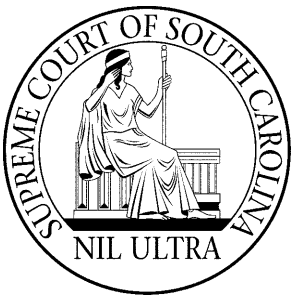

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12
March 29, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITIONS FOR REHEARING

26784 – Donald Austin v. Stokes-Craven Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

4529-State v. Jarod Tapp	Pending	
4637-Shirley's Iron Works v. City of Union	Pending	
4649-Sims v. Gregory	Pending	
4652-State v. Brayboy	Pending	
4653-Ward v. Evans	Pending	
2009-UP-594-Hammond v. Gerald and Kimpson	Pending	
2009-UP-596-Todd v. SCDPPPS	Pending	
2010-UP-001-Massey v. Werner Enterprises	Denied	03/24/10
2010-UP-059-State v. Webber	Denied	03/19/10
2010-UP-062-State v. Teamer	Pending	
2010-UP-072-State v. R. D. Brown	Denied	03/19/10
2010-UP-109-Johnson v. Cale Yarborough	Denied	03/18/10
2010-UP-111-Smith v. J. Metts	Pending	

2010-UP-117-State v. N. Teamer #1	Pending
2010-UP-131-State v. T. Burkhart	Pending
2010-UP-136-State v. R. Bryan	Pending
2010-UP-140-W. Chisholm v. S. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-142-State v. D. Evans	Pending
2010-UP-143-State v. L. Leverette	Pending
2010-UP-146-N. Majors v. E. Thode	Pending
2010-UP-154-State v. J. Giles	Pending
2010-UP-156-L. Alexander v. Abbeville Co. Memorial	Pending
2010-UP-158-V. Ambruoso v. F. Frank	Pending
2010-UP-159-State v. E. Boggans	Pending
2010-UP-162-State v. T. Washington	Pending
2010-UP-173-F. Edwards v. State	Pending
2010-UP-178-SCDSS v. Doss	Pending
2010-UP-181-State v. E. Boggans	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-187-State v. A. Jenkins	Pending
2010-UP-196-Black v. Black (4)	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page	Pending
4370-Spence v. Wingate	Pending
4441-Ardis v. Combined Ins. Co.	Pending
4451-State of South Carolina v. James Dickey	Pending
4462-Carolina Chloride v. Richland County	Pending
4472-Eadie v. Krause	Pending
4473-Hollins, Maria v. Wal-Mart Stores	Pending
4474-Stringer v. State Farm	Pending
4476-Bartley, Sandra v. Allendale County	Pending
4478-Turner v. Milliman	Pending
4480-Christal Moore v. The Barony House	Pending
4483-Carpenter, Karen v. Burr, J. et al.	Pending
4491-Payen v. Payne	Pending
4492-State v. Parker	Granted 03/17/10
4493-Mazloom v. Mazloom	Pending
4504-Stinney v. Sumter School District	Pending
4510-State v. Hicks, Hoss	Pending
4512-Robarge v. City of Greenville	Denied 02/04/10
4514-State v. J. Harris	Pending
4515-Gainey v. Gainey	Pending

4516-State v. Halcomb	Pending
4518-Loe #1 and #2 v. Mother	Pending
4522-State v. H. Bryant	Pending
4525-Mead v. Jessex, Inc.	Pending
4526-State v. B. Cope	Pending
4528-Judy v. Judy	Pending
4534-State v. Spratt	Pending
4541-State v. Singley	Pending
4542-Padgett v. Colleton Cty.	Pending
4544-State v. Corley	Pending
4545-State v. Tennant	Pending
4548-Jones v. Enterprise	Pending
4550-Mungo v. Rental Uniform Service	Pending
4552-State v. Fonseca	Pending
4553-Barron v. Labor Finders	Pending
4554-State v. C. Jackson	Pending
4560-State v. C. Commander	Pending
4561-Trotter v. Trane Coil Facility	Pending
4574-State v. J. Reid	Pending
4575-Santoro v. Schulthess	Pending
4576-Bass v. GOPAL, Inc.	Pending

4578-Cole Vision v. Hobbs	Pending
4585-Spence v. Wingate	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4598-State v. Rivera and Medero	Pending
4599-Fredrick v. Wellman	Pending
4600-Divine v. Robbins	Pending
4604-State v. R. Hatcher	Pending
4605-Auto-Owners v. Rhodes	Pending
4606-Foster v. Foster	Pending
4607-Duncan v. Ford Motor	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending
4611-Fairchild v. SCDOT/Palmer	Pending
4613-Stewart v. Chas. Cnty. Sch.	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4620-State v. K. Odems	Pending
4621-Michael P. v. Greenville Cnty. DSS	Pending

4622-Carolina Renewal v. SCDOT	Pending
4630-Leggett (Smith v. New York Mutual)	Pending
4631-Stringer v. State Farm	Pending
4635-State v. C. Liverman	Pending
4640-Normandy Corp. v. SCDOT	Pending
2008-UP-285-Biel v. Clark	Pending
2008-UP-565-State v. Matthew W. Gilliard	Denied 03/17/10
2009-UP-007-Miles, James v. Miles, Theodora	Pending
2009-UP-028-Gaby v. Kunstwerke Corp.	Pending
2009-UP-029-Demetre v. Beckmann	Pending
2009-UP-040-State v. Sowell	Pending
2009-UP-042-Atlantic Coast Bldrs v. Lewis	Pending
2009-UP-064-State v. Cohens	Pending
2009-UP-079-State v. C. Harrison	Pending
2009-UP-093-State v. K. Mercer	Denied 01/22/10
2009-UP-199-State v. Pollard	Pending
2009-UP-204-State v. R. Johnson	Pending
2009-UP-205-State v. Day	Pending
2009-UP-208-Wood v. Goddard	Pending
2009-UP-244-G&S Supply v. Watson	Pending
2009-UP-265-State v. H. Williams	Pending

2009-UP-266-State v. McKenzie	Pending
2009-UP-276-State v. Byers	Pending
2009-UP-281-Holland v. SCE&G	Pending
2009-UP-299-Spires v. Baby Spires	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-337-State v. Pendergrass	Pending
2009-UP-338-Austin v. Sea Crest (1)	Pending
2009-UP-340-State v. D. Wetherall	Pending
2009-UP-359-State v. P. Cleveland	Pending
2009-UP-364-Holmes v. National Service	Pending
2009-UP-369-State v. T. Smith	Pending
2009-UP-385-Lester v. Straker	Pending
2009-UP-396-McPeake Hotels v. Jasper's Porch	Pending
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-434-State v. Ridel	Pending
2009-UP-437-State v. R. Thomas	Pending
2009-UP-524-Durden v. Durden	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2009-UP-587-Oliver v. Lexington Cnty. Assessor	Pending
2009-UP-590-Teruel v. Teruel	Pending

The Supreme Court of South Carolina

James W. Dickert, Appellant/Respondent,

v.

Carolyn H. Dickert, Respondent/Appellant.

ORDER

The petition for rehearing is denied. The attached opinion, however, is substituted for the opinion previously filed in this matter.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

March 29, 2010

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Dickert, Appellant/Respondent,

v.

Carolyn H. Dickert, Respondent/Appellant.

Appeal From Greenville County
Timothy L. Brown, Family Court Judge

Opinion No. 26757
Heard December 1, 2009 – Re-filed March 29, 2010

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

David A. Wilson, of Horton, Drawdy, Ward & Jenkins, and Kenneth C. Porter, of Porter & Rosenfeld, both of Greenville, for Appellant/Respondent.

Timothy E. Madden and Megan G. Sandefur, both of Nelson Mullins Riley & Scarborough, of Greenville, for Respondent/Appellant.

CHIEF JUSTICE TOAL: This Court certified this case for review pursuant to Rule 204(b), SCACR.

FACTS/PROCEDURAL HISTORY

This is an appeal from a family court order granting Respondent/Appellant Carolyn H. Dickert (Wife) a divorce from Appellant/Respondent James W. Dickert (Husband).[1]

Husband and Wife began dating when Wife was fourteen years old and Husband was sixteen years old. Wife skipped her senior year of high school to join Husband at Clemson University. Upon Husband's graduation from Clemson, the parties moved to Charleston so Husband could attend dental school at the Medical University of South Carolina (MUSC). Husband and Wife were married in 1974 when Husband was twenty-three and a student at MUSC, and wife was twenty-one and working as a teacher.

While Husband was attending dental school, Wife was the sole breadwinner through her job as a teacher. When Husband finished dental school, the parties moved to Greenville where Husband opened a dental practice and worked at the county health department. Wife continued to teach while Husband established his dental practice. Upon moving to Greenville, the parties lived in an apartment. They then moved into a new house, where they lived for three years.

Wife continued to work until the birth of their first child in 1981. After the birth of their first child, Wife became a stay-at-home mother and primary caretaker of the children, and Husband was the primary breadwinner. Wife has not worked outside the home since 1981. Wife's primary roles were to maintain the home, maintain household finances, and support Husband in his dental practice.

[1] Both parties are appealing issues derived from the Amended Final Order filed September 17, 2007.

In 1984, Wife became pregnant with their second child, and the parties purchased a new house in Sugar Creek, an upper-middle-class subdivision in Greenville. The two sons grew up in this approximately 3,000 square foot home. While living in Sugar Creek, Husband's dental practice continued to grow and Wife continued as a stay-at-home mother. Husband was solely responsible for all of the income of the family while the parties shared child-rearing responsibilities. While living at Sugar Creek, Husband paid for a maid to assist Wife with some of the household chores. Wife continued to have a maid throughout the marriage. Throughout the marriage the parties engaged in social activities associated with the children's athletics and with their membership at Thornblade Country Club, including golf, tennis, and swimming.

In 2001, the parties decided to build their dream home in the Thornblade Country Club subdivision. The parties worked together to design a 7,000 square foot home in the Thornblade community. The parties invested approximately $900,000 in the home and moved into the Thornblade residence in May 2002. Within three months of moving into the Thornblade residence, Husband became involved in an adulterous relationship with Sandy Brockman (Brockman). Husband met Brockman on a golf trip to Hilton Head. Husband continued to see Brockman and informed Wife of his adulterous relationship in July of 2003.[2] Husband informed Wife he was unhappy and wanted a divorce so he could pursue a relationship with Brockman. Husband left the marital home in August 2003 and never returned. Husband commenced this marital dissolution action on October 30, 2003.

Husband's income at the time of trial was approximately $360,000 per year. Wife remained unemployed. Instead of seeking employment, Wife spent a significant amount of time playing tennis at the Thornblade Country Club. The marital estate of the parties was valued at approximately $2,000,000. The trial court awarded Wife forty-five percent of the marital

[2] Wife was granted an absolute divorce from Husband on the statutory ground of Husband's adultery.

estate and Husband fifty-five percent. The trial court awarded permanent periodic alimony to Wife in the amount of $8,600 per month. The trial court also ordered Husband to pay $99,000 in attorney's fees and costs.

ISSUES

I. Did the family court err by including the goodwill of Husband's dental practice in calculating the marital estate?

II. Did the family court err in apportioning forty-five percent of the marital estate to Wife?

III. Did the family court err in awarding Wife $8,600 per month in permanent periodic alimony?

IV. Did the family court err in awarding $99,000 to Wife in attorney's fees and litigation expenses?

STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Strickland v. Strickland*, 375 S.C. 76, 82, 650 S.E.2d 465, 469 (2007) (citation omitted). "This broad scope of review does not require the reviewing court to disregard the findings of the family court; appellate courts should be mindful that the family court, who saw and heard the witnesses, sits in a better position to evaluate credibility and assign comparative weight to the testimony." *Id.* (citation omitted).

LAW/ANALYSIS

I. Goodwill Included in Marital Estate

Husband argues the family court erred in determining the value of his dental practice by including goodwill in the amount of $256,519 to arrive at a value of $360,000 subject to equitable distribution. We agree.

This Court has defined "goodwill" in general:

> Goodwill may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

Donahue v. Donahue, 299 S.C. 353, 359, 384 S.E.2d 741, 745 (1989) (quoting *Levy v. Levy*, 164 N.J. Super. 542, 549, 397 A.2d 374, 377 (1978)). This Court has defined "professional goodwill" as having the following attributes:

> It attaches to the person of the professional man or woman as a result of confidence in his or her skill and ability. (cite omitted) It does not possess value or constitute an asset separate and apart from the professional's person, or from his individual ability to practice his profession. It would be extinguished in the event of the professional's death, retirement or disablement. (cite omitted)

Id. (quoting *Rathmell v. Morrison,* 732 S.W.2d 6, 17 (Tex. App. 1987)).

"'The very nature of a professional practice is that it is totally dependent upon the professional.'" *Id.* at 360, 384 S.E.2d at 745 (quoting *Powell v. Powell*, 648 P.2d 218, 223 (Kan. 1982)). "The definitions set forth above indicate the intangible nature of the goodwill asset . . . [and] [i]t is this intangibility which inevitably results in a speculative valuation." *Id.* This Court in *Donahue* held the family court erred in placing a value upon the goodwill of the husband's professional dental practice and attempting to equitably divide it. *Id.*; *see also Casey v. Casey*, 293 S.C. 503, 505, 362 S.E.2d 6, 7 (1987) (holding that goodwill in Husband's fireworks business does not constitute marital property subject to equitable distribution); *Keane v. Lowcountry Pediatrics*, 372 S.C. 136, 146, 641 S.E.2d 53, 59 (Ct. App. 2007) (holding that professional goodwill has no value that exists separate and apart from the professional).

In this case, the family court assigned the value of $360,000 to Husband's dental practice for purposes of equitable apportionment. In arriving at this number the family court included $256,517 in what it termed "enterprise goodwill." Wife wants this Court to follow other jurisdictions that subject "enterprise goodwill" to equitable apportionment. However, because of the intangible nature of the goodwill asset, "enterprise goodwill" in a professional practice is not subject to equitable distribution. Thus, the family court erred in including this "enterprise goodwill" in the amount of $256,517 in marital property to be equitably apportioned.

II. Equitable Distribution

The family court awarded fifty-five percent of the marital estate to Husband and forty-five percent of the marital estate to Wife. Because we reverse the family court's decision on "enterprise goodwill," we reverse and remand the family court's decision regarding equitable distribution. This will allow the family court to determine if a change in the marital apportionment should be made in light of the goodwill valuation change. This issue is to be tried on the record as it exists now. No more evidence is to be taken on remand to the family court.

III. Alimony

Husband argues the trial court abused its discretion in awarding $8,600 per month in permanent periodic alimony to Wife. We agree.

"An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." *Allen v. Allen*, 347 S.C. 177, 183-84, 554 S.E.2d 421, 424 (Ct. App. 2001) (citation omitted). Alimony is a substitute for the support that is normally incident to the marital relationship. *Spence v. Spence*, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Allen*, 347 S.C. at 184, 554 S.E.2d at 424 (citation omitted). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." *Id.* (citation omitted). "Alimony should not dissuade a spouse, to the extent possible, from becoming self-supporting." *Rimer v. Rimer*, 361 S.C. 521, 525, 605 S.E.2d 572, 574 (Ct. App. 2004) (citation omitted). Section 20-3-130(C) lists the factors the family court judge must consider in deciding whether to award alimony or separate maintenance and support.[3] *Hatfield v. Hatfield*, 327 S.C. 360, 364,

[3] S.C. Code Ann. § 20-3-130(C) (Supp. 2008) states:

> (C) In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to all of the following factors:
> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance action between the parties;
> (2) the physical and emotional condition of each spouse;
> (3) the educational background of each spouse, together with need of each spouse for additional training or education in order to achieve that spouse's income potential;
> (4) the employment history and earning potential of each spouse;
> (5) the standard of living established during the marriage;

489 S.E.2d 212, 215 (Ct. App. 1997). No one factor is dispositive. *Allen*, 347 S.C. at 184, 554 S.E.2d at 425 (citation omitted).

Husband concedes the family court considered all of the factors, but contends it abused its discretion in analyzing the factors. Husband's main contention is that the award of $8,600 a month allows wife to enjoy a

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> (6) the current and reasonably anticipated earnings of both spouses;
> (7) the current and reasonably anticipated expenses and needs of both spouses;
> (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action;
> (9) custody of the children, particularly where conditions or circumstances render it appropriate that the custodian not be required to seek employment outside the home, or where the employment must be of a limited nature;
> (10) marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce or separate maintenance decree if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage, except that no evidence of personal conduct which may otherwise be relevant and material for the purpose of this subsection may be considered with regard to this subsection if the conduct took place subsequent to the happening of the earliest of (a) the formal signing of a written property or marital settlement agreement or (b) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
> (11) the tax consequences to each party as a result of the particular form of support awarded;
> (12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and
> (13) such other factors the court considers relevant.

standard of living better than the marital standard. Husband points to several factors to show that during the majority of the marriage the couple did not live an extravagant lifestyle: for approximately twenty years of marriage the couple lived in the Sugar Creek subdivision; they did not move into Thornblade until May 2002; they did not drive luxury automobiles; and the wife even admitted that the standard of living she enjoyed in the Thornblade house was not the standard of living she enjoyed during the course of marriage.

Husband's expert determined that Wife would need $4,669 per month to enjoy the standard of living obtained during the marriage without imputed earnings. The court imputed earnings of $1,167 per month to Wife leaving her alimony need at $3,502 per month according to Husband. Wife contends the family court did not award her enough alimony. She argues she deserves $10,290 per month to maintain the marital standard of living. The family court found Husband's expert to be generally correct in his analysis of Wife's alimony needs. The family court also noted Wife's expert calculated her needs based on her expenditures for only 2002 and 2003. Because the family court found Husband's expert was generally correct concerning Wife's alimony needs and Wife's expert only considered two years in determining alimony, we find an award of $8,600 per month of permanent periodic alimony was an abuse of discretion. Moreover, we hold that an award of $7,000 per month in permanent periodic alimony will place Wife, as nearly as practical, in the same position she enjoyed during the marriage.

IV. Attorney's Fees

Husband argues the family court erred in awarding $99,000 in attorney's fees to Wife. We disagree.

The family court may order one party to pay a reasonable amount to the other party for attorney's fees and costs incurred in maintaining an action for divorce pursuant to S.C. Code Ann. § 20-3-130(H) (Supp. 2008). Whether to award attorney's fees is a matter within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Bakala v.*

Bakala, 352 S.C. 612, 633-34, 576 S.E.2d 156, 167 (2003). In determining whether to award attorney's fees, the following factors should be considered: (1) the party's ability to pay his or her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). When the family court finds an attorney's fee is justified, the amount of the fee should be determined by considering: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court addressed the four factors used to determine whether an award of attorney's fees is appropriate and correctly determined an award of attorney's fees was appropriate. The family court also addressed the six *Glasscock* factors in awarding attorney's fees. We hold that the family court did not abuse its discretion in awarding $99,000 in attorney's fees to Wife in a case presenting complex issues that required a great deal of time and energy to assess.

CONCLUSION

First, the family court erred by including the $256,517 in "enterprise goodwill" in the amount to be equitably apportioned. Second, because we reverse the family court's decision on "enterprise goodwill," we reverse and remand the family court's decision regarding equitable distribution. Third, we reverse the family court's alimony award and find that $7,000 per month in permanent periodic alimony will place Wife, as nearly as practical, in the same position she enjoyed during the marriage. Lastly, we affirm the family court's decision to award Wife $99,000 in attorney's fees.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Frances P. Segars-Andrews, Petitioner,

v.

Judicial Merit Selection Commission, The State of South Carolina, Andre Bauer, in his official capacity as President of the South Carolina Senate, and Glenn F. McConnell, in his official capacity as President Pro Tempore of the South Carolina Senate, and Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Respondents.

ORIGINAL JURISDICTION

Opinion No. 26791
Heard March 2, 2010 - Filed March 23, 2010

COMPLAINT DISMISSED

Morris D. Rosen, of Rosen Rosen & Hagood, LLC; Alexander M. Sanders; Armand Derfner, D. Peters Wilborn, Jr., Jonathan S. Altman, and Samuel Altman, of Derfner, Altman & Wilborn, LLC, all of Charleston, for Petitioner.

Michael R. Hitchcock, John P. Hazzard, V, and Kenneth M. Moffitt, Legal Counsel for the South Carolina Senate, of Columbia, for Judicial Merit Selection Commission, the Honorable R. Andre Bauer, in his official capacity as President of the S.C. Senate, and the Honorable Glenn F. McConnell, in his official capacity as President Pro Tempore of the S.C. Senate.

Bradley S. Wright, Charles F. Reid, and Patrick D. Dennis, Legal Counsel for the South Carolina House of Representatives, of Columbia, for Judicial Merit Selection Commission and the Honorable Robert W. Harrell, in his official capacity as Speaker of the S.C. House of Representatives.

Attorney General Henry D. McMaster and Assistant Deputy Attorney General J. Emory Smith, Jr., of the Office of the Attorney General, of Columbia, for the State of South Carolina.

Ruth F. Buck, of Mt. Pleasant, *pro se* amicus curiae.

Pamela E. Deal, of Deal & Deal, P.A., of Clemson, for amicus curiae South Carolina Chapter of the American Academy of Matrimonial Lawyers.

Constance A. Anastopoulo, of Charleston, for amicus curiae South Carolina League of Women Voters.

PER CURIAM: This is a matter in our original jurisdiction. For the reasons set forth below, we are constrained to dismiss the complaint.

I.
Factual/Procedural Background

Pursuant to the South Carolina Constitution, the election and re-election of justices and judges in South Carolina's unified judicial system is vested solely in the South Carolina General Assembly. These judgeships include supreme court justice, court of appeals judge, circuit court judge, and family court judge. The Judicial Merit Selection Commission (JMSC) is constitutionally and statutorily charged with evaluating the qualifications and fitness of all judicial candidates for election and re-election. Only those candidates found qualified by the JMSC may be submitted to and considered by the Legislature.

Judge Segars-Andrews (Petitioner) was elected by the General Assembly to the family court bench in 1993. Petitioner has served ably and with honor as a family court judge. The South Carolina House of Representatives honored Petitioner for her many years of volunteer service to the Charleston County Juvenile Drug Court. Since her election in 1994, Petitioner has been re-elected for successive six-year terms in 1998 and 2004.

Petitioner's current term expires on June 30, 2010. She applied for re-election with the JMSC in the normal course. No other individual filed for the judgeship. William R. Simpson, Jr., a disgruntled family court litigant, opposed Petitioner's re-election. After considering the litigant's complaint concerning Petitioner's failure to recuse in his divorce case, a majority of the JMSC found Petitioner unqualified, thereby foreclosing the Legislature's consideration of her re-election bid. The JMSC's finding was based solely on its determination, in the category of "ethical fitness," that Petitioner violated

Canons 2 and 2A of the Code of Judicial Conduct, Rule 501, SCACR, when she refused to recuse in a divorce action.[1]

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[1] The court of appeals affirmed Petitioner's denial of the plaintiff's motion for recusal in the divorce action. *Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008). The plaintiff also filed a complaint against Petitioner with the Commission on Judicial Conduct, alleging Petitioner had acted unethically. The Commission on Judicial Conduct dismissed the complaint, finding there was no evidence Petitioner had violated any ethical rules. The same allegations that were before the Commission on Judicial Conduct formed the basis for the JMSC's finding that Petitioner was unqualified. The JMSC's finding with regard to Petitioner's ethical fitness states the following:

> The Commission's investigation revealed evidence that [Petitioner]'s conduct caused an appearance of impropriety that led a litigant not only to question [Petitioner]'s ability to render a fair and impartial decision, but also to lose faith in the integrity of this state's judicial system.
>
> . . .
>
> It is the Commission's finding that [Petitioner] demonstrated an understanding of how the Canons of Judicial Conduct have been interpreted; however, in abruptly reversing her decision about recusal, based upon a submission from opposing counsel who had a financial and continuing relationship with her husband's law firm, she raised suspicions about her impartiality that were compounded by connections between opposing counsel and her husband's law firm and by her service on the board of the Office of Judicial Conduct. At the Family Court hearing on April 14, 2006, where she revealed the six-figure financial connection between her husband's law firm and opposing counsel, [Petitioner] vehemently insisted that she could not set the situation right for

Petitioner filed an action challenging the decision of the JMSC on multiple grounds, an action we accepted in our original jurisdiction. Petitioner raises several constitutional challenges, including separation of powers and a claim that legislative membership on the JMSC violates the constitutional prohibition against "dual office" holding. Respondents assert Petitioner's action should be summarily dismissed as a nonjusticiable political question. We disagree. The Complaint raises **legal** issues, which satisfy threshold justiciability requirements. Those legal challenges must be addressed and resolved. It is the duty of this Court to do so, and we have carefully considered Petitioner's legal challenges. While the complaint of Petitioner raises substantial and concerning judicial independence issues, it is our firm judgment that the law provides her no relief.

> [plaintiff] and that her only alternative was to let him have a new trial. When she failed to provide him with that alternative and gave only a perfunctory explanation that she was relying on opposing counsel's submission, she created an atmosphere of distrust that made [plaintiff] construe both her ruling and the system that authorized and sanctioned it as corruptible and capable of manipulation by persons with connections to a judge or a judge's spouse.
>
> For this reason, the Commission must find [Petitioner] unqualified.

II.

LAW / ANALYSIS

A. The Constitutionality of the JMSC and Separation of Powers

Article I, § 8 of the South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

The constitution vests in the Legislature the sole authority for the election and re-election of judges, specifically supreme court justices, court of appeals judges and circuit court judges. S.C. Const. art. V, §§ 3, 8 and 13. By statute, the Legislature is similarly charged with the election and re-election of family court judges. S.C. Code Ann. § 63-3-30(B) (2008).[2]

The constitution was amended by the people of South Carolina in 1997 to establish the JMSC. The JMSC was constitutionally established to mandate that all judgeships "which are filled by election of the General Assembly" be considered by the JMSC. Article V, § 27 provides in part:

> In addition to the qualifications for circuit court and court of appeals judges and Supreme Court justices contained in this article, the General Assembly by law shall establish a Judicial Merit Selection Commission to consider the qualifications and fitness of candidates for all judicial positions on these courts and on other courts of this State which are filled by election of the General Assembly. The General Assembly must elect the judges and justices from among the nominees of the commission to fill a

[2] The Legislature is also charged statutorily with the election and re-election of administrative law judges.

> vacancy on these courts. No person may be elected to these judicial positions unless he or she has been found qualified by the commission.

The Legislature established the JMSC, providing for its membership, powers, duties, functions and procedures. S.C. Code Ann. § 2-19-10 (2008). The provision regarding membership provides:

> (B) Notwithstanding any other provision of law, the Judicial Merit Selection Commission shall consist of the following individuals:
>
> (1) five members appointed by the Speaker of the House of Representatives and of these appointments:
>
> (a) three members must be serving members of the General Assembly; and
>
> (b) two members must be selected from the general public;
>
> (2) three members appointed by the Chairman of the Senate Judiciary Committee and two members appointed by the President Pro Tempore of the Senate and of these appointments:
>
> (a) three members must be serving members of the General Assembly; and
>
> (b) two members must be selected from the general public.

Petitioner states "[c]oncern has long been expressed that having the entire power and process of selecting judges vested in the legislature may tend to make the process too political." Accordingly, Petitioner asserts the "evident purpose of the people in adopting S.C. Const. Art. V, § 27 was to create a requirement beyond the power of the General Assembly, in the form of an independent body whose concurrence was a condition precedent to the General Assembly's selection of a judge." She argues the composition of the JMSC, established by the Legislature in Section 2-19-10(B), frustrates the very reason for its creation.

More specifically, Petitioner contends that the constitutional amendment precludes the presence of legislators on the JMSC. The use of the term "establish" in the constitutional amendment, she asserts, means the JMSC "was to be something new, not simply a remade version of the [earlier] Joint Legislative Committee for Judicial Screening." Citing opinions of this Court defining the term "establish," Petitioner maintains the intent of the amendment was to bring into being something that did not previously exist.

The structure of the South Carolina Constitution provides the analytical framework for resolving Petitioner's challenge. The provisions of the state constitution are not a grant but a limitation of legislative power, so that the Legislature may enact any law not expressly, or by clear implication, prohibited by the state or federal constitution. *Moseley v. Welch*, 209 S.C. 19, 39 S.E.2d 133 (1946). State constitutional provisions will not be construed to impose limitations beyond their clear meaning. *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935). Moreover, when the constitutionality of a statute is challenged, every presumption will be made in favor of its validity. A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the constitution. *Gold v. S.C. Bd. of Chiropractic Exam'rs*, 271 S.C. 74, 245 S.E.2d 117 (1978). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs. and Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999).

The question, then, is whether the language in article V, § 27 expressly or by clear implication precludes (as violative of separation of powers)

legislative membership on the JMSC. Because the constitutional amendment contains no express reference to legislative service on the JMSC, we are left with only the "clear implication" criteria. Here, Petitioner seeks to bolster her argument by blending judicial independence concerns with the constitutional prohibition against dual-office holding. As Petitioner's excellent counsel urged at oral argument, we should broadly construe our constitution because it does not expressly provide for the laudable goal of judicial independence. This argument is not without appeal, but it is irreconcilably at odds with the settled principle that the provisions of the state constitution are not a grant but a limitation of legislative power. Article V, § 27 simply contains no prohibition against legislative membership on the JMSC.

In making this determination, we are not persuaded by Respondents' argument that Act No. 391, 1996 S.C. Acts 2393, which added Chapter 19 to Title 2, including Section 2-19-10(B), was ratified on the same date as the joint resolution proposing the article V, § 27 amendment to the constitution. Respondents invite us to glean the meaning of the constitutional amendment from enabling legislation prepared prior to the vote on the constitutional amendment. We decline the invitation. While Respondents' argument may be technically correct, it is simply not realistic to give legal weight to the fiction that the electorate is sufficiently aware of enabling legislation at the time it votes on a constitutional amendment. The Constitution belongs to the people of South Carolina, not the Legislature. Our decision rests solely on the unambiguous language in article V, § 27, which contains no indication that the people intended to foreclose legislative membership on the JMSC.

The separation of powers argument that the Legislature is "both creating and executing" law must be rejected. In enacting Section 2-19-10 pursuant to the constitutional mandate of article V, § 27, the Legislature was acting within its constitutional role.

In exercising a political judgment in assessing the fitness of a judicial candidate, the JMSC is not constitutionally foreclosed from addressing in a political context a matter concomitantly determined by the judicial branch. To be sure, judicial independence considerations are implicated. Yet this Court may not, under the allure of separation of powers, intervene in what is a political question. As the JMSC correctly observes in its brief, "the Court is

being asked to delve into the subjective decision making process of the JMSC which is political in nature."

As noted, the complainant against Petitioner appealed the recusal issue to the court of appeals and filed a grievance with Commission on Judicial Conduct. The court of appeals affirmed Petitioner's decision not to recuse. The judicial grievance was dismissed.[3] Petitioner argues that in revisiting the recusal issue, the JMSC "usurped the power of the judicial branch by super-reviewing final legal determinations of the judicial branch." We find Petitioner's argument without merit. Simply stated, the Legislature has plenary authority over the political aspects of its constitutional authority in the election of judges. Beyond the legal / political distinction discussed above, we add the following observations.

Petitioner's notion of "super-reviewing" an action of the judicial branch would have merit but for the express constitutional delegation of authority to the legislative branch for the election and re-election of judges. It seems to

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[3] Petitioner relies on Rule 20 of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR, which states the following: "If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose unless the complaint is re-opened by the Commission." Petitioner argues Rule 20 was promulgated by this Court pursuant to article V, § 4 of the South Carolina Constitution and is binding on all state officials, including judges, legislators and the JMSC. Petitioner contends the JMSC violated Rule 20 when it took up the identical complaint previously dismissed by the Commission on Judicial Conduct and decided for itself that Petitioner had violated the Code of Judicial Conduct. Petitioner is correct as to the preclusive effect of a dismissal by the Commission on Judicial Conduct in a subsequent judicial proceeding. The JMSC is a political proceeding. We further observe the Commission on Judicial Conduct did not "re-open" the complaint; Petitioner signed a waiver authorizing the JMSC to have access to Commission on Judicial Conduct records. And finally, the JMSC was not responding to a Commission on Judicial Conduct finding, but to a direct complaint filed by Simpson in the JMSC. The JMSC had the authority to consider Simpson's complaint, notwithstanding the Commission on Judicial Conduct's prior consideration of the same complaint.

us that this point is most easily understood by applying the converse of Petitioner's argument. Assume the court of appeals reversed Petitioner's decision not to recuse or that the Commission on Judicial Conduct had made a finding adverse to Petitioner: would the JMSC be bound by that determination and be required to find Petitioner unqualified? Absolutely not.

What if Mr. Simpson had decided not to appeal Petitioner's recusal decision, due to lack of resources or otherwise? In that case, in the absence of an appellate court determination, would the JMSC be free to consider the matter? Or would Petitioner's "super-reviewing" position only apply in the presence of an appellate court determination? The implications are obvious, for we cannot place limitations on the ability of the JMSC to fully vet a judicial candidate based on the presence or absence of an appellate court determination. The same reasoning would apply with respect to a judicial grievance complaint. An individual wishing to file a complaint against a judge is not required to choose between the Commission on Judicial Conduct (a legal forum) and the JMSC (a political forum).

Consider also the case of *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007). This Court was presented with a **legal** challenge to appointments approved by the Legislature. Because the case presented a justiciable controversy, we reached the merits and declared as unlawful legislative appointments beyond the term prescribed by law. *Hardee* illustrates the fundamental distinction between a legal question and a political question. In the separation of powers context, the JMSC has acted in its political capacity. As a result, there has been no showing of an article I, § 8 separation of powers violation concerning the JMSC.

This returns us to Respondents' claim that Petitioner's complaint presents a nonjusticiable political question. "The nonjusticiability of a political question is primarily a function of the separation of powers." *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) (*SCPIF*) (citing *Baker v. Carr*, 369 U.S. 186, (1962). "The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *SCPIF*, 369 S.C. at 142-43, 632 S.E.2d at 278 (citing *U.S. v. Munoz-Flores*, 495 U.S. 385, 393-94, (1990)). Therefore, the

courts will not rule on questions that are exclusively or predominantly political in nature rather than judicial. *SCPIF*, 369 S.C. at 143, 632 S.E.2d at 278 (citing *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 111 (1948)). This Court, specifically, has declined to opine on issues where the constitution delegates authority to the Legislature. *See SCPIF* (holding the question of whether the JMSC properly determined residence of judicial candidate or gave proper weight to concerns regarding residency presented a nonjusticiable political question the Court should decline to answer because the power to determine if a person is qualified to hold judicial office is vested with the Legislature by the state constitution); *cf. Stone v. Leatherman*, 343 S.C. 484, 541 S.E.2d 241 (2001) (holding state constitution provides Senate with authority to judge election returns and qualifications of its members).

"In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198. In determining whether a question is political and nonjusticiable, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939). "Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine." *Baker*, 369 U.S. at 210-11. The political question doctrine "is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id.*

Indeed, this Court is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional, as the above reference to *Sloan v. Hardee* illustrates. While "[a]ll considerations involving the wisdom, policy, or expediency of an act are addressed exclusively to the General Assembly[,] . . . when the unconstitutionality of an act is clear to this court, beyond a reasonable doubt, then it is its plain duty to say so." *Elliott v. Sligh*, 233 S.C. 161, 103 S.E.2d 923 (1958); *see Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221 (1986) (stating the political question doctrine, which derives from the separation of powers doctrine, excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch). It is the duty of this Court to interpret and declare the meaning of the constitution. *Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999).

Accordingly, because of Petitioner's separation of powers argument, this Court must analyze the claim, which it has done. At the end of the day, Petitioner's separation of powers challenge presents not a legal question, but a nonjusticiable political question.

B. JMSC and Dual-Office Holding

Petitioner's dual-office argument presents a bona fide legal challenge. Article III, § 24 of the South Carolina Constitution provides:

> No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America, or any of them, or under any other power, except officers in the militia, members of lawfully and regularly organized fire departments, constables, and notaries public. If any member accepts or exercises any of the disqualifying offices or positions he shall vacate his seat.

Article VI, § 3 of the South Carolina Constitution provides:

> No person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia,

> notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention.

Petitioner asserts service on the JMSC is a constitutional office, a contention Respondents deny. A careful review of our jurisprudence compels a finding that the JMSC is an office in the constitutional sense.

"One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer." *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that "[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public." *Willis v. Aiken County*, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). "The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority. The duties must be performed independently and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer of body." 63C Am Jur. 2d *Public Officers and Employees* § 5 (2009).

The JMSC asserts it exercises no part of the sovereign and merely serves in an advisory capacity because the Legislature may reject the candidates approved by the JMSC. The JMSC misapprehends its power. The exercise of power of the sovereign by the JMSC is seen not only in its ability to favorably submit judicial candidates to the Legislature for consideration, but more importantly in its power to **exclude** candidates. The Legislature lacks any authority to consider a judicial candidate whose name is not favorably submitted by the JMSC. *See* S.C. Const. Art. V, § 27 ("No person may be elected to these judicial positions unless he or she has been found qualified by the commission."); S.C. Code Ann. § 2-19-80(B) and (C)(1) (2008) (providing that "the General Assembly … shall not elect a person not nominated by the commission [and] [i]f the commission does not

find the incumbent justice or judge qualified for the judicial office held and sought, his name shall not be submitted to the General Assembly for re-election and upon expiration of his then current term of office, he shall cease serving in that judicial position"). The JMSC exercises the power of the sovereign.

There can be no serious contention that the JMSC is not a constitutional office, for it exercises part of the sovereign and it possesses essentially all the additional characteristics, and more, commonly associated with an office in the constitutional sense. The features and powers of the JMSC include the authority to administer oaths; take depositions; issue subpoenas to compel the attendance of witnesses and the production of records; petition the circuit court in the case of "contumacy;" and most importantly, absolute control over which judicial candidates will, and will not, be submitted to the Legislature for a vote. *See* § 2-19-80(B).

A finding of an "office," for constitutional purposes does not end the inquiry. Our jurisprudence has a narrow, yet firmly established, exception which provides that "double or dual office holding in violation of the constitution is *not applicable to those officers upon whom other duties relating to their respective offices are placed by law*." *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947) (emphasis added). This exception is commonly referred to as the "ex officio" or "incidental duties" exception.

As applied here, service on the JMSC by members of the General Assembly is properly characterized as incidental to their legislative duties. This is so because the Legislature is impressed by our constitution with sole responsibility for the election and re-election of judges. Conversely, service on the JMSC by one who holds an office in the executive or judicial branch would violate the constitutional ban on dual-office holding. The "ex officio" or "incidental duties" exception may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the "ex officio" office. This narrow construction of the "ex officio" or "incidental duties" exception preserves inviolate the central feature of separation of powers in our constitution. S.C. Const. art I, § 8.

The case of *Ashmore v. Greater Greenville Sewer District* is instructive. In *Ashmore*, the General Assembly passed legislation calling for the building of an "Auditorium." The legislation provided for a "Board of Trustees" to oversee the issuance of bonds to finance the project. By law, the Board included many persons, including "the Senator and a Representative of [Greenville] County." Membership on the Board by legislators was successfully challenged as a violation of separation of powers and dual-office holding.

The *Ashmore* Court analyzed the constitutional issues:

> An enlightening discussion of the quoted provision is found in *Spartanburg County v. Miller*, 135 S.C. 348, 132 S.E. 673, 677, where it was said: 'As a general rule the Legislature of the state may not, consistently with the constitutional requirement here involved, undertake both to pass laws and to execute them by setting its own members to the task of discharging such functions by virtue of their offices as legislators, would seem to be self-evident. The principle, as we apprehend, upon the correct application of which depends the solution of any such problem as to the exercise by the Legislature of nonlegislative functions, is that the Legislature may properly engage in the discharge of such functions to the extent, and to the extent only, that their performance is reasonably incidental to the full and effective exercise of its legislative powers.' Paraphrasing the sentence which procedes [sic] this quotation from the opinion, it may be said that the members of the Legislature from Greenville County were elected for the purpose of making laws, not administering them.
>
> The principle stated in Spartanburg County v. Miller, supra, was applied in *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257, and a county bond issue act was held invalid for attempting to leave the execution of the law to the members of the legislature from the county. The authority of that decision cannot be consistently avoided in this. It requires similar holding of invalidity of the challenged provisions.

> The qualifications of members of the General Assembly are carefully set out in Article III of the constitution. Section 24 thereof forbids the holding of other public office or position, and provides that upon the acceptance of any such by a member he shall vacate his seat. The proposition seems to us to prove itself, that a member cannot sit upon the board of auditorium trustees established in the act under review and at the same time retain his membership in the General Assembly. The language of the fundamental law is plain and unambiguous. It admits of no doubt of its meaning.

Id. at 89-90, 44 S.E.2d at 94.

Service by members of the legislative branch in an office charged with the execution of the law violates separation of powers and dual-office holding. That was the case in *Ashmore*. *Ashmore* referenced the "ex officio" or "incidental duties" exception: "A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, *and the functions of the board or commission are related to the duties of the office*." *Id.* at 92, 44 S.E.2d at 95 (emphasis added).

Paraphrasing from *Spartanburg County v. Miller*, as approvingly referenced in *Ashmore*, members of the General Assembly may properly serve on the JMSC as such service is reasonably incidental to the full and effective exercise of their legislative powers. Accordingly, we dismiss Petitioner's dual-office claim against the members of the General Assembly who serve on the JMSC.

III.

Judicial Independence

The elephant in the room is judicial independence. A central feature of Petitioner's case concerns judicial independence. Echoing those same concerns, amici curiae briefs in support of Petitioner have been filed by the

South Carolina Chapter of the American Academy of Matrimonial Lawyers and the League of Women Voters of South Carolina. It is argued that the actions of the JMSC in finding Petitioner not qualified undermine the independence of the judiciary. More to the point, we are reminded that it is a chilling threat to judicial independence for judges to approach decision making knowing that the difficult and sometimes unpopular decisions they must make will be resurrected in the re-election process through a political lens.

All but three states impose some sort of re-election process, from public elections, to retention elections, to reappointment by the executive or the legislature. "Thus, in 47 states, incumbent judges know that their ability to keep their jobs depends on gaining the approval of others. This is hardly a scheme calculated to ensure that judges will apply the law. Reappointments and reelections are instituted precisely so that the incumbent judges do not stray too far from the preferences of the reappointing authorities. From an independence perspective, it makes no difference whether the re-selection is done by popular election or reappointment; in both cases judges are made answerable--accountable--for their decisions to an institution that is concerned with political results far more than with legal principle." Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451 (2008).

Judicial independence is not for the protection of judges, although it is often thought of in that context today. The principle of judicial independence is designed to protect our system of justice and the rule of law, and thus maintain public trust and confidence in the courts. With judicial independence, the winners are everyone.

We acknowledge the importance of judicial independence and our ethical mandate to uphold the integrity and independence of the judiciary. Indeed, this Court emphasized the cornerstone importance of judicial independence as support for its decision in *Grimball v Beattie*, 174 S.C. 422, 177 S.E. 668 (1934). In the depression years of the 1930s, the Legislature sought to allocate scarce revenues by reducing judicial salaries. Because the constitution provided that a judge's "compensation … shall not be diminished

during the term [of office],"[4] Grimball, a circuit judge, filed an action to declare the offending legislation unconstitutional and to recover the unpaid balance of his compensation.

This Court declared unconstitutional the legislative effort to reduce judicial pay. After reviewing the applicable constitutional provisions, the Court acknowledged the judicial independence concerns and found "convincing" the following language from the Oklahoma Supreme Court:

> If it be assumed that the only reason for the placing of this provision in our Constitution was to make secure to the public officials of this state the receipt of the salary fixed at the time of their election, then the suggestion of the withholding of the writ by this court would be entitled to the serious consideration of this court, but this assumption overlooks the history of the reasons for the insertion of this and similar provisions in the constitutions of practically all of the states and the Constitution of the United States. As applied to the judicial department, the history of such provisions shows clearly that they were inserted in the various constitutions for the purpose of making absolutely independent the judicial branch of the government, … the evident purpose expressed in each is the continuation of separate and independent branches of government.

Id. at 438, 177 S.E. at 675 (citing *Riley v. Carter*, 25 P.2d 666 (1933))

Grimball further quoted approvingly from a letter by former United States Supreme Court Chief Justice Taney to the Secretary of the Treasury:

> The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce

[4] S.C. Const. Art. V, § 16 (formerly § 9).

> their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

Id. at 441, 177 S.E. at 676.

The Court concluded by "quot[ing] the all-important language of the Declaration of Independence of the United States, wherein great citizens of South Carolina joined in declaring 'he, (the King) has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.' " *Id.*

Judicial independence served as an important adjunct to the *Grimball* decision. Yet the legal basis for the Court's ruling was the constitutional provision requiring that a judge's compensation not be diminished during his term of office. There is no such legal foundation to Petitioner's claim.

We are left with Petitioner's stand-alone judicial independence claim. Notwithstanding the undeniable significance of judicial independence, a judge's ethical duty to uphold judicial independence is not a grant of judicial power. We may not under some thinly veiled guise of law assert judicial power to an action taken by another branch that lies within its exclusive constitutional authority. The South Carolina Constitution expressly vests in the JMSC the sole determination of a judicial candidate's qualifications, and the General Assembly is constitutionally charged with the election and re-election of judges found qualified by the JMSC. Absent an unconstitutional exercise of those powers, the Court may not intervene in these political determinations. To judicially intervene in the purely political determination of the JMSC would itself violate separation of powers.

COMPLAINT DISMISSED.

TOAL, C.J., BEATTY, KITTREDGE, HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Paul Denman, Respondent,

v.

City of Columbia, City Council of the City of Columbia, City of Columbia Election Commission, Richland County Election Commission, Respondents,

and

Durham E. Carter, Appellant.

Appeal from Richland County
James R. Barber, Circuit Court Judge

Opinion No. 26792
Heard March 24, 2010 – filed March 24, 2010

REVERSED

Kevin A. Hall, Karl S. Bowers, Jr., and M. Todd Carroll, all of Hall & Bowers, of Columbia, for Appellant.

Jay Bender of Baker, Ravenel &, Bender, of Columbia, for Respondent Paul Denman.

Fernando Xavier Starkes, of Columbia, for Respondent City of Columbia Election Commission.
Kenneth E. Gaines, of Columbia, for Respondents City of Columbia and City Council of Columbia.

Bradley T. Farrar, of Columbia, for Respondent Richland County Election Commission.

PER CURIAM: In this election matter, appellant appeals an order of the circuit court enjoining the City of Columbia (City) from holding an election on April 6, 2010, to fill the unexpired term of a city council member who resigned. We reverse.

FACTS

Longtime City council member E.W. Cromartie resigned his District 2 City Council seat on March 9, 2010. The next day, City adopted a resolution requiring an election to be held on April 6, 2010, the same date as the general municipal election in Columbia,[1] to fill Cromartie's unexpired term. The resolution stated a notice of election must be published in The State Newspaper on or before March 14, 2010, and that the filing period for a person to file as a candidate would run from March 15th to March 19th.

The notice of election, which was published on March 14th, announced a general election for the City to be held on April 6. The notice stated the offices up for election were: (1) Mayor for term ending 2014; (2) Council Member for District 1 for term ending 2014; (3) Council Member for District 4 for term ending 2014; (4) Council Member for at-large seat for term ending

[1] Notice of elections for the office of Mayor, City Council District 1, City Council District 4, and one City Council at large seat were published in The State Newspaper on December 21, 2009, and again on January 3, 2010. There is no question that these notices were proper.

2014; and (5) Council Member for District 2 for term ending in 2012. The notice provided that people desiring to vote must have registered with the County Board of Voter Registration by March 5, 2010.

Paul Denman, a resident of District 2, filed a complaint in the circuit court on March 15th, arguing the action to hold the election to fill the District 2 seat was *ultra vires*. Denman sought an injunction to prevent City from conducting a special election on April 6th to fill the seat. Denman maintained he contemplated running for the seat to fill the unexpired term, but declined to do so because of the short time period between the announcement of the election and April 6th.

Appellant, who on March 16th filed his own complaint for an injunction, in which he maintained the election *must* be held on April 6th, sought to intervene in the instant action.

In the meantime, South Carolina House Representative James E. Smith sought an opinion from the Office of the Attorney General concerning the proper date for the election. On March 16th, the Attorney General issued an opinion in which he concluded it was permissible for City to hold the election to fill Cromartie's seat on April 6th, but that some constitutional questions as to the adequacy of notice existed. The Attorney General opined that any determination of constitutionality should be addressed by a court as quickly as possible. Based on this opinion, it appears, City elected to proceed with the election.

The circuit court heard this matter on March 18th. The next day, the court issued an order granting appellant's motion to intervene. Later that same day, the court granted an injunction in favor of Denman and ruled City could not hold the election to fill the vacant seat on April 6th, and the earliest date such election could occur is June 15, 2010. Appellant filed a notice of appeal and moved to expedite case. The Court granted the motion to expedite.

ISSUE

Did the circuit court err in granting an injunction and finding that City may not hold a special election to fill the District 2 seat the same day as the general election?

ANALYSIS

The legislature permits a municipality to hold its elections, primary or otherwise, whenever it wishes. S.C. Code Ann. § 5-15-50 (2004); Willis v. Wukela, 379 S.C 126, 665 S.E.2d 171 (2008). City has chosen to hold its general elections on the first Tuesday in April, rather than the first Tuesday following the first Monday in November. COLUMBIA, S.C. CODE § 6-6(a) (1998). The mayor and city council members are elected for terms of four years, and the terms for those offices are staggered, meaning one-half of the membership of the city council is elected every two years. COLUMBIA, S.C. CODE § 6-1(a) and (b) (1998).

At the heart of the instant dispute are three statutes. The first statute, S.C. Code Ann. § 5-7-200 (2004) governs the grounds for forfeiture of office of mayor or council member, and the method to fill vacancies in those offices. Section 5-7-200(b) provides, "[a] vacancy in the office of mayor or council **shall** be filled for the remainder of the unexpired term **at the next regular election** or at a special election if the vacancy occurs one hundred eighty days or more prior to the next general election." (Emphasis added).

In the instant case, Cromartie resigned less than 180 days before April 6, 2010, the date of the next general election. Therefore, § 5-7-200(b) appears to require that an election to elect a council member to replace Cromartie and fill his unexpired term take place on April 6th, provided the term "regular election" means the general election scheduled for the first Tuesday in April.[2] Otherwise, the position must be filled by a special

[2] We believe the Legislature likely meant for a regular election to be the general election. Notably, S.C. Code Ann. § 7-1-20(1) (1976 & Supp. 2009)

election, though the section does not specify precisely when such special election must occur.

The second statute, § 5-15-50 provides, "[e]ach municipal governing body may by ordinance establish municipal ward lines and the time for **general and special elections** within the municipality. **Public notice of the elections shall be given at least sixty days prior to such elections**." (Emphasis added).

The third statute, S.C. Code Ann. § 7-13-35 (2009), which is titled "Notice of general, municipal, special, and primary elections," provides as follows:

> The authority charged by law with conducting an election **must publish two notices of general, municipal, special, and primary elections** held in the county in a newspaper of general circulation in the county or municipality, as appropriate. . . . The first **notice must appear not later than sixty days before the election** and the second notice must appear not later than two weeks after the first notice.

(Emphasis added). Both of these general election statutes seem to require that, since Cromartie resigned on March 9th, sixty days notice is required prior to an election to fill the vacant seat.[3]

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defines a general election as the election held for the election of officers to the regular terms of office provided by law. Section 7-1-20(2) defines a special election as any other election provided by law to be held under the provisions of law applicable to general elections.

[3] Sections 5-7-200 and 5-15-50 were adopted by the legislature as part of Act 283 in 1975. Section 5-15-50 originally stated a municipality must provide at least ninety days notice of elections. It was amended in 1978 to lower that requirement to sixty days. Section 5-7-200 has never been amended. Section 7-13-35 was adopted in 1978, and it has been amended several times.

In granting the injunction, the circuit court found notice of the District 2 election was not published until March 14, 2010, twenty-three days prior to the general election date. He also found the period to campaign after the close of candidate filing was only eighteen days.

As to the issue of statutory conflict, the circuit court found that, where statutes cannot be read in harmony, the court must focus on constitutional policy considerations to resolve the dispute, and such focus necessarily involves an inquiry into the nature of an election. The court noted the United States Supreme Court has held voting is of the most fundamental significance under our constitutional structure, and that full and effective participation in the political process means a citizen can choose to become a candidate or participate as a voter.

Concerning the District 2 vacancy, the circuit court found Cromartie resigned unexpectedly after holding his position for more than twenty-five years. As a result of City's decision to hold the District 2 election on April 6th, it found citizens of District 2 only had approximately nine-and-a-half days to decide whether to file the documents necessary to effectuate a candidacy. The court found this time period was short for possible candidates, but that it had a much more profound effect on citizens of District 2 because voter registration books close thirty days prior to an election.[4] The court also found that, unless a District 2 resident was already registered to vote prior to the surprise resignation of Cromartie, whose seat was not set to expire until 2012, that voter could not vote in the April 6th election.

The circuit court also found registered voters who wish to vote, but are unavailable or unable to get to the ballot box, may be deprived of the opportunity to vote. The circuit court appeared to rule that absentee ballots, if made available only days before the election to voters who are in the military, overseas, or who are students, could disenfranchise voters.

[4] S.C. Code Ann. § 7-5-150 (Supp. 2009).

I. Statutory Construction

Appellant argues the circuit court erred in granting the injunction because § 5-7-200(b) is the more specific statute in that it deals precisely and exclusively with elections to fill vacancies in municipal offices, while §§ 5-15-50 and 7-13-35 deal generally with notice of elections. Based on our rules of statutory interpretation, we agree.

The primary purpose in interpreting statutes is to ascertain and effectuate the intent of the legislature. Cain v. Nationwide Prop. and Cas. Ins. Co., 378 S.C. 25, 29, 661 S.E.2d 349, 351 (2008). Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "It is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). However, where two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute. Hodges v. Rainey, id. at 85, 533 S.E.2d at 581; Stone v. City of Orangeburg, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994).

Furthermore, "[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Spectre, LLC v. S.C. Dept. of Health and Envtl. Control, __ S.C. __, 688 S.E.2d 844, 853 (2010). Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied. Atlas Food Systems and Serv., Inc. v. Crane National Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995); City of Rock Hill, v. S.C. Dept. of Health and Envtl. Control, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990); Sharpe v. S.C. Dept. of Mental Health, 281 S.C. 242, 245, 315

S.E.2d 112, 113 (1984). "Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement." Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 141-42, 628 S.E.2d 38, 41 (2006).

We hold § 5-7-200(b) is the more specific statute and §§ 5-15-50 and 7-13-35 are general statutes. The plain language of § 5-7-200(b) requires that a vacancy in a municipal office shall be filled for the remainder of the unexpired term at the next regular election if the vacancy occurs less than 180 days prior the next general election. In the instant case, Cromartie resigned less than 180 days prior to the April 6th election, which is the precise scenario envisioned by the legislature when it adopted § 5-7-200(b). Sections 5-15-50 and 7-13-35 are more general in nature.

While we acknowledge § 7-13-35 has a somewhat tortured procedural history concerning whether it applies to municipal elections, we believe this statute is general as to notice of all elections, and it cannot prevail over a specific statutory provision concerning the timing for elections to fill vacancies. The legislative history of § 7-13-35, while interesting, does not evidence a specific intent to repeal any portion of § 5-7-200. As such, we are constrained by the rules of statutory construction that a statute of specific nature is not to be considered as repealed in whole or in part by a later general statute, unless there is a direct reference to the former or the intent of the legislature to repeal is explicitly implied therein. Spartanburg County Dept. of Soc. Serv's v. Little, 309 S.C. 122, 125, 420 S.E.2d 499, 501 (1992).

Furthermore, while the circuit court found the issue of sufficient notice essentially controlled which statute applied, that finding was in error. First, although Denman argues permitting an election without sixty days notice creates an absurd result, we are not faced with an absurd result in the instant case. See e.g. Lancaster County Bar Assoc. v. S.C. Comm. on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008) (holding the Court should avoid construing a statute so as to lead to an absurd result, and it will reject an interpretation which leads to an absurd result that could not have been intended by the legislature). Here, the rules of statutory construction provide

that the specific statute must prevail over a general statute. Furthermore, while Denman has raised the issue of an election with substantially less notice than the one at issue in the present case,[5] such a situation is not before the Court.

Additionally, while §§ 5-15-50 and 7-13-35 require sixty days notice of elections generally, a number of statutes permit elections with less notice. For example, special elections relating to a change in the form of government, arguably a very significant decision for voters, require only three weeks notice pursuant to S.C. Code Ann. § 5-5-50 (2004). As noted by appellant, other issues such as bond referenda often call for shorter periods of time than the sixty days notice at issue in the instant matter. Yonce v. Lybrand, 254 S.C. 14, 173 S.E.2d 148 (1970) (noting a vote on a bond referendum required fifteen days notice to the public); see also S.C. Code Ann. § 4-11-265(D)(1) (1986) (requiring not less than five nor more than fifteen days notice of a referendum involving the budgetary powers and election of the governing bodies of special purpose districts).

II. Injunction

Appellant also argues the judge erred in enjoining City from conducting the election on April 6th. We hold that Denman has failed to satisfy his burden of showing he was entitled to an injunction.

Actions for injunctive relief are equitable in nature. See Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). In equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence. Id. at 4, 623 S.E.2d at 834. To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. Id. at 4, 623 S.E.2d at 834; Sanford v. S.C. State Ethics Com'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009). "An injunction is a drastic remedy issued by the court in its discretion to prevent

[5] Denman's example concerns a resignation on April 5th and an election to fill the vacancy the next day.

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).

We hold Denman has failed in his burden of showing he is entitled to injunctive relief because he cannot show irreparable harm. Notably, while he maintains voters in District 2 will be disenfranchised if the election is held on April 6th, he has presented no evidence, save for his own statement that he would have run for the office but for the short notice period, to prove any voter or prospective candidate has been disenfranchised. In fact, Denman's argument that candidates do not have proper notice of the election is directly contradicted in that eight candidates have filed to run for the District 2 seat. Denman has also failed to present, for example, any evidence that a voter who wishes to vote for a District 2 candidate cannot do so because the voter missed the deadline to register. Furthermore, while the circuit court found absentee voters could be disenfranchised, there is no evidence in the record that the County Election Commission does not have sufficient time to ensure absentee ballots are properly distributed. Finally, while we loathe the suggestion of any further litigation in this matter, Denman and other voters do have the option of contesting an election if irregularities exist. E.g. Armstrong v. Atlantic Beach Mun. Election Com'n, 380 S.C. 47, 668 S.E.2d 400 (2008). [6]

CONCLUSION

We hold the circuit erred in granting the injunction and in declaring a new schedule for the election. Therefore, the order is **REVERSED.**

TOAL, C.J., PLEICONES, BEATTY, HEARN, JJ., and ACTING JUSTICE JAMES E. MOORE, concur.

[6] We also note the circuit court ordered the election to fill District 2 vacancy could occur as early as June 15, 2010. However, this ruling ignores the timing requirements for a special election found in S.C. Code Ann. § 7-13-190(C) (Supp. 2009).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Rebecca Price, Respondent,

v.

Michael D. Turner, Appellant.

Appeal From Oconee County
Timothy M. Cain, Family Court Judge

Opinion No. 26793
Submitted February 4, 2010 – Filed March 29, 2010

AFFIRMED

Derek J. Enderlin, of Ross and Enderlin, of Greenville, and Appellate Defender Katherine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Rebecca L. Price, pro se, of Westminster, for Respondent.

Calvin Andrew Carroll, of N. Charleston, Malia N. Brink, of Washington, Stephen J. McConnell, of Meghan, Rohling, Kelly, Dechert, LLP, of Philadelphia, Susan King Dunn, of Charleston, for Amici Curiae, The American Civil Liberties Union Foundation, South Carolina National Office, the Brennan Center for Justice, The National Association of Criminal Defense Lawyers, The National

Legal Aid & Defender Association, and the South Carolina Association of Criminal Defense Lawyers.

CHIEF JUSTICE TOAL: In this case, Michael R. Turner (Appellant) appeals the family court's order holding Appellant in contempt of court for failure to pay child support. We certified the appeal pursuant to Rule 204(b), SCACR, and affirm.

FACTUAL/PROCEDURAL BACKGROUND

In January 2008, Appellant appeared in family court on a rule to show cause for failure to pay child support. Appellant was not represented by counsel. At the time of the hearing, Appellant owed nearly six thousand dollars in child support payments and had not made a payment in a year and a half. Appellant testified that his failure to pay was due to incarceration, drug addiction, unemployment, and injury. The court found Appellant in willful contempt of the child support order and sentenced him to twelve months in a detention center, which sentence he could purge himself of and avoid by full payment of his child support arrearage.

Appellant appealed the family court's order to the court of appeals. This Court certified the case pursuant to Rule 204(b), SCACR.

STANDARD OF REVIEW

A finding of contempt rests within the sound discretion of the trial judge. *Durlach v. Durlach*, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (citation omitted). Such a finding should not be disturbed on appeal unless it is unsupported by the evidence or the judge has abused his discretion. *Id.*

LAW/ANALYSIS

Appellant argues the Sixth and Fourteenth Amendments of the United States Constitution guarantee him, as an indigent defendant in family court, the right to appointed counsel before being sentenced to one year imprisonment for civil contempt. We disagree.

The purpose of civil contempt is to coerce the defendant to comply with the court's order. *Poston v. Poston*, 331 S.C. 106, 111, 502 S.E.2d 86, 88 (1998). In contrast, criminal contempt is intended to punish a party for disobedience and disrespect. *Id.* Civil contempt sanctions are conditioned on compliance with the court's order. *Id.* at 112, 502 S.E.2d at 89. Criminal contempt sanctions are unconditional. *Id.* at 111, 502 S.E.2d at 88. Thus, when the court orders imprisonment for contempt, whether the sanction is civil or criminal depends upon whether the sentence is conditional or for a definite period. *Id.* at 111-12, 502 S.E.2d at 89. A contemnor imprisoned for civil contempt is said to hold the keys to his cell because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do. *Id.* at 112, 502 S.E.2d at 89. This distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards not mandated in civil contempt proceedings. *See Miller v. Miller*, 375 S.C. 443, 457, 652 S.E.2d 754, 761 (Ct. App. 2007).

Here, the family court judge found Appellant in willful contempt of the support order and sentenced him to twelve months in a detention facility, stating, "He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release."[1] This conditional sentence is

[1] This sentence is statutorily permitted by S.C. Code Ann. § 63-3-620, which provides for, among other penalties, imprisonment for up to one year for contempt of court.

a classic civil contempt sanction. Therefore, Appellant is not constitutionally entitled to appointment of counsel.[2]

[2] We recognize that in holding a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position. Several jurisdictions have held that appointment of counsel is not constitutionally required before a civil contemnor may be incarcerated. *See Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983) (holding due process did not require appointment of counsel in civil contempt proceeding where father had ability to pay but willfully refused to do so); *Meyer v. Meyer*, 414 A.2d 236 (Me. 1980) (finding a defendant in family court is not entitled to appointment of counsel before being jailed for civil contempt for nonsupport); *Duval v. Duval*, 322 A.2d 1 (N.H. 1974) (holding court has discretion to appoint counsel in nonsupport civil contempt hearing, but is not constitutionally mandated); *State ex rel. Dep't of Human Servs. v. Rael*, 642 P.2d 1099 (N.M. 1982) (holding due process does not require appointment of counsel in all cases of civil contempt for nonsupport). The majority of courts that have considered this issue have determined indigent defendants do have a right to appointment of counsel before being incarcerated for civil contempt. *See e.g.*, *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984); *United States v. Bobert Travel Agency, Inc.*, 699 F.2d 618 (2d Cir. 1983); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973); *Johnson v. Zurz*, 596 F. Supp. 39 (N.D. Ohio 1984); *Ex parte Parcus*, 615 So. 2d 78 (Ala. 1993); *Black v. Div. of Child Support Enforcement*, 686 A.2d 164 (Del. 1996); *May v. Coleman*, 945 S.W.2d 426 (Ky. 1997); *Rutherford v. Rutherford*, 464 A.2d 228 (Md. 1983); *Mead v. Batchlor*, 460 NW.2d 493 (Mich. 1990); *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984); *McBride v. McBride*, 431 S.E.2d 14 (N.C. 1993); *State ex rel. Gullickson v. Gruchalla*, 467 N.W.2d 453 (N.D. 1991); *Pasqua v. Council*, 892 A.2d 663 (N.J. 2006); *Russell v. Armitage*, 697 A.2d 630 (Vt. 1997); *Tetro v. Tetro*, 544 P.2d 17 (Wash. 1975). However, we are persuaded that the minority position held by Florida, Maine, New Hampshire, and New Mexico is sound and in keeping with controlling precedent.

CONCLUSION

We hold that Appellant does not have a constitutional right to appointed counsel before being incarcerated for civil contempt for nonsupport. Because Appellant may avoid the sentence altogether by complying with the court's previous support order, he holds the keys to his cell door and is not subject to a permanent or unconditional loss of liberty. We affirm the family court's ruling.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Bank of New York, as Trustee for the Holders of EQCC Asset Backed Certificates, Series 2001-1F, Respondent/Appellant,

v.

Sumter County, South Carolina; Linwood S. Evans; South Carolina Judicial Department; and Shirley D. Holloman, Defendants,

of whom Sumter County, South Carolina is Appellant/Respondent,

and South Carolina Judicial Department is Respondent.

Branch Banking and Trust Company, Respondent/Appellant,

v.

Sumter County, South Carolina; Linwood S. Evans; South Carolina Judicial Department; and Shirley D. Holloman, Defendants,

of whom Sumter County, South Carolina is Appellant/Respondent,

and South Carolina Judicial Department is Respondent.

Branch Banking and Trust Company, Respondent/Appellant,

v.

Sumter County, South Carolina; Linwood S. Evans; South Carolina Judicial Department; and Shirley D. Holloman, Defendants,

of whom Sumter County, South Carolina is Appellant/Respondent,

and South Carolina Judicial Department is Respondent.

Deutsche Bank National Trust Company, as Trustee under the Pooling and Servicing Agreement dated as of March 1, 2003, Morgan Stanley Dean Witter Capital 1, Inc., Trust 2003-NC3, Respondent/Appellant,

v.

Sumter County, South Carolina; Linwood S. Evans; South Carolina Judicial Department; and Shirley D. Holloman, Defendants,

of whom Sumter County, South Carolina is Appellant/Respondent,

and South Carolina Judicial Department is Respondent.

GMAC Mortgage, LLC, Respondent/Appellant,

v.

Sumter County, South Carolina; Linwood S. Evans; South Carolina Judicial Department; and Shirley D. Holloman, Defendants,

of whom Sumter County, South Carolina is Appellant/Respondent,

and South Carolina Judicial Department is Respondent.

Appeal from Sumter County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26794
Heard November 17, 2009 – Filed March 29, 2010

AFFIRMED IN PART; DISMISSED IN PART

William H. Davidson, II, and Andrew F. Lindemann, both of Davidson & Lindemann, of Columbia, for Appellant/Respondent Sumter County.

Gerald M. Finkel, Sean A. O'Connor, and Brendan P. Langendorfer, all Finkel & Altman, of Charleston, for Respondent/Appellant GMAC Mortgage Corporation.

Robert P. Wood, of Rogers Townsend & Thomas, of Columbia, for Respondents/Appellants Bank of New York, Branch Banking & Trust Co., and Deutsche Bank.

T. Parkin Hunter and Jonathan B. Williams, both of Office of the Attorney General, of Columbia, for Respondent South Carolina Judicial Department.

Robert E. Lyon, Jr., General Counsel, and M. Clifton Scott, Sr., Staff Attorney, both of Columbia, for Amicus Curiae South Carolina Association of Counties.

PER CURIAM: These appeals are from an order granting the South Carolina Judicial Department (SCJD) summary judgment in five consolidated tort suits brought by lending institutions (Lenders)[1] that lost foreclosure

[1] Bank of New York; Branch Banking and Trust Company (2 suits); Deutsche Bank National Trust Company, as Trustee; and GMAC Mortgage, LLC.

proceeds as the result of embezzlement by defendant Holloman, at the time an employee of the Sumter County Master-in-Equity's office. The former Sumter County Master who employed Holloman, Linwood Evans (Evans), is also a defendant. Holloman was able to carry out her criminal scheme because Evans gave her signed blank checks, and did not reconcile bank statements. Lenders have appealed and filed a joint brief, and Sumter County (County) has also appealed. We affirm the Lenders' appeal and dismiss the County's appeal.

FACTS

The master-in-equity courts, which are county-based, are part of the unified judicial system. S.C. Code Ann. § 14-11-10 (Supp. 2008); Kramer v. County Council of Dorchester County, 277 S.C. 71, 282 S.E.2d 850 (1981). The master is appointed to a six-year term by the Governor, subject to the advice and consent of the General Assembly. S.C. Code Ann. § 14-11-20 (Supp. 2008). Candidates for the office must submit applications to, and be reviewed by, the Judicial Merit Selection Commission (Commission), which then submits reports and recommendations to the county legislative delegation. S.C. Code Ann. § 2-19-110 (2005). Only candidates found qualified by the Commission may be submitted by the delegation to the Governor for consideration as appointee to the office. Id.

The equity courts are considered a division of the circuit court. S.C. Code Ann. § 14-11-15. A master is entitled to the same benefits and is subject to the same requirements of the South Carolina Bar as a circuit or family court judge, and is subject to the same Supreme Court rules as these judges. Id. Masters, however, are not entitled to participate in the state judicial retirement system. Id. The county in which the master serves is responsible for providing "the salary, equipment, facilities, and supplies" for the master, the salaries of his support personnel, and all other costs associated with the master's office's "necessary and proper operation." S.C. Code Ann. § 14-11-30 (Supp. 2008). Section 14-11-30 also establishes the formula, based upon population and the salary of a circuit judge, for determining each

county's master's salary. Id. All fees and costs recovered by the master are to be paid into the county's general fund. S.C. Code Ann. § 14-11-40 (Supp. 2008).

The Supreme Court may remove a master from office for misconduct under Rule 7(b)(1), Rules for Judicial Disciplinary Enforcement (RJDE), Rule 502, SCACR. The Governor, too, may remove a master from office. S.C. Code Ann. § 1-3-240(A) (2005).

The trial court had before it motions for summary judgment filed by Lenders, Evans, County, and SCJD. All motions, except that of SCJD, were denied in summary orders. The order granting SCJD's summary judgment contains these findings:

> A. Holloman is not an employee of SCJD;
>
> B. Evans is not an employee of SCJD;
>
> C. SCJD is not required by law to supervise masters' management of their bank accounts: SCJD monitoring is limited to caseloads, and auditing of caseloads only, and therefore SCJD could not be negligent for failing to monitor the Sumter County Master's bank account;
>
> D. Since Evans was not its employee, SCJD cannot be liable for negligent supervision of him;
>
> E. There is no fiduciary relationship between SCJD and Lenders;
>
> F. Since SCJD exercised no ownership rights over foreclosure funds to the exclusion of Lenders, did not derive any benefit from those funds, and had no duty to safeguard, hold or deliver those funds, summary

judgment on Lenders' conversion and constructive bailment claims was appropriate; and

G. SCJD is immune from liability on the basis of judicial immunity and the Tort Claims Act (TCA).[2]

On appeal, Lenders raise a number of issues, some of which are directed to the potential liability of the County. Since the appealed order granted summary judgment to SCJD only, County's liability is an open question to be resolved first at the circuit court level. We therefore decline to address any issues related to County's liability.

In its appeal, County has raised two issues, asking whether Evans and/or Holloman was an employee of SCJD. We decline to address these issues, and dismiss County's appeal. County, unlike Lenders, chose not to file any responsive pleading to SCJD's summary judgment motion, but instead filed only a summary judgment motion on its own behalf. In asking this Court to hold that Evans and Holloman are SCJD employees, County is in reality asking the Court to reverse the trial judge's denial of its summary judgment motion, which was predicated in part on County's contentions that Evans and Holloman were SCJD employees. Since it is well-settled that an order denying summary judgment is never reviewable on appeal, Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003), we dismiss County's appeal.

LENDERS' ISSUES

1) Whether the circuit court erred in granting summary judgment to SCJD finding Evans was not its employee?

2) Whether the circuit court erred in granting SCJD summary judgment on Lenders' negligent supervision theory?

[2] S.C. Code Ann. §§ 15-78-10 et seq. (2005 and Supp. 2008).

3) Whether the circuit court erred in holding SCJD did not have a duty to supervise Evans' bank accounts?

4) Whether the circuit court erred in holding that SCJD had no duty to audit Evans' books?

5) Whether the circuit court erred in holding SCJD did not owe Lenders a fiduciary duty to safeguard foreclosure funds?

6) Whether the circuit court erred in granting SCJD summary judgment on the Lenders' conversion theory?

7) Whether the circuit court erred in holding there was no constructive bailment between SCJD and the Lenders?

8) Whether a writ of mandamus should issue requiring SCJD to give Lenders the foreclosure funds?

9) Whether the circuit court erred in holding that SCJD is immune under the Torts Claim Act and/or the doctrine of judicial immunity?

Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(e), SCRCP. On review of an order granting summary judgment, the appellate court applies the same standard as that used by trial court. Edwards v. Lexington County Sheriff's Dep't, ____ S.C. ____, 688 S.E.2d 125 (2010).

ANALYSIS

1. Was SCJD Evans' employer?

The Lenders argue the trial court erred in finding SCJD was not Evans' employer, and they also argue that he was, in fact, the dual employee of both SCJD and County. Since the trial court did not address the dual employee issue, it is not preserved for our review. Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009) (issue must be raised and ruled upon below to be preserved for appeal). We affirm the circuit court's ruling that Evans was not an employee of SCJD.

As explained above, the trial court's order held that the Lenders' contention that Evans was an employee of SCJD rested on three specific actions:[3]

> The Supreme Court suspended Evans from office;
>
> 1) The Supreme Court authorized County and the County Sheriff to audit the records in the Evans' Master's Office; and
>
> 2) Court Administration "told Sumter County what Judge Evans' salary would be."

The judge concluded that none of these actions created a genuine issue of material fact as to the existence of an employment relationship between SCJD and Evans, and granted SCJD summary judgment. We agree.

[3] Since there was no objection to the trial judge's analytical approach to this issue below, it is the law of the case ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unchallenged ruling, right or wrong, is the law of the case).

The first two alleged indicia of employment, the suspension of Evans and the subsequent audit, came about as the result of judicial disciplinary proceedings. By statute, masters are subject to discipline by the Supreme Court for violations of the Code of Judicial Ethics, S.C. Code Ann. § 14-11-15; see also Rule 7(b)(1), RJDE, Rule 502, SCACR. We agree with the trial judge that actions taken by SCJD in the course of a judicial disciplinary proceeding are not indicia of an employee/employer relationship: to hold otherwise, for example, would make SCJD the employer of all attorneys, since all members of the bar are subject to disciplinary investigation, including suspension by the Court and/or an audit.

The third fact advanced by the Lenders in support of their opposition to SCJD's summary judgment motion on the employment issue was that SCJD, through Court Administration, "told Sumter County what Evans' salary would be." By statute, the salary of a master is based upon a formula which takes into account both the salary of a circuit court judge and the county's population. See § 14-11-30. While Court Administration sends a letter to each county government calculating the master's salary for that county using the statutory formula, that salary is determined by the formula, not by the SCJD.

We affirm the order which grants SCJD summary judgment on Lenders' claim that Evans' was an employee of SCJD, finding no material issue of fact here. Edwards, *supra*.

2. Negligent Supervision

Lenders contend the trial court erred in granting SCJD summary judgment on their negligent supervision claims. As Lenders acknowledge, this claim fails since we affirm the trial judge's ruling that Evans was not an employee of SCJD. Moreover, even if there were an employment relationship, this cause of action lies "in circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public …." James v. Kelly Trucking Co., 377 S.C. 628, 661 S.E.2d 329 (2008). There is no evidence here that SCJD knew

or should have known that Evans or Holloman posed an "undue risk of harm to the public."

The order is affirmed to the extent it grants SCJD summary judgment on the Lenders' negligent supervision cause of action. Edwards, *supra*.

3. Duty to supervise a master's bank accounts and his audit books

Lenders contend that statutes impose a duty on SCJD to supervise a master's bank accounts and his audit books. The Lenders would find this duty in either the Chief Justice's administrative authority to "examine the administrative methods, systems and activities of the courts and their employees" pursuant to S.C. Code Ann. § 14-1-90, or through the Judicial Council (which they contend is a part of SCJD), a body authorized to "study and survey the administration of justice…and of the organization, procedure, practice, rules and methods of administration and operation of each and all of the courts…." S.C. Code Ann. § 14-27-70(1) (1976). We agree with the circuit court judge that summary judgment is appropriate here as there is no duty on the part of SCJD.

Neither § 14-1-90 nor § 14-27-70(1) imposes a duty on SCJD to supervise a master-in-equity's bank accounts and/or audit books. Instead, by statute, this auditing duty is placed on the county. S.C. Code Ann. § 4-9-150 (Supp. 2008). Even if § 14-1-90 or § 14-27-70(1) were read to create such a duty, Lenders have not made any showing that their claims would not be precluded by the public duty rule. E.g., Arthurs ex rel. Estate of Munn v. Aiken County, 346 S.C. 97, 551 S.E.2d 579 (2001) (presumption that statute creating or defining duties of public office create no duty of care towards individual members of the general public).

We affirm the trial judge's decision granting SCJD summary judgment on Lenders' duty to audit/supervise claims.

4. Fiduciary Duty

Lenders contend the trial judge erred in finding SCJD did not owe lenders a fiduciary duty to protect the funds held in the Evans' foreclosure account. Lenders' argument is premised, in the first instance, on the assertion that the courts, that is, SCJD requires that masters hold these funds.

Under current practice, authority for the master to hold these funds is found in Rule 71, SCRCP. The requirement that the master hold these funds in an account over which he has control derives not from this rule, however, but rather from the foreclosure statutes which permit, among other things, the seeking of a deficiency judgment. When such a judgment is sought, upset bids are allowed, and where such a bid is made, the initial deposit may have to be returned. S.C. Code Ann. §§ 15-39-720 and -750 (2005). In order to comply with this statutory possibility, the master must control the funds. Moreover, by statute, a master's fee for a real estate foreclosure is set at 1% "of the bid or of the funds passing through the court, whichever is greater." S.C. Code Ann. § 14-11-310 (Supp. 2008). This statute anticipates that the funds will be held by the master.

It is simply inaccurate to state that the courts (or SCJD), rather than statutes and a rule which implements the statutory practices (submitted to the General Assembly) require that masters hold these funds.

We affirm the grant of summary judgment to SCJD on Lenders' fiduciary duty theory, which is premised on a factual inaccuracy.

5. Conversion

Conversion is "the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." Moore v. Weinberg, 383 S.C. 583, 681 S.E.2d 875 (2009). Lenders' conversion argument is simply an extension of its negligent supervision argument: SCJD negligently supervised Evans, who

in turn negligently supervised Holloman, who in turn was able to convert the funds. Since there was no negligent supervision on the part of SCJD vis-à-vis Evans, who was not its employee, the conversion argument also fails. We affirm the grant of summary judgment to SCJD on Lenders' conversion claim.

6. Constructive Bailment

"A constructive bailment arises when one person has lawfully acquired possession of another person's personal property, other than by virtue of a bailment contract, and holds it under such circumstances that the law imposes on the recipient of the property the obligation to keep it safely and redeliver it to the owner." Hadfield v. Gilchrist, 343 S.C. 88, 538 S.E.2d 268 (Ct. App. 2000) (internal citations omitted). Here, SCJD never acquired possession of Lenders' funds, nor does it hold those funds, which have been embezzled by Holloman.

The trial court properly granted summary judgment on the bailment claim.

7. Mandamus

Lenders contend the trial court erred in failing to issue a writ of mandamus compelling SCJD to turn over the foreclosure funds. This issue is not before the Court, as there is no ruling below on this mandamus request. E.g. Metts v. Mims, *supra*. While Lenders sought to mandamus County, no writ of mandamus was sought against SCJD until Lenders filed their motion to alter or amend the order. It is axiomatic that an issue cannot be raised for the first time in a post-trial motion. E.g., Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005).

8. Immunity

Since we affirm the circuit court's rulings on all liability theories asserted against SCJD, we need not reach the immunity claims raised by SCJD.

CONCLUSION

The Lenders' appeals are affirmed, and County's appeal is dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

ACTING CHIEF JUSTICE WALLER, PLEICONES, BEATTY, JJ., and Acting Justices James E. Moore and E. C. Burnett, III, concur.

The Supreme Court of South Carolina

In re: Amendment to Rule 402, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the second paragraph of Rule 402(d)(1), SCACR, is hereby amended to state as follows:

> If the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application is filed, the applicant shall file one (1) additional copy of the application along with an additional fee of $500. A portion of this fee will be used to obtain a character report from the National Conference of Bar Examiners.

In addition, the fourth sentence of the fifth paragraph of Rule 402(d)(1), SCACR, is hereby amended to state as follows:

> Unless otherwise directed by the Court, the filing fee for a late application will be $1,500, plus an additional $500 fee if the applicant has been admitted to practice law for more than one (1) year in another state, the District of Columbia, or another country at the time the application is filed.

These amendments shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 24, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Revenue, Appellant,

v.

Blue Moon of Newberry, Inc., d/b/a Blue Moon Sports Bar, Respondent.

Appeal From the Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 4661
Submitted February 1, 2010 – Filed March 24, 2010

REVERSED

Harry Hancock, of Columbia, for Appellant.

Richard J. Breibart, of Lexington, for Respondent.

CURETON, A.J.: The South Carolina Department of Revenue (Department) sought to revoke the alcoholic beverage license and permit of Blue Moon of Newberry, Inc. (Blue Moon). The Department appeals the Administrative Law Court's (ALC's) order denying the revocation, arguing

the ALC incorrectly interpreted a Departmental regulation governing Blue Moon's operation and failed to find facts consistent with the evidence presented at trial. We reverse.

FACTS

Blue Moon operated a private social club known as the Blue Moon Sports Bar. Denise Polifrone managed the club, which also employed William Lindler and Steve Malone. On September 9, 2006, Quincy Ford (Agent Ford), an agent of the South Carolina State Law Enforcement Division (SLED), attempted to enter the club. Lindler, the doorman, asked whether Agent Ford was a member. Upon learning Agent Ford was not a member, Lindler denied him entry but directed him to a nearby poster that provided a telephone number for non-members to call to get permission to enter the club.

Agent Ford called the telephone number on the poster and spoke with Malone.[1] Malone took down Agent Ford's name and instructed him to approach the doorman again. When Agent Ford sought access to the club again, Lindler recognized his name as approved for entry, checked Agent Ford's identification, and allowed him to enter the club. Once inside, Agent Ford ordered and paid for an alcoholic beverage, consumed a small portion of it, and left.

On the same day, SLED issued a violation report against Blue Moon for permitting Agent Ford, a non-member, to consume liquor in the club. The Department sought to revoke Blue Moon's alcoholic beverage license and permit as a result of this violation.[2] Blue Moon appealed the Department determination and sought a contested case hearing before the ALC. The ALC

[1] Polifrone testified Malone was not only an employee with some managerial authority but also a member of the club. However, Agent Ford and Malone did not know each other before this telephone call.

[2] Blue Moon had two prior violations for serving alcoholic beverages to non-members in 2004 and 2005.

denied the revocation, finding Agent Ford was a guest of Malone, a club member. This appeal followed.

STANDARD OF REVIEW

Our review of an order of the ALC is confined to the record. S.C. Code Ann. § 1-23-610(B) (Supp. 2009). This court may reverse or modify a decision of the ALC if that decision prejudices the substantive rights of the petitioner by violating statutory provisions, resting upon an error of law, or exhibiting an abuse of discretion or a "clearly unwarranted exercise of discretion." Id. "The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000). Legislatively approved regulations of state agencies have the full force and effect of law. S.C. Code Ann. § 1-23-160 (2005). This court may review questions of statutory construction without deference to the trial court. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

LAW/ANALYSIS

The Department first contends the ALC erred in interpreting the regulation permitting bona fide guests of members to consume certain alcoholic beverages[3] on the premises of a nonprofit organization. We agree.

The General Assembly is authorized to enact statutes permitting the sale and consumption of alcoholic beverages "on the premises of certain nonprofit organizations with limited membership not open to the general public." S.C. Const. art. VIII-A. The General Assembly has defined a "nonprofit organization" as "an organization not open to the general public,

[3] The Alcoholic Beverage Control Act, S.C. Code Ann. §§ 61-6-10 to -4720 (2009), technically defines "alcoholic beverages" to refer primarily to alcoholic liquors and to exclude most wine. See S.C. Code Ann. § 61-6-20(1)(a) (2009).

but with a limited membership and established for social, benevolent, patriotic, recreational, or fraternal purposes." S.C. Code Ann. § 61-6-20(6) (2009).

"Only bona fide members and bona fide guests of members of [nonprofit] organizations may consume alcoholic beverages sold in sealed containers of two ounces or less upon the licensed premises."[4] 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2009). A relationship that is "bona fide" is one made "in good faith[,] without fraud or deceit." Black's Law Dictionary 168 (7th ed. 1999). Furthermore, a "bona fide guest" is a person "for whom the member has made prior arrangements with the management of the organization." 23 S.C. Code Ann. Regs. 7-401.4(K) (Supp. 2009).

We find the ALC abused its discretion in denying the Department's request to revoke Blue Moon's alcoholic beverage license and permit. Nonprofit organizations are constitutionally prohibited from opening their doors to the general public. S.C. Const. art. VIII-A. Rather, they may serve certain alcoholic beverages only to their members and the bona fide guests of those members. 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2009). Here, Blue Moon placed an advertisement outside its door indicating a telephone number to call for admission. After Agent Ford, a stranger who desired admission, called the number and asked to be allowed inside, Blue Moon's employee/member advised the doorman to admit the man. According to the record, "Agent Ford did not know anyone in the club and had no idea [to whom] he spoke . . . on the phone."

Noting the nonbinding effect of a prior decision of an ALC judge, the ALC judge cites as informative the decision of Judge Geathers in S.C. Dep't of Revenue v. Mir, Inc. d/b/a Alley Gator Sports Bar & Grill, 04-ALJ-17-0409-CC (S.C. Admin. Law Ct. filed May 31, 2005). In that case, Judge

[4] "Free-pour" licenses to sell liquor by the drink replaced the familiar "minibottle" licenses. See S.C. Code Ann. §§ 61-6-1600(A) & 61-6-1610(A) (2009); see also S.C. Code Ann. § 61-6-20(1)(b) (2009) (defining "alcoholic liquor by the drink" as "a drink poured from a container of alcoholic liquor, without regard to the size of the container . . .").

Geathers found no violation of regulation 7-401.4 (J) where the non-member agent entered the private club[5] and struck up a conversation with a member, who subsequently signed the agent in as his guest. We note that the focus of Judge Geathers's decision was not whether the member in that case made a "prior arrangement" with management to have the agent admitted as his guest but whether the agent accompanied the member onto the premises. The ALC further cites from Judge Geathers's decision for the proposition that the regulation "does not require that the member and his guest be longstanding friends since childhood or even prior acquaintances of several meetings, but rather only that the member genuinely, sincerely, and without fraud or deceit, intends a person to be his guest at the club, even if he has only just met the person." Judge Geathers concluded there was nothing in the evidence to suggest that the member intended anything other than to register the non-member agent as his bona fide guest.

The ALC concludes "the plain language of the regulation speaks for itself. A prior arrangement, of no definite duration, between management and a member is sufficient to permit a legal admission of a non-member guest." We think the ALC placed undue emphasis on the "prior arrangement" language of the regulation without regard for the context in which it is used. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand that statute's operation. The language must be read in a manner which "harmonizes with its subject matter and accords with its general purpose." See Mun. Ass'n of S.C. v. AT& T Communications of Southern States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (internal quotations omitted). The "prior arrangement" language should not be considered in isolation but should be read in conjunction with the purpose of the entire regulation and the policy of the law it addresses. See State v. Prince, 335 S.C. 466, 472, 517 S.E.2d 229, 232 (Ct. App. 1999). The stated purpose of the regulation is to ensure that only bona fide members of private clubs and their bona fide

[5] Notably, nothing in the law prohibits a non-member of a private club from entering the club's premises; rather, such persons are precluded only from consuming alcoholic beverages sold by the club if they are not bona fide guests.

guests purchase and consume alcoholic beverages at those clubs. To construe the regulation in the manner the ALC did would eviscerate that purpose. We, therefore, see no compelling reason for overruling the Department's construction of regulation 7-401.4. See Vulcan Materials Co., 342 S.C. at 496, 536 S.E.2d at 900.

The Department also argues the ALC erred in finding it offered at the merits hearing no evidence of Agent Ford's consumption of the alcoholic beverage.[6] We find this issue is abandoned on appeal and therefore decline to reach it. See In Re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned on appeal if the argument in the brief is not supported by authority or is only conclusory).

CONCLUSION

We conclude the ALC erred in finding Agent Ford was a bona fide guest entitled to consume alcoholic beverages on Blue Moon's premises. Accordingly, we reverse the ALC's decision and grant the Department's request to revoke Blue Moon's alcoholic beverage license and permit.

REVERSED.

GEATHERS, J., concurs.

PIEPER, J., dissenting: I would affirm the decision of the ALC. "Bona fide guests" are defined by Reg. 7-401.4(K) as "those who accompany a member onto the premises or for whom the member has made prior arrangements with the management of the organization." The Blue Moon Sports Bar complied with this regulation by allowing guests to call a phone number and speak to a member of management, who was also a member of the Blue Moon Sports Bar, prior to gaining entry into its establishment.

[6] We note the record contains evidence that Agent Ford consumed a portion of the alcoholic beverage. The issue on appeal concerns only the ALC's determination the Department presented no such evidence at the merits hearing.

According to Section 61-2-60 of the South Carolina Code (2009), both the Department of Revenue and the South Carolina Law Enforcement Division have the authority to promulgate such regulations to carry out or implement any designated duties in regard to the issuance of alcohol and liquor licenses. Although courts will typically defer to an agency's interpretation of its regulations, the court will reject such an interpretation where it is contrary to the statute or regulation. Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007). The Department promulgated a regulation and this business acted in accordance with that regulation, according to its plain and ordinary meaning. The Department's definition of "bona fide guest" is contrary to the definition plainly listed within the regulations. See id. ("[W]here the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation."). If the Department of Revenue has an issue with how the regulation itself defines "bona fide guest," then it may promulgate a new regulation as appropriate upon proper notice to the public. Until then, other businesses which follow the unambiguous language of the regulation should not be punished as a result. Thus, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marquita Smith, Appellant.

Appeal From Berkeley County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4662
Submitted December 1, 2009 – Filed March 24, 2010

AFFIRMED

Tommy Arthur Thomas, of Irmo; Tricia A. Blanchette, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

SHORT, J.: In this criminal case, Marquita Smith argues the trial court improperly denied her motions for a continuance and severance. We affirm.[1]

FACTS

Smith was tried on charges of accessory before the fact of murder and accessory before the fact of armed robbery. These allegations arose from Smith's involvement in a scheme to kidnap, rob, and murder her cousin, Dexter Perry. The State also tried Gary Grant and Jermaine Hartwell for armed robbery, murder, four counts of kidnapping, and two counts of burglary in the first degree in connection with the case. Smith, Grant, and Hartwell were jointly tried.

Smith made pretrial motions for continuance and severance. The trial court denied these motions and the case proceeded to trial. The jury found Smith guilty of both offenses and she was sentenced to thirty-years' imprisonment for each offense, to run consecutively. Grant was found guilty of all the offenses, and received a life sentence for murder and concurrent thirty-year sentences for the remaining convictions. Likewise, Hartwell was found guilty of each offense and received concurrent thirty-year sentences for each conviction. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The court is bound by the trial court's factual findings unless they are clearly erroneous. Id. This court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. Id.

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

LAW/ANALYSIS

I. Continuance

Smith first claims the trial court erred by failing to grant her motion for continuance. We disagree.

The trial court's decision to deny a motion for continuance is a matter within the trial court's discretion. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Therefore, this court will not reverse the trial court unless there was an abuse of discretion that resulted in prejudice. Id.

A. Adequate Notice

Smith argues the trial court should have granted the motion for continuance because the State failed to give adequate notice of the trial date. She also contends the trial court should have granted her motion because she was informed of a new charge, accessory before the fact of burglary, only one week before trial. We disagree.

Prior to trial on August 27, 2007, Smith made a motion for continuance and argued she did not receive notice of the trial date until August 17, 2007. However, she conceded the case had been on the docket since August 2006. The trial court stated Smith knew the substance of the State's case and that the accessory before the fact of burglary arose out of the same facts as the other charges. The trial court concluded there was no basis to grant a continuance, especially in light of the fact that the case had been on the docket for more than one year, Smith had substantial notice of the trial date, and she was not surprised by the new charge.[2] We find no reversible error in the trial court's decision. See State v. Motley, 251 S.C. 568, 571, 164 S.E.2d 569, 570 (1968) ("When a motion for a continuance is based upon the

[2] Smith was tried on charges of accessory before the fact of murder and accessory before the fact of armed robbery; however, the State did not proceed with the accessory before the fact of burglary charge.

contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal.").

B. Cross-Examination

Smith contends the trial court erred in denying her motion for continuance because she was unable to cross-examine Kerry Hollins, another individual charged in connection with the case. We disagree.

The trial court found nothing indicated Smith would not have a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness as to the weight the jury should give his testimony. The trial court also stated, "I have not heard anything that convinces me that you will not be able to fully explore your argument or your theory which is that your client was the least culpable in these alleged incidences." We find no reversible error in the trial court's decision. See State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) ("Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth.").

C. Witness Availability

Smith also argues the trial court erred by denying her motion for continuance because two witnesses were unavailable. We disagree.

Rule 7(b), SCRCrimP, speaks to the subject of continuances in the context of unavailable witnesses. This Rule provides:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to

> procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP.

In the present case, Smith did not comply with Rule 7(b) because she did not state under oath that the testimony of the witnesses was material to the support of her defense, the motion was not intended for delay, or due diligence had been exercised to secure the testimony of the witnesses. Thus, the trial court did not commit reversible error in denying the motion for continuance.

II. Severance

Smith next contends the trial court erred by denying her motion for severance. We disagree.

A motion for severance is left to the sound discretion of the trial court. State v. Kelsey, 331 S.C. 50, 73-74, 502 S.E.2d 63, 75 (1998). An appellate court will not disturb the trial court's ruling unless there is an abuse of discretion. Id.

A. Cross-Examination of Co-Defendant

The basis for Smith's motion for severance was her assertion that she would be unable to effectively cross-examine Hollins. Hollins was also charged in connection with the case but testified for the State. Prior to his testimony, Hollins made a statement that implicated Smith as the principal actor. Smith argues she could not effectively cross-examine Hollins on that statement without addressing the character and criminal history of Grant, Hartwell, and Hollins. We disagree.

The trial court expressed concern as to how Smith would be able to present the character and criminal history of each of the defendants even if a

severance was granted. Smith was unable to explain how she would be able to present this evidence for the jury to consider. Additionally, the trial court specifically found Smith would have "a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness as to the weight the jury should give his testimony." The trial court also stated, "I have not heard anything that convinces me that you will not be able to fully explore your argument or your theory which is that your client was the least culpable in these alleged incidences." We see no reversible error in the trial court's decision to deny Smith's motion. See id. (holding the granting of a motion for severance is within the discretion of the trial court and its ruling on such a motion will not be disturbed on appeal unless an abuse of discretion is shown).

B. Closing Argument

Smith also argues the trial court should have granted the severance motion because she lost her right to have the last closing argument to the jury as a result of being tried together. We disagree.

In a criminal case in which a defendant is separately tried and introduces no testimony, she is entitled to the closing argument to the jury. State v. Crowe, 258 S.C. 258, 268, 188 S.E.2d 379, 384 (1972). When defendants are jointly indicted and any one of them introduces evidence, the State is entitled to the closing argument. Id. "The fact that, upon a trial of defendants jointly indicted, the introduction of evidence by one defendant may operate to deprive a co-defendant, who offers no evidence, of the right to the closing argument, to which such co-defendant would be entitled if tried separately, affords no ground upon which to order separate trials." Id.

In the present case, Smith did not testify, but one of her co-defendants offered a photo lineup into evidence. The trial court admitted this lineup, and as a result, Smith lost her right to have the last closing argument to the jury. Based on Crowe, the trial court properly denied the motion for severance on this ground.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.