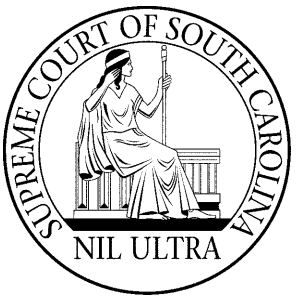


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 10**
**March 2, 2009**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Russell Laffitte, as Personal Representative of the Estate of Angela Lynn Plyler, Respondent,

v.

Bridgestone Corporation, Bridgestone/Firestone North American Tire, LLC, Ford Motor Company, Bubba Windham and Chuck Horton d/b/a Vintage Motors, Defendants,

of whom Bridgestone Corporation is the Petitioner.

Russell Laffitte, as Personal Representative of the Estate of Justin Plyler, Respondent,

v.

Bridgestone Corporation, Bridgestone/Firestone North American Tire, LLC, Ford Motor Company, Bubba Windham and Chuck Horton d/b/a Vintage Motors, Defendants,

of whom Bridgestone Corporation is the Petitioner.

Alania Plyler, a minor by and through her Conservator, Russell Laffitte, Respondent,

v.

Bridgestone Corporation, Bridgestone/Firestone North American Tire, LLC, Ford Motor Company, Bubba Windham and Chuck Horton d/b/a Vintage Motors, Defendants,

of whom Bridgestone Corporation is the Petitioner.

Hannah Plyler, a minor by and through her Conservator, Russell Laffitte, Respondent,

v.

Bridgestone Corporation, Bridgestone/Firestone North American Tire, LLC, Ford Motor Company, Bubba Windham and Chuck Horton d/b/a Vintage Motors, Defendants,

of whom Bridgestone Corporation is the Petitioner.

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ORIGINAL JURISDICTION

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Appeal from Hampton County
Carmen T. Mullen, Circuit Court Judge

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Opinion No. 26606
Re-heard September 17, 2008 – Filed March 2, 2009

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**REVERSED**

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M. Dawes Cooke, Jr., Todd M. Musheff, and John W. Fletcher, all of Barnwell Whaley Patterson & Helms, of Charleston, and Wallace K. Lightsey, of Wyche Burgess Freeman & Parham, of Greenville, for Petitioner.

F. Arnold Beacham, Jr., of Young & Sullivan, of Lexington, and John E. Parker, Ronnie L. Crosby, and R. Alexander Murdaugh, all of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Respondents.

Elbert S. Dorn and Nicholas W. Gladd, both of Turner Padget Graham & Laney, of Columbia, for Defendant Ford Motor Company, Erin D. Dean, of Tupper Grimsley & Dean, of Beaufort, for Defendant Bubba Windham et al., and Henry B. Smythe, Jr., David B. McCormack, and David S. Cox, all of Buist Moore Smythe McGee, of Charleston, for Defendant Bridgestone/Firestone North American Tire.

E. Warren Moise, of Grimball & Cabaniss, of Charleston, and Debora B. Alsup, of Thompson & Knight, of Austin, Texas, for Amicus Curiae Rubber Manufacturers Association.

John G. Creech, James H. Fowles III, and C. Victor Pyle III, all of Ogletree Deakins Nash Smoak & Stewart, of Columbia, for Amicus Curiae South Carolina Chamber of Commerce.

C. Mitchell Brown, William C. Wood, Jr., and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae Product Liability Advisory Council, Inc.

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**CHIEF JUSTICE TOAL:** In this product liability case, we granted a petition for a writ of certiorari in our original jurisdiction to review the trial court's discovery order compelling Petitioner Bridgestone Corporation (Bridgestone) to turn over its steel belt skim stock formula, classified as a trade secret, to Respondent Russell Laffitte. For the reasons detailed below, we find that Respondent has not shown that knowledge of Bridgestone's trade secret is necessary in order for Respondent to litigate this product liability action. Consequently, the trial court's order compelling disclosure by Bridgestone of the skim stock formula is reversed.

## FACTUAL/PROCEDURAL BACKGROUND

On July 16, 2005, Angela Plyler was driving her 1999 Ford Explorer along Interstate 95 in Hampton County with her three children as passengers. The tread from the left rear tire of the Explorer separated from the tire, allegedly causing the vehicle to overturn and collide with a tree. The single-car accident killed Angela and her teenage son Justin, and seriously injured her daughters Alania and Hannah.

Respondent, acting as personal representative for the decedents and as conservator for the minor daughters, filed four separate lawsuits against several defendants, including Bridgestone, the manufacturer of the vehicle's left rear tire. The complaints allege negligence, warranty, and strict liability claims against Bridgestone. As to the negligence allegations, Respondent maintains Bridgestone used an inadequate tire design and failed to use proper

manufacturing techniques resulting in a defective tire. In addition, Respondent specifically alleges Bridgestone failed to use sufficient antidegradants to protect the integrity of the tire.

The four cases were consolidated for discovery purposes. Respondent sought to obtain information on the design and manufacturing processes for the subject tire, which had been manufactured in 1996 at Bridgestone's Hofu Plant in Japan.[1] Bridgestone objected to Respondent's requests for its steel belt skim stock formula[2] and other related information on the basis that the skim stock formula was a trade secret of Bridgestone.[3] According to

[1] The subject tire is a P235/75R15 Radial ATX steel belted radial passenger tire and was designed for use as a replacement tire. At the time of the accident, the subject tire was being used as a spare and was the only Bridgestone tire on the Explorer; Michelen manufactured the other three tires.

[2] According to Bridgestone's expert witness, steel belt skim stock is "a specifically formulated rubber compound calendered onto the steel cord to form the steel belts in a steel belted radial passenger or light truck tire," which is "formulated to provide, among other things, adhesion between the rubber and steel cord, and between the belts and surrounding components." The formula of a rubber compound such as the steel belt skim stock "typically contains the chemicals or ingredients used in the compound; the quantities or relative percentages of those ingredients; and the manner in which those ingredients are processed to form the compound and give it the desired physical properties after it is vulcanized, or cured."

[3] Respondent has not disputed that the skim stock formula is a trade secret. Under South Carolina law, a trade secret is defined as information, including a formula or process, that:

> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

Bridgestone, Respondent can prove his claims without discovery of the skim stock formula because he has access to the actual failed tire and can therefore conduct appropriate testing on the tire itself. Respondent counters that without the information related to the skim stock ingredients and manufacturing processes, including any plant-specific deviations from the manufacturing formula, the defect claims cannot be proven.

The trial court held a hearing in January 2007 on Respondent's motion to compel and Bridgestone's cross-motion for a protective order. The trial court informed counsel in February 2007 that it would be granting the motion to compel. Prior to entry of the final order, however, the trial court granted Bridgestone's request that it be allowed to depose Respondent's experts solely on the issue of Respondent's need for the skim stock formula. Four experts provided affidavit or deposition testimony on the issue of Respondent's need for the skim stock formula.

Bridgestone's expert, Brian Queiser, described the various factors beyond the tire's chemical composition which could affect the tire's durability.[4] According to Queiser's affidavit:

> A tire is a highly engineered, complex product, which is the result of a blend of chemistry and engineering. A steel belted radial passenger tire typically contains twenty or more components and more than a dozen different rubber compounds. . . .

---

> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39-8-20(5)(a) (Supp. 2007).

[4] Queiser, an employee of Bridgestone/Firestone, Inc. since 1994, holds a bachelor's degree in aeronautical and astronautical engineering as well as a master's degree in engineering mechanics. He stated that he has "personally developed steel belted radial tires from concept through . . . production" and that his experience included analysis of tire failure.

> . . . Furthermore, the individual components of a steel belted radial tire are designed to work in conjunction with the other components of that tire. As a result, the forces exerted on the tire during its operation are subject to the combined effects of many parameters, including tire size; inflation pressure; component materials, dimensions, and gauge; as well as vehicle characteristics. Therefore, it is not accurate to gauge the performance of any particular tire by focusing on one isolated component or compound.
>
> . . . .
>
> . . . Given the inherent design of any steel belted radial tire, . . . the areas of the steel belt edges are generally the areas of highest stress/strain. As a result, any steel belted radial tire can sustain a tread/belt separation due to numerous service conditions such as overloading, underinflation, punctures, road hazards, impact damage and so forth.

Queiser further explained that rubber compound formulas cannot be reverse engineered from the finished product because once a tire is cured, the chemical composition changes. Queiser asserted that because the physical properties of the subject tire itself could be inspected and tested, "[a]ccess to the formulas is unnecessary to determine whether the tire was properly designed and manufactured." As to the trade secret nature of the skim stock formula, Queiser described the formula as "one of Bridgestone/Firestone's most valuable assets and most closely guarded secrets."

At his deposition, when asked why the skim stock formula was unnecessary in the instant litigation, Queiser responded as follows:

> Well, I guess in this case, as I understand it, all that you would need is what you essentially have. You have the tire, you have the ability to test the tire, test its physical properties. It has been my experience that that is all you need to evaluate the condition of the tire as it relates to its performance. It is my experience that

> the ability to have the chemical information, the recipe, really doesn't answer those questions for you. The formula or recipe doesn't give you the performance, frankly, which is the most important element.

Queiser elaborated that when the federal government investigated certain tires manufactured by Bridgestone/Firestone, Inc., which were similar to tires recalled by Firestone in August 2000, "[f]ormula was not part of the report . . . , it was all about the performance, the design of the tire from a mechanical and structural perspective and the performance of that tire. It was not about the chemical constituents or the recipe." When pressed by Respondent's counsel as to whether the skim compound or manufacturing process was ever considered as part of the federal investigation, Queiser answered as follows:

> No, I would not say "never considered." But certainly it was something that was clearly early set aside as a probable cause. We had so many tires produced from so many different plants with that same formula, hundreds of which . . . had absolutely no claim or lawsuit associated with them on that same compound. That formula or compound, per se, no, it wasn't a factor early on.

Queiser also described how rubber changes over time from exposure to oxygen and ozone, noting that "[t]he environment, the use of the tire or the rubber, how the rubber is used, [and] other external influences naturally are a part of its properties over time." Queiser acknowledged that oxidation in general would cause changes in the makeup of a rubber compound, but qualified his statement saying that chemical changes in rubber compounds, in his opinion, were still not fully understood by modern science. Queiser also acknowledged that antidegradants are added to the skim stock compound to combat the effects of oxygen on a tire and that there were "other inherent qualities" of other ingredients in the tire which "may also lend themselves to some resistance to change." Queiser nonetheless adhered to his view that by physically testing the subject tire – perhaps by viewing it at a microscopic level – would be the appropriate way to assess whether there is a design defect.

Finally, Queiser testified that the skim stock compound chemically interfaces with the brass which covers the steel belts, and that this "is one of the essences of the trade secret nature of the chemical composition and the production of that compound." If a competitor were to have knowledge on this aspect of tire design, Queiser stated that the competitor would essentially acquire "a company's decades' worth of experience" which would give it "a huge competitive advantage."

Respondent presented three experts to opine on the need for the skim stock formula in support of the motion to compel. Robert C. Ochs stated in an affidavit that he had evaluated the subject tire to determine why the tire failed.[5] Ochs averred as follows:

> My initial evaluation of the tire reveals that the tire failed prematurely as a result of a defect in the tire. At this time I cannot state whether the defect is in the manufacture or design of the tire.
>
> [Respondent has] requested that I work together with James E. Duddey, Ph.D. and Richard J. Smythe, Ph.D. to determine if the failure was the result of a manufacturing defect or a design defect. In order to perform the specific work requested by [Respondent] it will be necessary to compare the failed tire with its initial physical properties as designed by Bridgestone.
>
> Because this failure involves a separation of the tread belt, it will be necessary to examine the skim compound formula to aid in determining the true nature of the defect. Once the skim compound used to manufacture the subject tire is analyzed, both for its intended physical properties and as compared to the central compound formula, I will then be able to render opinions on the true nature of the defect.

[5] Ochs holds a bachelor's degree and a master's degree in mechanical engineering. Michelin employed Ochs from 1969-1994, during which time his work included analysis of failed passenger and light truck tires.

Respondent's second expert, Dr. James Duddey inspected the failed tire and made the following observations in his affidavit:[6]

> Examination of the tire demonstrates a premature failure caused by the separation of the steel belts. The tire shows evidence of surface cracking that could be caused by fatigue or premature rubber aging. The tire tread piece examined demonstrates a degree of hardness in the skim stock that may be related to either the initial physical properties of the rubber compound or premature aging.

Additionally, because Respondent's counsel specifically requested that Duddey review the skim stock formula to determine whether a design defect existed in the subject tire, and whether changes made to the antidegradant package used in the skim stock formula affected the aging mechanical properties of the tire, Duddey stated that he needed "access to documents showing the initial physical properties of the rubber compound to determine whether there exists a plant specific manufacturing issue or an overall design issue."

At his deposition, Duddey acknowledged that a number of factors, such as overload and underinflation, could cause belt separation in tires that were properly designed. Duddey also explained that there were multiple possible causes for the increased hardness found in the subject tire, including oxidative aging and heat exposure.

As to needing the skim stock formula in order to determine why the subject tire exhibited hardness, Duddey testified that "as a starter you need to know what the properties were as the tire was designed and manufactured and then you need to try to make some judgment as to if it's significantly different than when it was manufactured, how it got to that point." Duddey admitted, however, that both the hardness and the cracking found in the subject tire did not necessarily relate back to the formulation of the

[6] Duddey holds a Ph.D. in physical organic chemistry and worked for Goodyear Tire and Rubber Company for thirty-two years.

compound, but could also have been associated with how the tire had been used. Duddey explained that if Bridgestone provided the skim stock formula for the subject tire, ultimately all he could do was make a comparison as to "what is the general practice that is out there in the supplier literature and the technical literature."

Respondent's third expert, Dr. Richard Smythe, was hired to analyze certain materials within the tire deemed important by experts Ochs or Duddey.[7] Smythe indicated that he would design an analytical protocol in order to evaluate certain aspects of the skim stock formula and that if Ochs and Duddey determined that the subject tire did not exhibit the physical properties intended by its design, he would be able to assist in a root-cause analysis of why that tire failed. Smythe asserted that it was "absolutely necessary" that he know all of the ingredients in the rubber compound in order to render his expert opinion in the matter.

After considering the experts' depositions and the parties' supplemental briefs, the trial court issued an order compelling discovery and issued a restrictive protective order.[8] Specifically, the trial court found that Respondent had met the prerequisites for discovery of trade secret information under either Rule 26(c), SCRCP, or the South Carolina Trade Secrets Act, S .C. Code Ann. § 39-8-10 *et seq.* (Supp. 2007) (hereinafter "Trade

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[7] Smythe, an analytical chemist, has been exposed to at least one proprietary skim stock formula and has performed work on rubber compounds to determine why they failed. Smythe is not a tire engineer and does not claim to have expertise in tire design or manufacturing.

[8] The trial court found that a protective order could be fashioned to protect the trade secret status of the information, but "[b]ecause the parties are in a better position to narrow the issues on the terms of a protective order," the trial court instructed the parties to collaborate on the specific terms of the protective order. There is no protective order in the record presumably because Bridgestone filed its petition for a writ of certiorari less than a month after the trial court's order.

Secrets Act"). The trial court concluded that Respondent's experts had established the need for the skim stock formula, stating as follows:

> [Respondent's] claim [is] that the failed tire experienced a steel belt separation. It further appears it is the skim stock compound that is designed to provide adhesion between the steel belts and between surrounding components. As such, the composition of the ingredients, both actual and intended, and the method by which the rubber compound was made is relevant to the inquiry into why the subject tire failed. While it may be possible, it appears unlikely that [Respondent] could seriously pursue a design defect theory without access to the materials and methods used to manufacture the portion of the tire claimed to be responsible for the failure.

Bridgestone thereafter petitioned for certiorari review of the trial court's order in this Court's original jurisdiction. The Court granted the petition and Bridgestone raises the following issues for review:

I. What is the appropriate standard for the discovery of trade secret information in a product liability action?

II. Did the trial court err in finding that Respondent established the requisite need for Bridgestone's trade secret skim stock formula?

## STANDARD OF REVIEW

Ordinarily, an order compelling discovery is not directly appealable. *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974). Nevertheless, a writ of certiorari may be issued when exceptional circumstances exist. *See In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). The instant case presents such exceptional circumstances as it involves a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves the interests of judicial

economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest. *Id.* n.2.

On certiorari, review by the Court is confined to the correction of errors of law. *Berry v. Spigner*, 226 S.C. 183, 84 S.E.2d 381 (1954).

## LAW/ANALYSIS

We begin our analysis by putting the legal nature of a trade secret into context. As aptly described in a recent opinion by the Indiana Supreme Court:

> Trade secrets are unique creatures of the law, not property in the ordinary sense, but historically receiving protection as such. Unlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, the value quickly diminishes. For this reason, owners or inventors go to great lengths to protect their trade secrets from dissemination.
>
> The value of trade secret protection to a healthy economy has been widely accepted for some time. Over the last two hundred years, the law has developed mechanisms for accomplishing this end.

*Bridgestone Am. Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 192 (Ind. 2007) (footnote omitted).

However, it is also true that "trade secrets may be valuable during the course of litigation not involving misappropriation claims, and there are moments when justice requires disclosure." *Id.* at 193. In spite of this acknowledgement of the potential value of trade secrets in litigation, the *Mayberry* court also cautioned that "courts must proceed with care when supervising the discovery of trade secrets, lest the judiciary be used to achieve misappropriation or mere leverage." *Id.*

## I. Standard for Discovery of Trade Secrets

The question of what standard governs the discovery of trade secret information is a novel issue in South Carolina. Under the Trade Secrets Act, a person "aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring a civil action to recover damages incurred as a result of the wrongful acts." S.C. Code Ann. § 39-8-30(C). The Trade Secrets Act addresses discovery matters and provides in pertinent part as follows:

> (A) In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding hearings in-camera, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.
>
> (B) In any civil action where discovery is sought of information designated by its holder as a trade secret, before ordering discovery a court shall first determine whether there is a substantial need by the party seeking discovery for the information.
>
> "Substantial need" as used in this section means:
>
> > (1) the allegations in the initial pleading setting forth the factual predicate for or against liability have been plead with particularity;
> >
> > (2) the information sought is directly relevant to the allegations plead with particularity in the initial pleading;
> >
> > (3) the information is such that the proponent of the discovery will be substantially prejudiced if not permitted access to the information; and

> (4) a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.

S.C. Code Ann. § 39-8-60. Although Respondent suggests that the Trade Secrets Act only applies to those actions alleging trade secret misappropriation,[9] we find that the plain language of § 39-8-60(B) clearly indicates that trade secrets may be protected during discovery not only in misappropriation cases, but in "any civil action" where trade secrets are sought during discovery. *See Key Corp. Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007) (noting that where a statute's language is plain, unambiguous, and conveys a clear meaning, the court has no right to impose another meaning).

This is not to say, however, that the "substantial need" language of the Trade Secrets Act is the sole relevant inquiry in determining the standard governing trade secret information. As Respondent points out, the South Carolina Rules of Civil Procedure also provide for the protection of trade secret information when such information is sought during discovery. Specifically, Rule 26(c), SCRCP, allows for protective orders under certain circumstances as follows:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment,

[9] In support of his position, Respondent asserts *Griego v. Ford Motor Co.*, 19 F.Supp.2d 531, 533 (D.S.C. 1998), in which the federal district court held that the Trade Secrets Act does not apply to a product liability action because it "is not based on misappropriation of a trade secret or protection against such a misappropriation." We decline to adopt the reasoning set forth in *Griego* and note that a federal court decision interpreting state law is not binding on this Court. *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999).

> oppression, or undue burden by expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

In determining whether trade secret information is subject to a protective order under Rule 26(c)(7), federal and state courts typically apply a balancing test that incorporates a "relevant and necessary" standard for the party seeking to discover the trade secret information.[10] *See generally* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2043 (2d ed. 1994) (hereinafter "Wright & Miller"); James J. Watson, Annotation, *Discovery of Trade Secret in State Court Action*, 75 A.L.R.4th 1009, 1028-30 (1990). The test is a three-part inquiry:

1. The party opposing discovery must show that the information sought is a trade secret and that disclosure would be harmful.

2. If trade secret status is established, the burden shifts to the party seeking discovery to show that the information is relevant and necessary to bring the matter to trial.

3. If both parties satisfy their burden, the court must weigh the potential harm of disclosure against the need for the information in reaching a decision.

*See also Mayberry*, 878 N.E.2d at 193; *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 292-93 (D. Del. 1985).[11]

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[10] The language of Rule 26(c), SCRCP, mirrors that of federal Rule 26(c). Because there is no South Carolina precedent construing this rule, federal interpretation of Rule 26(c) is persuasive authority. *See State v. Colf*, 332 S.C. 313, 317, 504 S.E.2d 360, 361 (Ct. App. 1998).

[11] Likewise, in jurisdictions where trade secrets are protected by a codified evidentiary privilege, the courts apply a similar balancing test. *See, e.g., In re*

We disagree with Respondent's argument that our determination that the Trade Secrets Act applies to any civil action impermissibly supplants a rule of civil procedure. *See Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 635 S.E.2d 97 (2006) (rejecting an interpretation of a statute which would have contravened a rule of evidence). Unlike the statute at issue in *Baggerly*, § 39-8-60 does not improperly limit the operation of Rule 26, but rather is consistent with Rule 26 in that both provide for reasonable restrictions on the discovery of trade secrets. The Trade Secrets Act therefore does not supplant, but rather complements, Rule 26(c), SCRCP. *Cf. Mayberry*, 878 N.E.2d at 194 (finding that the application of Rule 26 to trade secrets "should be informed by Indiana's enactment of the Uniform Trade Secrets Act").

To this end, we hold that the balancing test associated with the discovery of trade secret information under Rule 26(c), SCRCP, governs the discovery of trade secret information in this matter. Regarding the requirement that the trade secret information must be "relevant," we hold that the information must be relevant not only to the general subject matter of the litigation, but also relevant specifically to the issues involved in the litigation. *See Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1185 (D.S.C. 1974). For the trade secret information to be deemed "necessary," we hold that the party seeking the information "cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733 (Tex. 2003); *accord Bridgestone/Firestone, Inc. v. Superior Court*, 9 Cal.Rptr.2d 709, 713 (Cal. Ct. App. 1992) (holding that a party seeking discovery must make a "particularized showing" that "the information sought is essential to a fair resolution of the lawsuit"). "Implicit in this is the notion that suitable substitutes must be completely lacking." *Mayberry*, 878 N.E.2d at 196. In other words, the trial court must evaluate whether there are reasonable alternatives available to the party seeking the discovery of the information,

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*Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998); *Bridgestone/Firestone, Inc. v. Superior Court*, 9 Cal.Rptr.2d 709 (Cal. Ct. App. 1992).

and ultimately, the trial court must require the discovery of a trade secret only when "the issues cannot be fairly adjudicated unless the information is available." Wright & Miller, § 2043.

From here, we turn to an analysis of the second issue on appeal in order to determine whether Respondent meets the "relevant and necessary" standard of proof for discovery of a trade secret.

## II. Application of the standard to Respondent's request for Bridgestone's skim stock formula

Bridgestone argues that the trial court erred in finding that discovery of the skim stock formula was necessary to Respondent's case. Specifically, Bridgestone contends that: (1) the expert testimony does not establish that if the experts were provided the skim stock formula and related manufacturing information, they would necessarily be able to opine on a defect; and (2) other methods, such as testing the tire itself, are available to Respondent. We agree.

In our view, Respondent's experts' reasons for opining that the formula was necessary for their analyses do not rise to the level of specificity required for discovery of trade secrets. For example, expert Smythe did not elaborate on why it was "absolutely necessary" that he know the skim stock formula in order to render his expert opinion in the matter. Furthermore, although expert Ochs concluded in his affidavit that it was necessary to compare the failed tire with its initial physical properties because the tire's failure involved a separation of the tread belt, Ochs never explained how the occurrence of a tread belt separation should result in the automatic conclusion that the belt separation was related to the initial physical properties of the tire requiring disclosure of the skim stock formula. Given Queiser's and Duddey's testimony on the many potential causes of tread belt separation related to the usage of the tire rather than its initial physical properties, we find that Ochs's testimony lacks the precision required for Respondent to show that disclosure of Bridgestone's skim stock formula is necessary to this case. *See also Bridgestone/Firestone, Inc. v. Superior Court*, 9 Cal.Rptr.2d at 716 (finding that the tire expert did not "describe with any precision how or

why the formulas were a predicate to his ability to reach conclusions in the case").

Expert Duddey's reasoning for acquiring the formula was similarly vague. In his affidavit, Duddey initially attributed the apparent surface cracking on the subject tire to either "fatigue or premature rubber aging," and the degree of hardness in the skim stock to "either the initial physical properties of the rubber compound or premature aging." When later asked at deposition to elaborate on the need for the skim stock formula, Duddey responded that "as a starter you need to know what the properties were as the tire was designed and manufactured and then you need to try to make some judgment as to if it's significantly different than when it was manufactured, how it got to that point." Duddey provided no indication in his response at deposition that he had examined and subsequently discarded the alternative theories propounded in his affidavit for the tire's failure. For this reason, we find that this testimony fails to adequately articulate how disclosure of the skim stock formula is critical to the analysis in this case.

We find also find no evidence that the skim stock formula is essential to a defect inquiry. Bridgestone's expert Queiser clearly indicated that because a tire is a complex object made up of many compounds, it would be inaccurate to gauge the performance of a particular tire by focusing on one isolated component or compound. Queiser also noted how properties of the skim rubber compounds change as the tire ages. Respondent's experts, however, focused solely on the tire's initial properties without addressing Queiser's assertions regarding the interaction of compounds in the tire during the curing process and throughout the tire's lifetime. In this way, we find Respondent's experts failed to provide a sufficiently complete argument as to why the skim stock formula was necessary to their analyses of this case.

Furthermore, the experts' testimony provides no detailed indication as to how the case is incapable of being fairly adjudicated without the trade secret information. *See In re Bridgestone/Firestone, Inc.*, 106 S.W.3d at 733 (holding that the party seeking trade secret information cannot simply claim unfairness but must show "with specificity how the lack of the information will impair the presentation of the case on the merits to the point that an

unjust result is a real, rather than a merely possible, threat"). While we recognize the logic in Respondent's theory that in order to prove a tire design or manufacturing defect, it would be useful to have knowledge of the original recipe and whatever manufacturing deviations were made from that recipe, we reiterate that the standard for discovery of trade secret information is "necessary," not "useful." *See Bridgestone/Firestone, Inc. v. Superior Court*, 9 Cal.Rptr.2d at 715 (finding that "it is not enough that a trade secret might be useful" to the party seeking discovery).

Additionally, we find that the trial court failed to analyze the availability of reasonable alternatives to the discovery of the trade secret. Specifically, a chemical analysis necessitating the discovery of Bridgestone's skim stock formula is not the sole, or even the best, way to test for defects. We find an October 2001 report issued by the National Highway Traffic Safety Administration (NHTSA) particularly instructive to the Court in this regard.[12] The stated purpose of the federal investigation documented in this report was to determine whether Firestone's August 2000 recall of Wilderness AT tires was adequate in scope. The report focused on non-recalled tires that were manufactured primarily as original equipment for Ford Explorers, yet were similar to the tires recalled by Firestone in 2000. The study used peer tires, mostly Goodyear Wrangler tires, in order to compare performance results to the Wilderness AT tires being evaluated.

The methods of the federal recall investigation, employed on both Firestone tires and the peer tires, included "thorough analyses of available data regarding the performance of tires in the field; shearography analysis to evaluate crack initiation and growth patterns and their severity in tires obtained from areas of the country where most of the failures have occurred; and observations, physical measurements, and chemical analyses." NHTSA Report at iii. Additionally, the NHTSA conducted belt peel adhesion testing, a physical test on one-inch wide samples of tire tread which are essentially

[12] *See* U.S. Dep't of Trans., NHTSA, Office of Defects Investigation, *Engineering Analysis Report and Initial Decision Regarding EA00-023 Firestone Wilderness AT Tires* (October 2001) (hereinafter "NHTSA Report").

pulled by a tensile test machine "to measure the force required to 'peel' the two belts apart." *Id.* The report explained the purpose of this test as follows:

> [T]he properties of the belt wedge and skim rubber compounds change as the tire ages. These changes reduce the compounds' resistance to fatigue crack growth and catastrophic failure. One measure of the degradation of the belt rubber is the peel adhesion test. This test is most directly related to the belt rubber's resistance to a final, catastrophic belt-leaving-belt failure.

*Id.* The report specifically noted there was "no evidence of a belt wire-to-rubber adhesion issue." *Id.* at 23 n.38.

The NHTSA concluded that a safety-related defect existed in Firestone Wilderness AT P235/75R15 and P255/75R16 tires manufactured prior to May 1998 at specified manufacturing facilities. One of the primary findings was that the design of the shoulder pocket of the tires could "cause high stresses at the belt edge and lead to a narrowing of the wedge gauge at the pocket," indicated by "a series of weak spots around the tire's circumference, leading to the initiation and growth of cracks" in the tires. *Id.* at 30.

We find it significant that the NHTSA, without focusing on the skim stock formula, conducted physical testing of the tires and ultimately arrived at a scientifically-supported conclusion that there was a design defect which caused belt separation. This reliance on a structural analysis to determine defect, rather than a chemical analysis, provides tangible proof that other adequate means of testing for defects are available to Respondent and that therefore, Respondent's case will not be substantially impaired if he is denied access to the trade secret information. We note that other jurisdictions have similarly recognized that physically testing the tire itself for defects, including testing at a molecular level if necessary, may be a suitable substitute for testing based on the skim stock formula. *See Mayberry*, 878 N.E.2d at 196 (noting that testimony revealed that an inspection of the failed tire appears to be "more than an adequate substitute for examining the skim stock formula"); *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d at 733 (finding that because a tire's physical properties can be tested without

knowing the recipe for the skim stock compound, tests on a finished tire are "more probative of defect than its skim stock formula would be").

Further, the discovery already available to Respondent for analysis of the alleged defect includes information about development, design review, and testing of tires manufactured with the same specifications as the tire in this case. Bridgestone has also produced or agreed to produce analysis reports of inner liner problems with similar tires, reports from cut tire analysis done at the Hofu plant, and records and depositions from similar cases involving Bridgestone tires. The variety of information these documents encompass provides Respondent with "suitable substitutes" for analysis of the skim stock formula itself. *Mayberry*, 878 N.E.2d at 196. Thus, particularly in light of the discovery obtainable in this case, Respondent has not shown that the case is incapable of being fairly adjudicated without the trade secret information.

For these reasons, we hold that under the proper standard governing the discovery of trade secrets, knowledge of Bridgestone's skim stock formula is not "necessary" in order for Respondent to litigate the instant product liability action.[13] Accordingly, we hold that the trial court erred in finding that Respondent was entitled to discovery of Bridgestone's trade secret information.

We note that Bridgestone should not use our holding in this matter at trial to suggest weaknesses in Respondent's case due to his experts' ignorance about the formula. *See In re Bridgestone/Firestone, Inc.*, 106 S.W.3d at 734 (recognizing that it would be unfair for the manufacturer to argue the plaintiff's case was impaired due to lack of evidence that the manufacturer withheld); *Bridgestone/Firestone, Inc. v. Superior Court*, 9 Cal.Rptr.2d at 716 n.8 (noting that it would be unfair for the manufacturer to challenge an expert at trial about his knowledge of the skim stock formula).

[13] Contrary to the dissent's assertion, we do not reverse the trial court's order compelling discovery based on our view of the experts' testimonies. Rather, we reverse because Respondent failed as a matter of law to meet the applicable standard governing the discovery of trade secrets.

Indeed, if at any time during the litigation, Respondent can satisfy his burden of showing necessity, this matter could be revisited. *See In re Bridgestone/Firestone, Inc.*, 106 S.W.3d at 734 (finding that while the mere possibility of unfairness is not enough to warrant disclosure of the information, this issue can be addressed should it materialize).

## CONCLUSION

For the foregoing reasons, we hold that Respondent failed meet the standard for the discovery of Bridgestone's trade secret information, and therefore, we reverse the decision of the trial court compelling the disclosure of Bridgestone's trade secret.

**BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion.**

**JUSTICE PLEICONES**: I respectfully dissent, and would affirm the circuit court's order compelling petitioner to disclose the skim stock formula. Since this order is before us on a common law writ of certiorari, we may reverse the trial court's decision only if it is affected by an error of law. Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381 (1954). We cannot consider the facts, "except to ascertain whether the order is wholly unsupported by the evidence." Id. Since I find evidence in the record, particularly the affidavit of Dr. Duddey, which supports the circuit court's order, I would affirm.

In my opinion, the majority reverses not because there is no evidence, nor because the circuit court committed an error of law, but because, in the majority's view, the petitioners' experts were more persuasive than those of respondent. For example, the majority states respondent's experts did not address Queiser's assertion that a tire's performance is not dependent on its initial composition. Dr. Duddey, however, acknowledged that post-manufacturing factors could explain the tire's failure, but also maintained that he needed the formula in order to determine whether a design defect, perhaps in the antidegradant package component of the formula, contributed to its failure. In my view, whether this was sufficiently specific is a judgment call for the trial judge.

Moreover, the majority opines that "a chemical analysis necessitating the discovery of Bridgestone's skim stock formula is not the sole, or even the best, means to test for defect" and holds there is "no evidence that the skim stock formula is essential to a defect inquiry." It is not respondent's burden under either the Trade Secrets Act or Rule 26 (c) (7), SCRCP to demonstrate that knowledge of the trade secret is the "best" or "sole" way for it to proceed, nor that it is "essential," but rather that it has a "substantial need"[14] for this "relevant and necessary"[15] information. Applying our limited scope

[14] S.C. Code Ann. § 39-8-60 (B).
[15] Rule 26 (c)(7), SCRCP.

of review on certiorari[16] to the order before us, I would hold there is evidence to support the trial judge's findings that respondent has met his burden.

I would affirm.

[16] Compare Bridgestone Americas Holding, Inc. v. Mayberry, 878 N.E.2d 189 (Ind. 2007); In re Bridgestone/Firestone, Inc., 106 S.W.3d 730 (Tex. 2003) *citing* In re Continental Tire, Inc., 979 S.W. 2d 609, (Tex. 1998), relied upon by the majority, both of which came before the reviewing courts under the more liberal "abuse of discretion" standard of review.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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| Jim Aaron, | Appellant, |
| v. | |
| Susan J. Mahl, a/k/a Susan J. Scott and Elizabeth M. Smith, Clerk of Court for Beaufort County, South Carolina, | Defendants, |
| Of Whom Susan J. Mahl, a/k/a Susan J. Scott is the | Respondent, |
| and | |
| Susan J. Scott, | Respondent, |
| v. | |
| Rehon & Roberts, a Professional Corporation, Peter M. Rehon and Ronald D. Foster, | Additional Plaintiffs on the Counterclaim. |

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Appeal From Beaufort County
Curtis L. Coltrane, Special Circuit Court Judge

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Opinion No. 26607
Heard December 4, 2008 – Filed March 2, 2009

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**REVERSED AND REMANDED**

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Brian C. Pitts, of Smoot, Pitts, Elliott & Biel, of Hilton Head Island, for Appellant

Robert V. Mathison, Jr., of Mathison & Mathison, of Hilton Head Island, for Respondent.

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**JUSTICE WALLER:** This is a direct appeal from the trial court's dismissal of appellant Jim Aaron's action to enforce California and Indiana judgments against respondent Susan Mahl (a/k/a Susan Scott). We certified the appeal pursuant to Rule 204(b), SCACR, and now reverse.

## FACTS/PROCEDURAL HISTORY

Respondent was a California attorney.[1] Between 1996 and 1999, respondent was a civil litigator and managing partner with the law firm now known as Rehon & Roberts ("R&R").[2] Respondent left the firm in November 1999 to start her own firm. In January 2000, R&R brought a California lawsuit against respondent for fraud and deceit, breach of fiduciary duty, conversion, and other causes of action.

In February 2001, she closed her practice, moved out of California, and then traveled with appellant, who was her boyfriend at the time. Eventually, she moved to Bluffton, South Carolina. In July 2001, respondent bought a house in Bluffton for $234,918 in cash, although the Bluffton house

[1] Respondent was admitted to the California Bar in 1980. Effective February 1, 2001, her status changed to inactive. On July 29, 2005, respondent had disciplinary charges pending, and she tendered her resignation. Respondent's resignation became effective as of September 14, 2005. See http://members.calbar.ca.gov/search/member_detail.aspx?x=95447.

[2] The firm was previously named Mahl Rehon Walworth & Roberts.

originally was titled in appellant's name. According to appellant, respondent titled the house in his name in order to secure it from judgment.[3] Moreover, in August 2001, respondent petitioned the South Carolina family court to legally change her name from Susan J. Mahl to Susan J. Scott.[4]

R&R's case against respondent went to trial on September 17, 2001. By this time, the California trial court had struck respondent's answer and cross complaint due to discovery abuse. Respondent did not appear at trial, and judgment was entered in R&R's favor. The California court granted general damages in the amount of $749,572.37, plus $150,000 in punitive damages ("the California judgment").

After trial, respondent moved to have both the California judgment, and the sanction order which had struck her answer, set aside. Respondent represented that after she moved out of California, she received her mail through a mailing service located in South Dakota. Respondent claimed that although she had been aware her trial originally had been set for September 10, 2001, she never received notice that the case was scheduled for September 17, 2001, and did not know her attorney had withdrawn on September 7, 2001. She also alleged that her mental condition – major depression – impaired her ability to participate in the litigation.

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[3] Appellant subsequently deeded the house back to her on October 5, 2001. Nonetheless, respondent filed suit **against appellant** in Indiana on October 11, 2001. According to respondent, appellant "had misappropriated funds entrusted to him." As of the time of trial in South Carolina, the Indiana litigation between respondent (as plaintiff) and appellant (as defendant) was still pending. Moreover, in the instant case, respondent admitted that she encumbered the Bluffton house by mortgages despite the fact that the Indiana court had ordered against such encumbrances.

[4] Respondent declared on the name change petition that she had "no intention to defraud anyone or to avoid creditors by virtue of the name change." The family court granted her the name change on September 24, 2001. In the instant case, appellant testified that respondent told him she was going to change her name in order to "disappear" and avoid her creditors.

The California trial court denied her motion to set aside the judgment.[5] Respondent appealed, but the California Court of Appeal affirmed. Rehon & Roberts v. Mahl, 2003 WL 22810438, 1 (Cal. Ct. App. Nov. 25, 2003). The California Supreme Court denied review on February 18, 2004.

In November or December of 2001, R&R **assigned** the California judgment **for collection** to appellant ("the Assignment").[6] There was also a **collection agreement** between R&R and appellant. This document stated, *inter alia*, that R&R retained appellant as a collector, and thereby assigned the California judgment to him.[7] Appellant was to receive 50% of the proceeds he collected.

In December 2001, appellant filed suit against respondent in both Indiana and South Carolina to enforce the California judgment. The lawsuit filed in South Carolina is the subject of the instant appeal.

On October 24, 2002, the Indiana circuit court granted appellant summary judgment in favor of appellant ("the Indiana judgment"). The Indiana court specifically rejected respondent's argument that R&R's assignment to appellant was an invalid partial assignment. **Respondent did not appeal the Indiana judgment.** In January 2003, the Indiana court

[5] The California judge specifically found that respondent "deliberately refrained from obtaining information about the status of her case." The judge also rejected respondent's allegations that her mental condition impaired her functioning, and noted respondent had been "active in litigation in other states, including a change of her surname, buying and selling real estate in two different states, and significant travel." The judge also specifically noted that respondent had "the wherewithal to transfer the title to her late model Jaguar automobile within a few days after she purportedly learned of the judgment against her."

[6] The assignment itself is undated, but testimony from appellant's attorney at the South Carolina trial establishes the approximate date of the assignment.

[7] The collection agreement was not disclosed in either the California litigation or the Indiana litigation. In May 2004, its production was ordered by the South Carolina court. This will be further discussed *infra*.

barred respondent from disposing, transferring or removing any of her assets, and specifically ordered respondent not to transfer any interest in her Bluffton house.

Various pretrial orders were also issued by the South Carolina court in the instant case. For example, on October 8, 2003, Judge Kemmerlin (the first Master in Equity assigned to this case) entered an order which directed the Beaufort Clerk of Court to enroll and index the California judgment, but delayed execution until the California appellate process had finalized.

Appellant moved for summary judgment in the instant action after the California judgment became final. The trial court, however, denied the motion and ordered appellant to produce the collection agreement. In July 2004, respondent amended her complaint to assert various counterclaims and defenses, including fraud on the court and the affirmative defense of unclean hands.

On March 20, 2006, the case went to trial before Master-in-Equity Coltrane acting as a special circuit court judge. Ultimately, the trial court issued a written order of judgment which found that appellant could not enforce the California judgment. The trial court found various aspects of the collection agreement "troubling," and specifically found that the Assignment from R&R to appellant was invalid. Additionally, the trial court decided that appellant's hands were unclean because his actions were "rendered possible only through his personal relationship with" respondent. Accordingly, the trial court dismissed appellant's complaint.[8]

Both parties moved to alter or amend the judgment order. In its amended order, the trial court ruled on the issue of whether R&R should have been joined as a plaintiff at trial. The trial court found that because appellant had previously objected to respondent's pretrial attempts to join R&R, he was estopped from seeking to join the firm as a party. Moreover, the trial court found joinder of R&R would not be just under Rule 21, SCRCP.

[8] Respondent's counterclaims were also dismissed because she did not oppose appellant's directed verdict motion.

## ISSUES

1. Did the trial court err in failing to find that respondent could not collaterally attack the California and Indiana judgments and by not giving full, faith and credit to both the California and Indiana judgments?

2. Did the trial court err in ruling that appellant had unclean hands?

## STANDARD OF REVIEW

An action to enforce a judgment is an action at law. Minorplanet Sys. USA Ltd. v. American Aire, Inc., 368 S.C. 146, 149, 628 S.E.2d 43, 45 (2006). In an action at law, tried by a judge without a jury, the findings of the trial court must be affirmed if there is any evidence to support them. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

## DISCUSSION

### 1. Full Faith and Credit / Collateral Estoppel

Appellant argues the trial court erred by not granting full faith and credit to the California judgment and the Indiana judgment, both of which are final judgments. In addition, appellant contends the trial court should not have allowed respondent to collaterally attack those judgments at the South Carolina trial. We agree.

The Full Faith and Credit Clause of the United States Constitution provides that "Full Faith and Credit shall be given in each state to the ... judicial proceedings of every other state." U.S. Const. art. IV, § 1. Generally, full faith and credit "'requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it.'" Hospitality Mgmt. Assocs. v. Shell Oil Co., 356 S.C. 644, 653, 591 S.E.2d 611, 616 (2004) (quoting Durfee v. Duke, 375 U.S. 106, 109

(1963)). Therefore, "a foreign judgment which is regular on its face generally may not be collaterally attacked." Bankers Trust Co. v. Braten, 317 S.C. 547, 550, 455 S.E.2d 199, 200 (Ct. App. 1995).

In other words, "the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced." Id.; see also Hamilton v. Patterson, 115 S.E.2d 68, 70 (1960) (a defendant may not a second time challenge the validity of a plaintiff's right which has ripened into a judgment) (citation omitted).

We find the trial court erred by not enforcing the California judgment in South Carolina. This judgment resulted from a trial at which respondent did not appear. She subsequently attempted to set aside the judgment, but all her attempts at appeal were denied by the California courts. Thus, the trial court should have followed the general principles of Full Faith and Credit in the instant case and given effect to R&R's valid foreign judgment.

Moreover, the basic principles of *res judicata* and collateral estoppel also apply. *Res judicata* bars subsequent actions by the same parties when the claims arise out of the same occurrence that was the subject of a prior action between those parties. E.g., Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992). Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action. E.g., Jinks v. Richland County, 355 S.C. 341, 349, 585 S.E.2d 281, 285 (2003).

Here, respondent expressly raised the issue about the validity of the Assignment to the circuit court in Indiana.[9] The circuit court in Indiana granted appellant summary judgment and **specifically** rejected respondent's attack on the Assignment. Respondent did not appeal from that order. Thus, the Indiana judgment, like the California judgment before it, became final and is entitled to Full Faith and Credit. Clearly, respondent should have been

[9] Furthermore, in the California post-judgment litigation, respondent also claimed the Assignment was invalid.

collaterally estopped from making the same argument about the Assignment to the South Carolina courts. Id.

Nevertheless, respondent maintains that because the collection agreement was not disclosed in either the California or the Indiana litigation, she is permitted not only to raise and litigate the issue again, but to have the entire lawsuit dismissed because of the existence of the collection agreement (which she alleges invalidates the Assignment). Respondent, however, has already had her bites at the apple. In both the California and Indiana actions, respondent unsuccessfully challenged the validity of the assignment; ultimately, she prevailed here in South Carolina on the very same issue. This was error. We find *res judicata* and collateral estoppel apply to preclude her from re-litigating issues which have already been actually litigated in a prior action.

Respondent further contends that the failure to produce the collection agreement amounts to extrinsic fraud, and therefore, an exception should be made to the general rules governing Full, Faith, and Credit and collateral estoppel.

It is true that these general rules may not apply "where extrinsic fraud has been practiced to procure the judgment." Bankers Trust Co. v. Braten, 317 S.C. at 550, 455 S.E.2d at 200. However, allegations that a party failed to disclose documents generally amount to intrinsic, rather than extrinsic, fraud. Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003). Moreover, relief from a judgment is generally denied in a case of intrinsic fraud because when an issue has been litigated and determined in a former action, it "should not be retried, … otherwise litigation would be interminable." Id. at 82, 579 S.E.2d at 610 (citation omitted).

Respondent maintains that a fraud on the court was perpetrated in Indiana when appellant and his attorneys attached the Assignment to the complaint seeking to enforce the California judgment. In respondent's view, this amounted to a fabrication because the collection agreement is the "true" assignment document. She therefore argues the Indiana attorneys engaged in

a scheme to defraud, and appellant committed perjury in his affidavits which stated that the Assignment was "a true and correct copy of the assignment."

Appellant, on the other hand, argues that the collection agreement does not negate the Assignment, and thus, there was nothing false about presenting the Assignment as evidence that R&R had assigned the California judgment to him for collection.

We find the facts of the instant case do not establish an extrinsic fraud on the court. See id. at 82, 579 S.E.2d at 610 ("The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud.").[10]

## 2. Unclean Hands

Appellant argues that the equitable defense of unclean hands should not have been allowed because he was not seeking equity, but instead was pursuing an action at law – the domestication and enforcement of a foreign judgment. We agree.

The doctrine of unclean hands "precludes a plaintiff from recovering **in equity** if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." Ingram v. Kasey's Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2, (2000) (emphasis added). The equitable doctrine of unclean hands, however, has no application to an action at law. E.g., Holmes v. Henderson, 549 S.E.2d 81 (Ga. 2001); Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174, 184 (Iowa 1987). Thus, the trial court erred in applying this particular equitable defense to the instant case because appellant was not seeking to recover in equity.

[10] At most, respondent's allegations amount to nondisclosure of a document which generally is considered intrinsic fraud; thus, the issue should not have been re-litigated.

## CONCLUSION

For the reasons outlined above, we reverse the trial court's dismissal and remand for enforcement of the California judgment.[11]

**REVERSED AND REMANDED.**

**PLEICONES, BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., dissenting in a separate opinion.**

[11] We decline to address appellant's remaining issues. See Futch v. McAllister Towing of Georgetown, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (an appellate court need not address additional issues if the resolution of another issue is dispositive).

**CHIEF JUSTICE TOAL**: I respectfully dissent. In my view, Appellant's repeated failure to present the Collection Agreement amounted to extrinsic fraud, and I would therefore hold that the trial court properly dismissed Appellant's action to enforce the California judgment.

Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action. *Chewning v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003) (quoting *Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). On the other hand, intrinsic fraud is fraud which was presented and considered in the trial. *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. *Id.*

In the instant case, Appellant retained Attorney Thomas Botkin to negotiate an assignment agreement between him and Rehon & Roberts for collection of the California judgment.[12] Subsequently, Botkin filed suit in Indiana on behalf of Appellant to enforce the California judgment. In the complaint, Botkin alleged that the California judgment had been assigned to Appellant, and he attached Appellant's supporting affidavit and a copy of the Assignment as proof of his right to enforce the judgment. The Collection Agreement was never referenced in the complaint or at any time during the Indiana litigation. Likewise, in the South Carolina complaint, Botkin[13] attached a copy of the Assignment in support of his motion to enforce the judgment and never disclosed the existence of the Collection Agreement. It was not until 2004 following the Master's order to compel that the Collection Agreement was disclosed.

[12] Botkin's signature appears on the Collection Agreement.

[13] Botkin was admitted *pro hac vice* to represent Appellant in the South Carolina litigation.

In my view, the evidence shows that Appellant's attorney intentionally concealed the Collection Agreement. As a result of these actions, Respondent was prevented from fully litigating her claim that the assignment was invalid[14] during the Indiana litigation. *See Chewing*, 354 S.C. at 84, 579 S.E.2d at 611 (recognizing that where an attorney embarks on a scheme to intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs). For these reasons, I would hold that repeatedly failing to disclose the Collection Agreement constituted extrinsic fraud, and therefore, the trial court did not err in failing to give full faith and credit to the Indiana judgment.

[14] The Collection Agreement purports to disclaim any fiduciary duty between the parties and appears to be a partial assignment, both of which are prohibited under California law. Thus, the alleged assignment upon which Appellant relied for his authority to enforce the judgment was invalid.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Crusader Servicing Corporation,

Respondent/Appellant,

v.

The County of Laurens, South Carolina, a Body Politic, and Southeastern Housing Foundation, Appellants/Respondents.

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Appeal From Laurens County
Ellis B. Drew, Special Referee

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Opinion No. 4464
Heard October 22, 2008 – Filed December 4, 2008
Withdrawn, Substituted and Refiled February 26, 2009

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**AFFIRMED IN PART and REVERSED IN PART**

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Robert Hill, of Newberry and Benjamin Goldberg, of Charleston, for Respondent/Appellant.

William Douglas Gray, of Anderson, for Appellant/Respondent, Laurens County.

Richard B. Ness, of Bamberg, for Appellant/Respondent, Southeastern Housing Foundation.

**KONDUROS, J.:** Laurens County (the County) and Southeastern Housing Foundation (Southeastern) appeal the special referee's finding they were jointly and severally liable to Crusader Servicing Corporation (Crusader) for bid interest related to a delinquent tax sale. Crusader cross-appeals alleging the special referee erred in denying its request for statutory prejudgment interest. We affirm in part and reverse in part.

## FACTS

Southeastern failed to pay ad valorem property taxes for 2001 and 2002 for its property located in Laurens County and known as the Westside Manor Apartments. In 2003, the County proceeded with a tax sale of the property. Crusader bid $348,000[1] for the property and deposited the bid money with the County. Southeastern claimed it was tax exempt and filed for such status with the Department of Revenue (the Department) subsequent to the sale of the property.[2] Two days prior to the expiration of the redemption period, Southeastern paid the taxes due to Laurens County plus twelve percent interest to be given to Crusader as the bidder pursuant to section 12-51-90(B) of the South Carolina Code (Supp. 2007). Four days later, the Department awarded Southeastern tax exempt status for the year 2002. Laurens County returned $67,569.00 to Southeastern, which specifically included the twelve percent interest on Crusader's bid.

The County sent a letter to Crusader indicating the tax sale was void and requesting return of the tax sale receipt to the property in exchange for a

[1] This was a clear overbid for the property.

[2] The record is unclear whether Southeastern may have at some point been declared tax exempt for the year 2001, but it is undisputed that Southeastern was assessed the taxes, failed to pay them in a timely manner, and was ultimately found liable for the ad valorem taxes for 2001.

refund of the bid amount. Crusader refused to return the tax sale receipt at that time, arguing it was entitled to the twelve percent interest under the redemption statute. The parties eventually entered a consent order in August of 2005 pursuant to which Crusader returned the tax sale receipt, and the County returned the bid money to Crusader.

Litigation ensued, and the special referee concluded Southeastern and Laurens County were jointly and severally liable for the twelve percent bid interest. The court reasoned the redemption statute provided for the payment of the interest. The court found the County was without authority under section 12-51-100 of the South Carolina Code (2000) to void a tax sale unless they made a procedural error in the conduct of the sale. The County and Southeastern appeal.

## STANDARD OF REVIEW

"The sale of the property of a defaulting taxpayer is governed by statute." Key Corporate Capital Inc., v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007). Statutory interpretation is a question of law. State v. Sweat, 379 S.C. 367, 373, 665 S.E. 2d 645, 648 (Ct. App. 2008). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. In such cases, the appellate court is not required to defer to the trial court's legal conclusions." Id., 665 S.E. 2d at 649. "If a statute's language is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

## LAW/ANALYSIS

### I. Bid Interest Under Sections 12-51-90, 12-51-100, and 12-51-150 of the South Carolina Code

Southeastern contends the special referee erred in finding it liable to Crusader for bid interest pursuant to section 12-51-90 of the South Carolina Code (Supp. 2007) because the tax sale was voided once Southeastern was declared tax exempt for 2002. We disagree.

Under section 12-51-90(A), the defaulting taxpayer may redeem the affected property within the redemption period by paying delinquent taxes, assessments, penalties, and costs, together with interest as provided in subsection (B). Subsection (B) requires the delinquent taxpayer to remit interest on the tax sale bid amount in accordance with the schedule set forth. For property redeemed in the final three months of the redemption period, the interest rate is twelve percent. Section 12-51-100 of the South Carolina Code (2000) dictates what happens when the redemption is instituted: "The successful purchaser, at the delinquent tax sale, shall promptly be notified by mail to return the tax sale receipt to the person officially charged with the collection of delinquent taxes in order to be expeditiously refunded the purchase price plus the interest provided in Section 12-51-90." (emphasis added).

Section 12-51-150 of the South Carolina Code (Supp. 2007) governs the procedure for voiding a tax sale:

> If the official in charge of the tax sale discovers before a tax title has passed that there is a failure of any action required to be properly performed, the official may void the tax sale and refund the amount paid, plus interest in the amount actually earned by the county on the amount refunded, to the successful bidder. If the full amount of the taxes, assessments,

> penalties, and costs have not been paid, the property must be brought to tax sale as soon as possible.

The statutory framework for tax sales does not seem to contemplate the precise situation presented in this case. The interest provision of section 12-51-90(B) is intended to encourage the prompt payment of delinquent taxes and to penalize the delinquent taxpayer for delay. Furthermore, the interest provision is an incentive for purchasers to bid on tax sale property even though there is risk involved that the property could be redeemed or the sale voided altogether.[3]

Once the redemption was accomplished by Southeastern under section 12-51-90, the terms of section 12-51-100 were triggered, and Crusader was entitled to the twelve percent interest on its bid. Section 12-51-150 does not provide that the official in charge of conducting the sale can void the sale because taxes were wrongfully assessed and the property was tax exempt. It only addresses situations in which the sale was not properly conducted. We decline to read more into the statute than can be discerned from its plain language. See Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (finding the court cannot impose another meaning on plain statutory language). Therefore, we cannot conclude the sale was void pursuant to section 12-51-150.

However, as Southeastern points out, section 12-4-730 of the South Carolina Code (2000) permits the county auditor to "void any tax notice applicable to the property" once notified by the department that a property is exempt from ad valorem taxes. We do not find it necessary to determine whether the auditor could retroactively void the tax notice thereby nullifying the sale. The record shows Southeastern did not pay, nor did it attempt to pay, the 2001 back taxes until after the tax sale. It is undisputed Southeastern was ultimately responsible for paying those taxes. The county was within its rights to proceed with a sale of the subject property based on the outstanding taxes owed for 2001. The failure to pay the undisputedly due taxes validates

[3] We recognize section 12-51-150 provides the bidder is entitled to the interest actually accrued on the bid amount in the event the sale is voided.

the sale even if the tax notice for the 2002 taxes was retroactively voided. Consequently, the sale was valid, the redemption was valid, and the subsequent determination of tax exempt status for 2002 did not affect the sale. The tax exempt determination entitled Southeastern to the refund of taxes assessed for 2002, but did not render the requirements under sections 12-51-90 and 12-51-100 ineffective. Therefore, we find the special referee correctly concluded Southeastern was required to pay the bid interest to the County of Laurens to be remitted to Crusader.

The County argues it should not be responsible for payment of the bid interest to Crusader. We agree. Under the statute, the person officially charge with the collection of delinquent taxes should "expeditiously refund the purchase price plus the interest provided in Section 12-51-90." § 12-51-100. Under section 12-51-90, it is the defaulting taxpayer, in this case Southeastern, who is responsible for paying the bid interest. The County, under the statute, is responsible for remitting the paid money to the bidder as part of the redemption process.

Our analysis with respect to the County's liability must be performed in light of another case from this court, H & K Specialists v. Brannen, 340 S.C. 585, 532 S.E.2d 617 (2000). In H & K Specialists, the Beaufort County treasurer provided improper notice regarding the tax sale of the property. Id. at 586, 532 S.E.2d at 618. After the title to the property had passed to the successful bidder, H&K, the treasurer set aside the sale and refunded the purchase price less the tax delinquency to the defaulting taxpayers, the Brannens. Id. H&K then sued Beaufort County for the return of its purchase price plus statutory interest as provided under the redemption statute. Id. In finding the County liable for the funds, the court stated:

> Finally, we are mindful of the fact that the master based his decision, in part, on the fact that the Brannens received both the property and the money and thus H&K's sole remedy was against the Brannens. However, it was the Beaufort County Respondents which created this inequitable situation

> by failing to provide the Brannens with the proper notice that resulted in the tax sale being set aside and erred in refunding the purchase price, less the tax delinquency, to the Brannens rather than to H&K. Therefore, we do not believe H&K is limited to pursuing a legal remedy solely against the Brannens.

Id. at 589, 532 S.E.2d at 619-20.

In this case, the County does not appear to be responsible for the inequity that has resulted to the parties. Southeastern neglected to pay its 2001 taxes and was not as diligent as it should have been in ascertaining the status of its tax exemption for 2002. Had Southeastern paid the taxes due and then sought a refund, the property would not have been sold, thereby avoiding the present scenario.

The County was faced with a legitimate conundrum in light of the Department's notice of tax exemption being issued almost simultaneously with the redemption. The County consulted its legal counsel, and based on that advice proceeded to refund the 2002 taxes and the bid interest paid to Southeastern believing the sale to be legally void at that time. The County then attempted to return the purchase price to Crusader as mandated and was willing to return the interest actually earned.

We do not find statutory authority for requiring the County to pay the bid interest to Crusader, and we find the present facts distinguishable from those present in H&K Specialists so that the County should not be found jointly and severally liable with Southeastern for the bid interest. Therefore, we conclude the bid interest was properly due to Crusader under section 12-51-100, but only Southeastern, the defaulting taxpayer thereunder, is liable for payment.

## II. Statutory Prejudgment Interest on the Bid Interest

Crusader contends the special referee erred in denying its request for statutory prejudgment interest on the bid interest it was due under the redemption statute. We disagree.

Section 34-31-20(A) of the South Carolina Code (Supp. 2007) provides "[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." (emphasis added). Prejudgment interest is allowed if the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006).

In the instant case, the sum due to Crusader was the bid interest under the redemption statute. Although the bid interest ultimately would be paid to Crusader, the statute required the money first pass from Southeastern through the County. According to the County, the bid interest was no longer due and owing. Consequently, the sum was removed from the purview of section 34-31-20(A), and Crusader is not entitled to statutory prejudgment interest.

## III. Statutory Interest on the Bid

The County contends the special referee erred in awarding Crusader $25,375 in interest on Crusader's $348,000 bid. We agree.

The special referee awarded statutory prejudgment interest pursuant to section 34-31-20(A) for the period of time in which the County held Crusader's bid money while awaiting return of the tax sale receipt. According to section 12-51-100, "[t]he successful purchaser, at the delinquent tax sale, shall promptly be notified by mail to return the tax sale receipt to the person officially charged with the collection of delinquent taxes in order to be expeditiously refunded the purchase price plus the interest provided in section 12-51-90." (emphasis added). Thus, as a condition

precedent to return of the bid, the bidder is required to return the tax sale receipt. Therefore, we find the County is not liable for prejudgment interest on Crusader's bid for the time in which Crusader retained the tax sale receipt after notification by the County.

## CONCLUSION

We find Southeastern liable for the bid interest due to Crusader pursuant to section 12-51-100, but Southeastern is not responsible for statutory prejudgment interest. We conclude this case is distinguishable from H & K Specialists so that the County is not responsible for payment of the bid interest or statutory prejudgment interest. We further find the County is not liable for prejudgment interest on Crusader's bid for the time in which Crusader retained the tax sale receipt. Therefore, the order of the circuit court is

**AFFIRMED IN PART and REVERSED IN PART.**

**ANDERSON and WILLIAMS, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

In Re: Estate of Jettie Byrd F. Anderson

Sarah Anderson Lee, Appellant,

v.

Burney V. Locklear, III, Individually and as Personal Representative of the Estate of Jettie Byrd F. Anderson, Edward Eugene Locklear, Otis D. Anderson, Regina A. Mistic, Gale A. Campbell, and Vickey A. Landing, Respondents.

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Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

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Opinion No. 4506
Heard December 12, 2008 – Filed February 24, 2009

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**AFFIRMED**

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Charles J. Hupfer, Jr., of Florence, for Appellant.

Larry G. Reddick, of Lake City, for Respondents.

**SHORT, J.**: Sara Anderson Lee appeals the probate court's finding that the last will and testament of Jettie Byrd Anderson was valid and not the result of undue influence. We affirm.

## FACTS

Anderson passed away on January 29, 2002, at the age of ninety-eight. Anderson's will named her grandsons, Burney Locklear, III, and Edward Eugene Locklear (collectively, the Locklears), as the sole beneficiaries, to the exclusion of Anderson's daughter, Sara Anderson Lee.[1] Lee is Anderson's last living child.

Anderson's last living son, John, predeceased her on October 2, 2001. John lived with Anderson until his death and was unmarried. Prior to and after John's death, the Locklears resided at Anderson's home and assisted her with daily living, including buying her groceries and paying her bills. Anderson did not want to go to a nursing home and the Locklears promised her they would take care of her so she could stay in her home.

In October 2001, at Anderson's request, the Locklears and their cousin took Anderson to a local attorney, James Epps, to prepare a power of attorney.[2] Burney made the appointment and was present during the meeting between Anderson and Epps. At some point after the power of attorney naming the Locklears was executed, a typographical error was discovered and Epps prepared a corrected one.

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[1] Betty Locklear was the Locklears' mother. She was one of Anderson's daughters and predeceased Anderson.

[2] Epps testified Lee's husband, Aaron, had previously come to his office seeking a power of attorney for Anderson because she was mentally incompetent; however, Epps told him Anderson could not give anyone a power of attorney if she was mentally incompetent, and Lee responded she was competent enough to give a power of attorney. Aaron testified he did not remember going to Epps' office.

Also, in October 2001, an adult abuse investigation was conducted as a result of an anonymous phone call. Diane Benjamin, a Department of Social Services (DSS) employee, testified she went unannounced to Anderson's home on October 19, 2001, to investigate an anonymous complaint of elderly abuse. Benjamin determined Anderson was well cared for by the Locklears and was mentally sharp, noting in her report that Anderson was "very alert to be a 98-year-old woman." Anderson told Benjamin she wanted her grandson, Burney, to be in charge of her affairs because she trusted him and she planned to meet with her attorney to get a power of attorney for Burney. She also said her son-in-law was trying to force Burney to sign papers and take her out of her house. Benjamin spoke with Anderson privately while the Locklears were not in the room. Benjamin made a return visit on November 14, 2001, and Anderson remembered her from the first visit. Anderson told Benjamin she had resolved the family feud by giving a power of attorney to Burney.

In December 2001, Anderson decided to review her will with Epps.[3] Anderson again directed Burney to make an appointment for her. Epps informed her that pursuant to her current will, executed in 1992, all of her property was left to her son, John Anderson, and if he predeceased her, the property went to her daughter, Betty Locklear. Because both John and Betty had predeceased Anderson, Epps told Anderson all her property would pass to Betty's children, the Locklears. Anderson explained to Epps that her other daughter, Lee, was not in the will because she did not want Lee's "husband to get his hands on any of her property." Anderson executed a second will on December 20, 2001, naming the Locklears as the personal representatives and beneficiaries because John and Betty had predeceased her. Epps did not consider the second will to be a substantive change because Anderson was simply changing the names of her personal representatives as a result of the death of the personal representatives named in her first will. Two witnesses

[3] Burney testified Aaron came over to Anderson's house after John's death and was upset about Anderson's deceased husband's will. After Aaron's visit, Burney said Anderson told him she wanted to see Epps and instructed him to make the appointment.

were present at the signing of the will and Epps testified the Locklears did not have any part in the discussion about the new will.

Aaron testified Anderson told him in December 2001 that the Locklears were trying to get her to change her will and she wanted to keep her first will. Aaron testified he believed Anderson had been incompetent for twelve to fifteen years and had been gradually getting worse. In support of Lee's claims, Anderson's treating physicians, Doctors Frank Lee and Joel Dekle, testified at trial as experts. Dr. Lee and Dr. Dekle both testified Anderson was mentally incompetent. Prior to trial, Aaron had contacted both doctors to write letters about Anderson's mental state and gave them to Lee's attorney. Dr. Lee testified, in his opinion, Anderson started to suffer from senility in 1995; however, his medical records for Anderson contained only two notations that she was senile in the twenty-five to thirty years he treated her and he never provided her with any medication for senility. Dr. Dekle saw Anderson four times and believed she had some senile dementia, but his medical records did not have any notations about her senility. Also, Dr. Dekle's letter stated Anderson's condition went downhill after her son's death; however, he testified this information was not from his personal knowledge, but was told to him from someone else, possibly the Lees. Gail Campbell, Anderson's granddaughter, also testified she did not think Anderson was capable of understanding the will when she signed it; however, at her deposition, she stated she probably only saw Anderson once after John passed away.

In contrast, Alma Matthews, Anderson's sister-in-law, testified she visited with Anderson once a week until she passed away and Anderson was mentally alert. Other family members, friends, and neighbors also testified Anderson was mentally competent until she passed away. Additionally, Anderson's life-long friend, Mary Benton, testified Anderson told her she did not want Aaron to have any of her property and she wanted the Locklears to get it.

On February 7, 2002, Burney instituted an informal probate of Anderson's will and was appointed as the personal representative. On March 4, 2002, Lee filed a petition alleging Anderson's will was invalid because

Anderson lacked the requisite capacity to make a will and the will was the result of undue influence. Lee also filed a petition to be appointed as Anderson's personal representative. On March 16 and 17, 2006, the matter was tried without a jury. The probate court issued its order on April 27, 2006, finding there was no undue influence and the will was valid. Lee filed a motion for reconsideration with the probate court, which was denied, and Lee appealed to the Court of Common Pleas. After a hearing, the court issued its order affirming the probate court. This appeal followed.

## STANDARD OF REVIEW

An action to set aside a will is an action at law. In re Estate of Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999). "If the proceeding in the probate court is in the nature of an action at law, the circuit court and this Court may not disturb the probate judge's findings of fact unless a review of the record discloses there is no evidence to support them." Id. "In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the trial judge." Golini v. Bolton, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997).

## LAW/ANALYSIS

Lee argues the probate court erred in finding Anderson's last will and testament was valid and not the result of undue influence. We disagree.

The maker's exercise of judgment and free choice must be prevented to void a will on the ground of undue influence. Cumbee, 333 S.C. at 671, 511 S.E.2d at 394. "A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." Id. "[T]he issue of undue influence should be resolved in the light of the proposition that a sane testator has the right to dispose of his property as he chooses." Harris v. Berry, 231 S.C. 201, 205, 98 S.E.2d 251, 253 (1957) (citations omitted). "The mere influence of affection and attachment, or the mere desire of gratifying the wishes of another, will not vitiate a testamentary act unless that act was the result of coercion or importunity beyond the testator’s power to resist." Id.

The party seeking to challenge a will on the basis of undue influence must present evidence which "unmistakenly and convincingly shows the party's will was overborne by the defendant or someone acting on his behalf." Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 299, 569 S.E.2d 371, 378 (Ct. App. 2002) (citations omitted). "However, the existence of a confidential relationship creates a presumption that the instrument is invalid, and the burden then shifts to the proponent of the instrument to affirmatively show the absence of undue influence." Id. at 300, 569 S.E.2d at 378. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." Cumbee, 333 S.C. at 672, 511 S.E.2d at 394 (quoting Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)). The presumption of invalidity in deed cases also applies to will cases. Howard v. Nasser, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct. App. 2005); see Dixon v. Dixon, 362 S.C. 388, 398 n.7, 608 S.E.2d 849, 854 n.7 (2005) ("[T]he analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed."); Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.3 cmt. f (2003) ("A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor . . . whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other types.").

Lee asserts the Locklears had a fiduciary relationship with Anderson by way of the power of attorney and they placed undue influence on her to make a change to her will. Lee offers the following additional evidence in support of her claim of undue influence: (1) the Locklears made the appointments with Epps for Anderson; (2) the Locklears accompanied Anderson to the appointments; (3) the Locklears were likely present during the discussion of the will; and (4) the Locklears resided with and cared for Anderson in her home.

While the Locklears had Anderson's power of attorney, which created a fiduciary relationship, no evidence was presented it was ever utilized. See Cumbee, 333 S.C. at 672-73, 511 S.E.2d at 394 (finding in a will contest that

a fiduciary relationship existed between son and mother when son had mother's power of attorney and managed her finances, which created the presumption of undue influence). Burney testified he made the appointment with Epps at Anderson's request and took Anderson to Epps' office because she needed help getting there. Epps, a practicing attorney, testified he did not witness any undue influence and he believed the changes to the will were Anderson's ideas. Epps testified the Locklears did not have any part in the discussion about the new will.

Additionally, in the 2001 will, Anderson changed the named personal representatives to the Locklears because her son and daughter had predeceased her. Also, Epps did not think the 2001 will substantially changed anything because Anderson's 1992 will also did not name Lee as a beneficiary and the Locklears were the sole beneficiaries under that will as well. Epps testified Anderson told him she did not want Lee named as a beneficiary because she did not want Lee's "husband to get his hands on any of her property." Anderson's life-long friend, Benton, also testified Anderson told her she did not want Aaron to have any of her property and she wanted the Locklears to inherit it.

Furthermore, the Locklears did not force Anderson to stay in her home but were merely following her wishes not to be sent to a nursing home. Several witnesses testified Anderson was the one giving the orders and was not likely to be influenced by someone else. Benjamin, the DSS Investigator, testified Anderson told her she wanted Burney to be in charge of her affairs because she trusted him and her son-in-law was trying to take her out of her house against her wishes. Also, Benjamin testified DSS encourages people to stay in their homes if they have adequate care. Dr. Lee also testified he had not recommended Anderson be placed in a nursing home.

Thus, the Locklears presented sufficient evidence to rebut a presumption of undue influence. Additionally, substantial evidence in the record supports the probate court's finding the will was valid and not the result of undue influence.

## CONCLUSION

For the foregoing reasons, the order of the probate court is

**AFFIRMED.**

**HEARN, C.J., and KONDUROS, J., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Jomer Hill, Appellant.

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Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

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Opinion No. 4507
Heard January 8, 2009 – Filed February 24, 2009

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**AFFIRMED**

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Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, of Columbia; and Solicitor Robert Mills Ariail, of Greenville, for Respondent.

**KONDUROS, J.:** Jomer Hill appeals his murder convictions arguing the trial court erred in admitting testimony of a police informant who was allowed to invoke the Fifth Amendment on cross-examination. Hill further contends the trial court erred in failing to give a jury instruction permitting the jury to draw an adverse inference from the informant's refusal to answer questions and in denying his motion for mistrial based on the solicitor's closing argument. We affirm.

## FACTS

Hill was convicted and sentenced to fifty years' imprisonment for the murders of Ken Goldsmith and Trey Brown in December of 2000. The lengthy trial produced numerous witnesses who testified to a drug-selling operation in which Trey Brown and Hill sold drugs for a man named Mont Brown. The victims were discovered shot in a liquor house[1] frequented by all of the aforementioned parties.

Witnesses observed Hill and Mont Brown having a serious private discussion at the liquor house the day before the murders. Witnesses also testified Trey Brown had a confrontation with Mont Brown the night before the murder regarding the division of profits from drugs Trey had sold.

Antone Jones testified he sold drugs for Mont Brown and as a member of the organization you were responsible for any other members you brought into the business. Jones stated Mont Brown had instructed him to kill his own cousin when the cousin was arrested. Jones testified Hill had brought Trey Brown into the business.

The mother of Hill's child, Chasaity Drummond, testified she was at Hill's mother's house picking up her child the morning after the murders. Hill

[1] The liquor house was a house located at 18 Chestnut Street in Greenville where visitors gambled, drank, sold drugs, socialized, played video games, and watched television.

went inside, changed his clothes, and asked Drummond to throw away a bag for him on her way out. Hill cautioned Drummond she should not throw the bag away at her home.

Maxie Wright, a former, long-time boyfriend of Hill's mother,[2] testified Hill told him Mont Brown had threatened to kill Hill's entire family if Hill did not kill the victims. Wright also testified Hill maintained his innocence.

The most damaging testimony against Hill was elicited from a police informant, Timothy Paden. Paden testified Hill had confessed to him while they were both in the Greenville County Detention Center. Paden further testified regarding a recording he later made of Paden allegedly confessing to the crime.[3] On cross-examination, Paden refused to answer questions regarding a plea agreement he had made with federal authorities on an apparently unrelated drug charge. The federal authorities discovered Paden had provided false information to them regarding a murder in an effort to have his sentence reduced. Paden told the federal authorities Mont Brown murdered another drug dealer, Andre Rosemond, because Rosemond had kidnapped Mont Brown's wife and child. Paden failed a polygraph examination and confessed to fabricating this story. When his dishonesty was discovered, the federal judge sentenced Paden to twenty years.

The trial court determined the specific details of the violated plea agreement were collateral to Hill's case thus, Hill's right to cross-examine Paden was not impermissibly limited by Paden's invoking the Fifth Amendment on questions relating to the failed agreement and Mont Brown. Furthermore, the State agreed, with some prodding from the trial court, to stipulate Paden had previously provided false information to federal authorities in order to receive a reduced sentence.

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[2] The woman is actually his grandmother, but she raised Hill and their relationship was that of mother and son.

[3] The record contains a transcript of the tape prepared by the State and provided to the jury to aid in their understanding of the recording. In the transcript, Hill purportedly answers in the affirmative several times when Paden asks if Hill was alone when he shot Trey and Ken.

Paden answered in the affirmative when asked if he had violated a plea agreement that required his cooperation and his honesty. Furthermore, upon cross-examination, Paden admitted to having criminal convictions of his own and to reporting crimes in exchange for the reward money available through the Crimestoppers program. At the conclusion of all testimony, Hill requested a jury instruction that jurors may infer a witness's answer to a question would be adverse if that witness invoked the Fifth Amendment. The trial court refused the instruction.

In closing arguments, the State attempted to neutralize the defense's emphasis on Mont Brown's role in the case by pointing out that Hill was the only person on trial before this jury. The solicitor stated "the issue before you is not the culpability of Demetrius Lamont Brown [Mont Brown]. The only issue before you ladies and gentlemen, according to your oath, is whether this defendant, Jomer Hill, is guilty of the murders of Trey Brown and Ken Goldsmith." The solicitor later stated "[w]hy isn't anybody else in here with him? Number one, he's the only person that's within your province to consider." The defense then objected and the discussion relating to the objection was later placed on the record arguing the last statement by the solicitor commented on Hill's failure to put up a defense and call witnesses. The court took the defense's argument and motion for mistrial under advisement and later determined the comment was meant to focus the jury on the question of Hill's innocence or guilt as opposed to Mont Brown's culpability and did not, in context, unfairly comment on Hill's right not to testify. This appeal followed.

## LAW/ANALYSIS

### I. Paden's Testimony

Hill argues the trial court erred in admitting Paden's testimony regarding the victims' murders and permitting Paden to refuse to answer certain questions on cross-examination. We disagree.

The right of a defendant in a federal court to confront the witnesses against him, guaranteed by the Sixth Amendment, includes the right to test the truth of those witnesses' testimony by cross-examination. U.S. v. Cardillo, 316 F.2d 606, 610 (2nd Cir. 1963). This right is also guaranteed by our State constitution. See State v. Nest Egg Soc. Today, Inc., 290 S.C. 124, 130, 348 S.E.2d 381, 385 (Ct. App. 1986).

> The importance of cross-examination in our jurisprudence has been well stated by Professor Wigmore: "It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this, its wonderful power, there has probably never been a moment's doubt upon this in the mind of a lawyer of experience."

Cardillo, 316 F.2d at 610-11 (quoting 5 Wigmore, Evidence § 1367 (3d ed. 1940)). Nevertheless, "[t]he trial court retains discretion to 'impose reasonable limits on [the scope] of cross-examination designed to show the prototypical form of bias on the part of a witness.' " State v. Graham, 314 S.C. 383, 385-86, 444 S.E.2d 525, 527 (1994) (citations omitted).

The seminal case on this issue is Cardillo, 316 F.2d at 610. In Cardillo, the court discussed the scenarios that could occur when a witness is presented to testify against a defendant and allowed to plead the Fifth Amendment on cross-examination.

> Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct

> testimony and, therefore, that witness's testimony should be stricken in whole or in part.

Id. at 611. Questions on cross-examination are collateral if they relate solely to the witness's credibility and bear no relation to the subject matter of the direct examination. Id.

On direct examination, Paden testified primarily to the contents of his taped conversation with Hill in which Hill answered "yeah" to the question of whether he was alone when he shot Trey and Ken. Paden testified about the events surrounding the making of that tape, and he testified about his past police informant activities and rewards he had received through the Crimestoppers program. The State questioned Paden regarding his current incarceration on drug charges and the violated plea agreement.

> Q. Last question, Mr. Paden. . . . First of all, did you enter into some kind of an agreement with the Federal Government?
>
> A. Yes, sir.
>
> Q. And was it the position of the Federal Government that you violated the terms of that agreement, with particularity toward your honesty?
>
> A. Yes, sir, but due to my appeal I'm not even allowed to discuss it, sir.

From the record, it appears Hill sought to elicit more details from Paden regarding the specifics of his dishonesty in his federal deal.[4] However, under Cardillo such information is collateral to Paden's direct testimony in

[4] Hill argued Paden was "dodging" him about lying about another murder case by "hiding behind the Fifth Amendment." Hill further contended Paden is "sitting here trying to put my client's feet in the fire and yet he wants to dodge being cross-examined about his prior – his prior lies . . . ."

the case sub judice. The specifics of the failed plea agreement bear on Paden's credibility. Nothing in the record suggests any of the proposed questions Paden failed to answer would have related to his direct testimony. Paden's credibility issues were put before the jury through direct and cross-examination. Consequently, Paden's refusal to address collateral matters did not prejudice Hill, and the admission of Paden's direct testimony was proper.

**II. Jury Instruction**

Hill contends the trial court erred in refusing to give the requested jury charge that "if [a] witness takes [the] fifth or refuses to testify you the jury may infer that the answer would be adverse." We disagree.

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Ziegler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). If a charge is substantially correct and covers the law there is no need for reversal. Id. To warrant reversal, the refusal to give a requested charge must be erroneous and prejudicial to the defendant. Id.

In the instant case, Hill submitted his request with no supporting authority, and we are unable to find any that supports the giving of this charge. In fact, "[i]t is desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation." State v. Hughes, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997) (discussing instances in which a witness is presented solely for the purpose of invoking the Fifth Amendment in front of the jury and referencing "general rule that no adverse inference may be drawn from witness' assertion of the privilege").

Furthermore, the given jury charge was substantially correct and covered the applicable law. The trial court instructed "[y]ou may also consider the appearance, the manner of the witness while on the stand. Was he or she straightforward or hesitant in answering?" and whether "there was some reason a witness would want to give testimony which would help or hurt one side or the other." These instructions informed the jury that it is the

judge of credibility and it could consider Paden's hesitancy in responding to questions on cross-examination. Therefore, we find the trial court did not err in refusing to give the requested charge, and Hill was not prejudiced thereby.

## III. Solicitor's Closing Remarks

Finally, Hill contends the trial court erred in denying his motion for mistrial because the solicitor improperly commented on Hill's right to remain silent and not present a defense. We disagree.

The trial court has discretion to grant or deny a motion for mistrial, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008). A mistrial should be granted only when absolutely necessary. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). To receive a mistrial, a defendant must show both error and resulting prejudice. Id.

"[I]t is impermissible for the State to comment directly or indirectly upon a defendant's failure to testify at trial." State v. Adkins, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003). "However, even improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001). The defendant must show the improper comment deprived him of a fair trial. Id. Additionally, a curative instruction emphasizing the jury cannot consider the defendant's failure to testify will cure any potential error. Id.

When examined in context, we do not believe the solicitor's comment unfairly commented on Hill's right to remain silent. As seen throughout the record, part of the defense strategy was to place direct or indirect responsibility for the murders on Mont Brown. Therefore, the solicitor emphasized that only Hill was on trial and before the jury, and its task was to determine whether or not he alone was guilty. Furthermore, the trial court instructed the jury the defendant's silence could not be considered "in any

manner whatsoever" and the defendant has no burden of proof and is not required to prove his innocence. Therefore, even if the solicitor's comment was improper, the trial court's jury instruction should be deemed to have cured any error or prejudice that may have resulted from it.

Based on the foregoing, the ruling of the trial court is

**AFFIRMED**.

**HEARN, C.J., and SHORT, J., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

AJG Holdings, LLC; Stalvey Holdings, LLC; David Croyle; Linda Croyle; Jean C. Abbott; Lynda T. Courtney; Sumter L. Langston; Diane Langston; Carl B. Singleton, Jr.; Virginia M. Owens; and Stoney Harrelson, Respondents,

v.

Levon Dunn; Pamela S. Dunn; and Helen Sasser, Defendants,

Of Whom Levon Dunn and Pamela S. Dunn are the Appellants.

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Appeal From Georgetown County
J. Michael Baxley, Circuit Court Judge

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Opinion No. 4508
Heard January 21, 2009 – Filed February 24, 2009

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**AFFIRMED IN PART, REVERSED IN PART AND REMANDED**

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Stephen P. Groves, Sr. and Thomas S. Tisdale, Jr., both of Charleston, for Appellants.

Jack M. Scoville, Jr., of Georgetown, for Respondents.

**SHORT, J.:** Levon Dunn and Pamela Dunn (the Dunns) appeal the trial court's imposition of a preliminary injunction barring any commercial use of their property. We affirm in part, reverse in part, and remand.

## FACTS

The Dunns own approximately thirteen acres of contiguous land in Georgetown County. Four of the thirteen acres are located within a subdivision developed by Helen Sasser and known as Woodland Plantation. The four acres are divided into four lots, numbered Lots 7, 8, 9, and 10. Lots 9 and 10 were previously conveyed to the Dunns on September 9, 1994, by Riverside, Inc. The Dunns purchased Lots 7 and 8 on January 20, 2003, from Rodney and Carolyn Causey. The deeds for the Dunns' lots contain covenants and restrictions placed on the land by Sasser. The restrictions prohibit, among other things, commercial use of the lots without Sasser's written consent. The Dunns claim they were unaware of the restrictions when they decided to renovate a house located on Lots 7 and 8 to be used as a bed and breakfast facility and for social events including weddings and receptions. Georgetown County approved the renovations to the property. After the renovations were completed, the Dunns advertised the property in various publications and on a website as Dunn Acres Plantation.[1]

Shortly after the Dunns began advertising the plantation, the Dunns received a letter from a neighbor, Tommy Abbott, stating he learned of their plans to use the property as a bed and breakfast and he objected to any commercial activity on the property. Abbott also informed the Dunns the deed restrictions prohibited any commercial activity. As a result of Abbott's letter,

[1] In his affidavit dated February 1, 2007, Levon Dunn stated they "have not conducted any commercial activity on Lots 7-10 at any time before or since we learned of the restrictions prohibiting such use." (Emphasis in original). Also, the Dunns' attorney stated twice during the hearing that there was no commercial activity taking place on the property.

the Dunns contacted Sasser to request an assignment and release of Sasser's rights as developer to the Dunns. The Dunns paid Sasser $15,000 for the assignment, which was executed on September 6, 2006.

On August 18, 2006, AJG Holdings, LLC; Stalvey Holdings, LLC; David Croyle; Linda Croyle; Jean Abbott; Lynda Courtney; Sumter Langston; Diane Langston; Carl Singleton, Jr.; Virginia Owens; and Stoney Harrelson (collectively, Respondents), who are owners of property in Woodland Plantation, filed an action seeking an injunction against the Dunns to prevent any commercial activity on their property, which Respondents claimed violated their deed restrictions. On February 26, 2007, Respondents filed an amended complaint and motion for a temporary restraining order.[2] Respondents asserted causes of action against the Dunns for violation of restrictive covenants, nuisance, and civil conspiracy. The amended complaint also added Sasser as a party-defendant and asserted causes of action against her for slander of title, breach of fiduciary duty, breach of warranties, breach of contract accompanied by a fraudulent act, and civil conspiracy.

The Dunns asserted counterclaims against Respondents for tortuous interference with prospective business relations, interference with a contractual relationship, civil conspiracy, and intentional infliction of emotional distress. On May 16, 2007, after a hearing on Respondents' motion for a temporary restraining order, the trial court imposed a temporary injunction against the Dunns. The Dunns filed a motion for reconsideration, to amend the court's findings, and to alter or amend the court's judgment pursuant to Rules 52(b) and 59(e), SCRCP, which was denied. This appeal followed.

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[2] Respondents also filed affidavits from neighbors David Croyle, Lynda Courtney, and Tommy Abbott that state the commercial use of the Dunns' property is disruptive to the neighborhood by causing traffic and noise, and impairs the enjoyment of their property. In response, the Dunns filed an affidavit from Reecy Whipple, who owns the house closest to the Dunns' property. Whipple averred he was present at his home during three weddings at the Dunns' property, and the music was not loud, the guests were gone in three hours, and the traffic was reasonable.

## STANDARD OF REVIEW

"An action to enforce restrictive covenants by injunctions is in equity." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). The grant of an injunction is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520-21 (2000); Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Peek, 367 S.C. at 454, 626 S.E.2d at 36; County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002).

## LAW/ANALYSIS

### I. Bond

The Dunns argue the trial court improperly failed to require Respondents to post a bond before imposing the preliminary injunction. We agree.

Rule 65(c), SCRCP, provides that:

> Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Recently, in Atwood Agency v. Black, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007), our supreme court held even a nominal bond does not satisfy Rule 65(c). The court found the nominal amount was improper "because it erroneously assume[d] the injunction [was] proper instead of providing an amount sufficient to protect appellants in the event the injunction [was]

ultimately deemed improper." Id. at 73, 646 S.E.2d at 884. The court remanded the case to the trial court to award the appropriate amount of costs and damages incurred as a result of the temporary injunction. See also 12 S.C. Jur. Equity § 19 (1992) ("Rule 65(c) of the South Carolina Rules of Civil Procedure requires that security be posted before the court may issue . . . a temporary injunction.").

Prior to the adoption of the South Carolina Rules of Civil Procedure, our supreme court held a bond was required for the issuance of a temporary injunction under section 570 of the 1942 South Carolina Code; however, a court's failure to require a bond was not a jurisdictional defect, and a court could amend the order of injunction to require execution of a sufficient bond. Epps v. Bryant, 218 S.C. 359, 365, 62 S.E.2d 832, 834-35 (1950); Ex Parte Zeigler, 83 S.C. 78, 81, 64 S.E. 513, 514 (1909) (holding the injunction was correctly granted, but the court erred in not requiring a bond and, thus, the circuit court's judgment was modified to require the filing of a proper bond).

Although we recognize the Dunns stated they were not using their property for commercial purposes, and therefore, it follows there would be no need for a bond to protect their future losses as a result of the injunction, Respondents also filed affidavits claiming nuisance and noise as a result of weddings previously held on the Dunns' property. Thus, it appears at some point the Dunns' property may have been used for commercial purposes. Therefore, because Rule 65(c), SCRCP, requires the trial court to order Respondents to post a bond before issuing the temporary injunction, and no bond was ordered in this case, we remand this case for the trial court to amend the order of injunction to require execution of a sufficient bond.[3]

## II. Elements Required for Temporary Injunction

The Dunns argue the trial court improperly imposed the preliminary injunction because the court failed to require Respondents to meet all of the mandatory elements to obtain a preliminary injunction. We disagree.

[3] Moreover, we note Rule 65(c) provides security for the payment of court and other costs incurred by the Dunns should the court ultimately find they were wrongfully enjoined.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). The plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action. Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005); County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. Scratch Golf Co., 361 S.C. at 121, 603 S.E.2d at 908; Peek, 367 S.C. at 454-55, 626 S.E.2d at 36. "Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." Peek, 367 S.C. at 455, 626 S.E.2d at 36-37. The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation. Id.

The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. Id. at 456, 626 S.E.2d at 37. "When a court is requested to issue a temporary injunction it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Id. "Generally, a restrictive covenant will be enforced regardless of the amount of damage that will result from the breach and even though there is no substantial monetary damage to the complainant by reason of the violation. . . . The mere breach alone is grounds for injunctive relief." Siau v. Kassel, 369 S.C. 631, 640-41, 632 S.E.2d 888, 893 (Ct. App. 2006).

The Dunns argue Respondents failed to meet the three mandatory elements to obtain a preliminary injunction. First, the Dunns claim Respondents did not show they would suffer irreparable harm if the injunction was not granted, but would merely suffer some inconvenience from their commercial activity. However, Respondents submitted affidavits stating the commercial activity on the Dunns' land caused noise and traffic in the neighborhood. This activity interfered with their right to the use and enjoyment of their property and is sufficient to prove Respondents suffered an irreparable harm. Second, the Dunns argue Respondents did not present sufficient evidence they will likely succeed on the merits of the litigation because the restrictions were eliminated by the Sasser assignment. Respondents presented affidavits and deeds in support of their argument that Sasser did not hold any such right or reservation, thus the assignment was invalid, and the Dunns' property remains subject to the prohibition against commercial uses. This is sufficient evidence to show Respondents are likely to succeed on the merits. Third, the Dunns claim Respondents have an adequate remedy at law because they could contact local law enforcement about the noise and disruptive guests, or they could sue for monetary damages. The trial judge found the Dunns' criminal law resolutions and an award of monetary damages to be inadequate remedies for the intrusions on Respondents' property rights. Accordingly, we find the trial judge properly found Respondents made a prima facie showing they were entitled to injunctive relief and, therefore, the temporary injunction was properly granted.

Additionally, the Dunns claim the court erred by basing its decision on their statements concerning the use of their land. Levon Dunn stated in his affidavit they "have not conducted any commercial activity on Lots 7-10 at any time before or since we learned of the restrictions prohibiting such use." (emphasis in original). Also, the Dunns' attorney stated twice during the hearing that there was no commercial activity taking place on the property. The trial court found these statements significant and noted them in the order because it is evidence the injunction will not be unduly inequitable against the Dunns.

## CONCLUSION

Therefore, we affirm the circuit court's order granting the temporary injunction; however, we reverse the circuit court's order failing to require Respondents to post a bond, and remand for findings in accordance with this opinion.

**AFFIRMED IN PART, REVERSED IN PART, and REMANDED.**

**CURETON and GOOLSBY, A.JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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American Legion Post 15,
American Legion Post 17,
and Steve Johnson, Respondents,

v.

Horry County, Appellant.

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Appeal From Horry County
James E. Lockemy, Circuit Court Judge

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Opinion No. 4509
Heard December 12, 2008 – Filed February 25, 2009

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**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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Emma Ruth Brittain and Charles B. Jordan, Jr., both of Myrtle Beach, for Appellant.

Kenneth R. Young, Jr., of Sumter, for Respondents.

**PER CURIAM:** Horry County appeals the circuit court's order requiring the County to refund admissions fees remitted by American Legion Post 15, American Legion Post 17, and Steve Johnson. We affirm in part, reverse in part, and remand.

## FACTS

American Legion Post 15 and American Legion Post 17 (the Posts) are non-profit tax-exempt corporations. Johnson is employed by the Posts as the administrator of the Posts' bingo games. In 1996, the South Carolina Legislature enacted the Bingo Tax Act of 1996 (the Act). S.C. Code Ann. §§ 12-21-3910 to -4300 (2000 & Supp. 2008). The Act governs the entrance fees and sale of bingo cards. S.C. Code Ann. § 12-21-4030 (2000).

The Act imposes a tax upon paid admissions to "places of amusement" within South Carolina. S.C. Code Ann. § 12-21-2420 (2000 & Supp. 2008). However, section 12-21-4270 of the Act provides: "Each licensed nonprofit organization or promoter, in the name of a licensed organization, may obtain bingo cards . . . . **The sale of bingo cards and entrance fees provided by Section 12-21-4030 are not subject to the admissions tax provided by Section 12-21-2420.**" S.C. Code Ann. § 12-21-4270 (Supp. 2008) (emphasis added).

In 1996, the Horry County Council adopted the Horry County Hospitality Fee Ordinance, which similarly imposed a service charge upon entrance fees paid at places of amusement within the County. See Horry County, S.C., Ordinances 105-96, §19-6(a)(2) (1996). This section applies to places of amusement that the admissions tax imposed by section 12-21-2420 applies under the South Carolina Code. Id. The Ordinance further mandates the payment of the fee "shall be the liability of the consumer" and "shall be collected by the provider of the services. . . ." Id. at §19-6(b). The County required the Posts to remit payments effective January 1, 1997, with the first remittances due to the County by February 20, 1997.

Johnson's daughter, Christie Johnson Brunson, operates the bingo operations for the Posts. Brunson testified the Posts collected the admissions

charges pursuant to state law for each person who entered to play bingo.[1] Brunson testified the County notified her the Posts would be charged the hospitality fee. She began forwarding the fees to the County but did not collect the fees from the bingo customers, instead remitting the amount from the Posts' proceeds. Between 1997 and 2001, the Posts paid $34,523.94 to the County as admissions fees. Brunson believed the fee should not be charged for bingo; therefore, she paid several of the Posts' first remittances "under protest."

In November of 2001, the County contacted Brunson and told her to cease remitting the County hospitality fee because the ordinance did not apply to the Posts' bingo establishments. As reflected in the County's file, Brunson asked for a refund on January 10, 2002. Brunson testified she was told by Roddy Dickerson, the Assistant County Treasurer,[2] that he would look into the possibility of refunding the payments. Dickerson advised Brunson to seek a refund by letter to the County. By undated letter, Brunson requested the refund. Brunson testified this letter was sent in January of 2002.

In response, Brunson received an interoffice memo from the Horry County Attorney to Dickerson dated November 3, 2003.[3] The memo noted that Horry County charged hospitality fees on bingo between 1997 and 2001, but in 2001 determined it was inappropriate to charge the hospitality fees, and in March of 2003 the County was requested to refund the Posts' payments. The County Attorney counseled that the Posts may be barred from a refund in part or full by the application of the statute of limitations. The County Attorney concluded any refund would be improper regardless of the statute of limitations because the right to a refund of erroneously collected taxes is restricted to those upon whom the tax liability is imposed.

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[1] See S.C. Code Ann. § 12-21-4190 (2000) (providing for remittance of a percentage of the face value of bingo cards sold).

[2] By the time of the hearing, Dickerson was the County Treasurer.

[3] It is unclear if Brunson received this directly or from her attorney. The memo states Brunson first requested the refund in March of 2003.

In October of 2004, the Posts and Johnson filed this action. The County answered, raising, inter alia, the statute of limitations and standing. After a hearing, the trial court ordered the County to refund the amount remitted by the Posts and denied the County's motion for reconsideration. The County appealed.

## STANDARD OF REVIEW

An action to recover a tax erroneously paid is an action at law but equitable in its function. Stone v. White, 301 U.S. 532, 534 (1937). Such an action is governed by the equitable principles that underlie an action to avoid unjust enrichment. Id.; see Hollingsworth on Wheels, Inc. v. Greenville County Treasurer, 276 S.C. 314, 317, 278 S.E.2d 340, 342 (1981) (applying standard of review of action in equity to action for refund of property taxes). In applying equity, this court can find facts in accordance with its own view of the preponderance of the evidence. Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

## LAW/ANALYSIS

The County argues the Posts lack standing to seek a refund and the Posts' action is barred by a three-year statute of limitations.

### A. Standing

Relying on Furman University v. Livingston, 244 S.C. 200, 136 S.E.2d 254 (1964), the County argues the Posts lacked standing to seek a refund because they were not the parties responsible for the payment of the hospitality fees. We disagree.

In Furman, the University collected admission taxes from ticket-purchasers to athletic events and remitted them to the State under protest. Id. at 201, 136 S.E.2d at 254-55. The University filed an action alleging its athletic events were exempt from the admission tax statute and seeking recovery of the taxes remitted. Id. at 202, 136 S.E.d at 255. Our Supreme Court found the right to sue for erroneously paid taxes is restricted to those

on whom the tax liability is imposed. Id. at 204, 136 S.E.2d at 256. "A withholding or collection agent who has reimbursed himself by withholding or collecting the amount of the taxes from a third person is not entitled to a refund of such taxes. In such case, the right to a refund is in the 'taxpayer' from whom the funds were withheld or collected." Id. The court concluded the University was not the taxpayer under the facts of that case and therefore had no standing to seek a refund. Id. at 205, 136 S.E.2d at 256-57.

Like the trial court, we find we find Furman is distinguishable. Although section 19-6 provides the admissions fee is the liability of the consumer, the only evidence in the record is that the Posts paid the fees rather than collecting them from the consumers and was therefore the "taxpayer" under Furman. Accordingly, we affirm the trial court's finding the Posts had standing to seek a refund.

**B. Statute of Limitations**

The County next argues the Posts' action is barred by a three-year statute of limitations. We agree.

Section 12-54-85(F)(1) of the South Carolina Code provides: "claims for credit or refund must be filed within three years from the time the return was filed, or two years from the date the tax was paid, whichever is later." S.C. Code Ann. § 12-54-85(F)(1) (Supp. 2008). The statute further states: "A credit or refund may not be made after the expiration of the period of limitation . . . unless the claim for credit or refund is filed by the taxpayer or determined to be due by the department within that period." Id.

South Carolina Code Section 12-60-2150(G) provides:

> Even if a taxpayer has not filed a claim for refund, where no question of fact or law is involved, and it appears from the record that money has been erroneously or illegally collected from a taxpayer or other person under a mistake of fact or law, the department may . . . , within the period specified in

> Section 12-54-85 and upon making a record in writing of its reasons, order a refund to the taxpayer or other person.

Id. at § 12-60-2150(G) (2000).

In its first order, the trial court found Brunson's letter requesting the refund was an appeal of the imposition of the tax and tolled any statute of limitations. In its subsequent order denying the County's motion for reconsideration, the court found the County was estopped from raising the statute of limitations as a defense. The court found the County's conduct induced the Posts into believing a lawsuit was unnecessary.

**1. Equitable Tolling**

The County argues the court erred in finding Brunson's letter tolled the statute of limitations. We agree.

"South Carolina has rarely applied the doctrine of equitable tolling to halt the running of the statute of limitations. Equitable tolling is reserved for extraordinary circumstances." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct. App. 2008), cert. granted, (Nov. 20, 2008). The court in Hooper stated:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

> Equitable tolling has been deemed available where –
>
> – extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> – the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
>
> – the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

Id. at 231-32, 659 S.E.2d at 220-21, quoting 51 Am. Jur. 2d Limitation of Actions § 174 (2007). In this case, we find no extraordinary circumstances or active misleading by the County to warrant tolling the statutory period of limitations. Nothing prevented the Posts from learning of the governing statutes, as we find is required for due diligence. See Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981) (defining reasonable diligence as requiring an injured party to act with promptness where circumstances of an injury would put a person of common knowledge and experience on notice that some claim may exist). Accordingly, we find the trial court erred in finding Brunson's letter tolled the statute of limitations.

### 2. Estoppel

Lastly, the County argues the trial court erred in finding the County was estopped from raising the statute of limitations. We agree.

A defendant may be estopped from claiming the statute of limitations as a defense if delay in bringing the action was induced by the defendant's conduct. Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994). The defendant's conduct may consist of an express representation or conduct suggesting a lawsuit is not necessary. Id. Estoppel may apply against a government agency and the party asserting estoppel against the government must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position. Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008). Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests. Id. Estoppel will not lie against a governmental entity when a government employee gives erroneous information in contradiction of statute. Id. at 319, 659 S.E.2d at 267. "Simply stated, equity follows the law." Id.

We find the Posts do not meet the elements necessary to estop the County from raising the statute of limitations. The Posts are presumed to know the law and may not rely on contrary conduct by the County in contradiction of a statute. Accordingly, we find the trial court erred in finding the County estopped from relying on the statute of limitations.

## CONCLUSION

We affirm the trial court's finding on the issue of standing. We reverse the trial court's rulings on tolling and estoppel. However, it appears the Posts' cause of action was timely for at least two payments made by the Posts. Accordingly, we remand this action to the trial court to determine the refund due to the Posts.

**AFFIRMED IN PART, REVERSED IN PART, and REMANDED.**

**HEARN, C.J., and SHORT and KONDUROS, JJ. concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Hoss Hicks #2, Appellant.

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Appeal From Spartanburg County
Gordon G. Cooper, Circuit Court Judge

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Opinion No. 4510
Submitted February 3, 2009 – Filed February 25, 2009

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**AFFIRMED**

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Appellate Defender Kathrine H. Hudgins, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

John Benjamin Aplin, South Carolina Dept. of Probation, Parole and Pardon Services, of Columbia, for Respondent.

**WILLIAMS, J.:** Hoss Hicks (Hicks) appeals the circuit court's probation revocation and imposition of additional conditions of probation on the grounds that it violated separation of powers principles as well as the Ex Post Facto Clauses of the United States and South Carolina Constitutions. We affirm.

## FACTS

On September 14, 2005, Hicks waived grand jury presentment and pled guilty to one count of assault and battery of a high and aggravated nature. The charges stemmed from an encounter with a fourteen-year-old girl. Hicks was sentenced to ten years imprisonment suspended upon time served with five years probation. As a condition of probation, the sentencing judge held Hicks was to have no contact with and was not to live within five miles of the victim or her family. Hicks was further required to complete one hundred hours of public service and submit to random drug testing. Hicks was not, however, required to register as a sex offender.

The September 14, 2005 sentencing order also incorporated the Department of Probation, Parole and Pardon Services' (the Department) standard conditions of probation (the Standard Conditions). One of the Standard Conditions is Condition Two, which states: "I shall not change my residence or employment without the consent of my Agent. Further, I shall allow my Agent to visit me in my home, at my place of employment, or elsewhere at any time."

On September 15, 2005, the State filed a motion to reconsider the sentence. A hearing was held, and in an order issued December 12, 2005, the sentencing judge changed the initial sentence by ordering Hicks to register under the South Carolina Sex Offender Registry (the Registry). The other requirements of the original sentence remained unchanged. Hicks appealed the sentencing judge's decision requiring him to register.[1]

[1] That decision was affirmed by this Court on March 18, 2008. State v. Hicks, 377 S.C. 322, 324, 659 S.E.2d 499, 500 (Ct. App. 2008).

Beginning in January 2006, the Department instituted a new policy (the Sex Offender Policy), the goals of which were “to effectively supervise sex offenders, to protect the public, and to promote the rehabilitation of the offenders” and "to reduce the likelihood of future sexual victimization." Under the Sex Offender Policy, any person who, as of January 1, 2006, was required to register pursuant to the terms of the Registry and was being supervised by the Department would be subject to the standard sex offender conditions (the Sex Offender Conditions).

On May 19, 2006, Hicks appeared before the circuit court for a probation violation hearing. The violation report alleged, among other things,[2] Hicks had violated Condition Nine of the Sex Offender Conditions[3] (Condition Nine) by spending a night at the residence of the mother of his child. As to the alleged violation of Condition Nine, Hicks argued that by basing his revocation, even in part, on a violation of Condition Nine, the circuit court's imposition of the Sex Offender Conditions violated separation of powers principles as well as the Ex Post Facto Clause. The probation judge disagreed and issued a written order finding Hicks had violated the conditions of his probation. In the order, the court revoked probation, required Hicks to serve ninety days of his suspended sentence, and added, as a condition of probation, all of the Sex Offender Conditions.

After the circuit court imposed the additional Sex Offender Conditions on Hicks' probation, counsel for Hicks requested the court hear his specific

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[2] Also included in the violation report were allegations Hicks failed to pay supervision fees and a fine.

[3] Condition Nine states: “I will at all times maintain a suitable residence, approved by my agent, which complies with all conditions of my supervision, which may not be within one thousand (1000) feet of any area frequented by people under the age of 18, including but not limited to schools, day care centers, playgrounds, arcades, swimming pools or beaches, shopping malls, or theaters. I will obtain approval from my agent of my residence and employment and shall obtain prior approval from my agent before changing my residence or employment. I will stay at my approved residence every night and will not sleep or stay overnight anywhere else without prior approval of my agent.”

objections as to the reasonableness of each of the conditions. The circuit court refused to address the objections. This appeal followed.

## STANDARD OF REVIEW

The decision to revoke probation is in the discretion of the circuit court. State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003). An appellate court's authority to review such a decision is confined to correcting errors of law unless the lack of legal or evidentiary basis indicates the circuit court's decision was arbitrary and capricious. Id.

## LAW & ANALYSIS

### A. Separation of Powers

Hicks argues the circuit court's revocation of his probation based, at least in part, on violating Condition Nine of the Sex Offender Conditions violates separation of powers principles because the Sex Offender Conditions were not judicially imposed. We disagree.

Initially, the State argues Hicks' failure to pay fines and supervision fees constitute additional sustaining grounds to affirm the circuit court's revocation. We disagree.

The basis for respondent's additional sustaining grounds must appear in the record on appeal. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). At the revocation hearing, Hicks argued his failure to pay was not willful because he was unable to secure work. However, the circuit court never ruled on the issue of willfulness, instead appearing more concerned with Hicks' constitutional arguments. The trial court, therefore, never made an on-the-record finding that Hicks' failure to pay was willful. Accordingly, the State's argument is without merit. See State v. Spare, 374 S.C. 264, 268-69, 647 S.E.2d 706, 708 (Ct. App. 2007) (holding probation cannot be revoked solely for the failure to pay fines unless the trial court makes a finding on the record that probationer willfully failed to pay).

Nevertheless, we believe the revocation was proper because Condition Nine is merely an enhancement of a previous, judicially ordered condition, specifically Condition Two of the Standard Conditions, which prohibits Hicks from changing his residence or employment without the consent of his agent.

Section 24-21-430 of the South Carolina Code (Supp. 2008) states: "To effectively supervise probationers, the [Department] director shall develop policies and procedures for imposing conditions of supervision on probationers. These conditions may enhance but must not diminish court imposed conditions." (emphasis added). In other words, § 24-21-430 permits the Department to impose conditions of supervision that enhance conditions of probation ordered by the sentencing judge. State v. Stevens, 373 S.C. 595, 598, 646 S.E.2d 870, 872 (2007).

In Stevens, the appellant was alleged to have violated certain probationary conditions. Id. In lieu of issuing a probation revocation warrant based on violations of court imposed conditions, the Department entered into an agreement with the appellant whereby he consented to participate in the Department's Global Position System (GPS) Program. Id. Under the agreement, the appellant agreed to avoid certain "exclusion zones" near his former girlfriend's home and work. Id. Two months later, the Department issued a probation revocation warrant alleging appellant violated a condition of probation by entering one of the exclusion zones established by the agreement. Id. At the probation revocation hearing, appellant argued his violation of the agreement could not be the basis for a probation revocation because the terms of the agreement were not court imposed conditions. Id. The circuit court disagreed and revoked six months for his violation of an exclusion zone condition. Id.

The Supreme Court reversed. Stevens, 373 S.C. at 597, 646 S.E.2d at 871. The Court held § 24-21-430 does not authorize the Department to add conditions of probation, only conditions of supervision. Id. In explaining the difference between the two, the Court used the example of § 24-21-430(11), which requires a probationer to "submit to intensive surveillance[,] which may include surveillance by electronic means." Stevens, 373 S.C. at 872, 646 S.E.2d at 598. The Court stated:

> Where condition 11 is imposed by the court, [the Department] may require the probationer to participate in the GPS program as a condition of supervision under § 24-21-430 because this program would "enhance . . . court[]imposed conditions[.]" Under these circumstances, a violation of the GPS monitoring [condition] would be a violation of the "enhanced court imposed conditions" and therefore grounds for revocation. In this case, however, the sentencing court chose not to [impose condition 11]; [the Department] therefore could not unilaterally impose GPS monitoring on appellant as this method of supervision did not enhance a judicially[]ordered condition of probation.

Stevens, 373 S.C. at 872, 646 S.E.2d at 598. Thus, while the probationer's failure to avoid the exclusion zones violated the GPS monitoring condition of the agreement, such a violation was not grounds for probation revocation because the agreement itself was not an enhancement of any judicially ordered condition. Id. at 872, 646 S.E.2d at 599.

The present case, however, is distinguishable from Stevens. Here, the sentencing judge incorporated by reference the Standard Conditions as part of Hicks' original sentence. Condition Two of the Standard Conditions prohibits Hicks from changing his residence or employment without the consent of the agent. Likewise, Condition Nine of the Sex Offender Conditions prevents a probationer from changing residence or employment without the consent of the agent. When the circuit court imposed Condition Nine of the Sex Offender Conditions, this was merely an "enhancement" of Condition Two, a judicially ordered condition of probation. Accordingly, the circuit court's revocation was consistent with § 24-21-430.

**B. Ex Post Facto Clause**

Hicks argues the circuit court's imposition of the additional Sex Offender Conditions violates the Ex Post Facto Clause because the Sex

Offender Conditions were neither ordered by the sentencing judge nor in place at the time of sentencing. We disagree.

The Ex Post Facto Clauses of the United States and South Carolina Constitutions prohibit the enactment of any law that imposes a punishment for an act that was not punishable at the time it was committed or imposes additional punishment to what was then prescribed. Weaver v. Graham, 450 U.S. 24, 28 (1981); see also Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 501, 661 S.E.2d 106, 113 (2008) (stating an ex post facto violation occurs when a change in the law retroactively alters the definition of a crime or increases punishment for a crime). A law violates the Ex Post Facto Clause if (1) the law applies to events that occurred before its enactment and (2) the offender of the law is disadvantaged by the law. State v. Walls, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002).

The State argues element (1) is not satisfied because the statute that authorizes the Department to enhance court imposed conditions has existed in its current version since before Hicks' conviction. We agree.

In Cooper, the Supreme Court held the Parole Board did not violate the Ex Post Facto Clause when, several years after Cooper's conviction, the Board established factors to be considered in granting or denying parole and denied parole based on those factors. 377 S.C. at 501, 661 S.E.2d at 112. The Supreme Court held the Board had not "changed the standards for granting parole" and, therefore, had not applied the law retroactively because S.C. Code Ann. § 24-21-640, which specifically authorizes the Board to establish written criteria for granting parole, had not been substantively amended since before Cooper's conviction. Cooper, 377 S.C. at 501, 661 S.E.2d at 112. Here, § 24-21-430, which gives the Department the authority to enhance court-imposed probation conditions, has existed in its current version since May 20, 1996, nine years before Hicks was convicted. Accordingly, the Ex Post Facto Clause was not violated.

### C. Addition of All Standard Sex Offender Conditions

Hicks argues the circuit court lacked authority to impose upon him all of the Sex Offender Conditions. The State argues this issue is not preserved

for review because it was neither raised to nor ruled upon by the circuit court. We agree with the State.

For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the circuit court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). At the probation revocation hearing, after the circuit court added the Sex Offender Conditions to Hicks' probation, Hicks asked the circuit court to address whether each of the Sex Offender Conditions was reasonable. Hicks did not, however, challenge the circuit court's underlying authority to add the Sex Offender Conditions to the existing conditions of probation. Accordingly, the issue is not properly preserved.

In any event, § 24-21-430 gave the circuit court in this case the authority to modify Hicks' probation by imposing the additional Sex Offender Standards.

Hicks argues only the sentencing judge, not the probation judge, has the authority to modify conditions of probation. To support this position, Hicks cites State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007). There, this Court held a probation judge was not authorized to order placement on the Registry as a condition of probation. Id. at 17, 649 S.E.2d at 180.

However, Davis is distinguishable from the present case. In Davis, the probation judge lacked the authority to order placement on the Registry for two reasons. First, the State had already plea bargained away that condition at the sentencing hearing. Id. at 16, 649 S.E.2d at 180. Thus, once the sentencing judge's order became final, neither he nor the probation judge could add placement on the Registry without dishonoring the plea agreement. Id. In the present case, the State did not plea bargain away the Sex Offender Conditions.

Second, the statute at issue in Davis, § 23-3-430(D),[4] granted the power to order inclusion on the Registry only to the "presiding judge," i.e., the

[4] "Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding

sentencing judge. Id. at 17, 649 S.E.2d at 180. The present case deals with a different set of statutory provisions. S.C. Code Ann. § 24-21-410 states, "[T]he judge of a court of record with criminal jurisdiction at the time of sentence may . . . place the defendant on probation." (2007) (emphasis added). However, § 24-21-430 states, "The court . . . may at any time modify the conditions of probation[.]" (emphasis added). Thus, while § 24-21-410 gives the power to impose probation to the sentencing judge alone, § 24-21-430 gives the power to modify probation conditions to "the court" of general session of the particular county, and therefore, the probation judge in the present case had statutory authority to add the Sex Offender Conditions.

Accordingly, we hold the circuit court had the authority to modify the sentence by adding all of the Sex Offender Conditions.

**D. Reasonableness of Conditions**

Hicks argues the circuit court erred in refusing to make a determination as to the reasonableness of each of the additional Sex Offender Conditions. We disagree.

An appellate court will not reverse the circuit court's decision regarding probation unless the circuit court abused its discretion. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). Section 24-21-430 vests judges with "a wide, but not unlimited, discretion in imposing conditions of suspension or probation." State v. Brown, 284 S.C. 407, 410, 326 S.E.2d 410, 411 (1985). However, conditions of probation must be reasonable and judges cannot impose conditions that are illegal and void as against public policy. Beckner v. State, 296 S.C. 365, 366, 373 S.E.2d 469, 469 (1988); Brown, 284 S.C. at 410, 326 S.E.2d at 411. As the Court stated in Allen:

> Various conditions of probation generally have been upheld unless (1) the condition is so unreasonable or overly broad that compliance is virtually impossible

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judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor." S.C. Code Ann. § 23-3-430(D).

> and the burden imposed on the probationer is greatly disproportionate to any rehabilitative function the condition might serve; (2) the condition has no relationship to the crime of which the offender was convicted; (3) the condition requires or forbids conduct which is not reasonably related to future criminality; (4) the condition relates to conduct which is not in itself criminal unless the prohibited conduct is reasonably related to the crime of which the offender was convicted or to future criminality; (5) the condition violates due process because it is overly broad or void for vagueness; or (6) the condition unnecessarily or excessively tramples upon First Amendment rights of free association.

370 S.C. at 97, 634 S.E.2d at 657.

We do not believe the circuit court abused its discretion by refusing to address the reasonableness of each of the Sex Offender Conditions for several reasons. First, there is no statutory requirement that the probation judge explicitly address the reasonableness of each and every probation condition imposed. Second, we do not believe the Sex Offender Conditions are so unreasonable or overly broad as to be void as against public policy or their burden on Hicks is greatly disproportionate to the protective functions they serve. Third, the Sex Offender Conditions are related to Hicks' original crime, and they forbid conduct that is reasonably related to future criminality. Fourth, Hicks can raise the issue of reasonableness again if and when the Department seeks to revoke his probation on the basis of violating any of the Sex Offender Conditions.

## CONCLUSION

Accordingly, the trial court's decision is

**AFFIRMED.**[5]

**HUFF and KONDUROS, JJ., concur.**

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