was an absolute guaranty of payment and that Guarantors waived their right to an appraisal. *See Peoples Fed. Sav. & Loan Ass'n*, 300 S.C. at 280, 387 S.E.2d at 673 ("A guaranty is a contract and is to be construed by the principles governing contracts. The construction of a guaranty calls for a reasonable interpretation of the language used in the instrument, and a court has the duty to ascertain the intention of the parties at the time the contract was made. The intention of the parties as expressed in the guaranty should guide the court." (citation omitted)). Although Green testified the Property was worth about $30 million in 2009, there is no evidence—other than the amount of the highest bid at the foreclosure sale—of the fair market value of the Property at the time of the foreclosure sale. Guarantors argue evidence shows the Trust valued the Property at $15 million following the foreclosure sale and it was therefore reasonable to conclude the Trust would have bid the full debt amount of $9.5 million if it had acted in compliance with the bidding statute. Guarantors mentioned this $15 million figure during the parties' pretrial discussions with the trial court, but no evidence in the record supports this value. The original loan was for $7,590,000, which Springs North Augusta used to purchase the Property. The winning bid of $7,160,000 demonstrated no party was willing to bid more than $7,160,000 for the Property and there was no evidence Guarantors would have been in a better position had a third party purchased the Property. *See Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Ret. Grp., Inc.*, 302 S.C. 223, 234 n.1, 394 S.E.2d 849, 855 n.1 (Ct. App. 1990) (Cureton, J., concurring) (noting "it is assumed that because a third party did not buy the property at the foreclosure sale no one else was

interested in purchasing the property at the price paid by the lender"). Even assuming the Trust violated the statute, Guarantors failed to demonstrate the sale price would have been higher but for Second Avenue's actions and thus failed to show the alleged violation prejudiced them. We therefore conclude the trial court did not err in determining that even assuming the Trust violated section 15-39-720, such violation could not serve as a defense to the enforcement of the guaranty. Thus, the trial court did not err in granting the Trust's motion for a directed verdict.

CONCLUSION

For the foregoing reasons, we affirm the trial court's grant of a directed verdict in favor of the Trust.

AFFIRMED.

HUFF and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory T. Christian, Appellant,

v.

Anna Healy, Greenville Police Officer Andrew League, City of Greenville, South Carolina, Defendants,

Of whom Anna Healy is the Respondent.

Appellate Case No. 2018-001600

Appeal from Greenville County
Alex Kinlaw, Jr., Circuit Court Judge

Opinion No. 5881
Submitted September 1, 2021 – Filed December 15, 2021

AFFIRMED

Gregory T. Christian, of Greenville, pro se.

Carl F. Muller, of Carl F. Muller, Attorney at Law, P.A., of Greenville, for Respondent.

LOCKEMY, C.J.: In this civil case, Gregory T. Christian, pro se, appeals the circuit court's dismissal of his complaint against Anna Healy pursuant to Rules 12(b)(5) and 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCP). Christian argues the circuit court erred in (1) ruling Healy was not properly served with process, (2) finding Christian himself alleged "Healy did *not* defame him," (3)

finding Healy's statements to law enforcement were not defamatory because Christian suggested she call police, (4) finding Healy's communications with law enforcement were privileged, (5) finding the complaint did not allege publication or fault, and (6) denying Christian's motion to amend his complaint. We affirm.[1]

FACTS AND PROCEDURAL HISTORY

On April 23, 2018, Christian filed a summons and complaint alleging a cause of action for defamation against Healy, Greenville Police Officer Andrew League, and the City of Greenville. Christian's claims arose from an incident that occurred at a yard sale Healy hosted on April 23, 2016. Christian alleged he attended the yard sale and as he was leaving, Healy "accosted" him from about twenty feet away and claimed she saw him steal a ring. Christian stated he denied stealing the ring and refused Healy's request to search him. According to Christian, he told Healy to "call the police" if she believed a crime had been committed and said he would wait for them to arrive. Healy called 911. Officer League was one of several officers who responded to the scene. Christian stated the officers searched him but found no ring. In support of his claim for defamation, Christian alleged Healy falsely claimed he stole a ring and that she repeated these statements to the 911 operator and police. He claimed that as a result, police designated him as a suspected criminal in a police report.

On May 21, 2018, Healy moved to dismiss the complaint pursuant to Rule 12(b)(6), SCRCP for failure to state a claim and Rule 12(b)(5), SCRCP for insufficient service of process, arguing Christian failed to comply with Rule 4(d)(8), SCRCP.[2] The circuit court heard the motion on July 17, 2018. Christian admitted insufficient service as to the original summons and complaint but argued he sent an amended summons and complaint on July 3, 2018, via certified mail with restricted delivery as required by Rule 4(d)(8). Healy argued Christian failed to serve her with the amended summons and complaint, which she claimed were sent to the incorrect address. Christian stated he Googled Healy's address and mailed both the original and the amended filings to her at the same address. The

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] "Service of a summons and complaint upon a defendant . . . may be made by the plaintiff . . . by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt." Rule 4(d)(8), SCRCP.

circuit court found service upon Healy "did not comply with Rule 4(d)(8)" because "it was not mailed certified mail, return receipt requested, restricted delivery" and dismissed Christian's claims against Healy with prejudice pursuant to Rules 12(b)(5) and 12(b)(6).[3] This appeal followed.[4]

ISSUES ON APPEAL

1. Did the circuit court err in granting Healy's motion to dismiss for insufficient service of process pursuant to Rule 12(b)(5), SCRCP?

2. Did the circuit court err in dismissing Christian's complaint pursuant to Rule 12(b)(6), SCRCP without allowing Christian leave to amend his complaint?

LAW AND ANALYSIS

Christian argues he complied with Rule 4(d)(8), SCRCP by sending the amended summons and complaint via "certified mail, return receipt requested, restricted delivery" to Healy's address. We disagree.

"The trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard." *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 294-95, 721 S.E.2d 430, 432 (2012). Rule 4(d)(8), SCRCP allows a plaintiff to serve a summons and complaint upon an individual defendant "by registered or certified mail, return receipt requested *and delivery restricted to the addressee*." (emphasis added). Rule 5, SCRCP provides, "[A] summons and complaint shall be filed before service. Proof of service shall be filed within ten . . . days after service of the summons and complaint." Rule 5(d). "Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party." *Id.* A party may assert a defense of insufficiency of service of process before filing a responsive pleading. Rule 12(b)(5).

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[3] Christian also moved to amend his complaint to allege facts to show publication of the statement, but the circuit court denied the request.

[4] The circuit court also dismissed Christian's claims against the City and Officer League. Christian has not appealed this ruling.

Christian conceded he did not comply with Rule 4(d)(8) when he first attempted to serve Healy. Further, he neither produced a return receipt indicating Healy received the original summons and complaint nor provided any documentation to show the amended summons and complaint were delivered to Healy.[5] Thus, evidence supports the circuit court's conclusion that Christian failed to serve Healy with the summons and complaint in compliance with Rule 4(d)(8). *See Langley v. Graham*, 322 S.C. 428, 431 n.4, 472 S.E.2d 259, 261 n.4 (Ct. App. 1996) ("We view the requirement of showing that the certified mail was properly sent as mandated by . . . Rule 4(d)(8) to be [the plaintiff]'s burden . . . ."). We therefore conclude the circuit court did not err in dismissing the complaint based on insufficient service of process pursuant to Rule 12(b)(5). Because Christian has not challenged the circuit court's decision to dismiss the complaint with prejudice, our decision to affirm the dismissal pursuant to Rule 12(b)(5) is dispositive. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue "must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). Thus, we decline to address Christian's remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address an appellant's remaining issues when its decision on a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, the circuit court's order dismissing Christian's complaint with prejudice pursuant to Rule 12(b)(5) is

AFFIRMED.

WILLIAMS and MCDONALD, JJ., concur.

[5] Christian's "amended" complaint was identical to the original complaint, and it is evident he filed the amended complaint in another attempt to serve Healy.