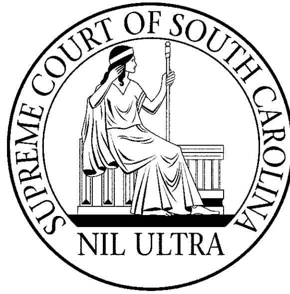

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
April 5, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Newberry, Petitioner,

v.

Newberry Electric Cooperative, Inc., and Wal-Mart Stores East, L.P., and Wal-Mart Real Estate Business Trust, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26795
Heard November 3, 2009 - Filed April 5, 2010

REVERSED AND REMANDED

Robert T. Bockman, of McNair Law Firm, of Columbia, for Petitioner.

Frank R. Ellerbe, III and Bonnie D. Shealy, both of Robinson, McFadden & Moore, of Columbia; Thomas H. Pope, III and Kyle B. Parker, both of Pope and Hudgens, of Newberry, for Respondents.

James M. Brailsford, III, of Edisto Island, for Amicus Curiae Municipal Association of South Carolina and the South Carolina Association of Municipal Power Systems.

CHIEF JUSTICE TOAL: In this case, we granted a writ of certiorari to review the court of appeals' decision holding that the Newberry Electric Cooperative, Inc. (Cooperative) could provide electric service to an area annexed by the City of Newberry (City). We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

This case concerns which electric provider, the City or the Cooperative, has the legal right to provide service to approximately 26 acres of land. When Wal-Mart began negotiations to construct a store on this site, the area was assigned to the Cooperative by the Public Service Commission (PSC), but the Cooperative was not providing services to any premises in the area. Wal-Mart wished for its property to be annexed into the City, but, nonetheless, wanted to obtain its electric services from the Cooperative.

In May 1999, the Cooperative initiated a suit in the PSC to enjoin the City from annexing the site and providing electric services. On June 21, 1999, the Cooperative and Wal-Mart entered into agreements for Wal-Mart to purchase its service from the Cooperative. The following day, the Cooperative voluntarily dismissed its case with the PSC as moot because of the service contracts; the City agreed to the dismissal. On July 27, 1999, the City annexed the property.

In January 2000, the Cooperative began supplying electric services for the construction site. In June 2000, the Cooperative began supplying electric

services to the completed Wal-Mart store. The City did not object to this provision of services until January 2003. On June 2, 2003, the City filed the summons and complaint that initiated this action, seeking declaratory relief, an injunction, and damages.

The circuit court made several findings: (1) the statute of limitations barred the City's claim, (2) the City consented to the Cooperative's service, and (3) several equitable principles also proscribed the City's requested remedies. The court of appeals affirmed, holding that the Cooperative had the right to continue serving the property because it had a contract with Wal-Mart to provide electricity and the City's suit was barred by the statute of limitations. *City of Newberry v. Newberry Elec. Coop., Inc.*, Op. No. 2008-UP-200 (S.C. Ct. App. filed Mar. 24, 2008).

STANDARD OF REVIEW

Statutory interpretation is a question of law. *Bryant v. State*, 683 S.E.2d 280, 282 (S.C. 2009). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Id.* (citing *Mid-State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)).

ANALYSIS

I. Right to Provide Electric Service

A. Section 33-49-250

The City argues that once it annexed the property, it had the sole right to provide electric service to the property, and any service provided by the Cooperative was unlawful. We agree.

The Cooperative is purely a creature of statute, and so has only such authority as the legislature has granted it under the Electric Cooperative Act, S.C. Code Ann. §§33-49-10, *et. seq.* (2006 & Supp. 2008). *See S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 489, 272 S.E.2d 793, 794

(1980) (stating that "regulatory bodies are possessed of only those powers which are specifically delineated").

The Electric Cooperative Act provides that an electric cooperative has the authority to provide electricity only in rural areas. S.C. Code Ann. § 33-49-250. Section 33-49-250 provides two exceptions: the "annexation exception" and the "principal supplier" exception. The annexation exception states that if a cooperative is providing electricity to premises in an area that is later annexed by a municipality, that cooperative may "continue serving all premises then being served." S.C. Code Ann. § 33-49-250(1). The principal supplier exception states that if a cooperative is serving a city or town of less than 2,500 persons, it will continue to have the right to serve that area even if the population later exceeds 2,500 persons. *Id.*

Neither of these exceptions applies here. Although the area had been assigned to the Cooperative, the Cooperative was not providing electric service to any premises in that area prior to the annexation.[1] Thus, the Cooperative does not have the right under the statutes to serve the Wal-Mart premises.

B. Contract for Services

The Cooperative contends, and the court of appeals held, that its service contract with Wal-Mart entitles it to continue providing service after annexation. We disagree.

In *City of Camden v. Fairfield Electric Cooperative, Inc.*, this Court held that a cooperative did not have the right to serve the premises post-annexation when the cooperative was not providing service to any premises pre-annexation. 372 S.C. 543, 643 S.E.2d 687 (2007). In *City of Camden*, Lowe's was planning to build a store in an unassigned area and had chosen Fairfield Electric Cooperative (Fairfield) as its supplier. However, the City of Camden annexed the property, and at the time of annexation, Fairfield was

[1] The parties argue only the annexation exception; the principal supplier exception is not at issue in this case.

furnishing electric service only to a security light on the unimproved lot. This Court held that the statutes require a cooperative to be serving electricity to a "premises" prior to annexation, and that a security light is not a "premises" as defined in S.C. Code Ann. § 58-27-610(2).[2] This Court determined that a security light was not a structure within the contemplation of the annexation exception of section 33-49-250. Because Fairfield could not satisfy one of the statutory exceptions, this Court held that it had no legal right to serve the annexed property.

Here, the court of appeals determined that *City of Camden* is not controlling because: (1) the property was unassigned in that case, whereas the property in the instant case was assigned, and (2) Lowe's had merely selected Fairfield for its future service, but in this case Wal-Mart and the Cooperative entered into a contract for services.

The court of appeals incorrectly distinguished *City of Camden*, which is controlling here. First, the fact of assignment is irrelevant to the present analysis. Clearly, pre-annexation the Cooperative had the legal right to serve the area. However, after annexation the Cooperative could only provide service if it met one of the two explicit exceptions in section 33-49-250, which it did not.

Second, contrary to the court of appeals' conclusion, a contract to provide services to a building that will exist sometime in the future does not function as "existing service" under the statutes to trigger the annexation exception. Section 33-49-250 clearly requires existing electrical service to existing premises at the time of annexation. The plain language of the statute simply does not allow the result reached by the court of appeals.

Notwithstanding the clear language of the section 33-49-250, the court of appeals determined section 58-27-670(1)[3] "precludes the City from

[2] This section defines a "premises" as a "building, structure or facility."
[3] This section provides:

interfering with an existing contract for services." This analysis is incorrect. In *City of Camden*, this Court was concerned that allowing Fairfield to provide service to the annexed area would "allow cooperative providers to effectively circumvent the statutory scheme set up by the Legislature simply by placing security lights in any areas in which it has distribution lines." 372 S.C. at 549, 645 S.E.2d at 690. If we followed the court of appeals' analysis, we would be allowing cooperatives to simply contract around a municipality's post-annexation rights as established by the Legislature, a situation very similar to the one we aimed to avoid in *City of Camden*. Thus, we reiterate our central holding in *City of Camden* that a cooperative must be providing existing electrical services to an existing premises prior to annexation to continue serving that premises after annexation. Otherwise, the cooperative does not satisfy the annexation exception.

In this case, the Cooperative only had a contract for services and was not actually providing electricity to the completed premises at the time of annexation. Therefore, we hold the City has the legal right to serve the annexed area because the Cooperative was not providing service to existing premises at the time of annexation.

II. Statute of Limitations

The court of appeals held the three year statute of limitations found in S.C. Code Ann. § 15-3-530 applies to this action, and the statute began running when the City annexed the property. To the extent a statute of limitations applies here, we find it did not begin running until the Cooperative began providing service to the completed store.

> Annexation may not be construed to increase, decrease, or affect any other right or responsibility a municipality, electric cooperative, or electric utility may have with regard to supplying electric service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58.

S.C. Code Ann. § 58-27-670(1) (Supp. 2007).

To hold otherwise, as the dissent urges, would mark a departure from our current jurisprudence. We have repeatedly held that a statute of limitations begins to run when the party either knew or should have known that some legal right had been invaded. *See Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (stating a statute of limitations begins to run when a party through the exercise of reasonable diligence would be put on notice that a legal right had been invaded); *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E. 2d 645, 647 (1996) ("The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("[T]he injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist.").

The dissent concedes the Cooperative was not serving Wal-Mart when the premises were annexed. Nevertheless, the dissent would hold that at the time of annexation, the City was on notice that the Cooperative "had taken steps to invade the rights of the City." Such a holding would turn our jurisprudence on its head, requiring parties to bring suit to defend rights that had not yet been invaded and ask the courts to intervene when injurious conduct is merely threatened and has not yet occurred.

Here, the City's exclusive right to provide electricity to the annexed premises was not invaded until the Cooperative exceeded its statutory grant of authority and began serving the premises. Thus, the City suffered no injury before that date and could not have brought suit. Therefore, the City's suit is not barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals.

WALLER, PLEICONES and BEATTY, JJ., concur. KITTREDGE, J., dissenting in a separate opinion.

JUSTICE KITTREDGE: I respectfully dissent. The City of Newberry annexed the property in question (the Wal-Mart property) on July 27, 1999. I agree with the majority that because Newberry Electric Cooperative was not serving the Wal-Mart property on the date of annexation, the City of Newberry had the exclusive statutory right to provide electric service to the property. In my judgment, the City lost its right to provide electric service by failing to assert its claim within the statutory period of limitations. Based on the facts and circumstances presented, the three-year statute of limitations began on July 27, 1999. The City commenced this action on June 2, 2003. Because I believe the City of Newberry filed this action beyond the statute of limitations, I vote to affirm the court of appeals decision in result.

I agree with the majority in its analysis of South Carolina Code section 33-49-250. The annexation exception portion of the statute only allows a cooperative that "is serving" an area to continue serving that area after annexation. The majority's interpretation is in accord with the clear and unambiguous terms of the statute and is consistent with our holding in *City of Camden v. Fairfield Electric Cooperative, Inc.*, 372 S.C. 543, 643 S.E.2d 687 (2007). I additionally agree with the majority that the fact that the area was assigned to the Cooperative has no bearing on the applicability of the annexation exception.

Nonetheless, I believe the three-year statute of limitations bars the City's claim against the Cooperative. Statutes of limitations are not simply technicalities; rather, they have long been respected as fundamental to a well-ordered judicial system. *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 80 (2008).

As the court of appeals recognized, the City relied on the applicable statutes for its exclusive right to provide electric service to Wal-Mart. Under

South Carolina Code section 15-3-530(2), a party must assert "an action upon a liability created by a statute" within three years. Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. *Id*.

In this case, it became common knowledge in late 1998 and early 1999 that Wal-Mart intended to build a new store on the property and that the Cooperative and the City both wanted to provide electric service to the future structure. On May 28, 1999, the Cooperative filed a complaint with the Public Service Commission (PSC) seeking an injunction prohibiting the City from providing electric service to the Wal-Mart site. On June 11, the PSC issued a cease and desist order against the City, thereby prohibiting it from attempting to supply the site with service until a hearing on the merits could be held.

On June 18, the Cooperative initiated an action in the circuit court seeking an injunction prohibiting the City from annexing the Wal-Mart property and prohibiting the City from requiring Wal-Mart to choose the City as the service provider as a condition for receiving other municipal services. This action was later dismissed by consent of the parties.

On June 21, 1999, the Cooperative and Wal-Mart entered into a contract in which the Cooperative agreed to provide Wal-Mart electric service. In accordance with the June 21 service contract, the Cooperative began clearing land and relocating electric poles and power lines. The following day, lawyers on behalf of the Cooperative and the City mailed a letter to the PSC on behalf of the Cooperative and the City informing it that "[t]he issues raised in the Petition and Complaint in the above matter have been resolved, and this matter is now moot." The Cooperative and the City

submitted a proposed consent order of dismissal signed by counsel for the parties. The order of dismissal was signed by the PSC and filed on August 4, 1999.

On July 26, 1999, the developer sent a letter to the City stating that it intended to select the City as the electric service provider for areas surrounding the Wal-Mart store. Significantly, however, the developer specifically stated, "please bear in mind that this letter should not be construed to include the Wal-Mart store . . . as a part of the contract for electric service."

The next day, on July 27, 1999, the City annexed the entire property. The City knew on the annexation date that the Cooperative had not begun furnishing electric service to any premises on the property.

In my view, on July 27, 1999, the date of annexation, the City was on notice that it had the exclusive right to provide electric service to the Wal-Mart property. The City knew or should have known the Cooperative could not avail itself of the annexation exception, yet the City knew of the Cooperative's very visible efforts to promptly move forward with its plan to provide electric service to the annexed property. Therefore, under these facts and circumstances, on the date of annexation, the City was on notice that the Cooperative had taken steps to invade the rights of the City. Accordingly, I would hold that the statute of limitations began to run on July 27, 1999.

The City argues it first discovered it had a claim against the Cooperative on January 6, 2003, the day the court of appeals issued its opinion in *City of Newberry v. Newberry Electric Cooperative, Inc.*, 352 S.C. 570, 575 S.E.2d 83 (Ct. App. 2003) (commonly referred to as the "*Burger King*" case). In essence, the City asserts it discovered its rights in the *Burger King* decision.

I reject the City's position for two, independent reasons. First, the City's right to provide electricity is not dependent on the holding of *Burger King*. Because the Cooperative was not "serving" Wal-Mart on the date of

annexation, the City's exclusive right to serve the Wal-Mart property was established pursuant to the statutory scheme. This Court's 2007 opinion in *City of Camden v. Fairfield Electric Cooperative*, as the majority compellingly demonstrates, confirmed existing law and did not mark a departure from it. Second, the discovery rule may be invoked to delay the commencement of a statute of limitations based on the discovery of facts, not the discovery of law. *See Burgess v. American Cancer Soc'y., S.C. Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989) (observing that under the discovery rule, the statute of limitations begins to run when "such facts as would have led to the knowledge" of a potential claim).[4]

Furthermore, the City's complaint in this matter also shows that it was well aware of its rights at the time of annexation. In its complaint, the City alleges the Cooperative could not look to the annexation exception as a source for authority to provide service because the Cooperative was not providing service to the Wal-Mart property at the time of annexation. In fact, the City argued "the Cooperative was aware that annexation would preclude its authority to provide electric service" in its brief to the trial court. Additionally, in its reply to the Cooperative's counterclaim, the City specifically averred that "upon annexation, [the Cooperative] lost its statutory authority to enter and agree to a contract to provide electric service to Wal-

[4] Misinterpretation of the law does not toll the statute of limitations. On June 21, 1999, Charles Guerry, the Utility Director for the City, executed an affidavit in which he stated the City was not requiring Wal-Mart to accept electric service as a condition for receiving other municipal services, and that "it is the City's position that annexation of the property would enable Wal-Mart to select the City as its electric service provider." Although the position that Wal-Mart had a right to choose its provider was contrary to the law, the City's erroneous position has no bearing on the statute of limitations. *See* 54 C.J.S. Limitations of Actions § 116 (2009) ("Mere ignorance of the existence of a cause of action . . . generally does not prevent the running of a statute of limitations."); *Miller v. Pac. Shore Funding*, 224 F.Supp.2d 977, 986 (D. Md. 2002) (recognizing that "[t]he discovery rule, in other words, applies to discovery of facts, not to discovery of law. Knowledge of the law is presumed.").

Mart under the law of South Carolina. Further responding the City would show that *upon its annexation it acquired the exclusive rights* to provide electric service to the subject tract on which Wal-Mart is located." (emphasis added).

In my view, the City's assertions in the pleadings show that it was aware of all of the necessary facts at the time of annexation. I would reject the City's transparent attempt to delay the start of the statute of limitations until its purported discovery of the law. *See Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (noting that the statute begins to run at the point of discovery of facts and not when advice of counsel is sought or a full-blown theory of recovery is developed).

In my judgment, effective July 27, 1999, the City had three years to assert its right to provide electrical service to the Wal-Mart property. Having failed to do so, the City's action is time barred. I vote to affirm the court of appeals in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tommy Hutto, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 26796
Heard October 8, 2009 – Filed April 5, 2010

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mary S. Williams, of Columbia; and John Benjamin Aplin, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, we granted a writ of certiorari to review the court of appeals' decision affirming the post-conviction relief (PCR) judge's denial of relief. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Tommy Hutto (Petitioner) broke into a 91-year old woman's home, cutting his arms and hands on the glass in the back door. Once inside, Petitioner sexually assaulted and robbed the victim. After he left her home, the victim notified the police, but Petitioner was neither identified nor caught at that time. About a month later**,** Ronnie Bends, Petitioner's probation agent from a previous conviction, went to Petitioner's home on a routine visit. Agent James Harris accompanied Agent Bends. During the visit, Agent Harris noticed the cuts on Petitioner's arms.

Hubert Nimau, the officer investigating the assault and robbery, received a tip about the crime from a crime watcher's newspaper article. Investigator Nimau questioned other officers, asking if they had seen anyone with cuts on his arms and hands. Investigator Nimau asked Agent Bends, who then called Agent Harris into his office to describe the injuries he had observed on Petitioner.

After receiving the information from both Agent Harris and the crime watcher's tip, Investigator Nimau included Petitioner's photograph in a photographic line-up shown to the victim. The victim identified Petitioner's photograph as the man who broke into her house. Based on the victim's identification, Investigator Nimau obtained a warrant for Petitioner's blood. DNA samples taken from the crime scene matched Petitioner's blood.

Petitioner was convicted of armed robbery, first degree criminal sexual conduct, and first degree burglary. At trial, Agent Harris had testified about the cuts he observed on Petitioner's arms and hands. Petitioner applied for PCR, arguing that his trial counsel was ineffective for failing to move to suppress Agent Harris's testimony based on S.C. Code Ann. § 24-21-290 (2007 & Supp. 2008), which provides:

> All information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director.

The PCR judge denied Petitioner's request and the court of appeals affirmed.

STANDARD OF REVIEW

In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

LAW/ANALYSIS

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To establish ineffective assistance of counsel, the applicant must show: (1) counsel's representation was deficient, as measured by an objective standard of reasonableness, and (2) applicant was prejudiced by counsel's performance, such that there is a reasonable probability the outcome of the trial would have been different absent the deficiency. *Id.* at 117-18, 386 S.E.2d at 625.

I. Deficient Performance

Petitioner argues that trial counsel's performance was deficient in that he failed to move to suppress Agent Harris's testimony under section 24-21-290. We disagree.

Petitioner contends that this statute makes all information gathered during the execution of the probation agent's duties privileged information. However, we find the legislature did not intend this statute to have such a broad application that it would cover anything the probation agent sees when visiting his client. We agree with the court of appeals' interpretation and believe that the statute's purpose is to foster open lines of communication between the probation agent and client. We do not believe the legislature intended the statute to cover physical observations, such as the one made in this case, that anyone could have made when encountering Petitioner. The information obtained was not reliant upon the probation agent/client relationship. Preventing a probation officer from reporting what he sees during his visit to his client, as the State argues, could mean that he would be unable to report evidence of a crime he sees in his client's home. Such a result is neither intended by the legislature nor necessary to further the goals of the statute.

II. Prejudice

Even if counsel's performance were deficient, Petitioner was not prejudiced.

Petitioner argues that both Agent Harris's trial testimony and his disclosure of Petitioner's cuts to Investigator Nimau violated the privilege contained in section 24-21-290. Petitioner further contends that trial counsel's allegedly deficient performance in not knowing the statute allowed the presentation at trial of testimony and evidence that was not properly admissible, without which there would be no evidence linking Petitioner to the crime. We address each of these arguments in turn.

A. Trial Testimony

To show prejudice, a defendant must demonstrate there is a reasonable probability the result of the trial would have been different absent trial counsel's deficient performance. *Id.* at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C. 182, 183, 480 S.E.2d 733, 735 (1997). No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt. *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

Assuming that trial counsel's performance had been deficient for failing to suppress Agent Harris's testimony, Petitioner suffered no prejudice because even without Agent Harris's testimony there was overwhelming evidence of Petitioner's guilt. First, the victim identified Petitioner's photograph as showing the man who assaulted and robbed her. Second, based on the victim's identification, the police obtained a search warrant for Petitioner's blood. Third, the DNA obtained from Petitioner's blood sample matched the DNA from blood taken from the crime scene. There can be no reasonable probability that a jury confronted with this body of evidence would have returned anything other than a guilty verdict.

Because the victim's identification and the results of the DNA testing constitute evidence, in the face of which, no reasonable jury would find Petitioner not guilty, Petitioner cannot show that the outcome of his trial reasonably might have been different if Agent Harris's testimony were excluded. Therefore, Petitioner was not prejudiced by counsel's failing to move to suppress Agent Harris's testimony under section 24-21-290.

B. Disclosure to Investigator Nimau

Petitioner argues: (1) section 24-21-290 was violated when Agent Harris told Investigator Nimau about the cuts on Petitioner's arms and hands; and (2) that this statutory exclusion applies to both the victim's identification

of Petitioner in the final photographic line-up and the DNA evidence because they only could be obtained by a violation of the privilege created by the statute in question. We disagree.

While we do not believe Agent Harris's disclosure violates the statute, assuming *arguendo* there was a violation, such violation would not warrant the exclusion of the evidence obtained from the information disclosed. Section 24-21-290 only creates a statutory privilege and does not implicate a constitutional right; therefore, the exclusionary rule does not apply. *See State v. Chandler*, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations . . . .").

Further, Agent Harris' disclosure was not the sole piece of information that led to the victim's identification and the subsequent DNA evidence. The crimewatchers tip was also relied upon in including Petitioner's photograph in the line-up. The victim's identification and the DNA evidence are pieces of evidence independent from Agent Harris' disclosure because his disclosure was not the only source that led to the evidence. Thus, they are in no way infected by the alleged statutory privilege issue and are properly admissible.

CONCLUSION

For these reasons, we affirm the court of appeals' decision denying Petitioner post-conviction relief.

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

JUSTICE PLEICONES: I respectfully dissent. In my view, trial counsel's performance did not meet prevailing professional norms, and that deficient performance prejudiced petitioner. McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). I would therefore reverse the order which denied petitioner post-conviction relief (PCR).

Petitioner's PCR claim rests on two instances of allegedly ineffective assistance of counsel: first, trial counsel's failure to object to Agent Harris's testimony at trial, and second, his failure to object to the admissibility of the victim's identification of petitioner both in and out of court, as well as the DNA evidence. Petitioner contends that this evidence was barred by S.C. Code Ann. § 24-21-190 and would have been excluded had trial counsel objected. I agree.

The statute explicitly bars Agent Harris's trial testimony, as § 24-21-290 renders "information and data obtained in the discharge of his official duty by a probation officer" "not receivable as evidence in a court" unless permission to disclose is granted by the trial judge or the director. No such permission was sought or granted here. It is unclear whether the majority finds Agent Harris's testimony objectionable since it holds that the statutory terms "information and data" do not include anything observed by the probation agent. Unlike the majority, however, I do not see anything in the statute which exempts "information and data" perceived by the officer's sense of sight from its ambit. It seems to me that if the statute were intended to create a privilege only as to statements made by the probationer to his agent, it would say just that.

The majority expresses concern that if the statute makes observations privileged, then a probation officer who observed evidence of a crime while conducting a home visit would be prevented from reporting that evidence. However, nothing in the statute prevents such a report as the majority suggests, rather § 24-21-290 simply requires that the probation officer first be "ordered" to disclose the information and/or data by a court or the director, or relay it to "others entitled . . . to receive [his] reports . . . ." The statute recognizes that there will be situations where, on balance, the privilege must

yield to policy, and provides a mechanism for disclosure. For whatever reason, Agent Harris did not follow that procedure here, and the "information and data" remained privileged. In my view, making the confidences between a probationer and his agent presumptively privileged furthers the legislative goal of "fostering open lines of communication."

Moreover, I am concerned that the majority dismisses any prejudice from Agent Harris's trial testimony by finding it harmless based on the evidence derived from Agent Harris's improper disclosure to Inspector Nimau. As explained below, the victim's photo line-up identification of petitioner and the subsequent DNA testing of his blood were the direct result of Agent Harris's breach of the statutory privilege, not as the majority holds, "independent from Agent Harris's disclosure." The record reveals that after the crime occurred on July 16, the investigating officer put out a "Be On the Lookout" (BOLO) for an individual with cuts on his forearms. The victim was shown two photographic lineups in July, but was unable to identify anyone. The persons included in these lineups were "subjects generated through crime watchers." Although petitioner was apparently named in a tip to crime watchers, no action was taken on this information until after Inspector Nimau spoke with Agent Harris in early August. "Based on this information, Nimau compiled a third photographic line-up, which he presented to the victim on August 19 . . . ." State v. Hutto, Op. No. 2002-UP-395 (S.C. Ct. App. filed June 4, 2002). Relying on the victim's August 19 identification of petitioner, Nimau executed an affidavit relating Harris's observations and the victim's subsequent identification in order to obtain a search warrant for a blood sample from petitioner. Id.

The statute not only explicitly bars Agent Harris's trial testimony, but also bars the disclosure of "all information and data" obtained "directly or indirectly [from him] to anyone other than the judge or others entitled under this chapter to receive reports" absent permission. § 24-21-290. Here, there was no permission sought or granted before Agent Harris was questioned by Investigator Nimau. In my view, the resulting identification by the victim and the DNA evidence found as the result of the warrant issued after her identification is "information and data" obtained indirectly as a result of

Agent Harris's unlawful disclosure to Investigator Nimau, and therefore privileged under § 24-21-290.

As we held in State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (2003), the construction of the privilege in § 24-21-290 is a question of legislative intent, not constitutional law. The purpose of the statutory privilege is clear: to encourage an atmosphere in which there is open communication and cooperation between a probationer and his probation agent. The statute expressly states that information and data obtained in the discharge of the agent's duty is "not receivable as evidence in court," and thus the evidentiary exclusion arises from the terms of the statute creating the privilege, not the application of the exclusionary rule. To permit information or data obtained directly or indirectly as a result of a violation of the statute to be received as evidence in court defeats the legislative intent in creating this privilege.

Because the statute bars disclosure of "information and data" without an order of the court or director, whether directly or indirectly, and because the victim's identification of petitioner in the photo lineup, the DNA evidence, and the victim's in-court identification were not obtained "independent" of Agent Harris's unlawful disclosure, I would hold that this evidence cannot be received "as evidence in a court." Any other ruling, in my view, invites probation officers to violate the statutory privilege by disclosing the information and data to third persons not otherwise entitled to it, without first being "ordered" to do so. Under the interpretation adopted by the majority today, these unauthorized persons are then free to present the evidence in court.

In my view, petitioner was prejudiced by counsel's deficient performance since had an objection been made it should have been sustained. I would reverse the denial of petitioner's application for PCR, finding both that counsel's performance was deficient and that petitioner was prejudiced thereby.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gary Mull, Respondent,

v.

Ridgeland Realty, LLC d/b/a
Boat N RV Mega Store, Appellant.

Appeal From Jasper County
Luke N. Brown, Jr., as Special Referee

Opinion No. 4663
Heard February 11, 2010 – Filed March 29, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Darrell T. Johnson, Jr., of Hardeeville, for Appellant.

R. Thayer Rivers, Jr., of Ridgeland, for Respondent.

WILLIAMS, J.: In this case, we must determine whether the Special Referee erred in (1) refusing to set aside a default judgment due to insufficient service of process; (2) finding Ridgeland Realty, LLC (Ridgeland Realty) made a voluntary appearance under Rule 4(d), SCRCP, thereby waiving any defects in service of process; (3) failing to set aside the default judgment because the award was grossly out of proportion with the evidence of actual damages; and (4) granting relief that amounted to splitting attorneys' fees with a layman. We affirm in part, reverse in part, and remand.

FACTS & PROCEDURAL HISTORY

a. The RV Sale

Respondent Gary Mull (Mull) is a minister who resides in Gainesville, Florida. On or about March 24, 2007, Mull was traveling with his family through Jasper County, South Carolina, along Interstate 95 when he saw Boat-N-RV Mega Store (Boat-N-RV) near the city of Ridgeland, South Carolina. Mull decided to stop at Boat-N-RV to look at recreational vehicles. While there, Mull took a particular interest in a Gulfstream model (the RV), the price of which was listed as $222,494. While Mull did not have any intention of buying a motor home that day, he had recently made some investments that, if successful, would make buying the RV feasible.

Mike Simard (Simard), an employee of Boat-N-RV, approached Mull to discuss buying the RV. Simard told Mull if he was interested, Mull would have to put down a $5,000 deposit. Simard assured Mull any deposit he put down would only be to hold the RV and would be completely refundable if Mull was unable to procure financing. Eventually, Mull agreed to give a $1,000 deposit. Before he left Boat-N-RV, Mull signed and dated a Buyer's Order/Bill of Sale.

A few weeks later, Mull called Simard to tell him his investments had not been successful. Mull told Simard he was no longer interested in buying

the RV, and he would like his $1,000 deposit refunded. Simard refused, telling Mull, "Well, as far as I'm concerned, the sale is going forward." A week later, Mull received a Bill of Sale from Boat-N-RV in the mail showing the list price of $222,494, along with a letter from an attorney stating Mull was liable for the purchase price of the RV. Although Mull's signature was at the bottom of the Bill of Sale, he claims he did not remember seeing such a document. Thereafter, Mull began receiving letters from Ridgeland Realty's attorney claiming Mull had signed a valid contract, and the matter was turned over to arbitration. Mull also began to receive demands for payment from the American Arbitration Association (AAA).

b. The Lawsuit

On May 2, 2007, Mull hired an attorney, to whom he paid a retainer fee of $2,500. On June 15, 2007, Mull filed a lawsuit against Ridgeland Realty d/b/a Boat-N-RV in the Jasper County Court of Common Pleas asserting claims for violation of the South Carolina Unfair Trade Practices Act (SCUTPA).

The registered agent for service listed in the Secretary of State's office for Ridgeland Realty is Mr. Matthew Sgambeterra (Sgambeterra) at 401 Sycamore Drive, Ridgeland, SC 29936 (the South Carolina Address). However, Sgambettera neither lives nor works in South Carolina; rather, his address is 323 Ushers Road, Clifton Park, NY 12065 (the New York Address).

On June 19, 2007, Mull's attorney mailed a copy of the summons and complaint to Ridgeland Realty via certified mail, restricted delivery, return receipt requested, to Sgambettera at the South Carolina Address. Samantha Williamson, a receptionist at Boat-N-RV, signed the return receipt on June 21, 2007. Also on June 19, 2007, Mull's attorney mailed a copy of the summons and complaint via certified mail, restricted delivery, return receipt requested, to Sgambettera at the New York Address. Sgambettera signed the return receipt on June 27, 2007.

On July 18, 2007, Mull's attorney received a letter from Sgambettera, in which Sgambettera acknowledged receipt of the summons and complaint sent June 19, 2007, but requested Mull voluntarily dismiss the action because Boat-N-RV had already filed a demand for arbitration. On July 25, 2007, Mull's attorney sent Sgambettera's office a letter informing him the thirty-day deadline for filing an answer was going to expire in two days. In response, Sgambettera's office requested an extension of time to file an answer, which Mull's attorney granted.[1] However, Sgambettera never filed an answer.

c. The Default Judgment

On September 4, 2007, Mull filed a motion for default judgment. The Honorable Carmen T. Mullen granted the motion on September 25, 2007. On November 9, 2007, a Special Reference hearing was held before the Honorable Luke N. Brown, Jr. (the Special Referee) to take testimony from Mull and his wife. On November 19, 2007, the Special Referee awarded Mull $10,000 in actual damages. The Special Referee arrived at this figure by taking into account (1) the $2,500 retainer fee, (2) the $1,000 deposit, (3) filing fees, service fees, and court costs, (4) two trips from Florida to South Carolina, and (5) a $125 charge from the AAA. The Special Referee then trebled the $10,000 actual damages to $30,000 on the grounds that "the requisites of the Unfair Trade Practices [Act] have been met and [Mull] is entitled to trebling of [the $10,000]." Finally, the Special Referee awarded Mull $10,000 in attorneys' fees.[2]

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[1] The record does not contain any documentary evidence of Sgambettera's request for an extension of time. However, at the May 19, 2007 Special Reference hearing, Mull's attorney stated one of Sgambettera's associates contacted him via telephone to ask for an extension. Counsel for Ridgeland Realty's did not deny this; his only response was that being granted the extension did not constitute a voluntary appearance pursuant to Rule 4(d), SCRCP.

[2] On November 19, 2007, Mull's attorney filed an affidavit in which he stated a reasonable fee for his services in this matter would be $10,000. He also stated Mull had already paid $2,500 of that $10,000 with his retainer fee.

On January 30, 2008, Ridgeland Realty filed a motion under Rule 60(b) to set aside the default judgment on the grounds of (1) insufficient service, (2) excusable neglect, (3) Ridgeland Realty is merely a landlord for Boat-N-RV, and is not in the business of selling goods,[3] and (4) the amount of the judgment was excessive. The Special Referee denied this motion on May 30, 2008.[4] On June 6, 2008, Ridgeland Realty filed a Rule 59(e), SCRCP, motion on the same grounds as its Rule 60(b) motion. The Special Referee denied this motion on July 28, 2008. Ridgeland Realty served its notice of appeal on August 6, 2008. This appeal followed.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Id. An abuse of discretion occurs when the judgment was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. Id.

LAW & ANALYSIS

a. Service of Process

Ridgeland Realty argues the service upon Sgambettera at the New York Address was ineffective because even though Sgambettera is the registered

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[3] Ridgeland Realty does not make this argument on appeal.

[4] The Special Referee did, however, make a correction to the original order of default judgment. In the original order, it appeared the Special Referee was awarding Mull $10,000 in actual damages and $30,000 in treble damages. Thus, when combined with the $10,000 in attorneys' fees, the order appeared to be awarding Mull a total of $50,000. In the May 30 order, the Special Referee corrected this error, stating Mull was awarded $10,000 in attorneys' fees and $30,000 in damages, for a total of $40,000.

agent for Ridgeland Realty and Sgambettera signed the return receipt, it was not sent to the address listed with the Secretary of State. We disagree.

"The principal object of service of process is to give notice to the defendant corporation of the proceedings against it." Burris Chemical, Inc. v. Daniel Const. Co., 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968). "Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). Exacting compliance with the rules is not required to effect service of process. Id. at 209-10, 456 S.E.2d at 899. "Rather, [the court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Id. at 210, 456 S.E.2d at 899.

Pursuant to section 15-9-210(b) of the South Carolina Code (Supp. 2007), corporations "may be served . . . by registered or certified mail, return receipt requested, addressed to the office of the registered agent, or the office of the secretary of the corporation at its principal office." The issue here is whether service via certified mail to a registered agent sent to the agent's out-of-state address constitutes service "to the office of the registered agent" under section 15-9-210(b). The statute does not explicitly define "the office of the registered agent," and we find no case law defining that phrase. Consequently, we turn to our rules of statutory interpretation to resolve this question.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). Courts should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). In interpreting a statute, the language of the statute must be read in a sense

which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

We find the service to the New York Address in this case was proper under the statute. First, we believe the service fulfilled the intent of the statute. It is undisputed that Sgambettera received the summons and complaint and signed the return receipt on June 27, 2007. Moreover, Sgambettera sent Mull's attorney a letter acknowledging receipt. Thus, the principal object of service was achieved in this case because the service was sufficient to put Sgambettera – and, by extension, Ridgeland Realty – on notice of Mull's claim. See Burris Chemical, 251 S.C. at 487, 163 S.E.2d at 620 ("The principal object of service of process is to give notice to the defendant corporation of the proceedings against it.").

Second, we believe the service complies with the actual language of the statute. Section 15-9-210(b) provides that corporations "may be served . . . by registered or certified mail, return receipt requested, addressed to the office of the registered agent, or the office of the secretary of the corporation at its principal office." (emphasis added). Mull sent the service via certified mail, return receipt requested, and addressed it to Sgambettera's office in New York. Thus, even though Sgambettera's office was not located at the South Carolina Address, the service was nonetheless "addressed to the office of the registered agent" as mandated by section 15-9-210(b).

Ridgeland Realty states in its brief, "[i]t is undisputed that the address of the registered agent is [the South Carolina Address]." This is an inaccurate statement inasmuch as Ridgeland Realty conceded Sgambettera lives and works in New York and has only come to South Carolina "on occasion."

Ridgeland Realty would have us define "the office of the registered agent" so narrowly that service on Sgambettera in this case would have only been proper if it were sent to the South Carolina Address and Sgambettera had signed the return receipt. To interpret the statute as only allowing plaintiffs to serve process on registered agents at the address listed with the Secretary of State would lead to an absurd result where, as here, the registered agent neither lives nor works in South Carolina.

Accordingly, we believe service on Ridgeland Realty through Sgambettera at the New York Address was proper. Consequently, we need not address the issue of whether Ridgeland made a voluntary appearance by requesting an extension of time. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address an issue if the resolution of a prior issue is dispositive).

b. Default Judgment

Ridgeland Realty argues the Special Referee's judgment should be reversed because it resulted in a trebling of attorneys' fees. We agree.

The SCUPTA permits recovery of actual damages. S.C. Code Ann. § 39-5-140(a) (Supp. 2008).[5] Actual damages under the SCUTPA include special or consequential damages that are a natural and proximate result of

[5] Section 39-5-140(a) provides: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by section 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs."

deceptive conduct. Taylor v. Medenica, 324 S.C. 200, 219, 479 S.E.2d 35, 45 (1996). Section 39-5-140(a) also provides if a court finds a defendant's violation of the SCUPTA to be willful or knowing, the court shall award treble damages.[6] Finally, section 39-5-140(a) provides, "Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." Reading section 39-5-140(a) in its entirety leads to two conclusions: (1) actual damages are distinct from attorneys' fees, and (2) whereas actual damages are subject to trebling, attorneys' fees are not.

As stated above, a trial court's decision as to a default judgment will not be reversed absent an abuse of discretion, which occurs when the judgment is controlled by some error of law or is without evidentiary support. Roberson, 365 S.C. at 9, 615 S.E.2d at 114. We believe the Special Referee abused his discretion by crafting a judgment that resulted in a trebling of attorneys' fees.

First, the Special Referee awarded Mull $10,000 in actual damages. That amount was based, in part, on the $2,500 retainer fee Mull paid to his attorney. In other words, the Special Referee considered Mull's attorneys' fees to be part of Mull's actual damages. Consequently, when the Special Referee trebled the actual damages, this had the effect of awarding Mull three

[6] In his November 19, 2007 Order, the Special Referee held that treble damages were appropriate in this case because "the requisites of the [SCUPTA] have been met[.]" Thus, the Special Referee did not make an explicit finding on the record that Ridgeland Realty's violations were "willful" and/or "knowing." However, we need not rule on the failure to make such a finding because Ridgeland Realty has not preserved that argument for appeal. "It is axiomatic that for an issue to be preserved for appeal, it must have been raised to and ruled upon by the trial court." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Although Ridgeland Realty challenges the default judgment as being "excessive," they do not specifically challenge the Special Referee's decision to treble the damages. That is to say, they do not argue their violations were not willful and/or knowing. Consequently, the decision to treble the actual damages has not been preserved for our review.

times the retainer fee. Thus, $2,500 became $7,500, which meant $7,500 of the $30,000 actual damages award was attributable to the retainer fee.

The Special Referee then awarded Mull, separate and apart from the actual damages, $10,000 in attorneys' fees, presumably based on Mull's attorneys' fee estimate. However, that estimate already included the same $2,500 retainer fee. Thus, between the actual damages and attorneys' fees, $17,500 of the $40,000 award was attributable to Mull's attorneys' fees, even though his actual attorneys' fees totaled only $10,000.

We believe the Special Referee's judgment was controlled by an error of law in that he awarded Mull attorneys' fees twice by counting attorneys' fees as actual damages. Consequently, we find this was an abuse of discretion.

CONCLUSION

We affirm the Special Referee's order denying Ridgeland Realty's Rule 60(b) motion as to the finding that service was proper. However, we reverse as to the default judgment amount and remand for more specific findings as to damages and attorneys' fees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tranquil Properties, Inc., Appellant,

v.

Dorchester County a/k/a Dorchester County Public Works, Respondent.

Appeal From Dorchester County
Patrick R. Watts, Master-In-Equity

Opinion No. 4664
Heard February 2, 2010 – Filed March 29, 2010

REVERSED

David G. Jennings and James A. Bruorton, IV, both of Charleston, for Appellant.

Andrew T. Shepherd and John G. Frampton, both of Summerville, for Respondent.

KONDUROS, J: Tranquil Properties, LLC[1] (Tranquil Properties) appeals the master-in-equity's holding Dorchester County (the County) can bill it for sewer service charges incurred by tenants of the units in Tranquil Acres. We reverse.

FACTS

Tranquil Acres is a planned development comprised of four main buildings arranged around a rectangular common area. Within the complex are forty single-unit homes individually deeded with Tranquil Properties being the record owner of thirty-nine units and the common area. The County provides sewer service to the units via four feeder lines, one for each building, connected to a main sewer tap located under a slab in the common area. Originally, the complex was serviced by a private septic tank system. It was later connected to the public sewer system.[2] While each unit is individually metered for water and other services, sewer service is to the entire complex.

David Scott Wiggins, principal member of Tranquil Properties, acquired the thirty-nine units in 2002. Tranquil Properties purchased Tranquil Acres' common area in 2004, and Wiggins transferred his ownership of the units to Tranquil Properties in 2006. All conveyances were made subject to easements, restrictions, and covenants of record.

In July 2007, the County billed Tranquil Properties directly for the sewer service provided to the entire complex. Prior to that time, each tenant was billed individually at a flat rate of $34.80 per month. Tranquil Properties refused to pay the bill unless the County provided a basis for directly billing it. The County notified Tranquil Properties it would terminate service to the complex if the bill was not paid. Eventually, Tranquil Properties brought a

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[1] The appellant in this matter is Tranquil Properties, LLC. However, the master-in-equity's final order denominates the entity as Tranquil Properties, Inc., and the appeal to this court was filed with that caption.

[2] Neither the record nor oral argument made clear whether Tranquil Acres' connection to public sewer service was mandated by the County.

declaratory judgment action and injunction seeking to have the tenants directly billed for sewer service and to prevent termination of service. The County counterclaimed seeking the payment due.

The master-in-equity concluded the County could directly bill Tranquil Properties because the covenants existing at the time of transfer called for the creation of an association composed of unit owners that could assess fees "to promote the recreation, health, safety and welfare of the residents and for the improvement and maintenance of Common Areas." The master-in-equity found Tranquil Properties took the units and common area subject to this requirement thereby placing ultimate responsibility upon it to provide sewer service to the complex. This appeal followed.

STANDARD OF REVIEW

A declaratory judgment action is reviewed based on the nature of the underlying issue. Sloan v. Greenville County, 356 S.C. 531, 544, 590 S.E.2d 338, 345 (Ct. App. 2003). In this case the master-in-equity based his decision primarily on Tranquil Properties being successor to the responsibilities of the Association. That issue depends on an examination of the conveyances and covenants which lies in equity. Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006). In that instance, the appellate court may find the facts on appeal in accordance with its own view of the preponderance of the evidence. Id.

LAW/ANALYSIS

Tranquil Properties argues the master-in-equity erred in finding it was a successor to the Association and as such was responsible for providing sewer service to the property. We agree.

The covenants involved called for an association to be formed and for each unit owner to be a member. The association could then assess fees to each unit owner to promote the recreation, health, safety, and welfare of the residents and for the improvement and maintenance of the common area and homes on the property. The master-in-equity concluded Tranquil Properties

was the successor to the association, defunct since 1997, stating: Tranquil Properties "took title to the common area from the original association, subject to all the recorded covenants and conditions." The common area included the original septic tank that serviced all the buildings. Therefore, the master-in-equity concluded Tranquil Properties, as purchaser of the common area, was successor to the association and its responsibilities. Because sewer service promotes the health, safety, and welfare of tenants, the master-in-equity concluded the association would have been responsible for paying the sewer service bill and recouping that money through assessments.

Restrictive covenants are to be strictly construed and should be interpreted to promote the free use of property. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The original covenants do not mention responsibility on the part of the association for sewer services. They seem more focused on the maintenance and access to any recreational facilities in the common area. The record reveals plans for a swimming pool in the common area that was never constructed. The covenants also give the association the right to dedicate any necessary portion of the common area to a public utility upon a two-thirds vote of the membership. However, to extrapolate from that a duty for the association, much less Tranquil Properties as successor, to pay for ongoing monthly sewer service is too great a leap. Obtaining the means for sewer service by securing a connection to the public system or providing the original septic tank is different than paying for the ongoing service in each unit each month. That service is utilized by the tenant and we can find no basis in the covenants to redirect that obligation.

Furthermore, the County had previously treated each tenant as a customer by billing them directly. The fact that such method was not effective does not by default shift the burden of collecting the payment to Tranquil Properties. See City of Grangeville v. Haskin, 777 P.2d 1208, 1211-12 (Idaho 1989) (holding ordinances allowing lien against property for unpaid utility services did not render landlord liable for cost of service to tenants); cf. Skyscraper Corp. v. County of Newberry, 323 S.C. 412, 417-18, 475 S.E.2d 764, 765-67 (1996) (finding yearly use fee for solid waste removal assessed directly to landlord did not violate equal protection laws

when such responsibility was spelled out in ordinance, landlord benefited from the service and others similarly situated were treated the same).

In our view of the evidence, the County presented no basis for concluding Tranquil Properties is liable for the monthly sewer service charges of the tenants occupying Tranquil Acres. The ruling of the master-in-equity is therefore

REVERSED.[3]

HUFF and THOMAS, JJ., concur.

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[3] Because our determination of this issue is dispositive of the appeal, we need not address any remaining arguments by Tranquil Properties. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amy Lynn Lapp, Appellant,

v.

South Carolina Department of Motor Vehicles, Respondent.

Appeal from Richland County
Paige J. Gossett, Administrative Law Court Judge

Opinion No. 4665
Submitted February 1, 2010 – Filed March 31, 2010

AFFIRMED

John L. Duffy, III and Edward L. Phipps, of Mount Pleasant, for Appellant.

Frank L. Valenta, Jr., Philip S. Porter, and Linda Annette Grice, of Blythewood, for Respondent.

PER CURIAM: This appeal arises from the suspension of Amy Lynn Lapp's driver's license by the Department of Motor Vehicles (Department) for

refusing to submit to a breath test as required under section 56-5-2950 of the South Carolina Code (2006). The Division of Motor Vehicle Hearings (DMVH) sustained the suspension and the Administrative Law Court (ALC) affirmed.[1] On appeal, Lapp argues that the ALC erred in upholding the DMVH's determination that probable cause existed to arrest her for driving under the influence (DUI). She also contends that her arrest was unlawful under section 56-5-6170 of the South Carolina Code (2006). We affirm.[2]

FACTUAL/PROCEDURAL BACKGROUND

On November 4, 2007, Officer Trevor Simmons of the Mount Pleasant Police Department was dispatched to the scene of an automobile accident. Upon arriving at the scene, he observed Lapp sitting in her vehicle. Officer Simmons questioned Lapp, who admitted that she had struck two vehicles. Having detected a "strong odor" of alcohol coming from Lapp, Officer Simmons asked Lapp to perform a field sobriety test. Lapp refused. After advising Lapp of her Miranda[3] rights, Officer Simmons arrested Lapp for DUI and transported her to the Mount Pleasant Police Department for a breath test.

While at the Mount Pleasant Police Department, Lapp was again informed of her Miranda rights. She was also advised of her implied consent rights as set forth in section 56-5-2950. Lapp subsequently refused to submit

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[1] After the issuance of its decision, the DMVH's name was changed to the Office of Motor Vehicle Hearings pursuant to Act. No. 279, 2008 S.C. Acts 2311.

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

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

to the breath test, and her driver's license was suspended pursuant to section 56-5-2951(A) of the South Carolina Code (2006).[4]

A few days later, Lapp requested an administrative hearing with the DMVH to challenge her suspension. The DMVH upheld her suspension, and she appealed to the ALC. The ALC affirmed the DMVH's decision, and this appeal followed.

ISSUES ON APPEAL

1. Did the ALC err in affirming the DMVH's finding that probable cause existed to arrest Lapp for DUI?

2. Was Lapp's arrest unlawful under section 56-5-6170 of the South Carolina Code (2006)?

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code (Supp. 2009) sets forth the standard of review for an appeal from an order of the ALC. It provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

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[4] Since the suspension of Lapp's driver's license, sections 56-5-2950 and 56-5-2951 have been amended. See S.C. Code Ann. §§ 56-5-2950, 56-5-2951 (Supp. 2009). However, those amendments have no bearing on this case.

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2009).

LAW/ANALYSIS

I. Probable Cause

Lapp argues that the ALC erred in affirming the DMVH hearing officer's finding of probable cause. We disagree.

The fundamental question in determining the lawfulness of an arrest is whether there was "probable cause" to make the arrest. Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). "The term 'probable cause' does not import absolute certainty." State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). Rather, probable cause exists "when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006).

In ascertaining the presence of probable cause, "all the evidence within the arresting officer's knowledge may be considered, including the details

observed while responding to information received." State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979); see also State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) ("Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers [sic] disposal."). An officer may lawfully arrest for a misdemeanor not committed within his presence where the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed. State v. Clark, 277 S.C. 333, 334, 287 S.E.2d 143, 144 (1982); State v. Martin, 275 S.C. 141, 145-46, 268 S.E.2d 105, 107 (1980); Summersell v. S.C. Dep't of Pub. Safety, 334 S.C. 357, 367, 513 S.E.2d 619, 625 (Ct. App. 1999), vacated in part on other grounds, 337 S.C. 19, 522 S.E.2d 144 (1999); Fradella v. Town of Mount Pleasant, 325 S.C. 469, 475, 482 S.E.2d 53, 56 (Ct. App. 1997).

In Martin, a police officer was dispatched to the scene of a reported accident. When he arrived, he found two damaged vehicles parked on the side of the road and a group of fifteen to twenty people gathered at the scene. The defendant, who was "highly intoxicated," admitted to being the driver of one of the vehicles. Based upon those facts, the South Carolina Supreme Court held that the defendant's warrantless arrest was lawful. Martin, 275 S.C. at 146, 268 S.E.2d at 108. In reaching that result, the court explained that "the only reasonable conclusion to be drawn was that a collision between the two vehicles had just occurred and that the crime had been freshly committed." Id. at 146, 268 S.E.2d at 107.

Here, Officer Simmons was dispatched to the scene of an automobile accident. Upon arriving at the scene, he observed Lapp sitting in her vehicle. Lapp, who smelled strongly of alcohol, admitted to Officer Simmons that she had struck two vehicles. When Officer Simmons asked Lapp to perform a field sobriety test, she refused. Under these circumstances, we find that Officer Simmons had probable cause to arrest Lapp for DUI. Because Lapp was still sitting in her vehicle at the scene of the accident, it was reasonable for Officer Simmons to conclude that the accident had recently occurred and that Lapp had freshly committed the crime of DUI.

Although Lapp contends that the Department failed to prove that she was "materially and appreciably impaired," an implied consent hearing "is *not* a trial in regard to the guilt or innocence of the defendant on a DUI charge."[5] Summersell, 334 S.C. at 369, 513 S.E.2d at 625. The pertinent question here was not whether Lapp was guilty of DUI, but merely whether probable cause existed to arrest her for that offense. Id. at 368-69, 513 S.E.2d at 625. A finding of probable cause may be based upon less evidence than would be necessary to support a conviction. See Henry v. United States, 361 U.S. 98, 102 (1959) (evidence required to establish guilt is not necessary to authorize a warrantless arrest); State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999) ("Probable cause may be found somewhere between suspicion and sufficient evidence to convict."). In this case, the DMVH hearing officer's finding of probable cause was consistent with holdings from other jurisdictions. See Miller v. Harget, 458 F.3d 1251, 1260 n.5 (11th Cir. 2006) ("[T]he fact that Mr. Miller was driving a vehicle, an odor of alcohol emanated from its interior, and his refusal to submit to a field sobriety test was sufficient to give Officer Harget probable cause to arrest."); Summers v. Utah, 927 F.2d 1165, 1166 (10th Cir. 1991) (holding that undisputed facts regarding plaintiff's operation of his vehicle, the officer's scent of alcohol emanating from the vehicle, and plaintiff's refusal to take a field sobriety test adequately supported magistrate's conclusion that DUI arrest was lawful).

For these reasons, we conclude that the ALC did not err by affirming the DMVH hearing officer's determination that probable cause existed to arrest Lapp for DUI.

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[5] When determining whether a motorist committed the offense of DUI under section 56-5-2930 of the South Carolina Code (Supp. 2009), "materially and appreciably impaired" is the standard used to assess the motorist's faculties to drive.

II. Section 56-5-6170

Lapp also contends that her DUI arrest was unlawful under section 56-5-6170 of the South Carolina Code (2006) because Officer Simmons failed to testify that Lapp violated any traffic laws. We disagree.

Section 56-5-6170 provides in pertinent part:

> No police officer in investigating a traffic accident shall necessarily deem the fact that an accident has occurred as giving rise to the presumption that a violation of a law has occurred. Arrests and criminal prosecution for violation of this chapter shall be based upon evidence of a violation of the law.

S.C. Code Ann. § 56-5-6170 (2006).

As a threshold matter, it does not appear that this issue is preserved for review. To be preserved for appellate review, an issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007).

Here, Lapp did not specifically argue to the DMVH hearing officer that the arrest was unlawful under section 56-5-6170. Although Lapp's attorney argued in closing that Lapp's arrest was unlawful and that "there was no testimony given to any impairment in [Lapp's] driving," he did not expressly reference section 56-5-6170. Moreover, neither the DMVH hearing officer nor the ALC mentioned section 56-5-6170 in their decisions. Therefore, we conclude that this issue is not preserved for the court's review. Cf. Allendale County Bank v. Cadle, 348 S.C. 367, 377-78, 559 S.E.2d 342, 347-48 (Ct.

App. 2001) (finding issue was not preserved for review where it was not specifically raised to the trial court).

Furthermore, even if this issue were preserved, Lapp's argument fails on the merits. Officer Simmons arrested Lapp based on his reasonable belief that she had committed the offense of DUI. Unquestionably, DUI constitutes "a violation of the law." See S.C. Code Ann. § 56-5-2930(A) (Supp. 2009) ("It is *unlawful* for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired . . . .") (emphasis added). Moreover, as discussed above, Lapp's arrest was predicated upon more than just the fact that an accident had occurred. In addition to testifying about Lapp's admission regarding the accident, Officer Simmons testified that Lapp smelled strongly of alcohol and that she refused field sobriety testing. Accordingly, we conclude that Officer Simmons did not violate section 56-5-6170 by arresting Lapp for DUI.

CONCLUSION

For the foregoing reasons, the ALC's order is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Southeast Toyota Distributors, LLC, Appellant,

v.

Jim Hudson Superstore, Inc., d/b/a Jim Hudson Toyota/Scion, Dyer, Inc., d/b/a Dick Dyer Toyota, and Anderson Columbia Acquisition, LLC, d/b/a Toyota Center, Defendants,

of whom Anderson Columbia Acquisition, LLC, d/b/a Toyota Center is, Appellant,

and Jim Hudson Superstore, Inc., d/b/a Jim Hudson Toyota/Scion is, Respondent.

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4666
Heard February 2, 2010 – Filed March 31, 2010

REVERSED

C. Mitchell Brown, Steven A. McKelvey, Jr., and Thad H. Westbrook, of Columbia, for Appellant Southeast Toyota Distributors, LLC.

John J. Pringle, Jr. and Shaun C. Blake, of Columbia, for Appellant Anderson Columbia Acquisition, LLC.

Manton M. Grier and Sarah P. Spruill, of Columbia, for Respondent.

GEATHERS, J.: Appellant Southeast Toyota Distributors, LLC (SET), brought this declaratory judgment action against Respondent Jim Hudson Superstore, Inc., d/b/a Jim Hudson Toyota/Scion (Hudson), Dyer, Inc., d/b/a Dick Dyer Toyota (Dyer), and Appellant Anderson Columbia Acquisition, LLC, d/b/a/ Toyota Center (Anderson) to determine whether the relocation of the Toyota Center dealership in Lexington County is exempt from protest pursuant to S.C. Code Ann. § 56-15-46(C) (2006).[1] Hudson and Dyer filed counterclaims asserting protests to the proposed relocation under subsection (B) of the statute. SET and Hudson then filed cross-motions for summary judgment on the exemption issue. The circuit court granted Hudson's summary judgment motion and denied SET's summary judgment motion. SET and Anderson challenge the circuit court's order on the ground

[1] Section 56-15-46(B) allows an existing dealership to petition the circuit court to enjoin the establishment of a new or relocated dealership within a ten-mile radius of the existing dealership. Subsection (C) sets forth three exemptions from the statute. Although SET named Anderson as a defendant in this declaratory judgment action, these two parties share the same position with respect to the exemption status of the Toyota Center dealership's relocation.

that subsection (C)(3) of the statute, which provides an exemption from protest, applies to the Toyota Center dealership despite a change in its ownership.[2] We reverse.

FACTS/PROCEDURAL HISTORY

On May 30, 2006, Anderson entered into an agreement with Rish-Corey Automotive, Inc. to purchase the assets of the Toyota Center dealership. Toyota Center has been located at 1640 Airport Boulevard in West Columbia since 1972. Anderson also entered into a dealer agreement with SET, the authorized distributor of Toyota vehicles, parts, and accessories for South Carolina, North Carolina, Georgia, Florida, and Alabama. Because of the inadequacy of the existing facility at 1640 Airport Boulevard, Anderson's dealer agreement with SET required Anderson to construct and occupy a new facility at a site to be approved by SET. SET later approved Anderson's choice of the site at 2136 Sunset Boulevard in West Columbia, less than three miles away from the facility at 1640 Airport Boulevard, and sent letters to Hudson and Dyer informing them of the proposed relocation of the Toyota Center dealership.

SET subsequently filed this declaratory judgment action against Hudson, Dyer, and Anderson, seeking a determination of whether the proposed relocation is exempt from protest pursuant to section 56-15-46(C). Hudson and Dyer filed counterclaims asserting a protest to the proposed relocation pursuant to subsection (B) of the statute. SET and Hudson then filed cross-motions for summary judgment on the exemption question. The circuit court granted Hudson's summary judgment motion and denied SET's summary judgment motion. SET filed a motion to alter or amend pursuant to

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[2] In view of our disposition of this issue, we decline to address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

Rule 59(e), SCRCP. However, the circuit court denied the motion, and this appeal followed.

ISSUE ON APPEAL

Did the circuit court err in concluding that the relocation of the Toyota Center dealership is not exempt from protest pursuant to S.C. Code Ann. § 56-15-46(C)(3) (2006)?

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

LAW/ANALYSIS

Section 56-15-46(B) of the South Carolina Code (2006) allows an existing dealership to petition the circuit court to enjoin the establishment of a new or relocated dealership within a ten-mile radius of the existing dealership.[3] Subsection (B) reads in pertinent part as follows:

> If a franchisor intends to establish a new dealership

[3] In the year 2000, the legislature added section 56-15-46 to Chapter 15 of Title 56 of the South Carolina Code. See Act No. 287, § 2, 2000 S.C. Acts 2041, 2045-47.

> or to relocate a current dealership within a ten-mile radius of an existing dealership, then that existing dealership may petition the court, within sixty days of the receipt of the notice, to enjoin or prohibit the establishment of the new or relocated dealership within a ten-mile radius of the existing dealership. The court shall enjoin or prohibit the establishment of the new or relocated dealership within a ten-mile radius of the protesting dealership unless the franchisor shows by a preponderance of the evidence that the existing dealership is not providing adequate representation of the line-make motor vehicle and that the new or relocated dealership is necessary to provide the public with reliable and convenient sales and service within that area.

S.C. Code Ann. § 56-15-46(B) (2006) (emphases added).

However, subsection (C) of the statute designates the following three exemptions from the protest procedure set forth in subsection (B):

> (1) [the] addition of a new dealership at a location that is within a three-mile radius of a former dealership of the same line make and that has been closed for less than two years;
>
> (2) [the] relocation of an existing dealership to a new location that is further away from the protesting dealer's location than the relocated dealer's previous location; or
>
> (3) [the] relocation of an existing dealership to a new location that is within a three-mile radius of the dealership's current location, when it has been at the current location at least ten years.

S.C. Code Ann. § 56-15-46(C) (2006) (emphases added).

SET and Anderson assign error to the circuit court's ruling that the relocation of the Toyota Center dealership is not exempt from protest pursuant to S.C. Code Ann. § 56-15-46(C)(3) because Anderson is a new dealer. Specifically, Anderson challenges the circuit court's conclusion that because Anderson is a new dealer, Toyota Center is no longer an "existing dealership," but is a "new dealership" for purposes of subsection (C) of the statute. The circuit court reached its conclusion based on the following rationale:

> The Court is called to determine whether Anderson is an "existing dealership" that has been at its current location at least ten years within the meaning of S.C. Code Ann. § 56-15-49(C)(3) [sic]. A dealership necessarily refers to a dealer, and when the dealer is changed, so is the dealership.
>
> Anderson and Rish-Corey are separate dealers and separate persons for purposes of the Dealer Statute. As reflected in its dealer agreement with SET and TMS, Anderson was a new franchisee in 2006. It is true that the businesses owned by Rish-Corey and Anderson share a location and operate under the same doing business as designations ("Toyota Center" and "Scion Center"); however, that does not change the underlying identity of the dealers or create one dealership for purposes of the Dealer Statute.
>
> Accordingly, the Court concludes that Anderson was a new dealership when it purchased the assets of Rish-Corey in 2006. Although Rish-Corey would have been entitled to assert the

> exemption found in S.C. Code Ann. § 56-15-46(C)(3), Anderson is not at this time.

Anderson essentially argues that the existence of a dealership is not extinguished for purposes of the exemption in subsection (C)(3) simply because its owner has changed. Similarly, SET argues that when read consistent with the principles of statutory construction, the application of the exemption in subsection (C)(3) depends on where consumers have been served and how long they have been served there, not on the identity of the dealership's owner. We agree.

"'Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.'" Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007) (quoting Collins Music Co., Inc. v. IGT, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005)). "A court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law." Id. at 599, 654 S.E.2d at 290 (citing Hinton v. S.C. Dep't of Prob., Parole, and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004)).

Several states, including South Carolina, have enacted "relevant market area" laws that are designed to protect dealerships from destructive intrabrand competition. See Act No. 287, § 2, 2000 S.C. Acts 2041, 2045-47 (enacting key provisions of South Carolina's "relevant market area" law by adding S.C. Code Ann. § 56-15-46 to Chapter 15 of Title 56); Heritage Jeep-Eagle, Inc. v. Chrysler Corp., 655 N.E.2d 140, 143-45 (Mass. App. Ct. 1995); see also General Motors Corp. v. State Motor Vehicle Review Bd., 862 N.E.2d 209, 216 (Ill. 2007) (citing 815 Ill. Comp. Stat. 710/2(q) (2004), which defines "relevant market area" in legislation allowing protests to the addition of a new franchise within ten miles of an existing franchise). The focus in this type of legislation is on the degree of competition among dealerships. See Heritage Jeep-Eagle, 655 N.E.2d at 143-45 (stating that the focus of Massachusetts' "relevant market area" law is on the degree of competition among franchisees).

South Carolina's "relevant market area" law clearly focuses on the introduction of new competition for an existing dealership, and the identity of the owner or operator of the new competitor has no relevance to this analysis. The new competition is unavoidably related to the geography of the area, i.e., the location of another business selling the same "line-make." Key terms in section 56-15-46, such as "market area," "ten-mile radius," "distance," and "location," clearly indicate that the legislature viewed the effect of geography on an existing dealership's customer base as the controlling factor in determining whether the addition or relocation of a dealership to an area is exempt from protest. When the dealership is the same geographically, even if its ownership is new, there is no new competition for purposes of section 56-15-46. Therefore, the status of a dealership as "existing" for purposes of section 56-15-46(C)(3) is not altered by a change in ownership.[4]

As Hudson correctly asserts, certain provisions of Act No. 287, 2000 S.C. Acts 2041, employ the terms "dealer" and "dealership" interchangeably.[5] However, in section 56-15-46(C)(3), there is no true indication that the legislature intended to restrict the ownership of a dealership in the manner proposed by Hudson. See Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (holding that however plain

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[4] Hudson cites Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (Ct. App. 2008) for the proposition that the purchaser of a dealership's assets is a new and distinct business. However, Walton did not involve the interpretation of Act No. 287, 2000 S.C. Acts 2041. Rather, Walton dealt with successor liability for an automobile warranty. 376 S.C. at 305-08, 657 S.E.2d at 69-70. In any event, whether a new and distinct business entity has purchased a dealership's assets has no significance in examining the impact of the dealership's physical location on a competing dealership.

[5] See, e.g., S.C. Code Ann. § 56-15-46(A) (2006) (notice provided by certified mail to existing "dealership"); § 56-15-46(B) (existing "dealership" may petition the court); § 56-15-46(C)(2) ("relocation of an existing dealership to a new location that is further away from the protesting dealer's location than the relocated dealer's previous location").

the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would defeat the plain legislative intention). Viewing the provisions of Act No. 287 as a whole, the term "dealership" in section 56-15-46(C) refers to the business operation itself and not to the identity of the business owner; and, the introduction of new competition in the relevant market area depends on the operation of the business and not on the owner's identity. See Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008) ("When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect."); Peake, 375 S.C. at 599, 654 S.E.2d at 290 (holding that a court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute).

The protest exemption in subsection (C)(1) provides a good illustration of the legislature's focus on changes in competition: "This section does not apply to the . . . addition of a new dealership at a location that is within a three-mile radius of a former dealership of the same line make and . . . has been closed for less than two years." (emphases added). This provision exempts a new dealership when its location is close to the location of a recently closed dealership—the idea being that there is no net increase in competition. In Heritage Jeep-Eagle, the Appeals Court of Massachusetts cited the language of a comparable provision in Massachusetts' relevant market area law to support its conclusion that the statute in general concerns itself with additional competition for dealerships already existing in the relevant market area. 655 N.E.2d at 144 n.8.

Hudson argues that section 56-15-46 protects South Carolina consumers and dealerships from aggressive practices by distributors and manufacturers and from excessive intrabrand competition. We agree. However, this purpose can be served by applying the exemptions in section 56-15-46(C) according to the geographical relationship between the businesses involved, as was intended by the legislature.

CONCLUSION

Accordingly, the circuit court's order is

REVERSED.

HUFF, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kareem T. Wiley, Appellant.

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

Opinion No. 4667
Heard March 3, 2010 – Filed March 31, 2010

AFFIRMED

Appellate Defender Lanelle C. DuRant, South Carolina Commission, of Columbia, 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 Norman Mark Rapoport, Assistant Attorney General Mark R. Farthing, Office of the Attorney General and Solicitor Warren Blair Giese, all of Columbia; for Respondent.

WILLIAMS J.: Kareem T. Wiley (Wiley) appeals his conviction for trafficking cocaine. On appeal, Wiley contends the trial court erred in refusing to grant a mistrial when the State commented on Wiley's unrelated outstanding warrant during opening statements. Wiley further contends the trial court erred in not instructing the jury that the State had the burden of proof when the State commented that Wiley did not contest the legality of the stop or search on cross-examination. We affirm.

FACTS

On January 9, 2007, law enforcement officers with the Richland County Sheriff's Department (the Department) conducted an undercover drug investigation involving Lauren Stuckey (Stuckey). The Department believed Stuckey was working with a cocaine supplier based on her prior drug transactions with Jason Williams (Williams), an undercover narcotics agent with the Department. As a result, Williams called Stuckey to set up a purchase for 125 grams of cocaine, and Stuckey agreed to set up a drug transaction at a Kmart parking lot. Stuckey informed Williams that her "partner" was going to be present at the Kmart.

Damon Robertson (Robertson), an investigator with the Department, conducted surveillance on the Kmart parking lot and saw Stuckey's vehicle and a second vehicle subsequently identified as a Chrysler Sebring (the Sebring) enter the Kmart parking lot. To confirm that the Sebring was actually involved in the drug transaction, Robertson ordered Williams to change the location of the drug transaction to see if the Sebring would follow Stuckey.

Robertson followed the Sebring to a Chick-fil-A restaurant and positively identified Wiley as the individual in the Sebring. The Department arrested Wiley, informed him of his Miranda rights, and conducted a search. The search revealed a "sandwich size bag" of cocaine in Wiley's front right jacket pocket. Robertson testified that Wiley later admitted that he intended to sell the cocaine to Williams.[1]

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[1] Wiley referred to Williams as "the drop off."

In its opening statement at trial, the State said, "[The Department] know[s] he's under suspension, so they have a legitimate right to stop him. They also know that he has an unrelated warrant outstanding. It's not - -."

At that point, Wiley objected. The trial court sustained the objection and gave the following curative instruction: "All right, ladies and gentlemen, I remind you that the arguments that are made by the attorneys are not considered evidence in the case. It's only their contention as to what the issues are in the case."

At the close of the State's opening statement, a bench conference was held, and Wiley moved for a mistrial based on the State's reference to Wiley's unrelated warrant. The trial court refused to grant a mistrial and indicated it would give a curative instruction to the jury. Wiley objected to the proposed curative instruction. Following the bench conference, the trial court instructed the jury, in part,

> [O]pening statements that are presented by either the State or the defense, they're not to be considered as evidence in this case. . . . And I'm going to instruct you now that you are not to draw any inferences, you're not to take what the State has said - - and also the defense when they make their opening statements, you're not to draw any inferences of guilt or innocence or inferences to any evidentiary conclusions that might be made from any statements that are made by the lawyers.

The jury subsequently convicted Wiley, and the trial court sentenced him to twenty-five years imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Martucci, 380 S.C. 232, 246, 669 S.E.2d 598, 605-06 (Ct. App. 2008). This court is bound by the trial court's factual findings unless they are

clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. State v. Moore, 374 S.C. 468, 473-74, 649 S.E.2d 84, 86 (Ct. App. 2007).

LAW/ANALYSIS

A. Opening Statements and Curative Instruction

Wiley argues the trial court erred in refusing to grant a mistrial when the State mentioned Wiley had an unrelated outstanding warrant during opening statements. Specifically, Wiley asserts the State's opening statement constituted improper evidence of prior bad acts. We disagree.

The decision to grant or deny a mistrial is within the sound discretion of the trial court. State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Id. The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court. Id. A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Id. The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way. Id.

In State v. Thompson, 352 S.C. 552, 560-61, 575 S.E.2d 77, 82, (Ct. App. 2003), this court concluded a deputy's testimony regarding a single reference to a defendant's warrants was not sufficiently prejudicial to justify a mistrial. The court found the deputy's testimony did not indicate whether Thompson's warrants referred to unrelated charges or other bad acts committed by Thompson. Id. at 561, 575 S.E.2d at 82. As a result, the court concluded a jury could reasonably infer the warrants related to the charged offenses. Id. Moreover, the court concluded a vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial when

there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes. Id.

In this case, the State informed the trial court during pre-trial that Wiley had a bench warrant for possession with intent to distribute in Richland County. However, the State did not identify to the jury the substantive nature of the warrant during its opening statements. As a result, the jury was unaware of the precise nature of the warrant. Furthermore, the record reveals the reference to Wiley's warrant was for the purpose of establishing the legality of the traffic stop. Therefore, we believe the State's comment regarding Wiley's warrant was merely a vague reference to his prior criminal record that did not justify granting his motion for mistrial. Furthermore, even if the jury inferred that Wiley committed another crime from the State's opening statement, we believe Wiley was not prejudiced because the State never attempted to prove Wiley was convicted of some other crime. See State v. Robinson, 238 S.C. 140, 119 S.E.2d 671 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (concluding a reference to a defendant's past conduct was not prejudicial because even if the testimony created the inference in the jury's mind that the accused had committed another crime, the State never attempted to prove the accused had been convicted of some other crime). Therefore, we conclude the State's opening statement regarding Wiley's unrelated outstanding warrant was not sufficiently prejudicial to warrant a mistrial.

Regardless, even if we assume Wiley was prejudiced by the State's reference to an unrelated outstanding warrant, any resulting error is harmless because of the overwhelming evidence of Wiley's guilt. Whether an error is harmless depends on the circumstances of the particular case. In re Care and Treatment of Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. Error is harmless when it "could not reasonably have affected the result of the trial." Id. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, [an appellate] court should not set aside a conviction because of

errors not affecting the results." State v. Kirton, 381 S.C. 7, 25, 671 S.E.2d 107, 115-16 (Ct. App. 2008) (citation omitted).

The State presented overwhelming evidence of Wiley's guilt. Robertson testified Wiley admitted to possessing the cocaine after he was advised of his Miranda rights. Furthermore, Wiley admitted his guilt in open court. Wiley stated, "I guess I want to apologize to the Court for getting myself in this trouble. I should have known better than what I was doing. I had numerous opportunities to stop. I just want to apologize to the Court." See State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) (holding appellant's guilt was conclusively shown by the record and any doubt about correctness of guilt was eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge, that the appellant had participated in the robbery). Thus, even if we assume the State's comment was prejudicial, we conclude the trial court's error was harmless based on Robertson's testimony and Wiley's admission of guilt in open court.

B. Curative Instruction

Wiley also argues the trial court's curative instruction was insufficient because the trial court did not inform the jury which specific statement was prejudicial. We disagree.

It is well-established "[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." Harris, 382 S.C. at 119, 674 S.E.2d at 538 (citation omitted).

We conclude the trial court's curative instruction to the jury was sufficient. The trial court specifically instructed the jury that opening statements should not be considered as evidence and that the jury should not draw any inferences of guilt or innocence from such statements. See State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (emphasizing that a jury should be specifically instructed to disregard the evidence and not to

consider it for any purpose during deliberations and that a mere general remark excluding the evidence does not cure the error).

C. Burden of Proof

Wiley argues the trial court erred in failing to instruct the jury during closing arguments that the State had the burden of proof after commenting on Wiley's failure to challenge the legality of the stop and search during cross-examination. We conclude this issue is not preserved for review.

In its closing argument, the State stated in relevant part,

> **State:** They got him. They secured him. They secured the pocket, checked the pocket, finding drugs that were the subject of the deal. And none of this has been challenged - - the facts of this - - none of this has been challenged on cross-examination. They haven't disputed that there was a lawful basis for the stop or that the search was unlawful. They had the opportunity to do that on cross, and they didn't.
>
> **Defense Counsel:** Your Honor, I'm going to object to the burdenship. [sic]
>
> **The Court:** All right, thank you, sir. Ladies and gentlemen, again I'll remind you that the closing arguments are not to be considered in evidence in the case. It is simply the opportunity for the lawyers to be persuasive to you and try to convince you of their positions. Go ahead, sir. You're protected on the record.

Wiley argues the State's comment violated the elementary principle that the accused has the right to remain silent and the State cannot comment on an accused's right to remain silent. In support of his argument, Wiley cites to

Doyle v. Ohio, 426 U.S. 610 (1976);[2] State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002)[3] overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); and State v. Pickens, 320 S.C. 528, 466 S.E.2d 364, (1996).[4]

In the present matter, the trial court sustained Wiley's objection and gave a curative instruction. However, we conclude this issue is not preserved for review because Wiley neither objected to the sufficiency of the curative instruction, moved to strike the testimony, nor moved for a mistrial after the objection was sustained. See State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (concluding that where an appellant objects to improper comments in closing arguments and the objection is sustained, the issue is not preserved unless the appellant further moves to strike or requests a curative instruction).

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

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[2] In Doyle, the United States Supreme Court held that an accused has the right to remain silent and the exercise of that right cannot be used against him. Doyle, 426 U.S. at 619.

[3] In Primus, our supreme court concluded when the defendant neither testified nor called witnesses on his behalf, it was error for the State to comment upon the defendant's failure to call an alibi witness; however, such error was deemed harmless beyond a reasonable doubt based on the overwhelming evidence of guilt. Primus, 349 S.C. at 584-88, 564 S.E.2d at 108-09.

[4] In Pickens, our supreme court held a trial court's failure to give a curative instruction after the State referred to defendant's failure to call witnesses was not harmless error where there was not overwhelming evidence of guilt in the record. Pickens, 320 S.C. at 531, 466 S.E.2d at 366.