The Supreme Court of South Carolina

In the Matter of Edward Hanson White, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 20, 1998, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated February 25, 2008, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Edward Hanson White shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Moore, J., not participating

Columbia, South Carolina

March 20, 2008

The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS AND NOTICE OF PUBLIC HEARING

The Supreme Court of South Carolina is considering amendments to Rule 5 of the South Carolina Rules of Criminal Procedure, Rules 16 and 26 of the South Carolina Rules of Civil Procedure, and Rules 701, 702, and 703 of the South Carolina Rules of Evidence. A copy of the proposed amendments is attached to this notice.

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

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

Any written comments must be actually received by the Supreme Court by Tuesday, June 10, 2008.

The Court will hold a public hearing regarding the proposed amendments on Wednesday, July 9, 2008 at 11:00 a.m., in the courtroom of the Supreme Court in Columbia, South Carolina. Those desiring to be heard shall notify the Clerk of the Supreme Court no later than Thursday, July 3, 2008.

Columbia, South Carolina
March 19, 2008

RULE 16, SCRCP
PRE-TRIAL PROCEDURE: FORMULATING ISSUES

****

(d) Expert witnesses. Upon motion of a party, the court shall hold a pretrial hearing to determine whether a witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Rules 702, 703 and 704, SCRE. The court shall allow sufficient time for a hearing and shall rule on the qualifications of the witness to testify as an expert and whether or not the testimony satisfies the requirements of Rules 702, 703 and 704, SCRE. The hearing and ruling must be completed no later than the final pretrial conference contemplated pursuant to subsection (a) of this Rule. The trial court's ruling shall set forth the findings of fact and conclusions of law upon which the ruling to admit or exclude expert evidence is based, pursuant to Rule 52(a), SCRCP.

~~(d)~~ (e) Pre-trial Calendar. The Chief Judge for Administrative Purposes in any circuit may establish a pre-trial hearing calendar on which actions may be placed for consideration as above provided and set thereon all actions in which a pre-trial hearing has been ordered or which, in his discretion, such hearing should be ordered. If a motion for such hearing is pending, the administrative judge shall hear or assign for hearing such motion. If the motion is granted the action shall be placed on the pre-trial calendar.

~~(e)~~ (f) Status Conferences. Whether or not a formal pre-trial hearing has been held in an action, the trial judge may hold an informal conference before trial to dispose of any remaining matters, including disposition of any pending motions and consideration of settlement. No pre-trial brief or other formal procedures set forth in paragraphs (a) through (d) of this Rule 16 shall be required for such conferences; however, any briefs and memoranda submitted in support of pending motions shall be served on all parties at the same time and by the same means used to serve the court.

***

Note to 2008 Amendment

This amendment adds new subsection (d) requiring the court, upon motion of a party, to hold a pre-trial hearing on the admissibility of expert testimony proffered by any other party. The new subsection also requires the court to apply the standards set forth in Rules 702, 703 and 704 of the South Carolina Rules of Evidence, and to abide by the requirements of Rule 52(a), SCRCP, that findings and conclusions be set forth in the trial court's ruling. Subsections (d) and (e) are renumbered accordingly.

RULE 26, SCRCP
GENERAL PROVISIONS GOVERNING DISCOVERY
***

(b) Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

***

(4)(A) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

(C) Whether or not a party elects to request a pretrial hearing as contemplated in Rule 16(d), all parties shall disclose to other parties to the litigation the identity of all persons who may be used at trial to present expert evidence. Except as otherwise stipulated or directed by the court, this disclosure, with respect to a witness who is retained to provide expert testimony at trial in the case or whose duties as an employee of the party regularly involve giving expert testimony, must be accompanied by a written report prepared and signed by the witness or by counsel for the party retaining that expert. The report must contain:

(1) a statement of all opinions to be expressed and the basis and reasons for them;

(2) the data or other information relied on by the witness in forming his opinions;

(3) all exhibits to be used as a summary of or support for the opinions;

(4) the qualifications of the witness, including a current curriculum vitae;

(5) the compensation to be paid to the witness; and

(6) a list of cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

These disclosures must be made at the times and in the sequence directed by the court. In the absence of other direction from the court or stipulation by the parties, the disclosures must be made on or before three hundred (300) days after the filing of the action or, if the evidence is intended solely to contradict or rebut evidence of an expert on the same subject matter identified by another party pursuant to this subsection, within thirty days after the disclosure made by the other party.

~~(C)~~ **(D)** A party may depose a person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required pursuant to subsection (B), the deposition may not be conducted until the report is provided. Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a party retaining an expert who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable and customary fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. *Provided that* the testimony of an expert witness may not be admitted if compensation is contingent on the outcome of a claim, defense, or case with respect to the testimony being offered.

***

Note to 2008 Amendment

This amendment adds new subsection (C) which substantially adopts the federal rule on expert witness disclosures. The default timing of the subsection (C) disclosure is the deadline for the ADR Conference pursuant to Rule 5(f), SCADR Rules.

RULE 5, SCRCrimP
TESTIMONY BY EXPERTS
***

(h) Expert witnesses. The court in its discretion may hold a pretrial hearing to determine whether a witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Rules 702, 703 and 704, SCRE. The court shall allow sufficient time for a hearing and shall rule on the qualifications of the witness to testify as an expert and whether the testimony satisfies the requirements of Rules 702, 703 and 704, SCRE. The trial court's ruling shall set forth the findings of fact and conclusions of law upon which the ruling to admit or exclude expert evidence is based.

Note to 2008 Amendment

The amendment, similar to Rule 16, SCRCP, as amended in 2008, gives the trial court discretion in holding a pretrial hearing to determine the qualifications of an expert and whether the expert's testimony meets the requirements of Rules 702, 703, and 704, SCRE.

RULE 701, SCRE
OPINION TESTIMONY BY LAY WITNESS

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which ~~(a)~~ are (a) rationally based on the perception of the witness, ~~(b)~~ are (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not, based on scientific, technical, or other specialized knowledge within the scope of Rule 702, require special knowledge, skill, experience or training.

***

Note to 2008 Amendment

Except for the addition of subsection (c) and minor changes in verbiage, this rule is identical to the federal rule, as amended, effective December 1, 2000, and the comments accompanying that amendment are incorporated herein by reference.

RULE 702, SCRE
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

***

Note to 2008 Amendment

The rule is identical to the federal rule as amended, effective December 1, 2000, and to former Rule 43(m)(1), SCRCP, and former Rule 24(a), SCRCrimP. The comments to the 2000 amendment to the federal rule are incorporated herein by reference.

RULE 703, SCRE
BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion of inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

***

Note to 2008 Amendment

The rule is identical to the federal rule as amended, effective December 1, 2000, and former Rule 43(m)(2), SCRCP, and former Rule 24(b), SCRCrimP. The comments to the 2000 amendment to the federal rule are incorporated herein by reference.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF DAVID P. COLE, PETITIONER

On September 6, 1994, Petitioner was disbarred from the practice of law. In the Matter of Cole, 316 S.C. 222, 449 S.E.2d 249 (1994). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than May 19, 2008.

Columbia, South Carolina

March 20, 2008

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF WILLIAM F. PARTRIDGE, III, PETITIONER

On July 18, 2007, Petitioner was definitely suspended from the practice of law for one year. In the Matter of Partridge, 374 S.C. 179, 648 S.E.2d 590 (2007). He has now filed a petition to be reinstated.

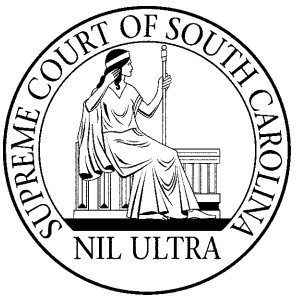
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than May 20, 2008.

Columbia, South Carolina

March 21, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13

March 24, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITION FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2008-UP-183-Jane and John Doe v. South Carolina DSS; Juan C.; Pamela C-R; et al.
(Cherokee, Judge Georgia V. Anderson)

2008-UP-184-The State v. Ted Edward Abney
(Newberry, Judge Paul M. Burch)

2008-UP-185-The State v. Tiwan Graham
(Florence, Judge Paul M. Burch)

2008-UP-186-The State v. Hershal Jackson
(Spartanburg, Judge Doyet A. Early, III)

2008-UP-187-The State v. Marlon Rivera
(Greenville, Judge C. Victor Pyle)

2008-UP-188-The State v. Marvin Shorow Miller
(Richland, Judge Kenneth G. Goode)

2008-UP-189-The State v. James Edward Ray
(Clarendon, Judge Thomas W. Cooper, Jr.)

2008-UP-190-The State v. Phillip Rhinehardt
(Spartanburg, Judge Roger L. Couch)

2008-UP-191-The State v. Thomas L. Mullins
(Spartanburg, Judge Roger L. Couch)

2008-UP-192-City of Columbia v. Mamie Jackson
(Richland, Judge Reginald I. Lloyd)

2008-UP-193-The State v. Dwayne Brown
(Florence, Judge B. Hicks Harwell)

PETITIONS FOR REHEARING

4316-Lynch v. Toys "R" Us, Inc.	Pending
4318-State v. David Swafford	Pending
4320-The State v. Donald Paige	Pending
4333-State v. Dantonio	Pending

4334-Silver v. Aabstract Pools	Pending
4338-Friends of McLeod v. City of Charleston	Pending
4339-Thompson v. Cisson Construction	Pending
4340-Simpson v. Simpson	Pending
4341-William Simpson v. Becky Simpson	Pending
4344-Green Tree v. Williams	Pending
2007-UP-467-State v. N. Perry	Pending
2007-UP-494-National Bank of SC v. Renaissance	Pending
2007-UP-544-State v. Christopher Pride	Pending
2007-UP-549-Frierson v. InTown Suites	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's Marine	Pending
2008-UP-004-Ex parte: Auto Owners	Pending
2008-UP-018-Wachovia Bank v. Beckham	Pending
2008-UP-043-Eadon v. White	Pending
2008-UP-048-State v. Edward Cross (#1)	Pending
2008-UP-060-BP Staff, Inc. v. Capital City Ins	Pending
2008-UP-063-State v. Gambrell	Pending
2008-UP-070-Burriss Electr. v. Office of Occupational Safety	Pending
2008-UP-073-Mosley v. MeadWestvaco	Pending
2008-UP-081-State v. Robert Hill	Pending
2008-UP-082-White Hat v. Town of Hilton Head	Pending

2008-UP-084-First Bank v. Wright Pending

2008-UP-096-State v. Daniel Cook Pending

2008-UP-104-State v. Damon L. Jackson Pending

2008-UP-116-Miller v. Ferrellgas Pending

2008-UP-122-Ex parte: GuideOne Pending

2008-UP-126-Massey v. Werner Ent. Pending

2008-UP-131-State v. Jimmy Owens Pending

2008-UP-132-Campagna v. Flowers Pending

2008-UP-134-Irby v. Lawson Pending

2008-UP-135-State v. D. Moore Pending

2008-UP-136-Wingate v. State Pending

2008-UP-139-Prince v. Beaufort Memorial Pending

2008-UP-140-Palmetto Bay Club v. Brissie Pending

2008-UP-141-One Hundred Eighth v. Miller Pending

2008-UP-144-State v. Porterfield Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4159--State v. T. Curry Pending

4209-Moore v. Weinberg Pending

4213-State v. D. Edwards Pending

4220-Jamison v. Ford Motor Pending

4233-State v. W. Fairey Pending

4235-Collins Holding v. DeFibaugh Pending

4237-State v. Rebecca Lee-Grigg	Pending
4238-Hopper v. Terry Hunt Const.	Pending
4239-State v. Dicapua	Pending
4240-BAGE v. Southeastern Roofing	Pending
4242-State v. T. Kinard	Pending
4243-Williamson v. Middleton	Pending
4244-State v. O. Gentile	Pending
4245-Sheppard v. Justin Enterprises	Pending
4247-State v. Larry Moore	Pending
4251-State v. Braxton Bell	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending
4262-Town of Iva v. Holley	Pending
4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4265-Osterneck v. Osterneck	Pending
4267-State v. Terry Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4272-Hilton Head Plantation v. Donald	Pending

4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending
4276-McCrosson v. Tanenbaum	Pending
4277-In the matter of Kenneth J. White	Pending
4279-Linda Mc Co. Inc. v. Shore	Pending
4284-Nash v. Tindall	Pending
4285-State v. Danny Whitten	Pending
4286-R. Brown v. D. Brown	Pending
4289-Floyd v. Morgan	Pending
4291-Robbins v. Walgreens	Pending
4292-SCE&G v. Hartough	Pending
4295-Nationwide Ins. Co. v. James Smith	Pending
4296-Mikell v. County of Charleston	Pending
4298-James Stalk v. State	Pending
4306-Walton v. Mazda of Rock Hill	Pending
4309-Brazell v. Windsor	Pending
4310-State v. John Boyd Frazier	Pending
4315-Todd v. Joyner	Pending
4319-State v. Anthony Woods (2)	Pending
4325-Dixie Belle v. Redd	Pending
4327-State v. J. Odom	Pending
4328-Jones v. Harold Arnold's Sentry	Pending

2006-UP-222-State v. T. Lilly	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-320-McConnell v. John Burry	Pending
2007-UP-052-State v. S. Frazier	Pending
2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-128-BB&T v. Kerns	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-177-State v. H. Ellison	Pending
2007-UP-183-State v. Hernandez, Guerrero, Arjona	Pending
2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-243-E. Jones v. SCDSS	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-266-State v. Dator	Pending

2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-318-State v. Shawn Wiles	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-331-Washington v. Wright Const.	Pending
2007-UP-340-O'Neal v. Pearson	Pending
2007-UP-341-Auto Owners v. Pittman	Pending
2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending
2007-UP-384-Miller v. Unity Group, Inc.	Pending
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-493-Babb v. Noble	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-513-Vaughn v. SCDHEC	Pending
2007-UP-528-McSwain v. Little Pee Dee	Pending
2007-UP-529-Adoptive Father v. Birth Father	Pending
2007-UP-530-Garrett v. Lister	Pending
2007-UP-531-Franklin Ventures v. Jaber	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Englert, Inc., Respondent,

v.

LeafGuard USA, Inc., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26460
Heard February 5, 2008 – Filed March 24, 2008

REVERSED

John W. Fletcher, of Barnwell Whaley Patterson & Helms, of Charleston, for Petitioner.

Mark McAdams, and Amanda A. Bailey, of McNair Law Firm PA, of Myrtle Beach, for Respondent.

JUSTICE WALLER: We granted certiorari to review the Court of Appeals' opinion in Englert, Inc. v. LeafGuard USA, Inc., 365 S.C. 565, 619 S.E.2d 12 (Ct. App. 2005). The Court of Appeals affirmed the partial grant of summary judgment to Respondent, Englert, Inc., finding Englert was

entitled to possession of a gutter-fabricating machine which was in the possession of Petitioner, LeafGuard USA, Inc. We reverse the grant of summary judgment.

FACTS

Jerry Dan Vickory is the owner of two companies which manufacture and install gutters: LeafGuard USA and Seamless Gutters of Socastee. In 1993, Vickory, on behalf of Seamless Gutters, entered into a Sub-License Agreement with Englert, Inc., a distributor of seamless gutter machines and raw materials used in manufacturing seamless gutters. Pursuant to the agreement, Seamless Gutters was granted the right to manufacture, sell, and install Englert's product, the LeafGuard Gutter System, in a set sales territory. The agreement set forth minimum sales quotas and required Seamless Gutters to pay Englert royalties. The agreement required Seamless Gutters to purchase a $26,000 gutter-fabricating machine to produce the Englert Gutter System. The contract includes the following buy-back provision:

> Upon termination of this Agreement, Englert shall purchase, and Sub-Licensee shall sell, the Englert LeafGuard Gutter Machine, subject to normal wear and tear and pay Sub-Licensee at a price equal to the greater of:
> (i) the depreciated value of the Englert LeafGuard Gutter Machine, based on a depreciated rate of 20% per year on the original price; or
> (ii) $1.00

In 1998, LeafGuard USA entered into a SubLicense Agreement with Englert which was substantially similar to the 1993 agreement between Englert and Seamless Gutters. As with the prior agreement, LeafGuard USA had minimum sales quotas (15,000 feet of gutters per year), and was required to pay royalties. Although the 1998 contract required LeafGuard USA to purchase an Englert LeafGuard Gutter Machine for $28,000.00, it is undisputed that LeafGuard USA simply took possession of and utilized the LeafGuard Gutter Machine purchased by Seamless Gutters in 1993.

The 1998 agreement contains the same buy-back provision, allowing Englert to repurchase the LeafGuard Gutter Machine for $1.00 after full depreciation. The 1998 agreement was for an initial two year term from Jan. 1, 1999- Dec. 31, 2000 and provided that it would continue for additional one year periods thereafter, "if Licensee has materially complied with all of the provisions of this License." However, the agreement provided that if the licensee breached any provision or remained in default for a period of thirty days after written notice from Englert (or 10 days written notice in the event of failure to pay royalties), Englert had the right to cancel the agreement and terminate the license immediately.

On March 15, 2001, Englert sent LeafGuard USA a letter advising that after numerous attempts at trying to contact LeafGuard USA, it was terminating the Sub-Licensing Agreement for the following reasons:

- Failure to meet the established sales target amount agreed as stated in the Sub-License Agreement under section 5C.
- As stated in the Sub-License Agreement under Section 6E, should Sub-Licensee be in default on its payment obligations to Englert for 60 days, Englert may, at its option, terminate this License Agreement and/or seek any other options open to Englert, taking over the repossessing SubLicensee's Englert LeafGuard Gutter Machine and/or rescinding Sub-Licensee from further manufacturing and distributing of Englert LeafGuard, and initiating the collection of the amounts owed to Englert.

The letter went on to advise that LeafGuard USA was 11,060 feet short of its 2000 sales quota, and that it was over 60 days past due in payment of royalties. Thereafter, Englert advised LeafGuard USA that it was to terminate all use of Englert's trademarks, and was to make arrangements for the immediate return of the gutter machine, at its expense, for which it would be paid $1.00 for the machine, in accordance with the licensing agreement.

LeafGuard USA did not return the machine and on July 30, 2001, Englert filed a Claim and Delivery action. One year later, on June 17, 2002, Judge Breeden denied Englert's motion for immediate possession of the

gutter machine. Englert filed an amended complaint in March 2003 seeking an injunction and other relief. LeafGuard USA answered and alleged the affirmative defenses of waiver, estoppel, laches, unclean hands, fraud and bad faith (among other defenses). LeafGuard USA also filed a counterclaim, alleging unfair and deceptive trade practices, breach of contract, breach of contract accompanied by a fraudulent act, and fraud.

After a hearing, Judge Harwell granted Englert's motion for partial summary judgment, essentially holding that since the parties' contract was terminated, Englert had an absolute right to repossess the machine. Judge Harwell also found that LeafGuard USA's counterclaims did not preclude summary judgment. The Court of Appeals affirmed. Englert, Inc. v. LeafGuard USA, Inc., 365 S.C. 565, 619 S.E.2d 12 (Ct. App. 2005). The Court of Appeals addressed only LeafGuard USA's primary issue, in which it asserted summary judgment could not be granted to Englert because the machine had actually been sold to Seamless Gutters, such that the court could not order a transfer of ownership from a non-party. The Court of Appeals ruled that the two companies were in reality the same company, such that the grant of summary judgment was proper. The Court of Appeals did not address whether LeafGuard USA's counterclaims and affirmative defenses were sufficient to raise a genuine issue of material fact.

ISSUE

Did the trial court err in granting summary judgment where LeafGuard USA's defenses and counterclaims had not been ruled on?

STANDARD OF REVIEW

When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Hansson v. Scalise Builders of South Carolina, 374 S.C. 352, 650 S.E.2d 658 (2007); David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. David, 367 S.C. at 247, 626 S.E.2d at 3. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues. Connor v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991).

DISCUSSION

LeafGuard USA contends there are genuine issues of material fact as to whether the contract was properly terminated by Englert, thereby precluding the entry of summary judgment. We agree.

LeafGuard USA submitted the affidavit of its owner, Jerry Vickory, in opposition to Englert's motion for summary judgment.[1] In the affidavit, Vickory contends Englert was upset with LeafGuard USA for having developed its own website to market LeafGuard products, and that for complaining about Englert infringing on its LeafGuard USA trademark. Vickory's affidavit asserts that Englert representatives told him, and his wife, that they would "get us and take away our franchise." Vickory also contends that prior to Englert's discovery of the website, he had heard nothing about failing to meet sales quotas or unpaid royalties and had, in fact, been recently

[1] Englert asserts the affidavit was untimely, as it was not filed until after the hearing on the motion for summary judgment. However, it is undisputed that the affidavit was filed prior to the trial court's ruling, and there being no indication in the record that the trial court did not consider the affidavit, we must assume it was considered. Cf. Smith v. Hastie, 367 S.C. 410, 626 S.E.2d 13 (Ct. App. 2005) (recognizing that it is within a trial judge's discretion to accept late affidavits in opposition to a motion for summary judgment).

commended on his sales.[2] Vickory asserted that throughout his course of dealing with Englert, if there was ever any issue as to minimum footage in a given year, LeafGuard USA was permitted to purchase extra rolls to make up the difference.

We find the information contained in Vickory's affidavit, along with its counterclaims, and affirmative defenses, are sufficient to create genuine issues of material fact as to whether or not Englert properly terminated the contract. Accordingly, under the facts presented, we find the trial court erred in granting summary judgment in favor of Englert. The Court of Appeals' opinion affirming the grant of summary judgment is

REVERSED.

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

[2] In fact, a letter dated Dec. 15, 2000, from Englert to LeafGuard USA states "Good job. Keep selling."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brenco, a General Partnership, Respondent,

v.

South Carolina Department of Transportation, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 26461
Heard February 5, 2008 – Filed March 24, 2008

REVERSED

John B. McCutcheon, Jr., Mary Ruth M. Baxter, and Arrigo P. Carotti, all of McCutcheon, McCutcheon & Baxter, of Conway, for Petitioner.

Howell V. Bellamy, Jr., and Douglas M. Zayicek, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, PA, of Myrtle Beach, for Respondent.

PER CURIAM: Brenco (respondent) brought suit against the Department of Transportation (petitioner) relating to a deed for the sale of a portion of its property along Highway 501 in Horry County, as well as for inverse condemnation. The master-in-equity found in favor of petitioner with respect to respondent's causes of action for rescission of the deed due to mutual mistake, rescission due to unilateral mistake, negligent misrepresentation, and declaratory judgment. The master took respondent's inverse condemnation claim under advisement but later ruled in favor of petitioner.

The Court of Appeals affirmed the master's ruling on the causes of action related to the deed but reversed the master's decision not to reopen the case and remanded for additional testimony as to damages stemming from inverse condemnation. Brenco v. S.C. Dept. of Transp., 363 S.C. 136, 609 S.E.2d 531 (Ct. App. 2005). We granted petitioner's request for certiorari review and now reverse.

FACTS

Respondent owns property located along Highway 501 in Horry County. The property formerly served as the location of a Brendle's store. In 1998, respondent sold to petitioner, in lieu of condemnation, a small portion of respondent's parking lot in order to build a frontage road as part of an ongoing plan to renovate and widen Highway 501. The negotiations before execution of the deed and the deed itself referenced aspects of petitioner's 1993 plans for the Highway 501 project. As a result of this conveyance, respondent lost direct access to Highway 501 but retained ingress and egress to the frontage road.

The final project was completed pursuant to updated plans drafted by petitioner in 2000- not the 1993 plans referenced in the deed. As part of the change in plans, petitioner also elevated Highway 501 twenty-five feet[1] and

[1] Previously, Highway 501 was twenty-two feet above sea level. The grade elevation brought the highway to a total height of forty-seven feet above sea level.

reconfigured exit ramps in close proximity to respondent's property in both the eastbound and westbound directions on Highway 501.

At trial, the main thrust of respondent's case centered on its cause of action for rescission of the deed. Specifically, respondent alleged petitioner had not been forthcoming during negotiations, and respondent claimed it did not know it would lose direct access to Highway 501. Respondent also argued that petitioner knew the grade of Highway 501 would eventually be elevated but did not disclose that information to respondent before delivery of the deed. Respondent's witnesses who testified as to damages focused on a comparison of the values of the entire property before the 1998 conveyance and the property after Highway 501 was completed pursuant to the 2000 plans.

After ruling on the deed issues, the master advised the parties he was struggling with the issue of damages relating to the inverse condemnation claim. Respondent thereafter moved to reopen the case for the taking of additional testimony as to potential damages stemming from inverse condemnation. The master denied respondent's motion to reopen the case and found in favor of petitioner on the inverse condemnation cause of action.

ISSUE

Did the Court of Appeals err in finding the master-in-equity abused his discretion by refusing to reopen the case for additional evidence regarding respondent's purported damages due to inverse condemnation?

ANALYSIS

The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct. App. 1991). The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case. Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co., 310 S.C. 477, 482, 427 S.E.2d 649,

651 (1993), *overruled on other grounds*, Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997).

The Court of Appeals relied on Wright in reversing the master. In Wright, the Court of Appeals affirmed a trial judge's refusal to reopen the record where the moving party did not proffer any testimony or show that the evidence could make any difference to the outcome of the case. Wright, 306 S.C. at 188, 410 S.E.2d at 597. The Court of Appeals distinguished Wright from the instant case by noting that respondent attempted to proffer testimony[2] and that the additional testimony would have helped the master. The Court of Appeals also considered that respondent did not learn it needed to establish damages in a different fashion, i.e. apart from damages calculated for the deed claims, until after the master's ruling on the deed issues.

We disagree with the Court of Appeals' reasoning. First, respondent was well aware before trial that petitioner took the position that respondent could not prove damages stemming from the elevation of Highway 501 and the road reconfiguration. Petitioner maintained this view throughout trial and provided expert testimony on the precise issue. Respondent had ample opportunity to present testimony and evidence regarding inverse condemnation damages at trial, but it instead decided to present evidence of damages as if the deed would be rescinded and the property would be valued as it existed prior to any condemnation proceeding. The master did not abuse his discretion by refusing to allow respondent a second opportunity to present its inverse condemnation case after it failed on its other claims. *See* Owens v. S.C. State Hwy. Dept., 239 S.C. 44, 54, 121 S.E.2d 240, 245 (1961) (landowner has the burden of proving its damages for a taking of its property, whether through condemnation proceedings or inverse condemnation).

The Court of Appeals' citation of Wright in its reversal of the master may be read to imply that a trial judge may abuse his discretion by refusing to reopen the record simply because additional testimony is proffered and would

[2] Respondent offered to proffer testimony at the hearing that addressed respondent's motion for reconsideration of the order disposing of the inverse condemnation claim.

make *any* difference to the outcome of the case. This is not the proper standard for reviewing a potential abuse of discretion in regard to post-trial motions to reopen a record. *See* Spinx, *supra* (no abuse of discretion in declining to reopen the record when party could have provided same evidence at trial). Accordingly, the Court of Appeals erred in remanding the case to the master for the taking of additional testimony.[3]

CONCLUSION

Notwithstanding that after Hardin no inverse condemnation taking has occurred, we hold that the master did not abuse his discretion in refusing to reopen the case. The Court of Appeals opinion is

REVERSED.

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

[3] Furthermore, in light of our decision in Hardin v. S.C. Dept. of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007), petitioner's actions in this case were not a taking by inverse condemnation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sloan Construction Company, Inc., Petitioner,

v.

Southco Grassing, Inc., Wanda Surrett, South Carolina Department of Transportation, and Greer State Bank, Defendants,

of whom South Carolina Department of Transportation is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 26462
Heard November 1, 2007 – Filed March 24, 2008

REVERSED AND REMANDED

T. S. Stern, Jr., of Covington Patrick Hagins Stern & Lewis, of Greenville, for Petitioner.

Beacham O. Brooker, Jr., of South Carolina Department of Transportation, of Columbia, for Respondent.

Charles H. McDonald and Daniel T. Brailsford, both of Robinson, McFadden & Moore, of Columbia, for Amicus Curiae American Subcontractors Association of the Carolinas.

L. Franklin Elmore, of Elmore & Wall, of Greenville, for Amicus Curiae Carolinas Associated General Contractors.

CHIEF JUSTICE TOAL: A subcontractor working on a state highway maintenance project brought negligence and breach of contract claims against the South Carolina Department of Transportation (SCDOT) for allegedly failing to comply with statutory bond requirements for contractors working on public projects. The trial court dismissed the subcontractor's claims finding that the bond statutes did not give rise to a private right of action against SCDOT and the court of appeals affirmed. This Court granted certiorari to decide whether a subcontractor may bring a private right of action against a government entity for failure to comply with statutory bond requirements. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

SCDOT hired Defendant Southco Grassing, Inc. ("Southco") as the general contractor on a state highway maintenance project and in accordance with the relevant statutory bond requirements, Southco provided SCDOT with proof of a payment bond for the benefit of its subcontractors and suppliers covering the entire value of the approximately $440,000 contract. Southco subsequently contracted with Petitioner Sloan Construction Company ("Sloan") to perform asphalt paving in connection with the project.

In June 2001, prior to the completion of the paving work, Southco's payment bond was cancelled due to the insolvency of the bond's issuer, Amwest Surety Insurance Company ("Amwest"). Upon notice of Amwest's insolvency, SCDOT wrote Southco requesting proof of a replacement bond within seven days. Southco never responded. In the meantime, Sloan completed its portion of the paving subcontract valued at nearly $52,000.

Sloan notified SCDOT in January 2002 that it still had not received payment from Southco for the work completed and additionally informed SCDOT that Southco had not secured another payment bond following the cancellation of the Amwest bond. In March 2003, without having made full payment to Sloan, Southco notified SCDOT that it had made all payments on the project and SCDOT disbursed final retainage to Southco.

Sloan brought an action for negligence against SCDOT pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et. seq.* (2005 & Supp. 2006), alleging that SCDOT was negligent in failing to ensure that Southco was properly bonded in accordance with the bond requirements in S.C. Code Ann. § 29-6-250 (Supp. 2006) and S.C. Code Ann. § 57-5-1660 (2006). Sloan also brought a breach of contract claim alleging that SCDOT was obligated to Sloan as a third-party beneficiary to the contract between SCDOT and Southco to ensure that Southco was properly bonded pursuant to these statutes.

In its answer, SCDOT moved to dismiss Sloan's complaint under Rule 12(b)(6), SCRCP, arguing that the bond statutes did not create a duty giving rise to liability for negligence on the part of SCDOT, and that SCDOT owed no contractual duty to Sloan due to lack of privity. The trial court granted SCDOT's motion to dismiss finding that the South Carolina Tort Claims Act prohibited Sloan from bringing a negligence claim against a government entity for failing to enforce a statute, and noting that under the analogous federal government bonding scheme contained in the Miller Act, 40 U.S.C. §§ 3131-3134 (2005), similar claims were not permitted on the grounds that the Federal Tort Claims Act – like the South Carolina Tort Claims Act – prohibited claims for violation of a federal statute in the absence of a similar state law cause of action recognizing private liability. Additionally, the trial court found that lack of privity prohibited Sloan's contract claim.

Sloan appealed and the court of appeals affirmed the trial court's decision, holding that Sloan's claims were prohibited under the South Carolina Tort Claims Act and that no other right of action otherwise existed under the bond statutes. The court of appeals never specifically addressed

Sloan's contract claim. *Sloan Constr. Co., Inc. v. Southco Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006).

This Court granted Sloan's petition for writ of certiorari and Sloan raises the following issue for review:

> Did the court of appeals err in holding that statutory bond requirements applicable to public projects do not create an enforceable duty giving rise to a private right of action by a subcontractor against a government entity?

STANDARD OF REVIEW

In reviewing the dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case," then dismissal under Rule 12(b)(6) is improper. *Stiles v. Oronato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

LAW/ANALYSIS

Sloan argues that the court of appeals erred in failing to find that the statutory bond requirements give rise to a cause of action by a subcontractor against the government for failure to ensure that general contractors on government construction projects are properly bonded. We agree.

A. Right of action arising under the bond statute

Prior to the year 2000, South Carolina law afforded limited protection to subcontractors and suppliers providing labor and materials on public

projects. *See* S.C. Code Ann. § 11-30-3030 (Supp. 2006) (outlining a bonding scheme applicable to projects under the direction of governmental bodies generally) *and* S.C. Code Ann. § 57-5-1660 (outlining a bonding scheme specific to highway projects under the direction of SCDOT). Known as "Little Miller Acts," these provisions are the state counterpart to the federal Miller Act legislation enacted to address the problem of subcontractors who may not use liens on public property to secure payment for work performed on public projects and must otherwise rely on the financial solvency of prime contractors. *See United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 241 (1947). *See also Atl. Coast Lumber Corp. v. Morrison*, 152 S.C. 305, 309, 149 S.E. 243, 245 (1929) (acknowledging that a mechanics' lien may not be enforced on public property). Consistent with the federal Miller Act, the bonding schemes contained in the Little Miller Acts require both a performance bond to ensure the timely performance of the contract by the general contractor and a payment bond to cover payment of subcontractors and suppliers in the event of the general contractor's default. *See* S.C. Code Ann. § 11-35-3030 *and* S.C. Code Ann. § 57-5-1660.

In 2000, the South Carolina legislature enacted the Subcontractors' and Suppliers' Payment Protection Act (SPPA), S.C. Code Ann. §§ 29-6-210 *et. seq.* (Supp. 2006). The SPPA is specifically applicable to subcontractors and suppliers on government projects and outlines a detailed bonding scheme that significantly expands the protections already afforded these parties under the Little Miller Acts. The SPPA reads in pertinent part as follows:

> (1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract . . . .
>
> . . . .
>
> (3) For purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the

> improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

S.C. Code Ann. § 29-6-250. The SPPA does not expressly provide for a right of action between the subcontractor and the contracting government body.

The court of appeals relied heavily on federal court interpretations of the Miller Act in holding that statutory bonding requirements under the SPPA do not establish a duty for which the government may be liable to a subcontractor. *See Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1290 (7th Cir. 1984) (holding that the failure of a government agency to comply with the Miller Act's bonding requirements does not give rise to a private right of action against the agency) *and Syro Steel Co. v. Eagle Constr. Co., Inc.*, 319 S.C. 180, 182, 460 S.E.2d 371, 373 (1995) (holding that absent a contrary expression of legislative intent, cases construing the federal Miller Act will be given great weight in interpreting the South Carolina counterpart). We find that the court of appeals improperly analyzed the SPPA bond statute under Miller Act rubric in arriving at its conclusion. The SPPA has neither ever been characterized as a Little Miller Act nor does it otherwise appear to be patterned after the Miller Act, which seeks to protect both the owner/government entity and the subcontractor through its bonding requirements. Instead, we look to our jurisprudence which holds that when a statute defining a government duty does not specifically create a private cause of action for breach of that duty, a cause of action may be implied if the legislation was enacted for the special benefit of a private party rather than the public at large. *Adkins v. S.C. Dept. of Corr.*, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004). Accordingly, we find that the relevant determination is whether an implied right of action exists under the SPPA.

Beginning with an analysis of the statutory framework, we first find that the very title of the SPPA clearly indicates the General Assembly intended to provide stronger payment protection specifically for subcontractors and suppliers on government projects. *See Broadhurst v. City of Myrtle Beach Elec. Comm'n*, 342 S.C. 373, 381, 537 S.E.2d 543, 546 (2000) (using title of statute to support a judicial interpretation). We also find the placement of the SPPA within the South Carolina Code significant.

Instead of appearing in the Procurement Code,[1] the SPPA is framed solely in the context of payment security by virtue of its location in Chapter 6 of Title 26, entitled "Payments to Contractors, Subcontractors, and Suppliers." This Court has long held that such remedial statutes should be liberally construed in order to effectuate their purpose. *S.C. Dept. of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978).

The statutory terms which tend to distinguish the SPPA from the Little Miller Acts likewise demonstrate the SPPA's enactment for the particular benefit of subcontractors and suppliers. First, the SPPA addresses only the requirement of a payment bond to protect subcontractors in the event of a contractor's nonpayment. The statute does not mention a corresponding performance bond – required in the Little Miller Acts – to protect the owner/government entity in the event of a contractor's nonperformance. Furthermore, the SPPA takes the Little Miller Acts' bond requirement one step further by establishing both a duty on the part of the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond. *See* S.C. Code Ann. § 29-6-250 (providing that "it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form"). In placing an affirmative duty on the government that is absent from the Little Miller Acts, we find that the legislature must have intended for those to whom the government owed the duty to be able to vindicate their rights under a statute enacted for their special benefit. *See State ex. rel. McLeod. v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (finding that a court must presume that the legislature "intended by its action to accomplish something and not to do a futile thing"); *see also Steinke v. S.C. Dep't. of Labor, Licensing and Regulation*, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999) (acknowledging that an affirmative legal duty may be created by statute (quoting *Jensen v. Anderson County Dept. of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991))). For these reasons,

[1] *See* S.C. Code Ann. § 11-35-10 *et. seq.* (1986 & Supp. 2006).

we hold that an implied private right of action by a subcontractor against the government exists under the SPPA.[2]

We briefly address SCDOT's suggestion that a suit on the bond in the event of nonpayment – a remedy expressly permitted under the statute[3] – adequately serves any legislative purpose to protect subcontractors. In our view, this argument fails. A right to sue on the bond provides absolutely no protection for the subcontractor where, as alleged here, the government agency has altogether failed to secure or maintain proper bonding; clearly, a subcontractor cannot sue on a bond that does not exist in the first instance. Moreover, a suit on the bond, standing alone, gives the government entity no incentive to comply with the statute's bonding requirement when the entity 1) has no financial stake in the event of a contractor's nonpayment, and 2) no legal stake in its own noncompliance. In our opinion, the legislative purpose of the SPPA is only served by permitting subcontractors and suppliers on government projects – the only parties with a financial interest in enforcing the bond requirements of the SPPA – to bring a claim under the statute.

Finally, although neither party raised the issue, the dissent asserts that the SPPA does not apply in the instant case, and that the bonding provisions relevant to SCDOT highway construction projects are found exclusively in S.C. Code Ann. § 57-5-1660 (2006). In doing so, the dissent draws a dubious distinction between "highways" and "roadways" that cannot be sustained in

---

[2] As described in the factual background of this case, Sloan purported to bring an action in negligence under both the SPPA and the Little Miller Act applicable to state highway projects. *See* S.C. Code Ann. § 57-5-1660. We see no reason to reject the court of appeals' reliance on federal Miller Act interpretations in finding that no implied right of action exists under the Little Miller Act bond statute. Moreover, any existence of such an action under the Little Miller Act bond statute would be duplicative given our holding today.

[3] *See* S.C. Code Ann. § 11-1-120 (Supp. 2006) (incorporating into the SPPA by reference a provision which allows a suit on the bond by the subcontractor against the contractor in the event of nonpayment).

light of the principle that statutory language must be given its plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Cohen's Drywall Co. Inc. v. Sea Spray Homes*, 374 S.C. 195, 200, 648 S.E.2d 598, 600 (2007). Although, as the dissent points out, there are apparent discrepancies between § 57-5-1660 and the SPPA,[4] a basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject. *Berkebile v. Outen*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993). Accordingly, and without an indication of legislative intent to the contrary, we find that any directive on the application of one statute to the exclusion of the other is within the province of the legislature. *State v. Blackmon*, 304 S.C. 270, 275, 403 S.E.2d 660, 662 (1991) (holding that the legislature, and not the court, is responsible for amending laws to resolve inconsistencies).

In our view, the enactment of the SPPA in 2000 illustrates the legislature's intent to, in essence, pick up where the Little Miller Acts left off by outlining a more extensive payment protection scheme dedicated specifically to subcontractors and suppliers. Accordingly, we hold that the duty created under the SPPA gives rise to a private right of action against a government entity for failure to ensure that a contractor is properly bonded.[5]

---

[4] The primary substantive differences in the statutory bonding requirements is that under § 57-5-1660, the contractor's performance and payment bonds are required on contracts exceeding $10,000 and must be with a surety "satisfactory to the awarding authority," which under SCDOT regulations, is a surety with a minimum rating of "B". Additionally, § 57-5-1660 requires the payment bond to have a face value of at least 50% of the contract. The SPPA, on the other hand, requires a bond on contracts exceeding $50,000 and provides that the bond must be issued by a surety with a minimum rating of "A". The payment bond under the SPPA is only required to have a face value of 10% of the contract.

[5] Sloan additionally argues that the court of appeals erred in finding that the South Carolina Tort Claims Act bars a claim against a government agency for failure to enforce statutory bonding requirements. Although we find that the court of appeals incorrectly based its conclusion with respect to the SPPA on

B. Third-party beneficiary breach of contract claim

Sloan contends that failure to comply with statutory bonding requirements gives rise to a third-party beneficiary breach of contract claim by the subcontractor against the government.[6] Sloan therefore argues that the trial court erred in dismissing its breach of contract claim against SCDOT based on lack of privity. We agree, finding Judge Richard Posner's reasoning in *A.E.I. Music Network, Inc. v. Business Computers, Inc.*, 290 F.3d 952 (7th Cir. 2002) instructive on this matter.

In *A.E.I. Music*, a federal district court was asked to determine the nature of an unpaid subcontractor's breach of contract claim against the city school board for failing to require a contractor on a school construction project to post a payment bond as required by the Illinois Bond Act. The Bond Act provided in relevant part that in contracts for public work, "[the contracting state agency] shall require every contractor for the work to furnish, supply and deliver" a payment bond to the State in favor of subcontractors. 30 Ill. Comp. Stat. Ann. 550/1. The court determined that because no bond had been in place to begin with, the subcontractor's suit against the school board was not a suit on the bond under the Bond Act.

---

this issue on federal Miller Act jurisprudence, we nevertheless agree that a claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the Tort Claims Act because the Act does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute. *See* S.C. Code Ann. § 15-78-60(4) (2005). *See also Hawkins v. City of Greenville*, 358 S.C. 280, 292-93, 594 S.E.2d 557, 563-64 (Ct. App. 2004) (noting that the South Carolina Tort Claims Act is only a limited waiver of sovereign immunity for tort claims against government entities and does not create new substantive causes of action). Therefore, the Tort Claims Act is not relevant to the government's liability for failure to comply with a duty under the SPPA.

[6] A sovereign is not immune from a suit based on its breach of a contractual obligation. *Hodges v. Rainey*, 341 S.C. 79, 92, 533 S.E.2d 578, 585 (2000).

A.E.I. Music, 290 F.3d at 954. Rather, the court characterized the action as a third-party beneficiary suit for breach of contract because the Act's bond requirement was read into every construction contract of a public entity, and therefore, became a term of the contract between the school board and the general contractor. *Id.* at 955. Because the term was intended to benefit the general contractor's subcontractors, the subcontractor was a direct third-party beneficiary – as opposed to an incidental beneficiary – and therefore entitled to enforce the bond requirement. *Id.*

The *A.E.I. Music* court's discussion contained numerous policy-based theories for characterizing a subcontractor as a direct third-party beneficiary with the right to sue on the primary contract. Judge Posner explained that the statutory bond requirement was a contractual term incorporated by the legislature, and therefore, the "relevant intentions" in determining whether a third party could enforce the contract pursuant to the third-party beneficiary doctrine were "no longer those of the parties but those of the legislature." *Id.* at 955-56. In creating a bond requirement, Judge Posner determined that the legislature intended public works construction contracts to protect subcontractors. Because subcontractors would be the only ones with an interest in enforcing this contractual term, carrying out the legislature's intent required enabling this protected class to enforce the contract. *Id.* at 956. Accordingly, the court held the subcontractor's claim sounded in common law as a claim for breach of contract.[7] *Id.* at 957.

We find the *A.E.I. Music* court's analysis is equally applicable in this case. Recognizing that "the underlying goals of the Procurement Code serve important public interests concerning this particular contractual relationship," this Court has held that contracts formed pursuant to the Procurement Code are deemed to incorporate the applicable statutory provisions and such

[7] Although the primary issue in *A.E.I. Music* was whether the subcontractor's claim was governed by the statute of limitations in the Illinois Bond Act or the common law statute of limitations for contract actions, we find Judge Posner's reasoning as to the subcontractor's rights and characterization as a third-party beneficiary is nonetheless instructive in this case.

provisions shall prevail over conflicting contractual provisions. *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 171, 551 S.E.2d 263, 271 (2001). Although not located in the Procurement Code, the SPPA is generally applicable to public procurement. Therefore, we find that an incorporation of the SPPA's bonding requirements into public works contracts is consistent with this Court's reasoning in *Unisys Corp*.

Even without reference to the Procurement Code, the SPPA serves important public interests in its own right. Seeking to protect subcontractors' payment rights on government projects encourages competitive bidding, which results in the most economically efficient use of tax dollars and other sources of public funding. Accordingly, we hold that the bonding requirements of the SPPA are incorporated into construction contracts governed by the statute.

Finally, we find that under established contract law in South Carolina, subcontractors have enforceable rights as third-party beneficiaries to construction contracts incorporating the SPPA. *See Bob Hammond Constr. Co., Inc. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994) (noting that where a contract between two parties is intended to create a direct benefit to a third party, the third party may enforce the contract). Because the legislature intended to protect contractors by creating bonding requirements, and because the subcontractors are the only ones with a financial stake in enforcing the bond requirements, subcontractors are direct third-party beneficiaries to the contract between a government entity and a general contractor to which the SPPA is applicable. For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements.

Accordingly, we hold that a government agency's failure to secure and maintain statutory bonding as required by the SPPA gives rise to a third-party beneficiary breach of contract action by a subcontractor.

C. Extent of governmental liability

We clarify our holding today by emphasizing that the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended. The purpose of the SPPA is similar to that underlying the subcontractor's lien outlined in the mechanics' lien statute, *see* S.C. Code Ann. § 29-5-20 (1991), which is to protect a party who provides labor or materials for the improvement of property but does not have a contractual relationship with the property owner. *Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship*, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (Ct. App. 1992). The subcontractor's lien, however, is not intended to create a windfall to the subcontractor. The mechanics' lien statute provides that when a subcontractor seeks to enforce a mechanics' lien against the owner of the improved property due to the general contractor's nonpayment, the owner's liability is limited to the remaining unpaid balance on the contract with the general contractor at the time the owner receives notice from the subcontractor of the general contractor's nonpayment. S.C. Code Ann. § 29-5-40 (1991); *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 630, 93 S.E.2d 855, 860 (1956). Given the similar purposes behind the SPPA bond requirements for public projects and the subcontractors' mechanics' lien on private work, we hold that in a tort or contract action arising under the SPPA, the government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment. This limitation, however, does not preclude the additional recovery of attorneys' fees under any applicable statute.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decision affirming the dismissal of Sloan's claims against SCDOT. Considering only the allegations set forth on the face of the plaintiff's complaint for purposes of our review today, we find that a resolution of Sloan's claim by this Court on the merits is factually premature. Accordingly, we remand the case to the

trial court for a determination of SCDOT's liability to Sloan consistent with this opinion.

WALLER, J., and Acting Justice Alexander S. Macaulay, concur. PLEICONES, J., dissenting in a separate opinion in which Acting Justice E. C. Burnett, III, concurs.

JUSTICE PLEICONES: I respectfully dissent. The trial court held, and I agree, that the SPPA does not apply to this contract for highway improvements, the relevant bonding provisions being those found in S.C. Code Ann. § 57-5-1660 (2006). I would accordingly vacate that part of the Court of Appeals opinion which addresses the merits of the SPPA claim, and affirm.

South Carolina Code Ann. § 57-5-1660 is found in a chapter of the Code entitled "State Highway System:" more specifically, this statute is found in the article of that chapter entitled "Construction Contracts and Purchases." Section 57-5-1660 governs "Contractors' bonds; amounts and actions thereon" and provides in relevant part:

> (a) The Department of Transportation shall require that the contractor on every public highway construction contract, exceeding ten thousand dollars, furnish the Department of Transportation, county, or road district the following bonds, which shall become binding upon the award of the contract to such contractor:
>
> (1) A performance and indemnity bond….
>
> (2) A payment bond with a surety or sureties satisfactory to the awarding authority, and in the amount of not less than fifty percent of the contract, for the protection of all persons supplying labor and materials in the prosecution of work provided for in the contract for the use of each such person.

The statute requires a bond before the contract was let, a condition which was admittedly complied with, and contains no requirement that DOT keep a viable bond in place throughout the project. Even if this statute created a privately enforceable duty, DOT has not breached it.

The SPPA upon which the majority rests its decision, is simply inapplicable to a State Highway Department construction project. The "labor

and material bond" statute cited by the majority applies when a governmental body, including DOT, enters "a contract to improve real property." S.C. Code Ann. § 29-6-250 (1)(2007). Such a contract is let by the property's owner to:

> (2) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill, or landscape any real property, or to construct driveways and roadways, or to furnish materials, including trees and shrubbery, for any of these purposes, or to perform any labor upon these improvements, and also means and includes any design or other professional or skilled services furnished by architects, engineers, land surveyors, and landscape architects.
>
> S. C. Code Ann. § 29-6-10 (2)(2007).

In other words, when DOT has a parking lot repaved, or relandscapes an area adjoining its offices, or even when it contracts to build a new access road for a heavy equipment depot, it is subject to this act. A State Highway construction project, however, is neither a driveway nor a roadway within the ambit of the SPPA. Moreover, even if the SPPA were implicated by a such a project, § 29-6-250(1) merely requires the governmental entity entering the real estate improvement contract "take reasonable steps to assure that the appropriate bond is issued and is in proper form." Here, there is no contention that DOT breached its duty to see that the AMWEST bond was issued, and that it was in proper form. As in § 57-5-1660, there is no obligation placed on the governmental entity to monitor the bond status after it has been issued. Accordingly, even assuming the SPPA applies, no breach of statutory duty has been alleged here.

Finally, I simply do not understand that part of the majority opinion which upholds Petitioner's right to maintain a third party breach of contract claim. Here, unlike the situation in A.E.I., a proper bond was procured and accordingly there is no need to resort to the third party theory. In a

breathtaking gesture, the majority incorporates the bond requirements of the SPPA into every public works contract "governed by the statute," apparently losing sight of the fact the statute only applies to contracts for the improvement of real estate, and then requires a bond only if the amount of the contract exceeds $50,000.[8] Using a Procurement Code analogy and legislative powers, the majority goes on to "limit" governmental liability and suggests that attorney's fees may somehow be recoverable from an unnamed statutory source, inferentially the mechanic's lien statute. Showing greater restraint, the majority, while reversing the trial court's dismissal of the complaint, does refrain from ruling prematurely in Petitioner's favor.

I am awed by the majority's decision but I cannot join it. Highway Construction bonding contracts are governed solely by § 57-5-1660. The trial court was correct in dismissing this complaint, and the Court of Appeals, although using reasoning which I do not entirely concur in, properly affirmed. I would uphold the dismissal for the reasons given above.

Acting Justice E. C. Burnett, III, concurs.

[8] The effect of the majority's decision is to import the SPPA into highway construction contracting. It therefore appears that although § 57-5-1660 requires a bond whenever the highway construction contract exceeds $10,000, that monetary threshold is superseded by the SPPA, which requires a bond only when the contact exceeds $50,000. It is unclear to me how this ruling provides "a more extensive payment protection scheme dedicated specifically to subcontractors and suppliers."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Terrence Haggins, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26463
Submitted February 21, 2008 – Filed March 24, 2008

DISMISSED AS IMPROVIDENTLY GRANTED

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

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

PER CURIAM: The State petitioned the Court of Appeals pursuant to Rule 227, SCACR, for a writ of certiorari to review a circuit court order granting respondent's application for post-conviction relief (PCR). The Court of Appeals denied the State's petition by letter without issuing a formal order or opinion.[1] We granted the State's petition for a writ of certiorari made pursuant to Rule 226, SCACR, to review the Court of Appeals' denial and now dismiss the writ as improvidently granted. We hold that, as a matter of policy, we will not entertain Rule 226 petitions where the Court of Appeals has exercised its discretion and denied a Rule 227 petition, and no formal opinion or order has been filed.

This Court has held that it will grant certiorari to the Court of Appeals "only where special reasons justify the exercise of that power." In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 471 S.E.2d 454 (1990), cited with approval in Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006) (holding counsel not required to seek certiorari after criminal direct appeal decided by Court of Appeals) and in Dunlap v. State, 371 S.C. 585, 641 S.E.2d 431 (2007) (extending rationale of Douglas to PCR cases, and holding counsel not required to seek certiorari from the Court of Appeals decision).

A decision by the Court of Appeals to grant or deny a writ of PCR certiorari is a matter committed to that court's discretion. The decision to deny PCR certiorari can never be deemed "a special reason" justifying the exercise of our discretion, nor can an informal "letter denial" meet any of the five criteria we consider when determining whether to grant certiorari to a decision of the Court of Appeals. See Rule 226(b), SCACR.[2]

---

[1] As is the practice in this Court, parties are informed that their petitions for writs of certiorari have been denied by letter from the appellate court clerk's office.

[2] Where there are novel questions of law; where there is a dissent in the decision of the Court of Appeals; where the decision of the Court of

We therefore hold that we will not entertain Rule 226 petitions for writ of certiorari to review "letter denials" in PCR matters. Accordingly, this writ is

DISMISSED AS IMPROVIDENTLY GRANTED.

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

Appeals is in conflict with a prior decision of the Supreme Court; where substantial constitutional issues are directly involved; and/or where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ernest E. Richardson, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 26464
Submitted March 19, 2008 – Filed March 24, 2008

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Daniel E. Grigg, all of the Office of the Attorney General, of Columbia, for Respondent.

PER CURIAM: Counsel for petitioner has filed a petition for a writ of certiorari, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), from the denial, after a hearing, of petitioner's application for post-conviction relief (PCR). Petitioner has filed a pro se response.

We grant the petition for a writ of certiorari on the issue of the PCR judge's refusal to relieve PCR counsel,[1] dispense with the requirements of a merits petition and brief, and affirm the denial of petitioner's PCR application. However, we take this opportunity to address the recurring problem of PCR applicants seeking repeatedly, and without sufficient cause, to have their appointed counsel relieved.[2] In the case at hand, although the exact number of these motions is unclear, at least nine motions to relieve PCR counsel or to be relieved as PCR counsel were made, and many of those motions were granted. Such tactics constitute an abuse of the judicial process, resulting in significant delays,[3] and should not be tolerated, much less acquiesced in, by judges presiding over PCR matters.

While there is no constitutional obligation to appoint counsel in a PCR matter, in South Carolina, if a PCR application presents questions of law or fact requiring a hearing, and the applicant is indigent, state law provides that counsel must be appointed or a knowing, intelligent waiver of the right to counsel must be obtained. S.C. Code Ann. § 17-27-60 (2003); Rule 71.1(d), SCRCP; Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992); see also Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001)(Counsel should be appointed when the State moves for dismissal on the ground the application was not timely filed where the applicant raises an issue of material fact regarding the applicability of the one-year statute of limitation.). However, a PCR applicant is not entitled to appointed counsel of choice. While an applicant *may* have the right to reject or discharge court-appointed counsel and proceed pro se or retain his own counsel, he does not have the right, without a showing of satisfactory cause to refuse or dismiss the counsel

---

[1] We deny certiorari on the remaining issues raised in the Johnson petition and pro se response.

[2] In some cases, applicants file a motion to relieve counsel, while in other cases, such as the one at hand, PCR counsel files a motion to be relieved as counsel at the behest of the applicant. On most occasions, motions to be relieved as counsel, even if not made at the behest of the applicant, are based on the applicant's insistence on raising allegations that are without merit and/or improper for PCR, counsel's refusal to pursue such allegations, and the applicant's resulting dissatisfaction with counsel.

[3] The PCR application in this matter was filed in 1998.

appointed and have other counsel appointed. State v. Jones, 270 S.C. 587, 243 S.E.2d 461 (1978).

A mere disagreement between an applicant and his counsel as to how to proceed with the PCR application, including the allegations to be raised, is not sufficient cause, in itself, to require the PCR judge to replace or to offer to replace court appointed counsel with another attorney. Id. Many times, such as in the case at hand, an applicant does not understand the PCR process, including the fact that the allegations that can be raised are limited by law. Counsel should not be relieved, and the process delayed, because an applicant is dissatisfied with counsel's legitimate refusal to pursue allegations that are meritless and/or not proper in PCR. Cf. State v. Graddick, 345 S.C. 383, 548 S.E.2d 210 (2001)(trial judge did not err in denying defendant's motion to relieve counsel where defendant alleged counsel was not representing his interests, was not fully prepared for this case, and the defendant asserted he did not feel comfortable going to court with counsel as his lawyer); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)(trial judge did not abuse his discretion in denying defendant's motion to relieve counsel based on defendant's allegation that counsel was not up to date on the law).

Another common tactic in PCR matters is for the applicant to file a complaint against appointed counsel with the Office of Disciplinary Counsel. The complaint is then asserted as a basis for a motion to relieve counsel or a motion to be relieved as counsel. We caution the bench that the filing of a disciplinary complaint should not result in automatic removal of appointed counsel. If this were not the case, applicants could obtain substitute counsel by the simple expedient of filing an ethical complaint even if that complaint is without any factual or legal basis. Instead, the basis for the complaint should be explored and the PCR judge should exercise discretion in determining whether the basis for the complaint constitutes sufficient cause to relieve counsel.[4] Again, applicants must not be allowed to employ tactics such as these to manipulate the PCR process.

[4] Pursuant to Rule 12(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, neither the attorney nor the complainant are prohibited from disclosing the existence of an ethical

In the case at hand, the PCR judge properly denied the motion to be relieved as counsel, as the basis for the motion, as well as the previous motions to relieve counsel or be relieved as counsel filed in this case, was petitioner's dissatisfaction with PCR counsel because counsel would not pursue allegations, by way of subpoenas and discovery, which were clearly meritless and/or not proper for PCR. State v. Jones, supra. The PCR judge's order is therefore

AFFIRMED.

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

---

complaint. However, if the attorney does not want the existence of the complaint revealed, or client confidences may be revealed in determining whether the underlying basis of the complaint establishes good cause to relieve counsel, the procedure set forth in Rule 12(d), RLDE, Rule 413, SCACR, may be followed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane Doe, Claimant, Petitioner,

v.

South Carolina Department of Disabilities and Special Needs, Employer, and State Accident Fund, Carrier, Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Florence County
James E. Brogdon, Circuit Court Judge

Opinion No. 26465
Heard December 5, 2007 – Filed March 24, 2008

REVERSED

Edward L. Graham, of Graham Law Firm, P.A., of Florence, for petitioner.

T. McRoy Shelley, III, of Rogers, Townsend & Thomas, PC; and Cynthia B. Polk, all of Columbia, for respondents.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision in this workers' compensation case.[1] We reverse.

FACTS

In 1979, petitioner (Claimant) began employment as a licensed practical nurse (LPN) with respondent South Carolina Department of Disabilities and Special Needs (Department). Claimant worked at a Department facility that housed patients in various units. She was the only LPN on first-shift duty in her unit. It was her responsibility to give basic patient care and administer medications.

During the spring of 1997, Department began downsizing the facility. Higher functioning patients were moved to community homes and the remaining patient units were consolidated. As a result, the patient population in Claimant's unit changed from being a passive group to a mixed group of passive and aggressive patients. The record indicates Claimant's unit went from being "a fairly pleasant unit to work in" to being "kind of a dumping ground" where none of the other nurses wanted to work.

The level of noise and violence in Claimant's unit increased dramatically in the spring of 1997. With the combination of patients, the aggressive patients attacked the passive ones and Claimant was forced to intervene. Patient and staff injuries increased significantly. The number of reported incidents in Claimant's unit increased from eleven in March 1997 to 128 in May 1997.[2] Claimant suffered a number of minor physical injuries, including having feces smeared in her face.

After the spring of 1997, Claimant began having problems with depression. She received psychiatric care, including medication and

---

[1]364 S.C. 411, 613 S.E.2d 785 (Ct. App. 2005).

[2]The number of incidents decreased in June 1997 to 87 and continued declining until the fall of 1997.

electro-convulsive treatment, and was hospitalized for severe depression in 1998. Dr. Lowe gave his medical opinion that Claimant's depression was caused by her job situation. He noted that Claimant was previously a well-integrated and functioning person and her sense of self-worth declined when her work situation fell apart. Claimant finally resigned in June 1998 as a result of her inability to work.

Claimant filed this claim for workers' compensation benefits alleging a stress-related mental injury.[3] The single commissioner denied the claim. His findings were adopted by the appellate panel of the full Commission (hereinafter "the Commission"). The circuit court found these findings were unsupported by substantial evidence and reversed. The Court of Appeals reversed the circuit court's order and reinstated the Commission's ruling that Claimant was not entitled to benefits.

ISSUE

Is there substantial evidence to support the Commission's decision regarding causation?

DISCUSSION

Our standard of review requires that we determine whether the circuit court properly found the Commission's findings of fact are not supported by substantial evidence in the record. Baxter v. Martin Bros., Inc., 368 S.C. 510, 630 S.E.2d 42 (2006).

Mental or nervous disorders are compensable provided the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment. Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1989) (adopting analysis of Stokes

[3]Claimant also alleged mental injury stemming from physical injuries she sustained on the job. This claim was denied and is not an issue here.

v. First Nat'l Bank, 298 S.C. 13, 377 S.E.2d 922 (Ct. App.1988)). In Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000), we surveyed different approaches to determining what constitutes an "unusual and extraordinary" condition of employment. We concluded the standard to be applied is whether the work conditions at issue were unusual compared to the particular employee's normal strains. 341 S.C. at 457, 535 S.E.2d at 443 (*citing* 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 44.05(4)(d)(i) (1999)).

Here, the commissioner found there were no extraordinary or unusual conditions in Claimant's employment. He concluded it was not unexpected that patients would be moved from one facility to another, that workers would be subjected to aggressive behavior from patients, or that the amount of care needed by patients would change. The circuit court found the commissioner's findings, adopted by the full Commission, were unsupported by substantial evidence. The court focused on the fact that the mix of passive and aggressive patients was an extraordinary and unusual condition in Claimant's employment and concluded this caused Claimant's stress-related mental injury. We agree with the circuit court's analysis.

The record indicates that in the spring of 1997, with the new mix of passive and aggressive patients in Claimant's unit, behavior problems escalated because of the "domino effect" created when an aggressive patient acted out. Claimant had never before worked with a mix of passive and aggressive patients. No other unit had a mix of passive and aggressive patients. In fact, Department made changes after a DHEC survey criticized Department for housing diverse patients together.

The Court of Appeals reversed the circuit court, finding substantial evidence in the record that supported the Commission's conclusion there were no extraordinary and unusual conditions in Claimant's employment. The Court of Appeals relied on the testimony of Claimant's two co-workers, Tenia Rae Allen and Kim Willis. A review of the record, however, indicates that the testimony relied upon

is taken completely out of context and does not support the Court of Appeals' conclusion.

First, the Court of Appeals noted the testimony of Tenia Rae Allen, a nurse supervisor, stating that it was not unusual for nurses to deal with aggressive patients and nurses were injured even before aggressive patients were transferred to Claimant's unit. Nurse Allen never stated that it was usual for a nurse to deal with a mix of passive and aggressive patients. In fact, she testified that Claimant's unit became "pretty chaotic" with the new mix of patients and there was a significant increase in violent behavior even among the patients who formerly were fairly well-controlled. She observed that the change in Claimant's unit was "pretty dramatic," and "yes, I think it could really depress somebody to be there." Other units housed only volatile patients but were smaller units and the staff was used to handling those patients. As a whole, Nurse Allen's testimony supports the conclusion that the mix of passive and aggressive patients in Claimant's unit was an extraordinary and unusual condition compared to the normal strains of Claimant's employment.

The Court of Appeals also noted the testimony of Nurse Willis that, in her experience, there are always patients who are harder to deal with, she expects changes in the types of patients she deals with, and physical confrontation with patients is not unusual. Nurse Willis, however, never discussed caring for a mixed group of passive and aggressive patients. She did say that Claimant's unit had an increase in patients with behavioral problems, including one patient who screamed continuously, and that the difference in caring for "low level" and "high level" patients was a substantial change.

Finally, the Court of Appeals observed that Claimant had non-work related stressors, including a prior bout with depression in 1980 and her father's cancer and death in December 1997, that "could impact her mental injury." There is no support in the record for the conclusion that any of these outside factors caused or even contributed to Claimant's disability. The only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by

Dr. Lowe. Moreover, a history of pre-existing depression does not preclude workers' compensation benefits for a mental-mental injury. *See* Ellison v. Frigidaire Home Prods., 371 S.C. 159, 638 S.E.2d 664 (2006) (an injured claimant is entitled to benefits for disability arising from a permanent impairment in combination with a pre-existing impairment if the combined effect results in a substantially greater disability).

CONCLUSION

We find no substantial evidence in the record to support the Commission's denial of benefits. Accordingly, we remand for the Commission to award benefits based on Claimant's disability arising from her mental-mental injury.

WALLER, J., and Acting Justice Doyet A. Early, III, concur. TOAL, C.J., concurring in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I concur in the majority's decision to reverse this case, but I write separately because I would resolve the case on different grounds. In my view, two of the tribunals below committed similar errors of law in failing to properly apply the standard for evaluating a workers' compensation claim for mental injuries brought about by emotional stress or stimuli. Accordingly, I would reverse this case without determining whether the lower courts' findings have evidentiary support.

The reasoning of the single commissioner shares a fatal flaw with that employed by the court of appeals in reinstating the single commissioner's decision. In my view, that fatal flaw is the focus on the ordinary aspects of Petitioner's employment to the exclusion of an examination of the extraordinary, and the consequent use of those ordinary aspects to support the conclusion that Petitioner's injury is not compensable. In *Stokes v. First Nat'l Bank*, the court of appeals adopted the view that mental injuries are compensable if, as in heart attack cases, the mental injury is induced either by physical injury or by unusual or extraordinary conditions of employment. 298 S.C. 13, 21, 377 S.E.2d 922, 926 (Ct. App. 1988). We affirmed that decision, noting:

> "injury by accident" . . . has been construed to mean not only an injury the means or cause of which is an accident, but also an injury which is itself an accident; that is, an injury occurring unexpectedly from the operation of internal or subjective conditions, without the prior occurrence of any external event of an accidental character . . . [i]n determining whether something constitutes an "injury by accident" the focus is not on some specific event, but rather on the injury itself.

Stokes v. First Nat'l Bank, 306 S.C. 46, 49-50, 410 S.E.2d 248, 250 (1991).

In my view, both the single commissioner and the court of appeals failed to consider whether the changed conditions of

Petitioner's employment were, for her, unusual or extraordinary, and similarly failed to evaluate how the changed conditions affected Petitioner. I believe this was error under *Stokes*, and based on this error of law, I would reverse.

JUSTICE PLEICONES: I respectfully dissent. I believe the Court of Appeals correctly held that the Commission's decision was supported by substantial evidence, and I would affirm the denial of benefits to Claimant.

Because we granted certiorari to review a decision of the Court of Appeals, our standard of review requires us to determine whether the Court of Appeals properly held that the Commission's findings were supported by substantial evidence in the record.[4]

While I am sympathetic to Claimant's struggle with depression, I cannot find error with the Court of Appeals' conclusion. Claimant was an experienced LPN whose patients suffered from severe mental retardation and cognitive disabilities. The Department produced sufficient evidence to show that: (a) the change in the type of patients under Claimant's care was neither unexpected nor unusual; (b) Claimant was trained to handle aggressive patients; and (c) although unfortunate, it was not unusual for Department nurses to be subjected to aggressive and sometimes violent behavior. Despite the fact that Claimant presented ample evidence to support her position, the Commission's findings must be upheld if supported by substantial evidence. *See* Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (substantial evidence is not evidence viewed solely from one side; it is evidence, when the whole record is considered, that would allow reasonable minds to reach the conclusion the Commission reached).

---

[4] Under the Administrative Procedures Act, we may not substitute our judgment for that of a state agency as to the weight of evidence on questions of fact, but we may reverse or modify decisions which are clearly erroneous in view of the substantial evidence on the whole record. Welch Moving and Storage Co., Inc. v. Pub. Serv. Comm'n of S.C., 301 S.C. 259, 261, 391 S.E.2d 556, 557 (1990). Baxter, cited by the majority as stating the applicable standard of review, does not apply to this case. Baxter involved a certified appeal directly from the circuit court pursuant to Rule 204, SCACR.

The Commission found that Claimant was not exposed to unusual and extraordinary conditions in her employment, and in light of the entire record, this conclusion is tenable. Accordingly, I would affirm the Court of Appeals because the Commission's findings are supported by substantial evidence.

The Supreme Court of South Carolina

In the Matter of
Thomas B. Hall, Petitioner.

ORDER

On October 9, 2006, the Court definitely suspended petitioner from the practice of law for nine months. In the Matter of Hall, 370 S.C. 496, 636 S.E.2d 621 (2006). In April 2007, he filed a Petition for Reinstatement and the matter was referred to the Committee on Character and Fitness (CCF). The CCF has filed a Report and Recommendation recommending the Court grant the Petition for Reinstatement. Neither petitioner nor the Office of Disciplinary Counsel (ODC) filed any exceptions to the CCF's Report and Recommendation.

The Court grants the Petition for Reinstatement. Petitioner is hereby reinstated to the practice of law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Moore, J., not participating

Columbia, South Carolina

March 19, 2008

The Supreme Court of South Carolina

Jonathan X. Miller, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

This matter is before the Court on a petition for a writ of mandamus dated September 24, 2007. The Attorney General's Office and the Richland County Clerk of Court have filed separate returns.

On June 15, 2004, petitioner filed a motion entitled Motion: Emergency Writ of Habeas Corpus (2004 habeas petition) in the circuit court. Petitioner claims he filed a motion of dismissal in the circuit court in August 2007.

Petitioner has filed a petition for a writ of mandamus in this Court in which he alleges the Richland County Clerk of Court and the State failed to respond to his 2004 habeas petition and his motion of dismissal. He further claims the State failed to set a court date for the hearing he requested. Petitioner requests the State be ordered to set a hearing on his motions.

The Attorney General's Office filed a return indicating they were unaware of petitioner's filings in the circuit court, and had they been aware of the 2004 habeas petition, they would have moved to summarily dismiss the petition as an untimely application for post-conviction relief (PCR).

By way of return, the Richland County Clerk of Court acknowledges the filing of the 2004 habeas petition. However, the Clerk of Court maintains there is no evidence the motion of dismissal was received. In addition, she states the petition for a writ of mandamus was not received by her until it was sent to her by this Court along with a request for a return.

The Clerk of Court contends the 2004 habeas petition was without merit on several procedural and substantive grounds. Specifically, she argues the 2004 habeas petition was neither in the form prescribed for a PCR application nor did it contain information required for a PCR application pursuant to S.C. Code Ann. § 17-27-50 (2003). Also, she maintains the 2004 habeas petition amounted to an untimely PCR application.

In addition, she argues the 2004 habeas petition, construed as a PCR application, contained only conclusory allegations, and would likely have been dismissed as time barred or found to be without substantive merit.

Also, the Clerk claims the 2004 habeas petition did not raise a violation which constituted a "denial of fundamental fairness shocking to the universal sense of justice" pursuant to Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998).

The Clerk argues petitioner failed to allege grounds warranting the issuance of a writ of mandamus. She claims, because the 2004 habeas petition did not conform to requirements for a PCR application, "it did not trigger a duty . . . to take any particular action." In addition, she maintains the decision when and where to set a hearing is discretionary rather than mandatory. The Clerk further contends the 2004 habeas petition was mooted by petitioner's release from incarceration into the Community Supervision Program because the only purpose of a habeas corpus petition is to seek release from the current term of incarceration.

Mandamus is the highest judicial writ and is issued to compel a public official to perform a ministerial duty, not a discretionary duty, and only when there is a specific right to be enforced, a positive duty to be performed, and no other available legal remedy. Riverwoods, L.L.C. v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002); City of Rock

Hill v. Thompson, 349 S.C. 197, 563 S.E.2d 101 (2002); Ex parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000); Redmond v. Lexington County Sch. Dist. No. 4, 314 S.C. 431, 445 S.E.2d 445 (1994).

Upon the filing of a petition for a writ of habeas corpus, the Clerk of Court should verify the document contains a case caption, a proper county designation, and the signature of the filing party, and should forward a copy of the petition to the Attorney General's Office. S.C. Clerk of Court Manual § 6.24.

Because petitioner failed to name the Clerk of Court as a party or serve his petition for a writ of mandamus on her, he may not seek mandamus relief as to her. Thompson, supra (holding a party seeking mandamus must serve the party against whom relief is sought). Moreover, the 2004 habeas petition became moot upon petitioner's release from incarceration. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998) ("The inquiry on habeas corpus is limited to the legality of the prisoner's *present* detention.") (emphasis added). Also, petitioner has not shown the Clerk failed to perform any duty as to the

motion of dismissal because the evidence indicates the motion of dismissal was never received by the Clerk. Accordingly, the petition for a writ of mandamus is denied.

However, we take this opportunity to emphasize the Clerk of Court's duties regarding the filing of a petition for habeas corpus. The Clerk of Court has the ministerial duty to verify the petition contains a case caption, a proper county designation, and the signature of the filing party, and to forward a copy of the petition to the Attorney General's office. S.C. Clerk of Court Manual § 6.24. The Clerk of Court's duty is not discretionary. The Clerk of Court should not construe a petition for a writ of habeas corpus as a PCR application. In addition, although a habeas corpus petition may be flawed on a number of procedural and substantive grounds, it is not within the Clerk of Court's authority to refuse to perform her duty based on her opinion that a filing lacks legal merit or is untimely. 21 C.J.S. Courts § 338 (2006) ("[A] clerk of court cannot ordinarily determine questions of law [or] render judgments.").

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Moore, J. not participating.

.
Columbia, South Carolina
March 19, 2008

The Supreme Court of South Carolina

In the Matter of Tynika Adams Claxton, Respondent.

ORDER

Respondent was suspended on January 14, 2008, for a period of sixty (60) days. She has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and she is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

March 17, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Virgil Lee Culbreath, Appellant.

Appeal From Edgefield County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4359
Submitted February 1, 2008 – Filed March 18, 2008

AFFIRMED

Tommy A. Thomas and Tricia A. Blanchette, of Irmo, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R. J. Shupe, Office of the Attorney General, of Columbia, and

Solicitor Donald V. Myers, of Lexington, for Respondent.

PIEPER, J.: Virgil Lee Culbreath appeals from his conviction for trafficking of crack cocaine, asserting the trial judge erred in denying Culbreath's motion for a mistrial after the State's witness mentioned prior drug dealings with Culbreath. We affirm.[1]

FACTS

Culbreath was indicted in 2004 on one count of trafficking crack cocaine and one count of distribution of crack cocaine within the proximity of a school or park. Both counts arose from an April 30, 2004 controlled sale to a confidential informant.

At trial, the State called the confidential informant, Kontay Gaines as a witness. Gaines testified he had been arrested several times for selling drugs and incarcerated twice. Gaines further stated that after he was arrested in November 2003, he told law enforcement officials he could buy drugs from Culbreath.[2] The solicitor then asked Gaines how he knew Culbreath but instructed him not to talk about any business transactions. Culbreath's counsel moved for a mistrial, contending the term "business transactions" inferred drug transactions. The trial court denied the motion. Before the jury returned to the courtroom, the solicitor specifically instructed Gaines not to talk about any prior drug transactions with Culbreath.

During direct examination Gaines testified he met Culbreath in 1994 and that Culbreath dated his stepsister. Gaines proceeded to detail the April 30, 2004 controlled sale from Culbreath. Gaines explained he met with law enforcement officers at the airport where the officers searched Gaines and his vehicle. The officers provided Gaines with $3000 and a beeper. Gaines went to Culbreath's residence and arranged to purchase three ounces of crack cocaine for $3000. Once Gaines left Culbreath's residence, the officers

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

[2] Culbreath did not object to this testimony.

contacted Gaines and instructed him to meet them at a nearby church. The officers searched Gaines and the vehicle, and changed the battery in the beeper. Gaines then drove to a restaurant parking lot to wait for Culbreath's call.

Culbreath pulled up next to Gaines in the parking lot and told Gaines to follow him. Gaines followed Culbreath to a house in Edgefield. Once inside Culbreath explained he could not get the three ounces Gaines wanted but gave Gaines a paper bag containing two ounces of crack cocaine. Gaines paid Culbreath $2000, left the house, and drove to a prearranged location to meet with the officers. He turned the crack cocaine and remaining $1000 over to the officers.

On cross-examination, Culbreath's counsel asked Gaines if the drugs he sold when he was arrested in November 2003 were "fronted" to him. Gaines replied, "[y]es sir, from Virgil Culbreath." Culbreath's counsel indicated he had a motion, and the trial court indicated it would be entertained later. Culbreath's counsel continued to question Gaines about the drugs he purchased from Culbreath on April 30, 2004. Gaines was asked if he checked inside the package containing the crack cocaine. Gaines replied he did not, and then asked if he could say why he did not check the package. Culbreath's counsel asked him "why," and Gaines responded "[b]ecause I dealt with [Culbreath] before and I never had to check it." Defense counsel again indicated he had a motion, and the trial court stated he could make it at the proper time.

After Gaines finished testifying, counsel moved for a mistrial based on Gaines' testimony referring to previous dealings with Culbreath. In reply, the State noted Gaines testified, without objection, he told the police he knew he could buy drugs from Culbreath. Further, the State argued Gaines' subsequent testimony was in response to questions from defense counsel and therefore the defense opened the door to the testimony. The trial court found counsel opened the door to the testimony by asking whether Gaines had drugs "fronted" to him, and then asking him why he did not check inside the package he received from Culbreath. Thus, the trial court conditionally

denied the mistrial motion and instructed Culbreath's counsel he could provide the court with relevant case law the following day.

The next morning, defense counsel presented two cases in support of his request for a mistrial.[3] After reviewing the cases, the trial court denied the motion, finding the cases were distinguishable because they involved the State's attempt to introduce prior bad acts or prior crimes evidence, while the instant case involved responses to questions posed by the defense counsel.

The trial court directed a verdict for Culbreath on the proximity charge and submitted the trafficking charge to the jury. Culbreath was convicted of trafficking crack cocaine and sentenced to fifteen years incarceration. This appeal follows.

STANDARD OF REVIEW

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508, 514 (1999); State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162 (Ct. App. 2006). A mistrial should be declared only when absolutely necessary. Council, 335 S.C. at 13, 515 S.E.2d at 514. In order to receive a mistrial, a defendant must show error and resulting prejudice. Id. It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial. White, 371 S.C. at 444, 639 S.E.2d at 162.

LAW/ANALYSIS

Initially, we note that any argument by Culbreath that the trial court erred in denying his motion for a mistrial based upon a comment or question made by the solicitor is not properly presented for appeal.

[3] Culbreath presented State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996) and State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994) to support his motion for a mistrial.

"In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal." Langehans v. Smith, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001); see also Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Culbreath's appellate brief contains only one argument. The heading above the argument states, "[t]he trial court erred in refusing to grant a mistrial after the State's key witness mentioned several times prior drug dealings with appellant." While Culbreath's appellate brief recounts the question asked by the solicitor, the legal argument presented applies only to the statements made by Gaines. Culbreath provides no legal authority or supportive arguments as to any improper question asked by the solicitor.

It is error for the appellate court to consider an issue not properly raised to it. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Therefore, this court is limited to addressing the single issue raised by Culbreath in his brief as to whether the trial court erred in refusing to grant a mistrial after Gaines mentioned prior drug dealings with Culbreath.

Culbreath contends Gaines' references to Culbreath's prior drug dealings were an impermissible attempt to submit evidence of prior bad acts. Further, Culbreath claims the references were prejudicial because they were shockingly similar to the charge for which Culbreath was on trial.

Generally, evidence of prior crimes or bad acts is not admissible to prove the crime for which the defendant is charged. State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Such evidence is admissible when it tends to show (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime on trial. Id. The evidence of prior crimes or bad acts must be relevant to prove the alleged crime. State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994). When the prior bad acts are "strikingly similar to the one

for which the appellant is being tried, the danger of prejudice is enhanced." State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). "[E]ven if [the] prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). This balancing process is reflected in Rule 403, SCRE.

Notwithstanding, a defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination. State v. Young, 364 S.C. 476, 485-87, 613 S.E.2d 386, 391-92 (Ct. App. 2005), cert granted, Shearouse Adv. Sh. No. 31 at 9 (Jan. 5, 2007) (discussing South Carolina jurisprudence regarding opening the door to otherwise inadmissible evidence). A party cannot complain of prejudice from evidence to which he opened the door. State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); Young, 364 S.C. at 485-88, 613 S.E.2d at 391-93, cert granted, Shearouse Adv. Sh. No. 31 at 9 (Jan. 5, 2007).

In this case, the State did not submit any evidence regarding Culbreath's prior drug transactions and specifically instructed Gaines not to discuss prior drug transactions between him and Culbreath. The evidence at issue resulted from defense counsel's questioning of Gaines. When counsel asked Gaines whether the crack cocaine he was selling in November 2003 was "fronted" for him, Gaines replied, "[y]es sir, from [Culbreath]." Culbreath's counsel subsequently asked Gaines if he checked the package he received from Culbreath, and Gaines replied, "[n]o sir." Gaines then asked if he could state why he did not check the package. When Culbreath's counsel asked him "[w]hy," Gaines stated "[b]ecause I dealt with [Culbreath] before and I never had to check it." We find the defense opened the door to the references made about Culbreath's prior drug dealing with Gaines. Accordingly we find the trial court did not abuse its discretion in refusing to grant a mistrial.

Therefore, the decision of the trial court is hereby

AFFIRMED.

HEARN, C.J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent.

v.

Hoss Hicks Appellant,

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 4360
Submitted March 3, 2008 – Filed March 18, 2008

AFFIRMED

Appellate Defender Kathrine H. Hudgins, S.C. Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliot, and Senior Assistant Attorney General Norman Mark Rapoport, Office of the Attorney General, of

Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

HEARN, C.J.: Hoss Hicks appeals the circuit court's decision to grant the State's motion to reconsider his sentence, specifically asserting that good cause was not shown to require him to register as a sex offender. We disagree and affirm.

FACTS

Hicks was indicted for criminal sexual conduct with a minor (Victim). At trial, Hicks pled guilty to the lesser offense of assault and battery of a high and aggravated nature(ABHAN), although he admitted to having had sex with the fourteen-year-old Victim. During sentencing, both parties were invited to make statements to the court, and defense counsel indicated that he didn't think Hicks knew where Victim lived. Ultimately, Hicks was sentenced to ten years imprisonment, suspended upon time served with five years probation. Although the State had requested it as an additional condition to his sentence, Hicks was not required to register as a sex offender. However, the circuit court did include as a condition of his probation, that Hicks not live within five miles of Victim's family and have no contact with the family or Victim.

The following day, the State moved to reconsider the sentence, arguing Victim's father was not able to attend the plea and wished to be heard by the court. In addition, the State sought to clarify defense counsel's assertion that Hicks did not know where Victim lived. Upon reconsideration, the court declined to increase Hicks' sentence, but ordered Hicks to register as a sex offender. This appeal followed.

STANDARD OF REVIEW

"On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of

law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

LAW/ANALYSIS

Hicks argues the circuit court abused its discretion in reconsidering its sentence. We disagree.

The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563 (1984). Here, the State made a timely motion to reconsider based upon additional information which Victim's father, who was not present at the original sentencing, could provide, as well as to clarify alleged misstatements made by Hicks' counsel during sentencing. We find the circuit court acted within its authority in hearing the motion to reconsider Hicks' sentence.

Hicks also maintains the circuit court abused its discretion in ordering him to register as a sex offender. We disagree.

Section 23-3-430 of the South Carolina Code (2007) provides the instances in which it is appropriate for a court to order a person to register as a sex offender. Although ABHAN, the crime to which Hicks pled guilty, is not included in the list, Section D provides that:

> [U]pon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.

S.C. Code Ann. § 23-3-430(D) (2007).

Hicks contends the State failed to show "good cause" sufficient to require him to register as a sex offender. As noted earlier, although he pled to ABHAN, Hicks admitted at the plea hearing to having sex with the fourteen-year-old Victim. In the reconsideration hearing, the court heard from Victim's father that, contrary to defense counsel's statement during the initial sentencing, Hicks did indeed know where Victim lived; Hicks lived within a half mile of Victim's house. Describing the nature of Hicks' behavior, Victim's father stated Hicks had been by Victim's house on numerous occasions, both before and after the ABHAN. During the course of several of these occurrences, Hicks made gestures towards Victim's father that could be interpreted as confrontational or predatory.

The court also heard from Victim's mother a second time, but she was limited to providing information she had not given during the initial sentencing. She confirmed Victim's father's statement that, not only did Hicks know where Victim lived, but that it was her understanding from Victim that Hicks had actually been in Victim's house on two occasions. This new information combined with the previous statements Victim's mother made regarding the many girls, similar in age to Victim, who lived in the same neighborhood within a half mile of Hicks, supports the circuit court's finding that good cause was shown.

Accordingly, the decision of the circuit court is

AFFIRMED[1].

PIEPER, J., and GOOLSBY, A.J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jerri L. Abate, Respondent,

v.

Alfonso A. Abate, Appellant.

Appeal From Charleston County
The Hon. Judy B. McMahon, Family Court Judge

Opinion No. 4361
Submitted February 1, 2008 – Filed March 20, 2008

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Gregory Samuel Forman, of Charleston, for Appellant.

Nathaniel Elliott Barnwell, of Charleston, for Respondent.

CURETON, A.J.: In this family court action to enforce a divorce decree incorporating an agreement between the parties, Father appeals the family court's order: (1) holding Father in contempt for his failure to give

Child his prescribed medication during summer vacation, (2) excluding Father's work-related childcare expenses from the childcare costs divisible between the parties, and (3) denying Father's motion for attorney's fees. We affirm in part, reverse in part, and remand.[1]

FACTS

Father and Mother married in 1993 and had one child in 1999. In 2004, they divorced in Charleston, South Carolina, on the ground of one year's separation. The parties' divorce decree (Decree) incorporated a written agreement between the parties concerning custody, visitation, and child support. Mother and Child subsequently moved to Ohio. Child visited Father in South Carolina pursuant to the Decree.

Although Mother submitted Child's medical bills to Father for reimbursement under the Decree, Mother obliterated the health care providers' names and addresses to prevent Father from contacting the providers. However, Father successfully identified Child's Ohio pediatrician and psychiatrist, and he contacted them by telephone and in letters Father copied to Mother regarding Child's treatment. In June 2005, Father telephoned Child's Ohio pediatrician and obtained his permission to suspend Child's Attention Deficit Hyperactivity Disorder (ADHD) medication temporarily. Additionally, in May and July 2005, Father contacted Child's Ohio psychiatrist to obtain his opinion concerning temporarily suspending Child's ADHD medicine. The psychiatrist discussed Father's letter with Mother. In July 2005, the psychiatrist sent a letter to Father and Mother, declining to make a recommendation in the matter and suggesting they obtain a second opinion. Later that month, when Child was visiting Father, Father obtained the opinion of a Charleston doctor regarding whether to suspend Child's ADHD medications temporarily in a "drug holiday." The Charleston doctor recommended suspending Child's ADHD medication pending further testing. In September 2005, Mother obtained the opinion of a different Ohio doctor regarding Child's diagnosis of ADHD. That doctor found that Child met "diagnostic criteria for ADHD" and suggested minor modifications to

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

Child's medication regimen but did not opine concerning any effects on Child from the drug holiday.

In September 2005, Mother submitted her work-related childcare costs to Father for reimbursement in accordance with the Decree. Father reimbursed Mother for less than half her expenses, claiming a credit equal to half the amount Father had expended for work-related childcare costs while Child was in his care over summer vacation.

In March 2006, Father obtained and filed an order and rule to show cause against Mother for nine alleged violations of the Decree. Father requested attorney's fees and costs for his prosecution of the show-cause issues. Mother responded by obtaining and filing her own rule to show cause against Father, alleging two violations of the Decree and requesting attorney's fees and costs. The family court heard both rules to show cause at the same hearing. Initially, the family court found Mother in contempt on three issues and in violation of the Decree on three others; additionally, it found Father in contempt on one issue and in violation of the Decree on another issue. The family court declined to award attorney's fees or costs to either party.

Father moved for reconsideration of eight issues, including contempt findings and the denial of attorney's fees. After rehearing, the family court still declined to award attorney's fees but held Mother in contempt on five issues. It held Father in contempt on one issue, his refusal to give Child his ADHD medication during July 2005. Furthermore, the family court held Father was not entitled to a credit for his childcare expenses and must reimburse Mother the amount of the money he had withheld. The family court did not hold Father in contempt for claiming the childcare credit. This appeal followed.

LAW/ANALYSIS

I. Contempt for Failure to Medicate

Father argues the family court erred in holding him in contempt for failing to give Child ADHD medication during summer vacation. We agree.

An appellate court should reverse a decision regarding contempt only if it is without evidentiary support or the trial judge has abused his discretion. Brandt v. Gooding, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). An appellate court will reverse a manifest abuse of discretion where the error of law is "so opposed to the trial judge's sound discretion as to amount to a deprivation of the legal rights of the party." Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 438, 633 S.E.2d 143, 145-46 (2006). The term "abuse of discretion" does not reflect negatively on the trial court; rather, it merely indicates the appellate court believes an error of law occurred in the circumstances at hand. Macauley v. Query, 193 S.C. 1, 5, 7 S.E.2d 519, 521 (1940).

"Contempt results from a willful disobedience of a court order." Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997). Willful disobedience requires an act to be "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Spartanburg Co. Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988). A party seeking a contempt finding for violation of a court order must show the order's existence and facts establishing the other party did not comply with the order. Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004).

We find the family court abused its discretion in holding Father in contempt for not giving Child his ADHD medication during summer break. Father and Mother agreed, and the family court ordered, that:

> Both parties shall follow [Child]'s pediatrician's and/or psychiatrist's orders regarding medication, and in particular, that he timely and without interruption takes his prescribed medicine for ADHD and both parties shall ensure that [Child] continues with counseling on a regular basis when he is in their respective care. The parties concur that they shall strive to utilize drug-free methods of raising [Child].

Two of the Decree's three provisions concerning Child's health care required interaction with health care providers. However, the family court held Mother in contempt for "failure to communicate with [Father] on issues of the child's health, education, and welfare and failure to provide [Father] full access" to Child's medical records. The family court specifically found Mother redacted the names and addresses of Child's Ohio medical providers from the documents she provided to Father. Moreover, Mother withheld the second opinion she obtained concerning Child's ADHD diagnosis from Father until the time of trial. We believe that without full access to Child's Ohio physicians and records, Father could not reasonably be expected to perform his obligations.

Absent direction from Child's Ohio physicians, Father attempted to consult with the physicians whose identities he divined. Child's Ohio pediatrician agreed with Father's suggestion of a drug holiday. After Child's current Ohio psychiatrist declined to opine concerning a drug holiday, Father presented Child to a Charleston physician for an evaluation and recommendation. After exhausting his contacts in Ohio and obtaining the Charleston physician's approval of a temporary suspension of medication, Father stopped giving Child his ADHD medication.[2]

[2] No health care provider has specifically warned or recommended against a temporary suspension of Child's medication. Both Child's Ohio pediatrician and the Charleston doctor who provided Father's second opinion endorsed the proposed drug holiday. Child's Ohio psychiatrist declined to comment on the proposed drug holiday. The doctor who provided Mother with a second opinion made recommendations for modifications to Child's prescription but

We believe Father's acts demonstrate a good-faith effort to comply with the Decree's requirement to follow Child's "pediatrician's and/or psychiatrist's orders regarding medication." Additionally, we believe Father's temporary, physician-sanctioned drug holiday for Child indicates an effort to comply with the Decree by exploring "drug-free methods of raising [Child]" outside Child's school year to avoid compromising Child's performance in school. Father did not willfully disobey a court order. Therefore, the family court abused its discretion in finding Father in contempt for failing to give Child his ADHD medication during the summer holiday.

II. Childcare Costs

Father argues the family court erred in excluding his summer 2005 work-related childcare expenses from the childcare costs divisible between the parties. We disagree.

In our view, the agreement on its face does not indicate Father's summer 2005 work-related childcare costs should be included in total childcare costs. In any event, the agreement contains no provision for Father to obtain credit for his work-related childcare costs. "Unambiguous marital agreements will be enforced according to their terms . . . regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Davis v. Davis, 372 S.C. 64, 75, 641 S.E.2d 446, 451-52 (Ct. App. 2006). A court will only look to extrinsic evidence if an ambiguity exists in the agreement's terms. Id. at 75, 641 S.E.2d at 452. In the case at bar, the Decree required that Father "contribute to . . . one-half of [Child's] work related childcare costs. MOTHER shall provide FATHER with copies of receipts for same with FATHER reimbursing MOTHER within Thirty (30) days." (emphasis in original) The parties agreed this provision was unambiguous and waived their rights to present additional evidence of intent.

---

did not address whether Child should have a drug holiday outside the school year.

Interpretation of this provision thus became a question of law. Consequently, we see no error in the family court's decision to exclude Father's work-related childcare costs.[3]

III. Attorney's Fees

Father argues the family court erred in denying Father's motion for attorney's fees. We disagree but remand for further consideration of the effects of this appeal on the outcome of this matter.

In a family court matter, "[t]he award of attorney's fees is left to the discretion of the trial judge and will only be disturbed upon a showing of abuse of discretion." Upchurch v. Upchurch, 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006).

The family court did not abuse its discretion in declining to award either party attorney's fees in this matter. Under South Carolina law, the family court has jurisdiction to determine whether to award attorney's fees in a matter properly before it. S.C. Code Ann. § 20-7-420(A)(38) (Supp. 2006). The family court may award attorney's fees under different theories.[4] Here,

---

[3] Our decision today does not preclude the parties from petitioning the family court to reinterpret the provision to ascertain the intention of the parties.

[4] The issue of whether the family court applied the correct standard to the question of attorney's fees is not preserved for our review. However, we note the family court could have applied the compensatory contempt theory enunciated in Miller v. Miller, 375 S.C. 443, 463, 652 S.E.2d 754, 764-65 (Ct. App. 2007):

> Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 178-79, 557 S.E.2d 708, 711-12 (Ct. App. 2001). Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders.

the family court evaluated the request on the basis of beneficial results. "In making this determination, the court should evaluate the requesting party's ability to pay, the parties' respective financial conditions, the effect of the award on each party's standard of living, and the beneficial results achieved." Upchurch, 367 S.C. at 28, 624 S.E.2d at 648. A beneficial result will not secure an award of attorney's fees where the other factors do not support such

---

> "In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding." Poston v. Poston, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998); Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("A compensatory contempt award may include attorney fees."); Curlee v. Howle, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-20 (1982) ("Compensatory contempt is a money award for the [Wife] when the [Husband] has injured the [Wife] by violating a previous court order . . . . Included in the actual loss are the costs of defending and enforcing the court's order, including litigation costs and attorney's fees."). The court is not required to provide the contemnor with an opportunity to purge himself of these attorney's fees in order to hold him in civil contempt. Floyd v. Floyd, 365 S.C. 56, 76, 615 S.E.2d 465, 476 (Ct. App. 2005) (citing Poston, 331 S.C. at 111-15, 502 S.E.2d at 88-91). "[T]he award of attorney's fees is not part of the punishment; instead, this award is made to indemnify the party for expenses incurred in seeking enforcement of the court's order." Id. at 77, 615 S.E. 2d at 476 (quoting Poston, 33 S.C. at 111-15, 502 S.E.2d at 88-91).

an award. Mazzone v. Miles, 341 S.C. 203, 214, 532 S.E.2d 890, 895 (Ct. App. 2000).[5]

In declining to award attorney's fees to either side, the family court found each party had achieved beneficial results. Of the nine issues for which Father sought a contempt ruling against Mother, the family court held Mother in contempt on five and found her in violation of the Decree, but not in contempt, on one. Of the three issues for which Mother sought a contempt ruling against Father, the family court held Father in contempt on one and in violation of the Decree, but not in contempt, on one. It appears each party prevailed on at least one issue and successfully defended against at least one issue, thereby achieving a beneficial result.

No evidence exists concerning either party's ability to pay, either party's financial condition, or the likely effect of such an award on either party's standard of living. The issues presented to the family court were complex, and we believe both parties proceeded in good faith. Accordingly, we find the family court did not abuse its discretion in ordering each party to pay his or her own attorney's fees. However, because we herein reverse the family court's finding of contempt for Father's failure to medicate, Father is no longer in contempt on any issues and has prevailed on six issues. By contrast, Mother was found in contempt on five issues and has prevailed on one, the issue of Father's claimed credit for childcare costs.[6] Consequently, we remand on the issue of attorney's fees for consideration of the effects of this appeal.

---

[5] Because the reasonableness of attorney's fees is not at issue here, we do not consider the factors enunciated in Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

[6] Although we affirm the family court's ruling that Father may not take a credit for his summer 2005 childcare expenses, we believe the language in the Decree addressing this issue is ambiguous, and the issue of future childcare expenses ultimately may be resolved in either Father's or Mother's favor.

CONCLUSION

As to the issue of contempt, we find Father made good-faith efforts to comply with the terms of the Decree by giving Child a physician-recommended drug holiday. Because Father did not willfully disobey a court order, we find the family court erred in holding Father in contempt for temporarily suspending Child's ADHD medication. Accordingly, we reverse the order of the family court on this issue.

As to the issue of Father's work-related childcare costs, we find the governing language of the Decree does not provide for Father receiving credit or childcare costs he expended. We find the family court did not err in excluding Father's summer 2005 work-related childcare costs from its analysis, and we affirm the order of the family court on this issue.

Finally, as to the issue of attorney's fees, we remand this issue to the family court for further consideration in light of this decision.

Accordingly, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Blair Adams, Appellant.

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4362
Heard February 5, 2008 – Filed March 20, 2008

AFFIRMED

John G. Reckenbeil, of Spartanburg, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

HEARN, C.J.: Blair Adams appeals the circuit court's failure to grant his motion to suppress evidence. Adams maintains the purpose of the initial traffic stop had been fulfilled, and police had no reasonable suspicion, probable cause, or Adams' consent to continue the stop. We affirm.

FACTS

Police Officer Bradford James pulled Adams over during the officer's patrol of the Park Hills area of Spartanburg. James noticed Adams' vehicle make a left turn without first signaling, and thereafter James pulled the vehicle over. James approached the vehicle and asked Adams to produce his driver's license, vehicle registration, and proof of insurance. James testified Adams was visibly nervous and unsure during the encounter, and stuttered slightly when answering his questions. James also noticed the vehicle had numerous air fresheners hanging from his rearview mirror, and there was a box filled with plastic bags in the passenger-side floorboard.[1]

Because of the nervousness displayed by Adams, as well as the potential existence of narcotics, and the safety concerns of James standing partially in the roadway, James asked Adams to exit and accompany him to the rear of the vehicle while he conducted the registration check. This check revealed Adams was not the registered owner of the vehicle, and that Adams' driving license had previously been suspended as a result of a drug conviction. During this police dispatch check, a second officer, William Reese came on the scene.

While in the presence of Reese, James asked Adams for permission to search his vehicle. Conflicting testimony exists as to whether Adams granted James permission to search his vehicle. James testified Adams initially did not understand his rights, and that he asked James whether he could say no to the request. Reese testified he arrived during this conversation and told

[1] Testimony from a second police officer to arrive on the scene, William Reese, explained that multiple air fresheners in one vehicle is "a very good indicator" of the presence of narcotics because of the fresheners' ability to mask the odor of drugs.

Adams "you do not have to give consent if you don't want to." Thereafter, both James and Reese testified Adams gave consent to search the vehicle. Adams meanwhile, testifying only to the issue of consent, maintained he never granted the officers permission to search his vehicle, and after he attempted to leave, the officers searched his vehicle without his consent to do so.

According to both officers, Reese remained with Adams at the rear of the vehicle while James conducted the search. An initial inspection revealed a quantity of white powder in the center console. James field-tested the powder, revealing a positive indication for cocaine. Adams was then placed under arrest. A subsequent search incident to the arrest revealed an additional 11.75 grams of powder that field-testing indicated was cocaine, as well as a set of digital scales.

A grand jury indicted Adams for trafficking in cocaine. During the ensuing bench trial, Adams made a motion to suppress the evidence found in Adams' vehicle as a product of an illegal search, which was denied. Subsequently, a bench trial was held, and the circuit court found Adams guilty of trafficking cocaine, and sentenced him to twenty-five years imprisonment. This appeal followed.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the circuit court and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In criminal cases, an appellate court only reviews errors of law. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003) (citing State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). We are bound by the circuit court's factual findings unless we find that they are clearly erroneous. This standard of review also applies to preliminary factual

findings in determining the admissibility of certain evidence in criminal cases. Id. We are limited in our review of Fourth Amendment search and seizure cases to determining whether there is any evidence to support the circuit court's finding. State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). An appellate court will reverse only when clear error exists. Id.

LAW/ANALYSIS

Adams maintains the purpose of the initial traffic stop had been fulfilled, and police had no reasonable suspicion, probable cause, or Adams' consent to continue the stop. We disagree.

Initially, we note Adams does not appeal the circuit court's order finding James had probable cause to initiate a traffic stop based on his observation of Adams making a turn without an appropriate turn signal. Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se. Whren v. United States, 517 U.S. 806, 810 (1996). When a vehicle has been lawfully detained for a traffic violation, a police officer may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977). In carrying out the stop, an officer " 'may request a driver's license and vehicle registration, run a computer check, and issue a citation.' " United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998) (citation omitted). However, "[a]ny further detention for questioning is beyond the scope of the [] stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime." Id.

Our inquiry then requires an analysis of whether James detained or seized Adams anew, thereby triggering the Fourth Amendment and potentially rendering any subsequent consent to a search of his vehicle invalid, or if the encounter turned into a consensual one invoking no constitutional scrutiny. See State v. Williams, 351 S.C. 591, 599, 571 S.E.2d 703, 707-08 (Ct. App. 2002). James testified the entire encounter from the initial detention to the arrest of Adams took no longer than ten minutes. Additionally, James testified he requested Adams' consent to search his

vehicle within thirty seconds of receiving the return call on the vehicle registration check. This request was made before James had returned to his cruiser to fill out the necessary paperwork to issue Adams a citation. As stated above, Reese arrived on the scene at approximately the same time, and both officers testified Adams' consent to search the vehicle was given a short time later. Therefore, we find Adams' disputed consent was given within the initial parameters of the lawful detention.

"Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). "Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search after an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005). Whether consent to a search is voluntary is a question of fact to be determined from the totality of the circumstances. State v. McKnight, 352 S.C. 635, 656, 576 S.E.2d 168, 179 (2003). See also State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 665-66 (2000) (applying a "clearly erroneous" standard of review in determining whether trial judge properly held defendant consented to search).

In the case before us, both James and Reese testified that permission to search the vehicle was sought within five minutes of the initial detention. Furthermore, Reese testified that when Adams inquired as to whether he could refuse the search request, Reese advised him he did not have to consent. According to the testimony, Adams consented to the search immediately thereafter. Based on the totality of the circumstances, the circuit court did not abuse its discretion in finding Adams gave his consent to search his vehicle, and that the consent was voluntary in nature.

Accordingly, the decision of the circuit court is

AFFIRMED.

PIEPER, J., and CURETON, A.J., concur.

The Supreme Court of South Carolina
P. O. Box 11330
Columbia, South Carolina 29211