The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS AND NOTICE OF PUBLIC HEARING

The Supreme Court of South Carolina is considering adopting guidelines or "best practices" for attorneys conducting residential or commercial real estate closings in South Carolina. The guidelines were developed by the South Carolina Bar Task Force on Closing Responsibilities.[1] A copy of the proposed guidelines is attached.[2]

Persons desiring to submit written comments regarding the proposed guidelines may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The comments must be sent to the following address:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

The Supreme Court must receive written comments by Friday, April 11, 2008.

The court will hold a public hearing regarding the proposed guidelines on Wednesday, May 7, 2008 at 3:00 p.m. in the Supreme Court Courtroom in Columbia, South Carolina. Those desiring to be heard shall

[1] The Task Force on Closing Responsibilities' members are H. Dave Whitener, Jr., Esq., Chairman; Professor Stephen A. Spitz; Edward J. Hamilton, Jr., Esq.; Kathleen G. Smith, Esq.; and Mardi S. Fair, Esq.

[2] An electronic version of the proposed guidelines and previously-received written comments are available on the Judicial Department website, www.sccourts.org, under "Court News" at the top of the page.

notify the Clerk of the Supreme Court no later than Friday, May 2, 2008.

Columbia, South Carolina
February 21, 2008

In relation to Residential Real Estate Purchases, First Mortgage Loan Closings, and Junior Lien Loan Closings, in South Carolina, only lawyers licensed in the state of South Carolina, or admitted to practice in the state of South Carolina, may do the following:

1. Certify the title to real estate and issue a title opinion to a client, a lender, a title insurance company, a governmental agency, or anyone else

2. Prepare deeds

3. Either draft, oversee the drafting, or review and approve loan closing documents to be utilized in a real estate transaction, including the legal description utilized in any document

4. Be responsible for the actual closing of a real estate transaction to include the explanation of the pertinent issues related to the transaction and review all documents for proper signatures, witnesses, notarization and authorizations, as applicable, even if the closing takes place out of state, or in a location other than the closing attorney's office

5. Oversee the proper recordation of the pertinent documents

6. Review and approve the form and execution of any power of attorney used in a real estate transaction for proper authority of the attorney-in-fact as well as the validity of the document

7. Disburse all funds related to the transaction, except payoffs and fees that can be held by a lender that will be paid to the lender and not to third parties

However, in the event that a borrower is obtaining a Home Equity Line of Credit from a financial institution insured by the Federal Deposit Insurance Corporation, and if such line of credit is not being used to purchase the real estate that is the collateral for the line of credit, and after the borrower has received notice of its right to choose its own attorney under the provisions

of S.C. Code Ann. §37-10-102, if the borrower elects to waive the right to have an attorney of its choice close the line of credit, the financial institution extending said line of credit may perform Items 3 though 7 listed above. However, in this scenario, if the lender requires a certification of title or a title opinion, Item 1 listed above must still be performed by a lawyer licensed in the state of South Carolina, or admitted to practice in the state of South Carolina.

Guidelines for a Closing Attorney in Non-Purchase Residential Real Estate Transactions, including First Mortgage Loan Closing and Junior Lien Mortgage Closings

I. Pre-Closing

1. Determine all conflicts of interests, including but not limited to multiple representation, that need to be disclosed, consented to, and/or waived, and obtain the informed consent of such parties in accordance with the Rules of Professional Conduct
2. Send an engagement letter to the client(s)
3. Certify the title to the subject property
4. Order a survey of the subject property if the client has elected to have a new survey of the property performed, or if obtaining a new survey is a requirement of the loan, and if the survey has not already been ordered
5. Review the survey
6. Prepare and/or review the legal description of the subject property
7. Obtain payoff information for all liens affecting the subject property
8. Ascertain the hazard insurance carrier for the owner
9. Review the hazard insurance declaration page to ensure the policy dates and loss payee information are satisfactory to the lender
10. Collect any letters or inspection reports that are a requirement of the loan
11. Either prepare or review and approve the Loan Documents
12. Either prepare or review and approve the Settlement Statement
13. Either prepare or review and approve any Title Insurance Documents required by Title Insurance Company and/or the South Carolina Department of Insurance, which may include, but are not limited to the following:
    a. Lien Affidavits
    b. Title Insurance Disclosure Form SC-305
    c. Survey Affidavit
    d. Privacy Disclosure
    e. Insured Closing Letter

14. Review and approve any Power of Attorney to be used in connection with the transaction

15. Review and approve any other applicable Closing Documents, which may include, but are not limited to the following: Credit Line Closure Authorization

II. Closing

1. Explain to the borrower the closing documents, which may include, but are not limited to the following:

a. Disclosure and consent to multiple representation

b. Loan documents, specifically noting the following provisions, as applicable:

i. Prepayment Penalties

ii. Late Payment Penalties

iii. Loan Assumption Rules

iv. Due on Sale Clause

v. Judicial Foreclosure

vi. Events of Default

vii. Annual Percentage Rate

viii. Interest Rate, and if the loan has an adjustable rate, point out
that fact.

ix. Term of the Loan

x. Maturity Date

xi. Date the First Payment is Due

xii. Payment Location

xiii. Transfer of Loan Servicing Rights

xiv. For rescindable transactions, Notice of Right to Cancel

2. Supervise the proper execution of the closing documents that are executed at the closing

3. Collect the closing funds and verify that all closing funds are properly deposited into the closing attorney’s trust account in accordance with the Rules of Professional Conduct

4. Disburse all of the closing funds in accordance with the settlement statement. The only exception to this rule is that in the event a borrower is refinancing a loan with the same lender, and that lender is paying off its prior loan to the borrower with the proceeds of the new loan to the borrower, neither the portion of the loan proceeds that are required to pay off the lender's prior loan to the borrower nor the lender's fees in connection with the new loan have to be disbursed by the closing attorney
5. Supervise the recording of the recordable closing documents

III. Post-Closing

1. Perform the final title update, which includes but is not limited to the following items:
    a. Verify that the documents were recorded with the correct priority
    b. Verify that the documents were indexed properly
    c. Verify that all liens that were paid in connection with the transaction are satisfied of record
2. Issue the final title opinion
3. Transmit all applicable documents to the appropriate parties

Guidelines for a Closing Attorney in a Residential Real Estate Purchase

I. Pre-Closing

1. Determine all conflicts of interests, including but not limited to multiple representation, that need to be disclosed, consented to, and/or waived, and obtain the informed consent of such parties in accordance with the Rules of Professional Conduct
2. Send an engagement letter to the client(s)
3. Review the sales contract
4. Certify the title to the subject property
5. Order a survey of the subject property if the client has elected to have a new survey of the property performed, and if the survey has not already been ordered
6. Review the survey
7. Prepare and/or review the legal description of the subject property
8. Obtain payoff information for all liens affecting the subject property
9. Ascertain the hazard insurance carrier for the purchaser
10. Collect inspection letters for determination by the client of compliance with the sales contract
11. Review the hazard insurance declaration page to ensure the policy dates and loss payee information are satisfactory to the lender
12. Collect the termite letter / HVAC and/or other letters required by the sales contract and/or lender's instructions
13. Either prepare or review and approve the Loan Documents
14. Either prepare or review and approve the Settlement Statement
15. Either prepare or review and approve any Title Insurance Documents required by Title Insurance Company and/or the South Carolina Department of Insurance, which may include, but are not limited to the following:
    a. Lien Affidavits
    b. Title Insurance Disclosure Form SC-305

c. Survey Affidavit
d. Privacy Disclosure
e. Insured Closing Letter

16. Either prepare the deed or review the deed prepared by the Seller's attorney

17. Review and approve any Power of Attorney to be used in connection with the
transaction

18. Review and approve any other applicable Closing Documents, which may include, but are not limited to the following:

a. Internal Revenue Service Form 1099
b. Non-Foreign Person Affidavit
c. Seller's Affidavit regarding South Carolina Withholding Tax and/or
South Carolina Department of Revenue Form I-290
d. Notice of Eligibility for 4% Tax Assessment
e. Seller's Affidavits
f. Credit Line Closure Authorization

II. Closing

1. Explain to the buyer/borrower the closing documents, which may include, but are not limited to the following:

a. Disclosure and consent to multiple representation
b. Deed
c. Loan documents, specifically noting the following provisions, as applicable:

i. Prepayment Penalties
ii. Late Payment Penalties
iii. Loan Assumption Rules
iv. Due on Sale Clause
v. Judicial Foreclosure
vi. Events of Default

vii. Annual Percentage Rate
viii. Interest Rate, and if the loan has an adjustable rate, point out
that fact.
ix. Term of the Loan
x. Maturity Date
xi. Date the First Payment is Due
xii. Payment Location
xiii. Transfer of Loan Servicing Rights

2. Supervise the proper execution of the closing documents that are executed at the closing
3. Collect the closing funds and verify that all closing funds are properly deposited into the closing attorney's trust account in accordance with the Rules of Professional Conduct
4. Disburse all of the closing funds in accordance with the settlement statement
5. Supervise the recording of the recordable closing documents

III. Post-Closing

1. Perform the final title update, which includes but is not limited to the following items:
    a. Verify that the documents were recorded with the correct priority
    b. Verify that the documents were indexed properly
    c. Verify that all liens that were paid in connection with the transaction are satisfied of record
2. Issue the final title opinion
3. Transmit all applicable documents to the appropriate parties

In relation to Commercial Real Estate Transactions, in South Carolina, only lawyers licensed in the state of South Carolina, or admitted to practice in the state of South Carolina, may do the following:

1. Certify the title to real estate and issue a title opinion to a client, a lender, a
title insurance company, a governmental agency, or anyone else

2. Prepare deeds

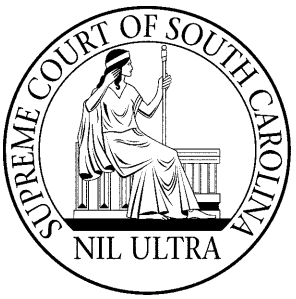
3. Either draft, oversee the drafting, or review and approve loan closing documents to be utilized in a real estate transaction, including the legal description utilized in any document

4. Be responsible for the actual closing of a real estate transaction to include the explanation of the pertinent issues related to the transaction and review all documents for proper signatures, witnesses, notarization and authorizations, as applicable, even if the closing takes place out of state, or in a location other than the closing attorney's office

5. Oversee the proper recordation of the pertinent documents

6. Review and approve the form and execution of any power of attorney used in a real estate transaction for proper authority of the attorney-in-fact as well as the validity of the document

7. Disburse all funds related to the transaction, except payoffs and fees that can be held by a lender that will be paid to the lender and not to third parties, and with the exception that nationally-recognized title insurance companies and financial institutions that are insured by the Federal Deposit Insurance Corporation may disburse funds related to the transaction as long as Items 1-6 listed above are performed by a lawyer licensed in the state of South Carolina or by a lawyer admitted to practice in the state of South Carolina.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9

March 10, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITION FOR REHEARING

2008-MO-009 – John and Jane Doe v. Baby Boy Granted

The South Carolina Court of Appeals

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

2008-UP-135- State of South Carolina v. Dominique Donte Moore
(York, Judge John C. Hayes, III)

2008-UP-136-Kenneth Marcell Wingate v. State of South Carolina
(Darlington, Judge J. Michael Baxley)

2008-UP-137-The State v. Derek Mims
(Lexington, Judge William P. Keesley)

2008-UP-138-The State v. Walter Martez Thomas
(Richland, Judge James W. Johnson)

2008-UP-139-Danny R. Prince v. Beaufort Memorial Hospital and its Employees, Servants And Agents
(Beaufort, Judge Alexander S. Macaulay)

2008-UP-140- Palmetto Bay Club Owners v. Danna Cooper Brissie
(Beaufort, Master-in-Equity Curtis L. Coltrane)

2008-UP-141-One Hundred Eighth Cookingham, Inc. v. David K. Miller
(Beaufort, Special Circuit Judge Curtis L. Coltrane)

2008-UP-142-The State v. Jeramy Williams
(Allendale, Judge R. Markley Dennis, Jr.)

2008-UP143-The State v. Daniel Lamar Larry
(Union, Judge Lee S. Alford)

2008-UP-144-The State v. Ronald Porterfield
(Richland, Judge Alison Renee Lee)

2008-UP-145-Judy Anne Yown v. William Robert Yown
(Spartanburg, Judge Georgia V. Anderson)

2008-UP-146-The State v. Jonathan Southers
(Lexington, Judge Larry Patterson)

2008-UP-147-The State v. Jesse Winfrey
(Beaufort, Judge J. Cordell Maddox, Jr.)

2008-UP-148-South Carolina Department of Social Services v. John Doe
(Anderson, Judge Barry W. Knobel)

PETITIONS FOR REHEARING

4316-Lynch v. Toys "R" Us, Inc.	Pending
4318-State v. David Swafford	Pending
4320-The State v. Donald Paige	Pending
4333-State v. Dantonio	Pending
4334-Silver v. Aabstract Pools	Pending
4338-Friends of McLeod v. City of Charleston	Pending
4339-Thompson v. Cisson Construction	Pending
4340-Simpson v. Simpson	Pending
4341-William Simpson v. Becky Simpson	Pending
2007-UP-467-State v. N. Perry	Pending
2007-UP-494-National Bank of SC v. Renaissance	Pending
2007-UP-544-State v. Christopher Pride	Pending

2007-UP-549-Frierson v. InTown Suites	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's Marine	Pending
2008-UP-004-Ex parte: Auto Owners	Pending
2008-UP-018-Wachovia Bank v. Beckham	Pending
2008-UP-043-Eadon v. White	Pending
2008-UP-048-State v. Edward Cross (#1)	Pending
2008-UP-060-BP Staff, Inc. v. Capital City Ins	Pending
2008-UP-073-Mosley v. MeadWestvaco	Pending
2008-UP-081-State v. Robert Hill	Pending
2008-UP-082-White Hat v. Town of Hilton Head	Pending
2008-UP-084-First Bank v. Wright	Pending
2008-UP-096-State v. Daniel Cook	Pending
2008-UP-104-State v. Damon L. Jackson	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4128 – Shealy v. Doe	Pending
4159--State v. T. Curry	Pending
4195—D. Rhoad v. State	Pending
4198--Vestry v. Orkin Exterminating	Pending
4209-Moore v. Weinberg	Pending

4211-State v. C. Govan	Pending
4213-State v. D. Edwards	Pending
4220-Jamison v. Ford Motor	Pending
4233-State v. W. Fairey	Pending
4235-Collins Holding v. DeFibaugh	Pending
4237-State v. Rebecca Lee-Grigg	Pending
4238-Hopper v. Terry Hunt Const.	Pending
4239-State v. Dicapua	Pending
4240-BAGE v. Southeastern Roofing	Pending
4242-State v. T. Kinard	Pending
4243-Williamson v. Middleton	Pending
4244-State v. O. Gentile	Pending
4245-Sheppard v. Justin Enterprises	Pending
4247-State v. Larry Moore	Pending
4251-State v. Braxton Bell	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending
4262-Town of Iva v. Holley	Pending
4264-Law Firm of Paul L. Erickson v. Boykin	Pending

4265-Osterneck v. Osterneck	Pending
4267-State v. Terry Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4272-Hilton Head Plantation v. Donald	Pending
4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending
4276-McCrosson v. Tanenbaum	Pending
4277-In the matter of Kenneth J. White	Pending
4279-Linda Mc Co. Inc. v. Shore	Pending
4284-Nash v. Tindall	Pending
4285-State v. Danny Whitten	Pending
4286-R. Brown v. D. Brown	Pending
4289-Floyd v. Morgan	Pending
4291-Robbins v. Walgreens	Pending
4292-SCE&G v. Hartough	Pending
4295-Nationwide Ins. Co. v. James Smith	Pending
4296-Mikell v. County of Charleston	Pending
4298-James Stalk v. State	Pending
4306-Walton v. Mazda of Rock Hill	Pending
4309-Brazell v. Windsor	Pending

4310-State v. John Boyd Frazier	Pending
4315-Todd v. Joyner	Pending
4319-State v. Anthony Woods (2)	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-350-State v. M. Harrison	Denied 02/21/08
2007-UP-052-State v. S. Frazier	Pending
2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-128-BB&T v. Kerns	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-177-State v. H. Ellison	Pending
2007-UP-183-State v. Hernandez, Guerrero, Arjona	Pending
2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-199-CompTrust AGC v. Whitaker's	Pending

2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-243-E. Jones v. SCDSS	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-266-State v. Dator	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-318-State v. Shawn Wiles	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-331-Washington v. Wright Const.	Pending
2007-UP-340-O'Neal v. Pearson	Pending
2007-UP-341-Auto Owners v. Pittman	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending
2007-UP-384-Miller v. Unity Group, Inc.	Pending
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-493-Babb v. Noble	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending

2007-UP-513-Vaughn v. SCDHEC	Pending
2007-UP-528-McSwain v. Little Pee Dee	Pending
2007-UP-529-Adoptive Father v. Birth Father	Pending
2007-UP-530-Garrett v. Lister	Pending
2007-UP-531-Franklin Ventures v. Jaber	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James M. Williams, III, Respondent.

Opinion No. 26441
Submitted January 29, 2008 – Refiled March 10, 2008

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Assistant Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Larry C. Brandt, of Larry C. Brandt, PA, of Walhalla, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent[1] and the Office of Disciplinary Counsel (ODC) have

[1]Respondent was admitted to practice law in this State in 1978. While he practiced law in Clemson, South Carolina, for most of his career, respondent was practicing law at 125 Bram Cat Alley in Seneca when he was placed on incapacity inactive status on August 8, 2007.

We are aware that there is another attorney with a very similar name who has practiced law in Seneca for his entire career, James L. Williams. This attorney practices law at 107 North Fairplay in Seneca, and he has no involvement in this matter and is a member in good standing with the South Carolina Bar.

entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent from the practice of law in this state.[2] The facts, as set forth in the agreement, are as follows.

FACTS

Since the late 1980s, respondent represented Client and his wife on a variety of legal matters. Presently, Client is an elderly man residing in a retirement community. Client's wife resided in the same facility until her death in November 2002.

Respondent drafted durable powers of attorney for Client and his wife. In each of the documents, respondent was named attorney-in-fact. The durable powers of attorney drafted by respondent contained a provision that respondent, as attorney-in-fact, had authority to "deal with Attorney in Attorney's individual, or any fiduciary capacity in buying and selling assets, and lending and borrowing money, and in all other transactions irrespective of the occupancy by the same person of dual positions."

Respondent's representation of Client and his wife in the preparation and execution of the durable powers of attorney and the naming of respondent as attorney-in-fact presented a conflict of interest. Respondent did not advise Client and his wife of this conflict of interest.

Respondent admits misappropriating more than $400,000 from Client's personal assets for his own use and benefit by executing documents, checks, etc., as Client's attorney-in-fact. Further,

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[2] While the agreement was pending before the Court, respondent submitted a letter requesting permission to resign from the Bar. The request is denied.

respondent borrowed money from Client without obtaining his informed consent to the conflict of interest the transactions presented. Respondent failed to reduce the terms of Client's loans to respondent to writing in the form and with the substance required by the Rules of Professional Conduct.

Client initiated a civil action against respondent. Respondent settled the suit, in part by agreeing to pay restitution.

Respondent pled guilty to one count of exploitation of a vulnerable adult. He was sentenced to eighteen (18) months under house arrest.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.8(a) (lawyer shall not enter into business transaction with a client unless terms are fair and disclosed, client is given opportunity to seek advice of independent counsel, and client consents in writing); Rule 1.15 (lawyer shall hold property of client separate from lawyer's own property); Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4(c) (lawyer shall not commit criminal act involving moral turpitude); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice, bring courts or legal profession into disrepute, or conduct demonstrating an unfitness to practice law) and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken upon admission to practice law in this state).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ronald Donald Dingle, Appellant.

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 26444
Heard October 30, 2007 – Filed February 27, 2008

AFFIRMED AS MODIFIED

Tara Shurling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

JUSTICE BEATTY: Ronald Donald Dingle appeals from the circuit court's order resentencing him instead of granting him a new trial upon remand by the post-conviction relief (PCR) court. We affirm as modified.

FACTS

On December 22, 1992, seventeen-year-old Dingle was charged in Sumter County with murder, first-degree burglary, assault and battery with intent to kill (ABIK), two counts of possession of a weapon during a violent crime, two counts of possession of a sawed-off shotgun, pointing a firearm, first-degree burglary, and kidnapping. While out on bond in June 1993, Dingle was arrested in Lee County and charged with trafficking in crack cocaine. Dingle pled guilty to the Lee County offense in September 1993 and was sentenced to three years imprisonment and a $25,000 fine. Dingle later became concerned about the potential effect of his Lee County conviction on his eligibility for parole, and he filed an application for PCR. The PCR court dismissed the matter without prejudice, noting that the court handling the Sumter County charges would be better able to deal with the matter.

In April 1995, Dingle entered a negotiated plea of guilty to the Sumter County charges. The State informed the plea court that in exchange for the plea, Dingle would not be exposed to the death penalty and would still be eligible for parole. The plea court sentenced Dingle on the Sumter County charges to consecutive terms of: life imprisonment on each of the murder and first-degree burglary charges; twenty years imprisonment for ABIK; five years for each count of possession of a weapon during a violent crime; ten years for each count of possession of a sawed-off shotgun; and five years for pointing a firearm. Further, as part of the negotiated plea and to avoid ineligibility for parole for a subsequent conviction,[1] Dingle's prior conviction

[1] Although trafficking was not defined as a violent crime at the time Dingle originally entered his Lee County plea, trafficking was defined as a "violent crime" at the time of his Sumter County guilty plea. Therefore, the prior Lee County plea would have rendered Dingle ineligible for parole consideration had it not been vacated and the plea re-entered at the same time as his Sumter County plea. See S.C. Code Ann. § 16-1-60 (Supp. 2006) (including trafficking as a violent offense); S.C. Code Ann. § 24-21-640 (2007) (holding that parole must not be granted to a person serving a sentence for a second or

and sentence on his Lee County trafficking in crack cocaine charge were vacated, he pled guilty again, and he was resentenced at the same time as his plea to the Sumter County charges. He was sentenced to a concurrent term of three years and a fine of $25,000. The plea judge placed on the record the fact that the Lee County plea was part of the same sentencing proceeding as the Sumter County plea. Throughout the sentencing hearing, the parties and the plea judge all indicated their intent that Dingle would be eligible for parole after serving thirty years of his life sentence.

In 1996, Dingle learned that he would not be eligible for parole because the Sumter County sentences were consecutive, and he filed another application for PCR. After a hearing, the PCR court issued an order in December 1997 finding Dingle pled guilty pursuant to assurances by his counsel and by the Sumter County plea court that he would be eligible for parole after thirty years. The PCR court vacated the Sumter County sentences and remanded the matter to the circuit court "for sentencing consistent with the intent of the plea agreement or for a new trial." The Lee County plea and sentence were not addressed in the order.

Dingle's case was not called for trial for several years, and he filed a motion for a speedy trial in 2004. Representatives from the Department of Probation, Parole, and Pardon Services were present at the hearing. Dingle testified that: he wanted a new trial; it was his decision to make; he understood that he could face a punishment of life without the possibility of parole if he were convicted; he would not be eligible for parole anyway upon resentencing; and he did not get the benefit of his bargain when the death penalty, a major motivator in his plea decision, was later ruled unconstitutional for minors. The State indicated it would *nolle pros* the two gun charges that could potentially interfere with parole eligibility so that Dingle could be eligible for parole after thirty years.[2]

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subsequent conviction following a separate sentencing for a prior conviction for violent crimes).

[2] It does not appear from the record that the State followed through with this proposal.

The circuit court denied Dingle's motion for a new trial. The court interpreted the PCR court's order as holding that Dingle was to be "sent back for resentencing in accordance with the agreement and if the State is not willing to do that then he would be entitled to a new trial." Despite Dingle's arguments that he would not be eligible for parole if he were just resentenced because the new sentencing date would constitute a "subsequent offense," the court found Dingle could get the benefit of the plea bargain and it ordered the parole board to "compute Dingle's eligibility for parole on the murder conviction as if these other convictions were either concurrent or not on his record." Finally, the court disagreed with Dingle's argument that he was entitled to a new trial because the major motivating factor to plead guilty was to avoid the death penalty, and it was later outlawed for minors pursuant to Roper v. Simmons, 543 U.S. 551 (2005). The court re-imposed the original sentences given to Dingle on the Sumter County charges, but the sentences were to run concurrently instead of consecutively. Dingle's motion to alter or amend the judgment was denied, and he appeals.

DISCUSSION

Dingle argues the circuit court abused its discretion by not allowing him to withdraw his guilty pleas and have a new trial because: (1) resentencing him on the Sumter County convictions would amount to a "subsequent conviction" such that he would be ineligible for parole anyway; and (2) it was his choice as to whether he was resentenced or entitled to a new trial, especially in light of the fact that he no longer had the full benefit of the original bargain because the death penalty was later found to be unconstitutional for minors. We disagree.

In his first argument, Dingle focuses on the language "second or subsequent conviction" in the statute to argue that resentencing him on the Sumter County charges would trigger the no-parole clause in the statute. As will be further discussed, Dingle has misinterpreted the statute.

Parole is a privilege, not a matter of right. Sullivan v. South Carolina Dep't of Corr., 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 127 n.4 (2003).

Although a court's final judgment in a criminal case is the pronouncement of the sentence, the parole board has the sole authority to determine parole eligibility separate and apart from the court's authority to sentence a defendant. State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623-24 (1989). However, the court may order the parole board to structure a sentence in such a way as to carry out the intent of the parties. Tilley v. State, 334 S.C. 24, 28-29, 511 S.E.2d 689, 692 (1999) (ordering the parole board to consider the five-year mandatory term for possession of a firearm as being served first such that the prisoner would be considered eligible for parole as the parties had intended).

This Court has the authority to interpret the parole statute. In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature. Hinton v. South Carolina Dep't of Prob., Parole, & Pardon Servs., 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004). As with any statute that is penal in nature, the Court must construe it strictly in favor of the defendant and against the State. Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (construing in favor of the defendant the different time frames for parole eligibility found in the general parole statute and in a statute regarding parole eligibility for burglary). The relevant portion of the parole statute provides: "The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60." S.C. Code Ann. § 24-21-640 (2007).

A clear reading of the underlying statute is that in order to trigger the no-parole language, a defendant must not only have a separate sentencing hearing, but he or she must also have a separate conviction. Dingle entered his pleas to both the Sumter County and Lee County charges in the same proceeding, and only his sentences, not his convictions, on the Sumter County charges were overturned by the PCR court. A clear reading of the statute indicates the Legislature's desire to punish subsequent offenders. To interpret the statute in such a way as to bar parole consideration where, as here, the sentence alone is overturned and remanded for resentencing would lead to an absurd result. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("However, a court must reject a statute's interpretation leading to

absurd results not intended by the Legislature."). Dingle's argument that the remand of his Sumter County sentences was a "subsequent conviction" rendering him ineligible for parole is erroneous, and specific performance of the plea bargain can still be accomplished.

Furthermore, the State has affirmatively stated its intent to comply with the plea bargain and does not intend to challenge Dingle's eligibility for parole. Thus, the State, and its various agencies, would be estopped from later asserting Dingle was ineligible for parole. See State v. Peake, 353 S.C. 499, 505, 579 S.E.2d 297, 300 (2003) (discussing whether the State was estopped to prosecute a defendant based on representations made by someone regarding a civil action).

Citing cases that deal with breaches of plea agreements, Dingle next argues that he was entitled to choose between resentencing or a new trial because it "comports with this jurisdiction's recognition of the importance of contract principles in resolving plea agreement disputes." He also argues that he was entitled to choose a trial because he could never get the benefit of the original plea bargain where a motivating factor was to avoid a death sentence, and the death penalty was later ruled unconstitutional for minors.

It has long been established that state prosecutors "are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty." Sprouse v. State, 355 S.C. 335, 338, 585 S.E.2d 278, 279 (2003) (citing Santobello v. New York, 404 U.S. 257 (1971)). Where a solicitor breaches a plea agreement, the United States Supreme Court has indicated two remedies: specific performance of the plea agreement; or allowing the defendant to withdraw his guilty plea. Santobello, 404 U.S. at 262-63. As Dingle correctly notes, although South Carolina has not ruled on whether a defendant may elect the remedies when a solicitor breaches a plea agreement, some jurisdictions have held that it is the defendant's right to choose between the remedies in such a situation. See State v. Munoz, 23 P.3d 922, 928 (Mont. 2001) (relying upon contract law principles to find a "non-breaching defendant must be afforded the initial right to choose from available remedies where the State breaches a plea agreement"); State v. Miller, 756 P.2d 122, 126-27 (Wash. 1988) (noting that

the prosecutor failed to carry his burden of demonstrating the defendant's choice of remedy was unjust).

However, in the instant case, the State did not violate the terms of the agreement: in exchange for Dingle's plea, they did not seek a death sentence and they agreed to structuring the sentence such that he would still be parole eligible. It was only the way the plea judge structured the sentence that rendered Dingle parole ineligible. Because the State did not violate the agreement, the question of election of remedies does not apply.

Finally, there is no merit to Dingle's argument that he did not get the benefit of the bargain because the death penalty later became unconstitutional for minors. See Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding capital punishment for persons under the age of eighteen when the crimes were committed violated the Eighth and Fourteenth Amendments). Dingle still received the benefit of his bargain when the parties agreed to structure the sentence such that he would be parole eligible. All the parties attempted to accomplish that goal. By remanding Dingle's Sumter County sentences for resentencing such that he will be parole eligible, Dingle gets the benefit of his bargain.

Because the plea agreement can faithfully be enforced and specific performance promotes judicial economy, we find the circuit court did not abuse its discretion in ordering resentencing instead of a new trial.

However, as the parties note in their briefs, the circuit court made some errors in the original order, including ordering the parole board to only consider the murder conviction when determining parole eligibility and finding there was no retroactive application of the statute defining trafficking as a violent offense. See Sullivan v. State, 331 S.C. 479, 479, 504 S.E.2d 110, 111 (1998) (holding it is not a violation of the ex post facto clause for the Legislature to enhance punishment for an offense based on a prior conviction of the defendant, even though the enhancement provision was not in effect at the time of the previous offense); S.C. Code Ann. § 21-24-640 (2007) (noting that the parole board has the sole authority to determine parole eligibility based on the prisoner's complete record). Although we affirm the

circuit court's decision to enforce the plea agreement by resentencing Dingle, we modify the court's order to the extent it made findings inconsistent with the above-cited law.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, WALLER, and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

American General Financial Services, Inc., f/k/a American General Finance, Inc., Appellant,

v.

Kimberly Dawn Brown f/k/a Kimberly Dawn Tate, Respondent.

Appeal From Spartanburg County
Gordon G. Cooper, Master-in-Equity

Opinion No. 26445
Submitted February 21, 2008 – Filed February 27, 2008

REVERSED AND REMANDED

W. Reid Cox, Jr., of Cox and Ferguson, of Laurens, for Appellant.

Kimberly Dawn Tate, of Spartanburg, *pro se*, Respondent.

JUSTICE WALLER: In this foreclosure action, appellant American General Financial Services, Inc. appeals from the Master-in-Equity's decision to deny its request for a deficiency judgment. We reverse and remand.

FACTS

In 1999, respondent Kimberly Dawn Tate executed a mortgage in the amount of $53,600.00, which was assigned to appellant in 2000. In 2005, appellant brought a foreclosure action against respondent. A deficiency judgment was specifically demanded in the complaint.

On November 28, 2005, the Master-in-Equity entered a judgment of foreclosure and an order for sale of the real property. The total debt due was found to be $61,763.90.[1] The order also stated that appellant had demanded the right to a deficiency judgment.

Appellant submitted a bid on the property for $25,000.00, but a third party was the highest bidder in the amount of $25,001.00. Appellant thereafter requested a deficiency judgment against respondent for $39,087.99. The Master-in-Equity, however, denied the request.

In his written order denying the deficiency judgment, the Master-in-Equity stated as follows:

> As a Court of Equity, it is this Court's position that it may take into consideration all of the facts and circumstances surrounding a foreclosure sale. When it does not appear that it is equitable to grant a deficiency judgment in a given situation it may exercise its discretion and deny the request for the entry of a deficiency judgment….
>
> To grant [appellant] a deficiency judgment after consideration of the facts of this case would not be equitable.

Appellant moved for reconsideration, but the Master-in-Equity maintained his position that a court of equity "has the discretion to deny the

[1] Although respondent defaulted on the complaint, she appeared at the November 17, 2005, foreclosure hearing. At this hearing, she did not contest that the total debt amount was $61,763.90.

request for the entry of a deficiency judgment if the granting of such appears inequitable." Therefore, he denied the motion for reconsideration.

ISSUE

> Where a deficiency judgment was demanded in the complaint and not thereafter waived, did the Master-in-Equity err by denying appellant the requested deficiency judgment?

DISCUSSION

Appellant argues the Master-in-Equity did not have the discretion to deny its request for a deficiency judgment because a deficiency judgment was specifically demanded in the complaint and acknowledged in the foreclosure order. We agree.

The right to a deficiency judgment is provided by statute:

> In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage.

S.C. Code Ann. § 29-3-660 (2007).

Although the Master-in-Equity interpreted this statutory section as giving an equity court the discretion to determine whether to grant a deficiency judgment, we find this interpretation clearly conflicts with South Carolina case law on this issue.

We have explained that a mortgage "represents security for an obligation, [but] not full payment thereof." Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978). Thus, the general rule is that "if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the

mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency." Id. (citation omitted). Moreover, "a mortgagee is not denied the full amount due him merely because he elects initially to pursue his remedy by foreclosure. An action for a deficiency judgment as a sequel to foreclosure is taken as a matter of course." Id. at 341, 242 S.E.2d at 408.

Looking at the applicable South Carolina foreclosure statutes, the Braun Court found the Legislature intended for a deficiency judgment to be denied **only** when it has been "expressly waived." Id. at 343, 242 S.E.2d at 409; see also Bartles v. Livingston, 282 S.C. 448, 319 S.E.2d 707 (Ct. App. 1984) ("a mortgagee whose debt remains unsatisfied after sale of the property is entitled to a deficiency judgment, unless the right to a deficiency has been waived."). Consequently, the Court in Braun held that although a deficiency judgment had not been specifically demanded in the foreclosure complaint, the equity court properly granted the mortgagee the deficiency judgment.

In Bartles v. Livingston, supra, the Court of Appeals reversed the circuit court's denial of a deficiency judgment for the mortgagee. The Bartles court stated the following:

> Absent grounds to set aside the decree of foreclosure, there is **no discretion** to cut off the right to a deficiency after sale where (1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt.

282 S.C. at 461, 319 S.E.2d at 715 (emphasis added).

We find the Master-in-Equity erred in the instant case by denying appellant the requested deficiency judgment. Appellant had not waived its right to a deficiency judgment, but instead specifically demanded a deficiency. Certainly, appellant met the criteria set out in Bartles, and

therefore, the Master-in-Equity was bound to award the deficiency judgment in the amount of $39,087.99.[2]

Accordingly, we reverse the denial of the deficiency judgment and remand to the Master-in-Equity for an order consistent with this opinion.

REVERSED AND REMANDED.

TOAL, C.J., MOORE and PLEICONES, JJ., concur. BEATTY, J., not participating.

[2] We note the foreclosure statutes regarding appraisal give the defendant in a foreclosure action – the mortgagor – a right to apply for an order of appraisal which could possibly result in the deficiency judgment being adjusted or extinguished. See S.C. Code Ann. §§ 29-3-680 & -740 (2007). Furthermore, there are guidelines for an equity court to set aside a foreclosure sale. Although inadequacy of price generally is not enough to allow the court to set aside a sale, if the sale price "'is so gross as to shock the conscience,'" the court may interfere with the sale. Investors Sav. Bank v. Phelps, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990) (quoting Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 157, 177 S.E. 24, 27 (1934)). In Investors Sav. Bank v. Phelps, the Court of Appeals affirmed the Master's decision to set aside the sale where the bid amount was only slightly more than 1% of the original amount of the mortgage. Here, however, appellant's bid was approximately 47% of the original amount of the mortgage.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Kenneth Roach, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26446
Heard January 8, 2008 – Filed March 10, 2008

VACATED IN PART; AFFIRMED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Thomas E. Pope, of York, for Petitioner.

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

PER CURIAM: Kenneth Roach was convicted of multiple drug offenses and sentenced to an aggregate term of thirty years in prison. Roach appealed to the Court of Appeals, arguing the trial court erred by admitting hearsay testimony in violation of the Confrontation Clause and by improperly allowing an in-court identification. The Court of Appeals upheld the trial judge's ruling on the in-court identification but found that the admission of the allegedly hearsay testimony violated the Confrontation Clause. However, the Court of Appeals determined the admission of the testimony was harmless error and affirmed Roach's convictions. State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005). We granted the State's petition to review whether the allegedly hearsay testimony was improperly admitted at trial.

At oral argument before this Court, Roach's counsel admitted that the State was correct in asserting that the hearsay issue was not properly preserved for appellate review. We therefore hold that the hearsay issue should not have been addressed by the Court of Appeals. Hendrix v. Eastern Distrib., Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (issue not preserved for review before the Court of Appeals should not have been addressed and thus portion of opinion was vacated by Supreme Court). Accordingly, we affirm Roach's convictions in result only and vacate the portion of the Court of Appeals' opinion that addresses the hearsay issue.

VACATED IN PART; AFFIRMED IN PART.

TOAL, C.J., MOORE, WALLER, PLEICONES, JJ., and Acting Justice J. Michelle Childs, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Rose L. James and Leroy T. James, Plaintiffs,

v.

Kelly Trucking Company and Alvino C. Hymes, Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, Jr., United States District Judge

Opinion No. 26447
Heard September 18, 2007 – Filed March 10, 2008

CERTIFIED QUESTIONS ANSWERED

Dwight Christopher Moore, of Moore Law Firm, of Sumter, John S. Nichols, of Bluestein & Nichols, of Columbia, and S. Randall Hood, of McGowan Hood Felder & Johnson, of Rock Hill, for Plaintiffs.

Kirby D. Shealy III, of Baker Ravenel & Bender, of Columbia, for Defendants.

CHIEF JUSTICE TOAL: We accepted two certified questions from the United States District Court arising out of the situation in which a plaintiff, as a result of allegedly tortious actions by an employee, asserts causes of action for vicarious liability and negligent hiring, training, supervision, or entrustment against an employer. The first question asks whether a plaintiff in South Carolina is precluded, as a general matter, from maintaining a cause of action for negligent hiring, training, supervision, or entrustment after an employer stipulates that it is vicariously liable for its employee's negligence. In the event we answer the first question "yes," the second question asks whether there is an exception to this general rule when the negligent hiring, training, supervision, or entrustment claim involves a properly pled and available claim for punitive damages. We answer the first question "no," and therefore do not reach the second.

FACTUAL/PROCEDURAL BACKGROUND

Rose and Leroy James commenced this action to recover for injuries sustained in an automobile accident caused by defendant Alvino Hymes. Hymes was driving a tractor-trailer truck for his employer, defendant Kelly Trucking Company, when he failed to stop for a red light and struck Mrs. James' vehicle. The James sued both Hymes and Kelly Trucking, seeking to hold Kelly Trucking liable for Hymes' negligence through the doctrine of respondeat superior. The James also asserted a separate cause of action against Kelly Trucking for the negligent hiring, training, and supervision of Hymes based on his poor driving record. In their prayer for relief, the James sought both actual and punitive damages.

The James settled with the insurers of both Hymes and Kelly Trucking, and then sought recovery under the underinsured motorists provision (UIM) of their insurance policy. The James' insurer ("the Insurer") then assumed the defense of this case as allowed by S.C. Code Ann. § 38-77-160 (Supp. 2006). The Insurer, defending the action from the defendants' perspective, stipulated that Hymes was negligent in causing the accident and that Hymes was acting in the course and scope of his employment with Kelly Trucking when the accident occurred. The Insurer then moved for partial summary

judgment, arguing that the James were precluded from proceeding with their negligent hiring claim because Kelly Trucking had admitted liability for Hymes' negligence.

It was against this backdrop that the District Court certified two questions to this Court, questions which we accepted pursuant to Rule 228, SCACR. The District Court asked:

> I. Does South Carolina law prohibit a plaintiff from pursuing a negligent hiring, training, supervision, or entrustment claim once respondeat superior liability has been admitted?
>
> II. If the answer to question 1 is in the affirmative, does South Carolina law recognize an exception to the rule where punitive damages on the negligent hiring, training, supervision, or entrustment claim are pled and available?

LAW/ANALYSIS

A plaintiff in a civil case may have a number of causes of action at his disposal through which he may seek to hold a tortfeasor or other responsible party liable for his injury, and this is no less the case when a plaintiff alleges that he has been injured by an employee acting in the course and scope of his employment. The doctrine of respondeat superior provides that the employer, as the employee's master, is called to answer for the tortious acts of his servant, the employee, when those acts occur in the course and scope of the employee's employment. *Sams v. Arthur*, 135 S.C. 123, 128-131, 133 S.E. 205, 207-08 (1926). Such liability is not predicated on the negligence of the employer, but upon the acts of the employee, whether those acts occurred while the employee was going about the employer's business, and the agency principles that characterize the employer-employee relationship. *Id.*

Just as an employee can act to cause another's injury in a tortious manner, so can an employer be independently liable in tort. In circumstances where an employer knew or should have known that its employment of a

specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public. *See* RESTATEMENT (SECOND) OF TORTS § 317 (1965) (*Cited with approval in Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992)). As this recitation suggests, the employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence. Stated differently, the employer's liability under this theory is not derivative, it is direct.[1]

The Insurer argues that pubic policy justifies the preclusion of the pursuit of a negligent hiring, training, supervision, or entrustment claim against an employer when the employer admits vicarious liability. The argument goes that the admission of evidence which must be offered to prove a negligent hiring, training, supervision, or entrustment claim – evidence such as a prior driving record, an arrest record, or other records of past mishaps or misbehavior by the employee – will be highly prejudicial if combined with a stipulation by the employer that it will ultimately be vicariously liable for the employee's negligent acts. The Insurer argues that allowing a plaintiff to maintain an independent negligence cause of action against the employer will require that evidence of an employee's past negligence be admitted. This admission, in the Insurer's view, will result in the jury improperly inferring that because the employee was negligent in the past, he was negligent in causing the plaintiff's injuries. The Insurer argues that this inference will lead to a jury verdict driven more by emotion than by application of the law. Although we do not take these arguments lightly, we believe that they do not accurately characterize the concerns at play.

[1] Some jurisdictions have limited the application of the theories of negligent hiring, training, supervision, and entrustment to instances where an employee acts outside the scope of his employment, and this proposition finds some support in the comments to the Restatement. *See Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982); *and* RESTATEMENT (SECOND) § 317 cmt. a. Our case law has not previously recognized such a distinction, and the parties in this case did not argue that we should begin to do so.

Primarily, we think the argument that an independent cause of action against an employer must be precluded to protect the jury from considering prejudicial evidence presumes too much. Our court system relies on the trial court to determine when relevant evidence is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE. Similarly, we rely on the trial court to craft instructions describing what a jury may or may not infer from a particular piece of evidence, and we grant the trial court discretion to give such instructions to the jury at the time such evidence is introduced, when charging the jury at the close of the case, or at any proper time in between. In our view, the argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial, and to the jury's ability to follow the trial court's instructions.

If this fact alone did not provide a sufficient basis to reject the proposition at issue, the additional complexities involved with adopting such a rule and the proposed exception would provide the tiebreaker. To its credit, the Insurer stipulates that if a plaintiff should generally be prohibited from pursuing a negligent hiring, training, supervision, or entrustment claim once respondeat superior liability has been admitted, there should be an exception to this rule where an employer's conduct is so reckless or wanton that punitive damages are available. Although this exception appears fairly benign on the surface, we think it raises procedural problems of its own.[2]

When judging whether a plaintiff may proceed to trial on a cause of action, the trial court typically concerns itself only with whether the plaintiff's complaint states a factual basis to support a cause of action and whether, at the close of his presentation of the case, the plaintiff has

[2] The Insurer focuses much of its argument on the question of whether an award of punitive damages against it, standing in the shoes of the defendants, would be constitutional. Though an intriguing question, this was not a question we agreed to answer.

presented a prima facie case supporting the allegations of his complaint. If the trial court, under the exception proposed, is asked to make any sort of a qualitative judgment regarding the employer's conduct, the exception would drastically alter our traditional concepts of the court's proper function. On the other hand, if the trial court is simply required to ask whether the plaintiff has requested an award of punitive damages, we think the adoption of a rule of preclusion might prove of little utility. As requests for punitive damages are commonplace in cases of this type, we think traveling the road the Insurer proposes would create an exception which swallows the rule.

We recognize that other jurisdictions have answered these questions differently, *see, e.g., McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995), but we are not resolved to agree in this instance. In our view, it is a rather strange proposition that a stipulation as to one cause of action could somehow "prohibit" completely the pursuit of another. A plaintiff may, in a single lawsuit, assert many causes of action against a defendant. The considerations limiting a plaintiff's available causes of action in the typical case are that the plaintiff must be able to demonstrate a prime facie case for each cause of action and that a plaintiff may ultimately recover only once for an injury. Thus, although the Insurer's stipulation as to vicarious liability ensures that the Insurer (standing in the shoes of Kelly Trucking) will be liable for the James' injuries, that is only the practical effect of the stipulation. Such practical considerations, in our opinion, ought not require the preclusion of a claim based upon Kelly Trucking's alleged negligence in hiring Hymes as a matter of law.

CONCLUSION

After considering the arguments in favor of answering the first certified question in the affirmative, we are of the opinion that the largely policy-based arguments offered in support of such an answer do not justify a grant of approval to the rule proposed. Accordingly, we conclude that South Carolina law does not prohibit a plaintiff from pursuing a negligent hiring, training, supervision, or entrustment claim once respondeat superior liability has been admitted, and we therefore answer the first certified question "no." For this reason, we need not reach the second question certified by the District Court.

PLEICONES and BEATTY, JJ., concur. MOORE, J. dissenting in a separate opinion in which WALLER, J. concurs.

JUSTICE MOORE: I respectfully dissent. I would hold that a plaintiff may proceed on a negligent hiring claim when the employer admits vicarious liability only if there is evidence of gross negligence in hiring that would support an award of punitive damages.

As a general rule, most jurisdictions do not allow a separate claim against an employer where vicarious liability is admitted for the acts of an employee. *See* McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995), *and cases cited therein*; Annot. 30 A.L.R. 4th 838 (1984).[3] The rationale is that the employer's liability is a derivative claim fixed by a determination of the employee's negligence. Some courts following this general rule, however, will allow a negligent hiring claim to proceed when the employer's liability is alleged to include *gross* negligence in hiring; in this situation, the employer's gross negligence supports a claim beyond the employee's negligent act. *See* Durben v. American Materials, Inc., 503 S.E.2d 618 (Ga. 1998); Lockett v. Bi-State Transit Auth., 445 N.E.2d 310 (Ill. 1983); Coville v. Ryder Truck Rental, Inc., 795 N.Y.S.2d 708 (2006); *see also* Bruck v. Jim Walter Corp., 470 So.2d 1141 (Ala. 1985). Finally, a minority of courts will allow a negligent hiring claim to proceed, irrespective of gross negligence on the employer's part, because they hold that negligent hiring is a separate, and not derivative, claim. *See* Quinonex v. Andersen, 696 P.2d 1342 (Ariz. 1984); Marquis v. State Farm Fire and Cas. Co., 961 P.2d 1213 (Kan. 1998); Lim v. Interstate System Steel Div., Inc., 435 N.W.2d 830 (Minn. 1989). The majority has chosen to follow the minority rule.

Contrary to the minority view, our precedent indicates that generally a claim against an employer under a theory of respondeat superior is treated as a derivative claim dependent upon establishing the negligence of the employee. For instance, in David v. McLeod Reg. Med. Center, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006), a plaintiff alleged medical malpractice by the treating physicians and vicarious liability of the hospital. We held

[3]Judge Anderson, who certified the questions here, applied this majority rule in another South Carolina case but acknowledged that this Court has never ruled on the issue. Bowman v. Norfolk So. Rwy., 832 F.Supp. 1014, 1021-22 (D.S.C. 1993).

summary judgment was properly granted in favor of the hospital because the plaintiff had failed to establish negligence by the physician-employees. Similarly, in McCullem v. Liberty Life Ins. Co., 217 S.C. 565, 571, 61 S.E.2d 181, 184 (1950), we upheld a nonsuit in the plaintiff's action against an employer for injuries allegedly caused by an employee where there was no evidence of the employee's negligence. Both these cases indicate that generally an employer's liability is determined by the negligence of his employee and the suit against the employer is a derivative one.[4]

In some circumstances, a plaintiff may allege the employer's negligence rises to such a level that it supports liability *in addition to* the employer's vicarious liability for the employee's negligent acts.[5] I would allow a separate cause of action in this circumstance because the cause of action against the employer is no longer simply derivative of, or dependent upon, the negligence of the employee.[6] Allowing such an action against an employer would further the deterrent purpose of punitive damages. *See* Clark v. South Carolina Dep't of Pub. Safety, 362 S.C. 377, 608 S.E.2d 573 (2005) (upholding verdict on claim of negligent supervision where there was evidence of employer's gross negligence despite jury's failure to find employee's breach of a duty); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (purposes of punitive damages are to punish wrongdoer and deter similar reckless, willful, wanton, or malicious conduct

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[4]Similarly, in Longshore v. Saber Security Servs., Inc., 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005), the Court of Appeals speculated that a plaintiff must prove an actionable tort by the employee in order to maintain a negligent hiring action against the employer.

[5]Defendants do not argue against adopting such a rule. Instead, they simply claim that any punitive damages award in this case is unconstitutional. This is not a question we agreed to answer in accepting the questions certified by the District Court.

[6]For instance, here plaintiffs claim Hymes' poor driving record supports punitive damages against Kelly Trucking irrespective of any showing that Hymes himself was grossly negligent.

in the future).[7] I depart from the majority's holding because I would not allow a separate cause of action to proceed where there is no evidence of gross negligence on the employer's part.

WALLER, J., concurs.

[7]I note that by giving a limiting instruction, the trial court may restrict the use of evidence regarding the negligent hiring claim to avoid the potential danger of unfair prejudice from the jury's consideration of such evidence in the context of the underlying tort. For instance, here the jury could be instructed that Hymes' poor driving record is not to be considered in determining liability for the wreck but is admissible only on the negligent hiring claim. *See* Lockett, *supra*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Kizer Hazel, Jr., Respondent,

v.

State of South Carolina, Appellant.

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

Opinion No. 26448
Heard January 9, 2008 – Filed March 10, 2008

AFFIRMED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General T. Stephen Lynch, Assistant Attorney General David A. Spencer, of Columbia, for appellant.

Charles Preston Edwards, of Spartanburg, for respondent.

JUSTICE MOORE: After respondent's request for a declaratory judgment was granted, the State appealed. We certified the appeal from the Court of Appeals.

FACTS

Respondent pled guilty to kidnapping in 1979 and was sentenced to life imprisonment.[1] He served twenty-two years of his sentence and was granted parole in 2002. Upon release, he was informed that he would be required to register on the Sex Offender Registry. Respondent has registered annually since that time.[2]

Respondent was required to register pursuant to S.C. Code Ann. § 23-3-430 (2007), which provides that persons convicted of certain offenses must register as sex offenders upon their release. The current § 23-3-430(C)(15) (2007) requires that any person convicted of kidnapping a person eighteen years of age or older must register as a sex offender unless a finding is made on the record that the kidnapping did not include a criminal sexual offense or attempted criminal sexual offense.

Respondent filed a petition for declaratory judgment requesting that he not be required to register as a sex offender. The petition was originally regarded as a PCR application; however, it was subsequently removed from the PCR docket and placed on the Common Pleas non-jury docket. Respondent's and the State's motions for summary judgment were denied.

A bench trial was held and an order was issued finding that the transcript of the plea made it clear there was no sexual element involved in the kidnapping. The court found the trial judge did not make a specific

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[1]Respondent, his former wife, and another man kidnapped a woman and demanded $20,000 from her husband. No sexual misconduct was involved in the kidnapping.

[2]However, after the lower court's ruling, respondent was removed from the Sex Offender Registry.

finding that sex was not involved in the kidnapping because the law that required him to do so was not yet in effect. The court further found that the legislative intent behind the 1998 amendment to § 23-3-430 was to protect the public from sexual offenders who may re-offend and the court found this was certainly not the case with respondent. The court granted respondent's motion for declaratory judgment and found that respondent is not required to register as a sex offender.

ISSUES

I. Did the Court of Common Pleas err by finding that respondent's 1979 kidnapping conviction did not involve a sexual offense such that he would be required to register as a sex offender?

II. Did the Court of Common Pleas lack subject matter jurisdiction to make a factual finding that respondent's kidnapping conviction did not involve a sexual offense?

DISCUSSION

I

The State argues respondent became a sex offender upon the enactment of the 1994 amendment to S.C. Code Ann. § 23-3-430, and that the court erred by applying the 1998 amendment to him.

Section 23-3-430 has been through many changes since its enactment in 1994. In the beginning, the statute provided that a person convicted of kidnapping shall be referred to as a sex offender. § 23-3-430(8) (Supp. 1995). The statute was amended in 1996 and kidnapping was deleted from the listing of offenses that require one to register as a sex offender. § 23-3-430(C) (Supp. 1996). In 1998, the statute was again amended and kidnapping was re-added as one of the enumerated offenses. An exception was added to state that if the court makes a finding on the record that the offense did not include a criminal sexual offense, then a defendant convicted

of kidnapping would not be required to register as a sex offender. § 23-3-430(C)(15) (Supp. 1998).

The statute was again amended in 1999. This amendment rewrote the kidnapping subsection to state that a person convicted of kidnapping a person eighteen years of age or older would be required to register as a sex offender. The exception was again included and stated that no registration would be required if the court made a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. § 23-3-430(C)(15) (Supp. 1999).[3]

The 1994 version of the statute does not apply to respondent. We conclude the applicable statute is the statute that existed at the time of respondent's release from prison.[4] Section 23-3-430 had no effect on respondent until he was released from prison and was required to register as a sex offender. Applying the law as it read on the date of respondent's release best fulfills the legislature's intent because respondent is not at risk of re-offending where his crime did not have involve a sexual element. South Carolina Code Ann. § 23-3-400 (2007) states:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. . . .
>
> The sex offender registry will provide law enforcement with the tools needed in investigating

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[3]Three subsequent amendments did not affect this subsection. § 23-3-430(C)(15) (2007).

[4]Further, the kidnapping subsection of the 1994 statute was implicitly repealed by the 1996 amendment that removed kidnapping as one of the enumerated offenses requiring one to register as a sex offender. *See* Taylor v. Murphy, 293 S.C. 316, 360 S.E.2d 314 (1987) (repeal of a statute operates retrospectively and has the effect of blotting the statute out completely as if it had never existed).

> criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

See also State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002) (the language of § 23-3-400 makes clear that the legislature did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes).

Accordingly, the 1999 version of § 23-3-430(C)(15) applies to respondent because he was released and required to register in 2002.[5] The 1999 amendment states that a person convicted of kidnapping a person eighteen years of age or older would be required to register as a sex offender, with the exception that no registration would be required if the court made a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. In the instant case, no such finding was made on the record because the amendment did not exist at that time. The record is clear, however, that no sexual misconduct was involved in this kidnapping. Accordingly, the Court of Common Pleas properly found that respondent should not be required to register as a sex offender.

II

The State argues that the Court of Common Pleas did not have jurisdiction to make a factual finding regarding respondent's kidnapping offense and, instead, such a finding could be made only by the General Sessions court.

[5]The lower court incorrectly applied the 1998 amendment; however, using the 1998 amendment, instead of the 1999 amendment, does not affect the result in this case.

The Court of Common Pleas had the power to make this finding pursuant to the Declaratory Judgment Act. *See* S.C. Code Ann § 15-53-20 (2005) (courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed). The judge, in the Court of Common Pleas, properly determined respondent's status as affected by § 23-3-430, a civil statute. *See* State v. Walls, *supra* (Sex Offender Registry Act not so punitive in purpose or effect as to constitute a criminal penalty). As a result, we approve the procedure utilized by the Court of Common Pleas and find that court has the power to make the determination that a prior kidnapping offense did not involve sexual misconduct such that the one convicted is required to register as a sex offender. Accordingly, the decision of the lower court is **AFFIRMED.**

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jonathan James, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26449
Submitted January 23, 2008 – Filed March 10, 2008

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, of Columbia, for Petitioner.

Evert Comer, Jr., of Denmark, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from a grant of post-conviction relief ("PCR") to Respondent Jonathan James. Respondent appeared in court for a plea hearing, and at the conclusion of the hearing, the plea court sentenced Respondent to seventeen years imprisonment. On collateral review, the PCR court found that Respondent never entered a plea of guilty and granted relief. This Court granted the State's request for a writ of certiorari. Because the record unequivocally reflects that Respondent entered a guilty plea, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

The State charged Respondent with several crimes as a result of a rather violent domestic disturbance involving Respondent and his estranged wife.[1] Respondent appeared in court for a plea hearing roughly one week prior to the scheduled beginning of his trial, and immediately prior to the plea hearing, Respondent executed a "plea sheet" – a document which described several rights associated with a criminal trial and which required Respondent to list the offenses to which he desired to plead guilty as well as the maximum penalties for the charges. Respondent submitted this sheet to the plea court during the hearing, and at the conclusion of the hearing, the court sentenced Respondent to seventeen years imprisonment. Respondent appealed, and the court of appeals affirmed Respondent's convictions and sentence after performing a review of the case pursuant to the decision *Anders v. California*, 386 U.S. 738 (1967).

Respondent filed an application for PCR, contending that he did not voluntarily, knowingly, and intelligently enter a guilty plea. After a hearing, the PCR court granted relief. The PCR court held, "[u]pon examination of the entire record, it is apparent that [Respondent] never entered a guilty plea. He was never asked how he pled and never made any statement that could be construed as an admission of guilt." This Court granted the State's request for a writ of certiorari to review the PCR court's decision, and the State presents the following issue for review:

[1] Specifically, the State charged Respondent with assault and battery with intent to kill, first degree criminal sexual conduct, and first-degree burglary.

Did the PCR court err in finding that Respondent never entered a guilty plea?

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings and conclusions. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (*citing McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). A PCR court's findings will be upheld on review if there is any evidence of probative value supporting them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In the context of a challenge to a guilty plea, a PCR applicant must establish both that his plea counsel's representation was deficient and that there is a reasonable probability that but for counsel's deficient representation, the applicant would not have pled guilty. *Smith v. State*, 369 S.C. 135, 137, 631 S.E.2d 260, 261 (2006) (*citing Hill v. Lockhart*, 474 U.S. 52, 56-58 (1985)).

LAW/ANALYSIS

The State argues that the PCR court erred in finding that Respondent never entered a guilty plea. We agree.

There are two fatal flaws in the PCR court's order. The first relates to the court's conclusion that Respondent never made any statement that could be construed as an admission of guilt. As a primary matter, it is well-settled that a defendant need not admit guilt in order to enter a valid guilty plea. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Instead, a guilty plea need only represent a voluntary and intelligent choice among alternative courses of action open to the defendant. *Id.* For this reason, the implication that an admission of guilt is a necessary prerequisite to a guilty plea does not accurately characterize the law.

But this point is not determinative, because even if a guilty plea required an admission of guilt, Respondent admitted his guilt at the plea hearing. The solicitor at the hearing recounted the factual basis for the

charges at length, and when the court asked Respondent if he had anything to offer, he responded, "This time it just got out of control that night, and I wasn't going to kill her, I know I wasn't going to – it just got out of control, it got out of hand[,] and I'm sorry." In light of this statement, the PCR court's conclusion that Respondent did not admit his guilt at the plea hearing is directly contrary to the evidence in the record.

The second flaw in the PCR court's order is in its attachment of unnecessary significance to the fact that the plea court never specifically asked Respondent "how do you plea?" The argument goes that the plea court's failure to ask this question is tantamount to a failure by Respondent to enter a plea. In our opinion, however, this failure is not fatal to the plea's validity.

Respondent incorrectly focuses only on the fact that the plea court did not specifically ask for his plea. The transcript of the plea hearing cannot be viewed in isolation, but must be considered in the full context of the record. *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984); *State v. Lambert*, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976). This context requires that we consider both the transcript and Respondent's conduct relating to the execution of the written plea sheet.

The plea sheet is instructive because it contains a written manifestation of Respondent's desire to plead guilty and was executed by Respondent immediately prior to the plea hearing. Respondent submitted the sheet to the court during the plea hearing, and the court examined Respondent regarding the information provided in the plea sheet during the hearing. Respondent indicated to the plea court that his attorney reviewed the plea sheet with him and that his answers were true and correct. This indication, that the answers provided in the plea sheet were correct, is the most instructive. This presumably applies to Respondent's affirmative response to the final question on the sheet which reads "Are you pleading guilty freely and voluntarily?"

The plea sheet and Respondent's conduct at the plea hearing thus unequivocally expressed his desire to plead guilty.[2]

Accordingly, we hold that the PCR court erred in determining that Respondent did not enter a guilty plea.

CONCLUSION

For the foregoing reasons, we reverse the PCR court's grant of relief.

MOORE, WALLER and BEATTY, JJ., concur. PLEICONES, J., concurring in result only.

[2] Similarly, the plea court's imposition of a sentence clearly evidences that the court accepted Respondent's plea. *Cf. Gaines v. State*, 335 S.C. 376, 381, 517 S.E.2d 439, 441-42 (1999) (providing that "[t]he clear implication is that the trial judge found the pleas voluntary[,] otherwise he would not have entered [the] sentences.").

(footnote continues)

Interestingly, the record in the instant case also contains three "sentencing sheets" – documents executed by both Respondent and the plea court containing the caption of Respondent's case, a criminal charge, an indication that Respondent has pled guilty to the listed charge, and a sentence for the listed charge. This evidence further undercuts the proposition that Respondent never pled guilty.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Auto Owners Insurance Company, Inc., Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., Respondents.

Appeal from Charleston County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26450
Heard January 23, 2008 – Filed March 10, 2008

AFFIRMED

John L. McCants, of Ellis Lawhorne & Sims, of Columbia, for Appellant.

Frank M. Cisa, of Cisa & Dodds, of Mt. Pleasant, Joseph K. Qualey, of Qualey & Beck, of Charleston, Michael S. Seekings and Amy E. Melvin, both of Leath Bouch & Crawford, of Charleston, for Respondents.

George E. Mullen and Daniel F. Oberklein, both of Mullen Wylie & Seekings, of Hilton Head Island, Kenneth E. Ormand, Jr., of Ormand Ashley & Gibbons, of Columbia, and David E. Dukes and Williams C. Wood, Jr., both of Nelson Mullins Riley &

Scarborough, of Columbia, Laura A. Foggan and Parker J. Lavin, both of Wiley Rein, of Washington, D.C., for Amici Curiae.

CHIEF JUSTICE TOAL: The issuer of a homebuilder's commercial general liability policy sought a declaratory judgment to determine whether the policy covered a homeowner's claim for damages caused by the negligence of a construction subcontractor. The trial court determined that the homeowner's claim fell within the policy's coverage and this appeal followed. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Trinity Construction, Inc. ("Trinity") completed the construction of a home for Respondent Virginia Newman ("Homeowner") in May 1999. Shortly thereafter, the Homeowner filed a claim against Trinity for breach of contract, negligence, and breach of warranty, alleging defective construction primarily related to the installation of the stucco siding. Based on the report of an engineer hired by the Homeowner to inspect the home's construction, the Homeowner alleged that the application of the stucco did not conform to industry standards and that these nonconforming aspects of the stucco installation allowed water to seep into the home causing severe damage to the home's framing and exterior sheathing. The Homeowner and Trinity referred the action to binding arbitration in which an arbitrator issued the Homeowner an award of itemized damages due to the defective construction totaling $55,898.

At the time of construction, Trinity held a commercial general liability (CGL) policy issued by Appellant Auto-Owners Insurance Company ("Auto-Owners"). Following arbitration, Auto-Owners sought a declaratory judgment to determine its rights and obligations under the CGL policy, contending that the damages awarded by the arbitrator were not covered under the policy. The trial court determined that the policy covered the damages because they resulted from an "occurrence" and because Auto-Owners failed to show that any policy exclusions applied. Accordingly, the

trial court determined that the CGL policy covered all but four items of the damages provided for in the arbitration award. Auto-Owners appealed.

This Court certified the case, and Auto-Owners raises the following issue for review:

> Did the trial court err in holding that the damages awarded by the arbitrator for negligent construction were covered under a CGL policy?

STANDARD OF REVIEW

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. *Auto-Owners Ins. Co. v. Haman*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. *Id.*

LAW/ANALYSIS

A. Negligent construction as an "occurrence" under the policy

Auto-Owners argues that the arbitrator's award for the Homeowner's property damage is not covered by the policy. Specifically, Auto-Owners argues that pursuant to this Court's opinion in *L-J v. Bituminous Fire & Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the subcontractor's defective installation of stucco did not cause an "accident" constituting an "occurrence" subject to coverage under the policy. We disagree.

The CGL policy issued by Auto-Owners in this case is the standard Insurance Services Office (ISO) CGL policy used since 1986, and is identical

to that reviewed by this Court in *L-J*. The relevant policy provisions state that Auto Owners will "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policy further explains that the insurance applies to such "bodily injury" or "property damage" only if it is caused by an "occurrence."

The CGL policy defines many of the particular terms used to outline the scope of its coverage. The policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." The policy does not define the term "accident," however, and this Court has found that in the absence of a prescribed definition in the policy, the definition of "accident" is "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *Green v. U. Ins. Co. of America*, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

We begin our analysis in this case with a review of *L-J*, which all parties, as well as the trial court, assert in support of their respective resolutions of the issue. In *L-J*, a developer hired L-J, Inc. as contractor for the site development and road construction in a subdivision development. 366 S.C. at 119, 621 S.E.2d at 34. L-J hired subcontractors to perform most of the work and four years after construction was completed, the roads began to deteriorate due to negligent road design, preparation, and construction. *Id.* The developer sued L-J and the parties settled. L-J subsequently sought indemnification from Bituminous Fire and Marine Insurance Company ("Bituminous") and three other insurance companies who insured L-J under various CGL policies. *Id.* Bituminous refused to indemnify L-J and brought a declaratory judgment action to determine whether its CGL policy issued to L-J covered the damage to the roads caused by the negligent construction. *Id.* at 120, 621 S.E.2d at 34.

This Court found that although the deterioration to the roadways may have constituted "property damage" under the policy, the various negligent

acts of the subcontractors upon which the developer based its claim did not constitute an "occurrence" for which the CGL policy provided coverage. *Id.* at 123, 621 S.E.2d at 36. Specifically, the Court found that the developer's claim alleged negligent construction causing damage only to the work product itself (i.e. the roadway), and that such a claim was merely one for faulty workmanship. *Id.* Because damages to the work product alone resulting from faulty workmanship could not typically be said to have been "caused by an accident or by exposure to the same general harmful conditions," the Court reasoned that such claims for faulty workmanship did not constitute an "occurrence" falling within the policy's coverage. *Id.*

The *L-J* court went on to explain, however, that a CGL policy may provide coverage where a claim for faulty workmanship alleges third party bodily injury or damage to other property. *Id.* n.4. To illustrate this theory, the Court examined the case of *High Country Associates v. New Hampshire Insurance Co.*, in which a condominium homeowners' association sued the condominium builder seeking damages allegedly due to negligent construction of the condominium buildings. 648 A.2d 474, 476 (N.H. 1994). The complaint alleged that the continuous moisture intrusion resulting from a subcontractor's defective installation of siding resulted in moisture seeping into the buildings, which caused widespread decay of the interior and exterior walls and loss of structural integrity over a nine-year period. *Id.* The *High Country* court found that the complaint was not simply a claim for faulty workmanship seeking damages to repair the defective work product itself, but rather, was a claim for negligent construction resulting in damage to other property. *Id.* at 477. The court determined that the continuous exposure to moisture due to the defective installation of siding constituted an "occurrence" under the policy and that, in this way, the homeowners' association had properly "alleged negligent construction that resulted in an occurrence, rather than an occurrence of alleged negligent construction." *Id.* at 478. Accordingly, *High Country* held that the CGL policy would cover the homeowners' association's claim against the builder, if successful. *Id.*

This Court's attempt to distinguish an "occurrence" of alleged negligent construction, such as that which took place in *L-J*, from negligent construction resulting in an "occurrence," such as that which took place in

High Country, has apparently caused confusion in other courts' interpretations of the ultimate holding in *L-J*. *See, e.g., Bituminous Cas. Corp. v. Altman Builders, Inc.*, 2006 U.S. Dist. LEXIS 53354, at *10 (D.S.C. 2006). In *L-J*, we phrased this distinction as "a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party," noting that the latter could be covered under a CGL policy. 366 S.C. at 123, 621 S.E.2d at 36. Given our analysis of *High Country* in the *L-J* opinion, it should be clear that this Court intended the "third party" language to refer to subcontractors who are not a party to the CGL policy between the insurer and the contractor.

In this vein, we find *High Country* equally instructive in determining whether a CGL policy provides coverage for property damage in the instant case. The arbitrator in this case determined that the Homeowner suffered damage as a result of the negligent application of stucco by Trinity's subcontractor. Specifically, the arbitrator found that the defective stucco allowed for continuous moisture intrusion resulting in substantial water damage to the home's exterior sheathing and wooden framing.[1] These findings, in our opinion, clearly establish that there was property damage beyond that of the negligently applied stucco itself. Although the stucco subcontractor's negligent application is not on its own sufficient to constitute an "occurrence," we find that under the reasoning of *High Country* – adopted by this Court in *L-J* – the continuous water intrusion into the home resulting from the subcontractor's negligence qualifies as an "accident" involving "continuous or repeated exposure to substantially the same harmful conditions." Accordingly, we hold that the subcontractor's negligence led to an "occurrence" invoking coverage under the CGL policy for the resulting "property damage" to other property not the work product. *See also Penn. Mfrs. Assoc. Ins. Co. v. Dargan Constr. Co.*, 2006 U.S. Dist. LEXIS 53366

[1] According to expert testimony from the consulting engineer hired by the Homeowner, the subcontractor's application of stucco did not meet applicable building code requirements and deviated from industry standards. The expert testified that the subcontractor did not apply the stucco to the required thickness; failed to install a weep system or flashing around doors and windows; and used improper caulking and banding methods.

(D.S.C. July 13, 2006); *Okatie Hotel Group v. Amerisure Ins. Co.*, 2006 U.S. Dist. LEXIS 2980 (D.S.C. Jan. 13, 2006).

Moreover, as a matter of pure contract interpretation, we hold that the CGL policy covers the damage resulting from the negligent acts of the subcontractor in this case. On this matter, a brief history of CGL policies is instructive. A CGL policy in the home construction industry is designed to cover the risks faced by homebuilders when a homeowner asserts a post-construction claim against the builder for damage to the home caused by alleged construction defects. *See* Rowland H. Long, *The Law of Liability Insurance*, § 3.06(1) (2007). Several construction-specific exclusions in the standard CGL policy exclude from coverage certain types of property damage attributable to risks outside the scope of CGL recovery. *See id.* The primary exclusion is the "your work" exclusion which provides that the policy will not cover "'property damage' to 'your work.'" In 1986, the insurance industry amended the "your work" exclusion to provide that even if the property damage is to the builder's own work, the "your work" exclusion does not apply "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." *See French v. Assurance Co. of America*, 448 F.3d 693, 701 (4th Cir. 2006) (discussing the evolution of the standard CGL policy). In doing so, the insurance industry extended liability coverage for property damage to the contractor's completed work arising out of work performed by the subcontractor. *Id.*

The facts of this case establish exactly the type of property damage the CGL policy was intended to cover after the 1986 amendment to the "your work" exclusion. In construing the provisions of an insurance policy, the Court must consider the policy as a whole and adopt a construction that gives effect to the whole instrument and to each of its various parts and provisions. *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). To interpret the term "occurrence" as narrowly as Auto-Owners suggests would mean that any time a subcontractor's negligence damaged any part of the contractor's overall project, a CGL insurer could deny coverage under the policy. This would render both the "your work" exclusion and the subcontractor's exception to the "your work" exclusion in

the policy meaningless.[2] *See French*, 448 F.3d at 705-06. Accordingly, we hold that the stucco subcontractor's faulty workmanship led to an "occurrence" justifying coverage for the resulting property damage under the terms of the CGL policy.

The presence of the subcontractor exception to the "your work" exclusion also establishes the scope of "work product" for purposes of determining whether a CGL policy covers a homeowner's negligent construction claim in cases arising out of a subcontractor's faulty workmanship. In cases of subcontractor negligence, consideration of whether a homeowner's complaint alleges property damage to other property or property damage to the work product alone must be limited to the subcontractor's own work product, and not extended to the contractor's entire project. To hold otherwise would obviate the purpose of the subcontractor exception to the "your work" exclusion in post-1986 CGL policies.[3]

For these reasons, we hold that the trial court correctly found that the negligent application of stucco resulted in an "occurrence" of water intrusion, causing property damage that is covered under Trinity's CGL policy.

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[2] *C.D. Walters Construction Co., Inc. v. Fireman's Insurance Co.*, cited by Auto-Owners in support of its argument, is distinguishable from the instant case because it denied coverage under a CGL policy based on the "your work" policy exclusion before the 1986 modification to cover damage resulting from subcontractor negligence. 281 S.C. 593, 597-98, 316 S.E.2d 709, 712 (Ct. App. 1984).

[3] For this same reason, we disagree with the reasoning set forth in *Bituminous Cas. Corp. v. Altman Builders, Inc.*, in which the federal district court interpreted this Court's decision in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), to mean that a homebuilder's CGL policy would not cover damage to any work product component of a construction project when the damage resulted from the negligence of a subcontractor. 2006 U.S. Dist. LEXIS 53354, at *14-*17.

B. Operation of policy exclusion to exclude damages awarded for replacing the substrate

Auto-Owners argues that even if the subcontractor's negligent application of stucco resulted in an "occurrence" under the CGL policy, coverage for the resulting property damage is nevertheless barred by a policy exclusion. We disagree.

An exclusion found in the standard CGL policy prohibits coverage for "'property damage' expected or intended from the standpoint of the insured." Auto-Owners claims that pursuant to this exclusion, damages awarded by the arbitrator related to the framing and exterior sheathing of the home are not covered by the CGL policy because a construction professional would expect substantial moisture intrusion from defective stucco to result in these types of damages. In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently. Therefore, Trinity could not have expected or intended the resulting property damage.[4] Accordingly, we hold that the property damage to the home's exterior sheathing and framing was not expected or intended by Trinity, and therefore, coverage of the Homeowner's damages is not barred by any exclusion within the CGL policy.

C. Damages awarded for replacement of the defective stucco

Auto-Owners finally argues that even if an "occurrence" warrants policy coverage for damages to other property, the arbitrator's itemized allowance for replacing and repairing the defective stucco itself constitutes property damage to the work product alone. Auto-Owners therefore contends

[4] Auto-Owners asserts a similar argument urging this Court to find that the moisture intrusion was not an "accident," generally defined as "an unexpected happening or event," and therefore did not constitute an "occurrence" to bring the claim within policy coverage in the first instance. For the same reasons discussed in reference to the "expected or intended" policy exclusion, we find this argument to be unpersuasive.

that the allowance for replacing the stucco is not covered under the CGL policy because it did not arise out of an "occurrence."

In support of its argument, Auto-Owners points to the arbitrator's decision concluding that the Homeowner was "entitled to have the stucco replaced" based on its defective application and because there were "sufficient other problems with the installation . . . [such] that allowance need[ed] to be made for replacement of the system." Auto-Owners contends that this amounts to a finding of damage to the work product alone which is not covered under CGL policies. Noting that the award of an arbitrator is a final judgment, *see Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 494, 593 S.E.2d 480, 485 (Ct. App. 2004), Auto-Owners argues that it was not within the trial court's discretion to displace these findings with those of its own by determining that the policy covered the replacement of the defective stucco.

In our opinion, the analysis set forth by Auto-Owners is incomplete. The arbitrator's award itself "is the best evidence of its meaning, and the construction of its provisions is a matter for the courts." *Renaissance Enters. v. Ocean Resorts, Inc.*, 330 S.C. 13, 19 n.4, 496 S.E.2d 858, 861 n.4 (1998) (citing Rueben I. Friedman, Annotation, *Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award* 80 A.L.R.3d 155 (1977)). For this reason, we find that the trial court correctly determined that the arbitrator's specific awards for rough carpentry, windows and doors, thermal and moisture protection, and interior and exterior finishes, establishes that the arbitrator recognized the existence of the underlying water damage to the home resulting from the defectively-applied stucco. Because this underlying moisture damage could neither be assessed nor repaired without first removing the entire stucco exterior, the trial court correctly concluded that the arbitrator's allowance for replacement of the defective stucco was covered by the CGL policy as a cost associated with remedying the other property damage that resulted from an "occurrence."

Accordingly, we hold that the arbitrator's allowance for replacement of the defective stucco is covered under the terms of the CGL policy.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damages awarded by the arbitrator to the Homeowner.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Howard E. Duvall, Jr., Appellant,

v.

South Carolina Budget and Control Board, South Carolina Retirement System, Respondents.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 26451
Heard January 22, 2008 – Filed March 10, 2008

AFFIRMED

Danny C. Crowe and R. Hawthorne Barrett, both of Turner, Padget, Graham & Laney, of Columbia, for Appellant

Kelly Hunter Rainsford, of South Carolina Retirement System, of Columbia, and W. Allen Nickles, III, of Gergel, Nickles & Solomon, of Columbia, for Respondents.

JUSTICE WALLER: Appellant, Howard E. Duvall, Jr., challenged the calculation of his retirement benefits by respondent, the South Carolina Retirement System ("SCRS"). The Administrative Law Court ("ALC") upheld the calculation made by the SCRS, and the circuit court affirmed the ALC's decision. Duvall now directly appeals to this Court. We affirm.

FACTS

Duvall has been the executive director of the Municipal Association of South Carolina ("MASC") since 1992 and has been employed there since 1987. Although Duvall is not a state employee, he is an active member in the SCRS because the MASC is a participating employer with the SCRS.[1]

Before 2003, the MASC permitted its employees to accrue unlimited amounts of unused annual leave. In October 2002, the MASC's board of directors changed this policy and decided to cap unused leave at 45 days (360 hours). Of the MASC's 35-member staff, only four people had unused leave in excess of 45 days, and Duvall was one of those four. The MASC board decided that all employees who had accumulated leave in excess of 360 hours as of December 31, 2002, would be allowed to either use the leave, or be paid the excess annual leave "as an addition to salary" prior to leaving the employment of the MASC.

Duvall opted to be paid for his excess leave. In the first quarter of 2003, he received approximately $18,000 for unused excess annual leave; in the second quarter of 2003, he was paid approximately $39,000. The payouts for Duvall's excess leave of 734.8 hours came to a total of $57,997.76.[2]

Duvall decided to retire under the Teacher and Employee Retention Incentive (TERI) plan, with an effective retirement date of October 1, 2003.[3]

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[1] See S.C. Code Ann. § 9-1-470 (Supp. 2007).

[2] Originally, the SCRS subtracted contributions to the retirement system from these payments. However, those contributions were subsequently refunded to Duvall.

[3] Duvall had 36 years of service credit within the SCRS. Pursuant to the TERI program, Duvall remains director of MASC until September 30, 2008. For these

At the time of his TERI retirement, Duvall's regular annual salary was approximately $147,000. Furthermore, because he still had 45 days of unused annual leave at retirement, he received a lump sum payment of $27,637.20 at retirement. When the SCRS calculated Duvall's average final compensation, this latter amount was included in the calculation; however, the payments he received earlier in 2003 for excess unused annual leave (amounting to over $57,000) were excluded from the calculation of his retirement benefits.

The estimates done by the SCRS projected that if all payments were considered, Duvall would have a monthly retirement benefit of $9,224.13; with the excess leave payments **excluded**, the monthly benefit would be $8,053.99. Thus, if the excess leave payments are considered this would amount to over $14,000 more in benefits per year.[4]

Duvall challenged the calculation, arguing that the $57,997.76 in unused annual leave was intended by the MASC to be part of his salary, and therefore, he was entitled to have it included for purposes of calculating his average final compensation. The SCRS issued a Final Agency Determination which found that the system was prohibited by statute from including any payments for unused annual leave above the 45-day limit. See S.C. Code Ann. § 9-1-10(4).

Duvall filed for review with the ALC. After a hearing, the ALC upheld the agency's decision. Duvall then appealed to the circuit court. In addition to arguing that the ALC should be reversed on the merits, Duvall also argued that because of a subsequent statutory amendment, the case should be remanded back to the ALC. The circuit court affirmed the ALC's ruling. Specifically, the circuit court found that leave payments which either exceed 45 days or are made at any time other than "at retirement" should not be included in the average final compensation calculation.

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five years, the SCRS retains his monthly retirement benefits in an interest-free account.

[4] This does not take into account cost of living increases.

ISSUE

Did the circuit court err in affirming the exclusion of excess unused leave payments from the calculation of Duvall's retirement benefits?

DISCUSSION

Duvall argues the circuit court erred by finding that SCRS properly excluded the excess annual leave payments he received in the first two quarters of 2003 from its calculation of his retirement benefits. We disagree.

This Court has stated that the retirement statutes "should be liberally construed in favor of those to be benefitted and the objective sought to be accomplished." King v. South Carolina Ret. Sys., 319 S.C. 373, 461 S.E.2d 822 (1995). Nevertheless, the SCRS is also "administered under an elaborate statutory and constitutional scheme designed to protect the independence, integrity and actuarial soundness of the funds." Wehle v. South Carolina Ret. Sys., 363 S.C. 394, 399, 611 S.E.2d 240, 242 (2005).

"Average final compensation" is currently defined by statute as:

> [T]he average annual earnable compensation[5] of a member during the twelve consecutive quarters of his creditable service on which regular contributions as a member were made to the system producing the highest such average; a quarter means a period January through March, April through June, July through September, or October through December. **An amount up to and including forty-five days' termination pay for unused annual leave at retirement may be added to the average final compensation.**

[5] "Earnable compensation" is defined as "the full rate of the compensation that would be payable to a member if the member worked the member's full normal working time; when compensation includes maintenance, fees, and other things of value the board shall fix the value of that part of the compensation not paid in money directly by the employer." § 9-1-10(8).

S.C. Code Ann. § 9-1-10(4) (Supp. 2007) (emphasis added).

The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. E.g., Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). Moreover, "[a] statute should not be construed by concentrating on an isolated phrase." South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act. TNS Mills, supra.

Citing the liberal construction rule of King, supra, Duvall contends that because the average final compensation definition only speaks to "termination pay for unused annual leave at retirement," those payments made **prior to** retirement should be included as salary.[6] Specifically, Duvall maintains that the Legislature included the phrases "termination pay" and "at retirement" because it intended to refer only to unused leave payments made at the actual end of a system member's employment. According to Duvall, any other interpretation of the statute would ignore those words and therefore render the Legislature's action as futile.

[6] To support his argument that the payments for excess leave should be considered part of his salary, Duvall relies on Bales v. Aughtry, 302 S.C. 262, 395 S.E.2d 177 (1990). In Bales, the Court stated that "[l]eave benefits are part of compensation earned for services rendered and the right to receive that compensation vests once the services are rendered." Id. at 264, 395 S.E.2d at 179. The issue in Bales, however, was not how leave payments related to retirement calculations; instead, it was whether elected county officials were entitled to payment of accumulated sick and annual leave. The Court held that "[p]ayment for accrued leave benefits does not constitute extra compensation after services rendered." Id. Here, there is no dispute that Duvall was indeed paid for his accrued leave benefits. The issue is whether those payments should be figured into the average final compensation computation. Thus, we find Bales inapposite to the instant case.

In addition, Duvall asserts that because he is not a state employee, he is not restricted to 45 days of annual leave upon retirement; state employees, on the other hand, are statutorily limited to a 45-day cap. See S.C. Code Ann. § 8-11-620 ("Upon termination from state employment, an employee may take both annual leave and a lump-sum payment for unused leave, but this combination may not exceed forty-five days in a calendar year").

We find Duvall's arguments unpersuasive. The statutory language defining average final compensation clearly indicates that a maximum of 45 days' pay for unused annual leave should be used to calculate the average final compensation. Thus, even if additional payments for annual leave are made at a time other than "at retirement," those payments should not be included. In our opinion, the Legislature's inclusion of the terms "termination pay" and "at retirement" was not futile; instead, when these terms are read in context with the entire definition of average final compensation, the language clearly establishes the intent to cap how much unused annual leave may be figured into the retirement calculation. See Hodges v. Rainey, supra (the primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature); see also South Carolina State Ports Auth. v. Jasper County, supra (a statute should not be construed by focusing on an isolated phrase).

Furthermore, this Court's discussion of average final compensation in Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001), supports the decision made by the SCRS.[7] At issue in Kennedy was whether the 45 days of unused annual leave pay should be added into the equation before or after the total average had been calculated. The Kennedy Court looked to the legislative history, as well as the rules of statutory construction, and concluded the intent was that annual leave pay should be added prior to the average being computed.

The Kennedy Court noted that when the Legislature amended this definition in 1978, it "addressed unused annual leave for the first time." Id.

[7] When Kennedy was heard, the statutory section defining average final compensation was § 9-1-10(17), but it is now located at § 9-1-10(4).

at 344, 549 S.E.2d at 245. The 1978 amendment added the following emphasized language, and the definition then stated as follows:

> "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service producing the highest such average; **an amount up to and including forty-five days termination pay for unused annual leave may be added to the pay period immediately prior to retirement and included in the average as applicable**.

Prior to 1978, however, there was no language specifically addressing unused annual leave. As a matter of policy, the SCRS had credited retirees with **all** of their accrued unused leave and used that credit when calculating the average final compensation. Moreover, there was no limit on the amount of annual leave that an employee could accumulate. See id. at 343, 549 S.E.2d at 245.

According to the Kennedy Court, the 1978 amendment therefore had two primary effects regarding annual leave:

> First, the amendment placed a forty-five day cap on the amount of unused annual leave for which an employee could receive credit. Second, the unused annual leave could only be calculated in the average final compensation equation if the pay period immediately prior to the employee's retirement was one of the three highest in the employee's career. As a consequence of this second restriction, employees would regularly have to retire on the last day of their last fiscal year to ensure that any unused annual leave would be included in the calculation. Servicing a large volume of retirement claims at one time created an administrative problem for the Retirement System.

Id.

As a result of this administrative glitch, the Legislature amended the definition again in 1986 by using language regarding "twelve consecutive quarters" as opposed to "three consecutive fiscal years." Thus, the 1986 amendment allowed members of the SCRS "to retire throughout the year, rather than require essentially all retirements to occur on June 30, the last day of the fiscal year." Wehle, 363 S.C. at 400, 611 S.E.2d at 243.

The Kennedy Court's conclusion was that average final compensation was properly calculated by totaling the 12 highest consecutive quarters, adding the termination payment for up to 45 days of unused annual leave, and **then** taking the average. The Court reasoned that if the statute was interpreted as allowing the annual leave payment to be added in **after** an average was taken, "this interpretation would increase the dollar value for unused annual leave three fold, and would allow members to retire with benefits calculated on an 'average' salary which is greater than any salary they earned during employment." Kennedy, 345 S.C. at 348, 549 S.E.2d at 248 (footnote omitted).

In the instant case, Duvall's position is that he is entitled to calculate his average final compensation by adding: (1) his pre-retirement payments for **over 90 days** of excess unused leave ($57,997.76); (2) his regular salary for the 12 quarters prior to retirement; and (3) his final payment at retirement for 45 days of unused annual leave ($27,637.20); and then dividing that sum by three. Clearly, this would inflate the average of his final three years of salary to an amount significantly "greater than any salary" he earned during one regular year of employment. Pursuant to Kennedy, this would be an absurd result unintended by the Legislature. See id. at 351, 549 S.E.2d at 249 (statutes should not be construed as to lead to absurd results).

Put another way, Duvall is asking that he be credited with three times the amount of unused annual leave that state employees are permitted. We simply do not believe the Legislature intended such a result, especially because the language of section 9-1-10(4) defines the average final compensation to be for those "members retiring." We therefore find that the 45-day cap for unused annual leave is intended for all members of the SCRS, not simply those classified as state employees. Cf. S.C. Code Ann. § 9-1-290

(1986) (the Budget and Control Board shall, "from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of the System.").

Finally, Duvall contends that an amendment to section 9-1-1020, which expressly supports the practice used by the SCRS in this case, was a material change to the statute, thereby indicating that his interpretation of the statute (in its prior form) is correct. We disagree.

When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law. Key Corp. Capital, Inc. v. County of Beaufort, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007). Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent. Stuckey v. State Budget and Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) (citing Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100 (1992)).

At the time the SCRS made its decision in this case, section 9-1-1020 read as follows, in pertinent part:

> Payments for unused sick leave, single special payments at retirement, bonus and incentive-type payments, or any other payments not considered a part of the regular salary base are not compensation for which contributions are deductible. Contributions are deductible on pay for unused annual leave.

In 2005, the Legislature amended this section, with an effective date of July 1, 2004. See 2005 Act No. 14, § 3 (the Act). The statute now provides as follows:

> Payments for unused sick leave, single special payments at retirement, bonus and incentive-type payments, or any other payments not considered a part of the regular salary base are not compensation for which contributions are deductible. Contributions are deductible on **up to and including forty-five days' termination** pay for unused annual leave. **If a member**

> **has received termination pay for unused annual leave on more than one occasion, contributions are deductible on up to and including forty-five days' termination pay for unused annual leave for each termination payment for unused annual leave received by the member. However, only an amount up to and including forty-five days' pay for unused annual leave from the member's last termination payment shall be included in a members average final compensation calculation.**

(Additions to statute emphasized). The title of the Act specifically stated that the amendment of section 9-1-1020 "relat[ed] to member contributions for purposes of the South Carolina Retirement System …, **so as to clarify the contribution requirements on unused annual leave and the use of such payments in calculating average final compensation**." (Emphasis added.)

Given that the title of the Act itself indicates the amendment was a clarification of, rather than a change to, the law, we find a remand to the ALC is unnecessary. See, e.g., Kennedy, 345 S.C. at 349, 549 S.E.2d at 248 (where the Court looked at the title of an Act to glean legislative intent); Demas v. Convention Motor Inns, 268 S.C. 186, 190, 232 S.E.2d 724, 726 (1977) (noting that it is proper to discern legislative intent from the title of an Act).

CONCLUSION

Based on the above discussion, we hold that the circuit court and the ALC correctly decided the SCRS appropriately excluded payments made to Duvall for excess unused annual leave from the calculation of his retirement benefits. Thus, the circuit court's decision is

AFFIRMED.

TOAL, C.J., MOORE, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolyn Bair Austin,
Individually and as Personal
Representative of the Estate of
Robert Jacob Bair, deceased, Appellant,

v.

Beaufort County Sheriff's
Office, Respondent.

Appeal From Beaufort County
John C. Few, Circuit Court Judge

Opinion No. 26452
Heard February 6, 2008 – Filed March 10, 2008

AFFIRMED

M. Adam Gess, of McDaniel & Gess, of Beaufort, Mark Weston Hardee, of the Hardee Law Firm, of Columbia, and Robert E. Austin, Jr., of Robert E. Austin, Jr., Law Offices, of Leesburg, Florida, for Appellant.

Marshall H. Waldron, Jr., of Bluffton, for Respondent.

JUSTICE WALLER: This is a direct appeal from the trial court's order which granted summary judgment in favor of respondent, Beaufort County Sheriff's Office (the Sheriff's Office). We affirm.

FACTS

On July 25, 2001, Robert Bair, the adult son of appellant Carolyn Bair Austin, was found dead in his neighbor's garage at a condominium complex in Hilton Head. The Sheriff's Office began an investigation into his death and collected the following items from the scene: three blood swabs, one syringe, some green leafy vegetable matter,[1] and a white rock substance, which field tested positive for cocaine. In addition to this evidence, the Sheriff's Office submitted four envelopes containing photographs.

The cause of Bair's death was determined to be an illegal drug overdose. In July 2002, the Sheriff's Office destroyed the items of evidence. In July **2004**, appellant's attorney discovered that the evidence, as well as related reports, had been destroyed. Appellant filed an action against the Sheriff's Office claiming she is entitled to damages because the destruction of evidence impaired her ability to bring a wrongful death action.[2] In an amended complaint, appellant explained her theory regarding Bair's death as follows: "On July 25, 2001, decedent was assaulted by unknown assailants who inflicted bodily injuries and a fatal dose of drugs on decedent."

The Sheriff's Office moved for summary judgment. Appellant moved for a continuance in order to conduct additional discovery. The trial court granted summary judgment for the Sheriff's Office.

ISSUE

Did the trial court err in granting summary judgment?

[1] This material was believed to be marijuana.

[2] Appellant has not alleged the Sheriff's Office is responsible for Bair's death.

DISCUSSION

Appellant urges this Court to adopt the tort of third party spoliation of evidence and allow the case to further proceed through the discovery phase. Specifically, she argues we should recognize the spoliation tort as outlined by West Virginia in Hannah v. Heeter, 584 S.E.2d 560 (W.Va. 2003). Under the facts of this case, we decline to do so.

This Court reviews the grant of a summary judgment motion under the same standard as the trial court, pursuant to Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. E.g., Burriss v. Anderson County Bd. of Educ., 369 S.C. 443, 633 S.E.2d 482 (2006); Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

In Hannah, the Supreme Court of Appeals of West Virginia recognized two "stand-alone torts" regarding spoliation of evidence: (1) **negligent** spoliation of evidence by a third party; and (2) **intentional** spoliation of evidence by either a party to the civil action or a third party.[3]

Regarding negligent spoliation by a third party, the Hannah court held that the tort had the following elements:

> (1) the existence of a pending or potential civil action;
> (2) the alleged spoliator had actual knowledge of the pending or potential civil action;
> (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances;
> (4) spoliation of the evidence;

[3] The court refused to recognize first party negligent spoliation of evidence.

(5) the spoliated evidence was vital to a party's ability to prevail in a pending or potential civil action; and
(6) damages.

Hannah, 584 S.E.2d at 569-70.

As for the tort of **intentional** spoliation of evidence, the Hannah court listed similar elements:

(1) a pending or potential civil action;
(2) knowledge of the spoliator of the pending or potential civil action;
(3) willful destruction of evidence;
(4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action;
(5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action;
(6) the party's inability to prevail in the civil action; and
(7) damages.

Hannah, 584 S.E.2d at 573.

Under the particular facts of the instant case, it is clear that appellant's allegations do not rise to the level of stating a claim. First, although appellant contends there is a potential wrongful death action, no tortfeasor has been identified, beyond the "unknown assailants" mentioned in the complaint. Therefore, it is merely speculative that a potential civil action for wrongful death exists. Second, it obviously follows that the Sheriff's Office, could not have actually known of the potentiality of a lawsuit, especially given the fact that the Sheriff's Office apparently concluded that Bair's drug overdose had been self-inflicted. Certainly, appellant never notified the Sheriff's Office of the fact that she sought to pursue a civil lawsuit related to her son's death.

Third, appellant can point to no **specific** duty that the Sheriff's Office was required to preserve this evidence. We have held in a criminal case that the State has no absolute duty to preserve potentially useful evidence that

might exonerate a defendant. See State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). Clearly, then, under the facts of the instant case, there was no general duty to preserve evidence after the police had terminated a criminal investigation.

Finally, because of the speculative nature regarding the value of the evidence destroyed, appellant is simply unable to establish that the destroyed evidence was vital to her ability **to prevail** in the potential civil action.

Accordingly, even using the tort elements set out by the Hannah court as urged by appellant, no claim for third party spoliation of evidence has been alleged. Thus, we decline to address whether we would, under other factual circumstances, adopt the tort of third party spoliation of evidence. The grant of summary judgment in favor of the Sheriff's Office is

AFFIRMED.

TOAL, C.J., MOORE, PLEICONES and BEATTY, JJ., concur.