The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay South Carolina Bar License Fees and Assessments

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O R D E R

The South Carolina Bar has furnished the attached list of lawyers who were administratively suspended from the practice of law on February 1, 2010, under Rule 419(b)(1), SCACR, and remain suspended as of April 1, 2010. Pursuant to Rule 419(e)(1), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 1, 2010.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 9, 2010

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As of April 1, 2010

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The Supreme Court of South Carolina

In the Matter of James Henry Nichols, III, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 6, 1988, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 28, 2010, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 9, 2010

The Supreme Court of South Carolina

In the Matter of Lesly Ann Bowers, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1979, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court Court of South Carolina, dated February 28, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

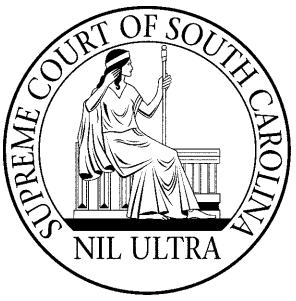
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 9, 2010



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
April 12, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Ward and Robby Hodge, d/b/a R&B Amusements, Petitioners,

v.

West Oil Company, Inc., d/b/a Markette Stores, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Darlington County
Eugene P. Warr, Jr., Special Master

Opinion No. 26797
Heard March 3, 2010 – Filed April 12, 2010

VACATED AND DISMISSED

Charles E. Carpenter, Jr. and Carmen V. Ganjehsani, both of Carpenter Appeals and Trial Support, of Columbia, D. Kenneth Baker, of Darlington, for Petitioners.

Martin S. Driggers, Jr. and William R. Calhoun, Jr., both of Sweeny, Wingate & Barrow, of Columbia, for Respondent.

JUSTICE BEATTY: In this contract dispute case involving "pull-tab" game machines, this Court granted the petition of Charles Ward and Robby Hodge, d/b/a R&B Amusements ("R&B") for a writ of certiorari to review the Court of Appeals' decision in Ward v. West Oil Co., 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008), in which the Court of Appeals affirmed the special master's award of $5,067.31 in damages to R&B for its breach of contract action against West Oil Company, Inc., d/b/a Markette Stores ("West Oil"). Because we find the parties' contract is void *ab initio*, we vacate the decisions of the special master and the Court of Appeals and dismiss with prejudice R&B's breach of contract action.

I. Factual/Procedural History

Charles Ward and Robby Hodge own and operate R&B, which provides games and gambling machines to businesses. In September 2001, they sought to place "pull-tab" game machines[1] in Markette convenience stores owned by West Oil. The machines sold tickets, called "Pots of Gold," with the potential for winning prizes. On September 11, 2001, Ward and Hodge met with Alexander West, Jr. (West), the President of West Oil, and Camp Segars (Segars), the Director of Operations for West Oil, to discuss placing machines in a number of Markette stores.

At the meeting, Ward and Hodge gave West Oil an overview of the machines and presented West Oil with a form contract, which they had obtained from their "pull-tab" machine supplier. The typewritten contract consisted of eleven paragraphs. As part of the agreement, West Oil agreed to initially place the machines at four of its convenience stores. During the remaining discussions, the parties

[1] A "pull-tab" ticket has been defined as: "[a] small, two-ply paper card, a pull-tab bears symbols and patterns similar to tic-tac-toe that appear when players peel off the pull-tab's top layer. The pattern of the symbols determines whether the player wins a prize . . . Pull-tabs are sold from large pools know as 'deals.'" Diamond Game Enters., Inc. v. Reno, 230 F.3d 365, 367 (D.C. 2000) (addressing the legality of "pull-tab" cards and machines).

negotiated the following changes to the contract: (1) the payout scheme; (2) a reduction of the term of the contract from three years to one year; and (3) a requirement that R&B pay West Oil a $500 up-front placement fee for each machine that they installed. R&B also agreed to absorb the $180 cost of the tickets in the machines.

On September 13, 2001, Ward, Hodge, and Segars met to execute the contract. Ward and Hodge had revised the contract to conform to the parties' discussions during the initial meeting. Paragraph 7 of the typewritten contract provided for liquidated damages in the event of a breach. Segars added a handwritten provision to the top of the contract that was initialed by Segars, Hodge, and Ward. This provision stated:

> Addition ***** In [the] event of contract termination, up front placement money will be re-imbursed [sic] at pro-rated time with no penalties to either party of this contract. This is added this day September 13th 2001.

Within two days of signing the contract, R&B placed the machines in four Markette stores, as specified in the contract. Because these machines performed well, the parties orally agreed to place machines in thirteen additional stores. With the placement of each machine, R&B paid West Oil the agreed-upon placement fee of $500.

Initially, each ticket machine held a total of $4,800 worth of "red" tickets at a time. After the red tickets sold out, R&B would remove the proceeds, pay the portion due to West Oil, and refill the machine with red tickets. [2]

In late 2001, R&B approached Segars to discuss changing the game from red tickets to "green" tickets known as "Jackpots," which had different values and payouts. Segars agreed to allow R&B to change from red tickets to green tickets at one store with the stipulation

[2] Ward explained that there are 4,800 tickets in a box. Once the tickets are sold, R&B collects a $1,510 profit which is reduced by a $180 cost for the cards. The parties then equally divided the remaining profit.

that if the new cards were successful, he would consider changing the cards in all of the stores.

In February 2002, in a meeting of store managers, Segars and West discovered that R&B had replaced the red tickets with green tickets in several store locations other than the originally-designated store. After Segars told West that he had only authorized R&B to replace the cards in the one store, West became angry and told Segars that he wanted all of the machines removed from all of the stores. West instructed Segars to leave the meeting to phone R&B and direct them to remove their machines from all West Oil stores. With thirty-one weeks remaining on the contract, R&B complied with West Oil's request and removed the machines.

Shortly thereafter, R&B filed suit against West Oil for breach of contract. The parties consented to have the matter decided by a special master. Following a bench trial, the special master issued a written order in which he concluded:

> The court finds that a written, enforceable contract existed for the initial four ticket machines. The contract was terminated. Under the handwritten Addition to the contract: "In the event of contract termination, up front placement money will be reimbursed at pro-rated time with no penalties to either party of this contract." The up front placement money was $500 per machine. This also applied for the thirteen additional machines that were added at other locations. Therefore, [R&B] initially paid [West Oil] $8,500 in up front placement money. Under [R&B's] calculations, the machines were in place for twenty-one weeks. Therefore, [R&B] [is] entitled to be reimbursed the pro-rated portion of the up front placement money, which equals $5,067.31.

In a unanimous decision, the Court of Appeals affirmed the special master's order in its entirety. Ward v. West Oil Co., 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008). After the Court of Appeals

denied R&B's petition for rehearing, this Court granted R&B's petition for a writ of certiorari.

II. Discussion

A.

In our order granting R&B's petition for a writ of certiorari, we directed the parties to brief the question of whether the "pull-tab" game machines at issue in this case constitute illegal gambling devices under section 12-21-2710 of the South Carolina Code. This section provides in pertinent part:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any **punch board, pull board, or other device pertaining to games of chance of whatever name or kind**, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, **but the provisions of this section do not extend to** coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and **vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance**.

S.C. Code Ann. § 12-21-2710 (2000) (emphasis added).[3]

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

"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 the 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). The Court 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).

B.

As a threshold matter, R&B contends that any challenge as to the legality of the "pull-tab" cards and machines should not be considered by this Court given this issue was not previously raised or ruled upon during the course of the proceedings.

Although R&B correctly references our appellate court rules regarding error preservation,[4] we find these rules are inapplicable as this Court will not "lend its assistance" to carry out the terms of a

[3] Section 12-21-2710 was amended by Act No. 125, 1999 S.C. Acts 1319, which became effective on July 1, 2000. The parties executed their contract on September 13, 2001.

[4] See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (recognizing that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved).

contract that violates statutory law or public policy. See McMullen v. Hoffman, 174 U.S. 639, 654 (1899) ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."); White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (holding that illegal contracts are void and unenforceable, such that actions for its breach may not be maintained).

Because this Court will not enforce an illegal contract, we find the question regarding the legality of the "pull-tab" cards and machines is appropriate for this Court's review. See Hyta v. Finley, 53 P.3d 338, 340-41 (Idaho 2002) (holding, in a partnership dissolution action involving a bar that primarily profited from illegal gaming machines, appellate court could *sua sponte* raise issue of whether underlying contract was illegal); Parente v. Pirozzoli, 866 A.2d 629, 635 (Conn. App. Ct. 2005) ("'It is generally true that illegality of a contract, if of a serious nature, need not be pleaded, as a court will generally of its own motion take notice of anything contrary to public policy if it appears from the pleadings or in evidence, and the plaintiff will be denied relief, for to hold otherwise would be to enforce inappropriately an illegal agreement.'" (quoting 6 Richard A. Lord, Williston on Contracts § 12:5 at 56-64 (4th ed. 1995))); see also 17A Am. Jur. 2d Contracts § 323 (2004) ("[I]f a question of illegality develops during the course of the trial, a court must consider that question, whether pleaded or not.").[5]

[5] In Armstrong v. Collins, 366 S.C. 204, 224, 621 S.E.2d 368, 378 (Ct. App. 2005), the Court of Appeals declined to rule on the legality of a contract given the Appellant failed to raise this issue to the trial court. However, we find Collins is

C.

Having determined the issue is properly before us, we now address the merits of the legality question. Applying the above-outlined rules of statutory construction in conjunction with this Court's decision in Sun Light Prepaid Phonecard Co. v. State, 360 S.C. 49, 600 S.E.2d 61 (2004), we find the "pull-tab" cards and game machines constituted illegal gambling devices under section 12-21-2710.

In Sun Light, the Sellers of pre-paid, long distance telephone cards and dispensers brought suit against the State following the State's seizure of the cards and dispensers. The State had seized these items on the ground they constituted illegal gambling devices under section 12-21-2710. Id. at 51, 600 S.E.2d at 62.

In the declaratory judgment hearing to determine the legality of these items, the testimony established that the phone cards, including the game pieces, were pre-printed by the manufacturer before they were placed in the "Lucky Shamrock" dispenser. The dispenser could not work without a roll of phone cards inside. The dispensers were housed within a standard slot machine cabinet and contained several features present in a gambling machine as opposed to a vending machine. Id. at 51-52, 600 S.E.2d at 62-63.

The phone cards were printed on rolls containing 7,500 cards. Attached to each phone card was a game piece that gave the customer a chance to win a cash prize. The entire card contained a paper cover, which, when pulled back revealed a toll-free number and pin number for activating the phone service as well as an array of nine symbols in an "8-liner" format. If the game piece contained symbols arranged in a certain order, the customer would win a prize. The computer that printed the cards randomly generated winners on the cards. Id. at 51,

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distinguishable from the instant case. Here, the contract is potentially void *ab initio* in that its enforcement would violate statutory law and, in turn, public policy. In contrast, the legality of the contract in Collins was potentially voidable on the ground it may have violated a bank's security agreement. Unlike the instant case, there were no public policy concerns in Collins.

600 S.E.2d at 62. Each card sold for $1.00 and gave the customer two minutes of long distance telephone service. Id. at 52, 600 S.E.2d at 63.

At the conclusion of the declaratory judgment hearing, the circuit court held the phone cards and dispensers were illegal gambling devices. Id. at 51, 600 S.E.2d at 62. On appeal, this Court affirmed the circuit court's order.

In so holding, this Court specifically analyzed and applied the provisions of section 12-21-2710. Id. at 54-55, 600 S.E.2d at 64-65. In terms of the phone cards, this Court found "[t]he phone card itself contains an element of chance and is a type of gambling device known as a pull-tab," which is illegal under section 12-21-2710. Id. at 54, 600 S.E.2d at 64. The Court noted that "the phone portion of the cards is mere surplusage to the game piece." Id. at 55, 600 S.E.2d at 64.

The Court went on to reject the Sellers' argument that the phone card dispensers were legal under section 12-21-2710 given they are similar to traditional vending machines and provide a uniform return for every dollar inserted. Because the phone card rolls were an integral part of the machine and present the element of chance in the dispensers, the Court found the dispensers violated section 12-21-2710. Id. at 54, 600 S.E.2d at 64.

Additionally, the Court recognized that the phone card dispensers resembled slot machines and not traditional vending machines that are exempted from section 12-21-2710. Id. at 55, 600 S.E.2d at 64. The Court explained that the dispensers had a gambling-themed video screen, played celebration music when a customer won, had a lock-out feature which froze the operation of the machine when a pre-determined level of prize money was reached, contained a meter that records the value of the prizes paid out, and did not give change. Id.

Finally, because the game pieces were not a "legitimate promotion or sweepstakes," the Court found the dispensers and phone

cards were not exempt under section 61-4-580[6] of the South Carolina Code. Id. at 56, 600 S.E.2d at 65.

Applying the foregoing to the facts of the instant case, we hold the "pull-tab" cards and the game machines constitute illegal gambling devices under section 12-21-2710 as interpreted by this Court in Sun Light.

Significantly, at no point during these proceedings has R&B disputed that the game cards at issue in this case are "pull-tabs." Unlike the phone cards in Sun Light, the cards were not attached to any promotional item or thing of value. Thus, the sole function of the "Pots of Gold" and "Jackpot" game cards was to provide a game of chance, in

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[6] At the time Sun Light was decided, section 61-4-580 provided in relevant part:

> No holder of a permit authorizing the sale of beer or wine . . . may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:
> . . . .
>
> (3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:
>
> (a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
>
> (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and
>
> (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

S.C. Code Ann. § 61-4-580 (Supp. 2003).

the form of a cash prize, to players who deposited a dollar in the card dispenser.

Although the card dispensers did not resemble "slot machines" as those at issue in Sun Light, we find this fact is not dispositive. We hold the card dispensers and the cards were intrinsically connected in a way that deemed them illegal under this Court's decision in Sun Light.

As in Sun Light, the "pull-tab" cards created an element of chance when placed in the dispenser. As testified to by Ward, each dispenser contained 4,800 game pieces that were "pre-rated." He explained that certain cards were designated as "winners" of various sums of money. Therefore, the payout amount and profits were pre-determined by a deck of cards placed in the dispensing machines. The machine was designed to payout $3,350 per deck of game cards, which translated into a 69.8 payout percentage. The "Pots of Gold" game had one $1,000 winner and the "Jackpot" game had two.

Furthermore, as described by R&B in its brief, there was an element of chance in the customer's selection of the tickets in that the dispenser contained eight columns or stacks of tickets. Under each column, there is a selector button which is pushed to receive a ticket. Thus, there is an added level of chance in terms of which column is selected.

Therefore, we conclude the "pull-tab" game machines constituted illegal gambling devices under section 12-21-2710. See 38 C.J.S. Gaming § 10 (Supp. 2010) (defining "gambling device" and stating: "[a]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance, no matter how small the intrinsic value"; "they are gaming devices if used or intended for gaming, but otherwise they are not, and generally the courts will look behind the name and style of the device to ascertain its true character"); State v. 158 Gaming Devices, 499 A.2d 940, 951 (Md. 1985) ("The three elements of gambling—consideration, chance and reward—are thus clearly present in a device which, for a price, and based upon chance, offers a monetary or merchandise reward to the successful player.").

Additionally, we disagree with R&B's argument that the decision in Sun Light should not be determinative of the instant case. In essence, R&B claims that it could not have anticipated the result in Sun Light at the time it entered into the contract with West Oil. Consequently, it should not be precluded from pursuing its breach of contract action against West Oil.

Section 12-21-2710 clearly provides that "pull boards," i.e., "pull-tabs," constitute illegal gambling devices. Unlike the phone cards in Sun Light, there is no dispute that the cards at issue were strictly "pull tabs" given there was no attached promotional item or thing of value. Thus, because section 12-21-2710 became effective approximately one year before the parties entered into the contract, R&B was not required to be clairvoyant regarding the legality of the "Pots of Gold" or the "Jackpot" tickets. Furthermore, in view of the existence of this statute, we do not believe R&B can legitimately claim reliance on the assurances of their "pull-tab" game supplier that the cards and dispensers were legal.[7]

Finally, we reject R&B's contention that West Oil will unjustly profit if the parties' contract is deemed illegal. Specifically, R&B claimed at oral argument that West Oil will be absolved of its contractual obligations even though it retained the profits from the sale of the "pull-tab" cards. Admittedly, a decision to void the contract eliminates the parties' obligations under the contract. However, both parties equally benefited financially from the division of the ticket proceeds prior to the termination of the contract.

Based on our determination that the "pull-tab" cards and the dispensers constituted illegal gambling devices, we find the underlying contract is void *ab initio* and unenforceable as it violates statutory law and public policy. Thus, we will not enforce this contract. See Berkebile v. Outen, 311 S.C. 50, 54 n.2, 426 S.E.2d 760, 762 n.2

[7] In support of its argument, R&B references several exhibits that involve prior civil litigation and criminal proceedings.

(1993) (recognizing that an illegal contract has always been unenforceable and that South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the constitution).[8]

As a result, we vacate the decisions of the special master and the Court of Appeals and dismiss with prejudice R&B's breach of contract action.

VACATED AND DISMISSED.

ACTING CHIEF JUSTICE PLEICONES, HEARN, J., and Acting Justices James E. Moore and Steven H. John, concur.

[8] In view of our ruling, we need not address R&B's remaining arguments regarding the Court of Appeals' interpretation of the instant contract. 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 review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Zurich American Insurance Company, Petitioner,

v.

Tony Fitzgerald Tolbert and Tonesha Tolbert, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26798
Heard January 7, 2010 – Filed April 12, 2010

AFFIRMED

J. R. Murphy and Ashley B. Stratton, both of Murphy & Grantland, of Columbia, for Petitioner.

Matthew Christian, of Christian Moorhead & Davis, of Greenville, for Respondents.

JUSTICE PLEICONES: We granted certiorari to consider a Court of Appeals decision reversing a circuit court order which granted petitioner (Zurich) summary judgment in this declaratory judgment action to determine respondents' entitlement to Underinsured Motorist (UIM) coverage. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 662 S.E.2d 606 (Ct. App. 2008). We affirm.

FACTS

Respondent Tony Tolbert (Tolbert) owned a Honda Accord, and leased a BMW through his employer. He rejected UIM coverage on the Honda, but the BMW was insured by BMW of North America, LLC through Zurich, under a policy which had UIM coverage. Tolbert had an accident while driving the Honda on a personal errand. After he and his wife (together respondents) settled their suit against the other driver involved in the accident, they sought to recover UIM benefits under the BMW/Zurich policy.

Zurich brought this declaratory judgment action, and filed a summary judgment motion alleging there was no coverage under the policy's "Drive Other Car" endorsement. Respondents opposed Zurich's motion, and alleged in their cross-motion for summary judgment that the Zurich policy applied pursuant to a "temporary substitute" endorsement because, at the time of the accident, the Honda qualified as a "temporary substitute" for the BMW. In support of respondents' summary judgment motion, Tolbert provided an affidavit in which he stated, "The reason I drove the [Honda] and not the BMW…was due to the fact that the BMW was in need of service and an oil change and could not be driven."

The circuit court granted Zurich's summary judgment motion and denied respondents' motion. On appeal, the Court of Appeals agreed that there was no coverage under the "Drive Other Car" endorsement, but found a genuine question of material fact such that summary judgment was improper under the "temporary substitute" vehicle endorsement found in the "South

Carolina Underinsured Motorist Coverage" (SCUIM) provision of the Zurich policy, and reversed.

ISSUE

Did the Court of Appeals err in reversing the circuit court order granting summary judgment to Zurich?

ANALYSIS

The SCUIM endorsement defines who is an UIM insured for purposes of automobiles principally garaged in South Carolina as:

> B. **Who is an Insured**
>
> If the Named Insured designated in the Declaration is:
>
> ….
>
> 2. A…corporation, then the following are "insureds:"
>
> a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto." The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). In our view, respondents presented a scintilla of evidence through Tolbert's affidavit, sufficient to withstand summary judgment, that there may be coverage under the SCUIM endorsement.

Tolbert averred, "The reason I drove the 1989 Honda Accord and not the BMW…" was because it needed service. This averment is some evidence that once the BMW was back in service, Tolbert intended to resume driving it, i.e., that he was driving the Honda as a temporary substitute. In this same sentence, Tolbert averred that the BMW "was in need of service and an oil change and could not be driven." In our view, this averment constitutes the scintilla of evidence necessary to withstand summary judgment on the question whether the "covered "auto" [was] out of service because of its…servicing…." and thus covered by the SCUIM endorsement. Unlike the dissent, we do not view the terms used in this provision as requiring that the covered automobile be "actually disabled," but rather that it be "out of service" due to one of five enumerated reasons. Here, the affidavit states the BMW "could not be driven" because, among other reasons,[1] it "was in need of service." Under the SCUIM, a person occupying the temporary substitute automobile is an insured if the covered auto is "out of service because of its . . . servicing . . . ." Tolbert's affidavit satisfied the scintilla standard, and thus the Court of Appeals correctly reversed the order granting Zurich summary judgment. Hancock, *supra*.

CONCLUSION

The decision of the Court of Appeals reversing the grant of summary judgment to Zurich is

AFFIRMED.

BEATTY, J. and Acting Justice James E. Moore, concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs in Section I only.

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[1] As we read the affidavit, the BMW was in need of both an oil change and a service, unlike the cars in both State Farm Mut. Auto. Ins. Co. v. O'Brien, 534 P.2d 388 (Cal. 1975) and Iowa Mut. Ins. Co. v. Addy, 286 P.2d 622 (Colo. 1955) which needed only more gasoline in order to be driven.

CHIEF JUSTICE TOAL: I respectfully dissent from the majority's opinion and would reverse the court of appeals' decision finding Tony Tolbert and Tonesha Tolbert's (Respondents) affidavit creates a genuine issue of material fact sufficient to survive Zurich American Insurance Company's (Petitioner) motion for summary judgment.

Tony Tolbert (Tolbert), a BMW employee, leased a 2003 BMW 325 (BMW) as part of a lease program for BMW employees. Petitioner issued a business automobile insurance policy (Policy) to BMW which provided underinsured (UIM) coverage to the leasing employees in certain circumstances.

On a Saturday in 2003, Tolbert picked up his son in Greenwood, South Carolina. Tolbert was driving a 1989 Honda Accord (Honda) registered and titled in his name, instead of the leased BMW. The Honda was insured, but Tolbert chose to reject UIM coverage under the Honda policy. On the return trip from Greenwood to Greenville, Tolbert was involved in an accident caused by William Humbert (Humbert). Tolbert was injured, but settled with Humbert for the minimum liability limits of $15,000 Humbert carried on his automobile.

Petitioner filed this declaratory judgment action against Respondents seeking a determination on several different grounds that Tolbert did not qualify as an insured for purposes of UIM coverage under the Policy. Both parties filed motions for summary judgment, and a hearing was scheduled at the circuit court. At the hearing, Respondents argued the Honda was a temporary substitute for the leased BMW, and thus qualified Respondents for UIM coverage under a Policy endorsement. In support of their argument, Respondents submitted an affidavit stating the reason Tolbert was driving the Honda instead of the BMW was because the BMW was "in need of service and an oil change and could not be driven." The circuit court granted Petitioner's motion for summary judgment. The court of appeals reversed and held Respondents' affidavit created a genuine issue of material fact as to whether Tolbert's Honda qualified as a temporary substitute for the covered

BMW. *Zurich American Ins. Co. v. Tolbert*, 378 S.C. 493, 501, 662 S.E.2d 606, 610 (Ct. App. 2008).

I. The Honda Was Not a Temporary Substitute

The UIM policy provision upon which Respondents rely states:

> B. Who Is An Insured
>
> If the Named Insured is designated in the Declarations as:
>
> 2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
>
> a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

This Court addressed a temporary substitute clause in *Nationwide Mutual Insurance Co. v. Douglas*, 273 S.C. 243, 255 S.E.2d 828 (1979). We noted that "in order for coverage to be extended under a substitution provision, the use of the alleged substitute automobile must be Temporary." *Douglas*, 273 S.C. at 246, 255 S.E.2d at 830. In *Douglas*, the Court found the automobile alleged to be a temporary substitute for the covered automobile was not a temporary substitute because "[t]he record is barren of any evidence that she was using the Pontiac temporarily." *Id.*

In this case, there is no evidence in the record that Tolbert was using the Honda temporarily. Indeed, there was nothing temporary about Tolbert's use of the Honda he was driving at the time of the accident. The Honda was registered and titled in Tolbert's name and was available for Tolbert's use at any time. Similar to the vehicles in *Douglas*, both the Honda and BMW were

intended for Tolbert's continued use until he chose to dispose of them. There is no evidence the Honda was being used temporarily or as a substitute for the BMW at the time of the accident. Thus, the court of appeals should be reversed.

II. The BMW Was Not "Out of Service"

Moreover, even if the Honda were being used as a temporary substitute, the policy language also requires the covered automobile to be "be out of service because of its breakdown, repair, servicing, 'loss' or destruction." In this case, the only possibility for coverage would be if the car was deemed to be out of service due to servicing.

Other courts have held that routine auto service does not sufficiently remove a vehicle from service to trigger temporary substitute auto coverage. *See State Farm Mut. Auto. Ins. Co. v. O'Brien*, 534 P.2d 388 (Cal. 1975) (holding the fact that the insured vehicle was low on gas did not allow for another vehicle to qualify as a temporary substitute); *Iowa Mut. Ins. Co. v. Addy*, 286 P.2d 622, 624 (Colo. 1955) (finding when an insured vehicle was low on fuel and had snow tires on it was insufficient for another vehicle to qualify as a temporary substitute because "[a] reasonable and logical interpretation of the word 'servicing' would seem to present a condition where the automobile covered by the policy was in some manner actually disabled."). In my view, alleging that an oil change and service are needed is not sufficient to trigger UIM coverage under the policy language. Similar to the *O'Brien* case where the covered vehicle needed gas, Respondents' affidavit alleges that the BMW needed an oil change. There was no evidence that the BMW was actually disabled. I would find that merely needing an oil change and service does not constitute a car being out of service for the purpose of UIM coverage under this policy.

To conclude, in my opinion, the Honda fails to be a temporary substitute for the BMW for two reasons: (1) there is no evidence in the record to show that Tolbert's use of the Honda was temporary or that it was being

used as a substitute for the BMW at the time of the accident; and (2) even if the Honda were being used as a temporary substitute, it was not out of service for the purpose of UIM coverage. Thus, I would reverse the court of appeals and affirm the trial court's decision to grant Petitioner's motion for summary judgment.

KITTREDGE, J., concurs in Section I only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tobaccoville USA, Inc., Respondent,

v.

Henry D. McMaster, in his Official Capacity as Attorney General of the State of South Carolina, Appellant.

Appeal from Richland County
Marvin F. Kittrell, Admin Law Ct Court Judge

Opinion No. 26799
Heard January 20, 2010 – Filed April 12, 2010

REVERSED AND REMANDED

Jonathan B. Williams, David Spencer, T. Parkin Hunter, all of Office of the Attorney General, of Columbia, for Appellant.

Stephen P. Groves, Sr., of Nexsen, Pruet, LLC, of Charleston; Val H. Stieglitz and Amy Harmon Geddes, both of Nexsen, Pruet, LLC, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Attorney General (the AG) appeals the administrative law court's (ALC) order compelling production of numerous documents the AG contends are privileged, confidential communications. We certified the appeal pursuant to Rule 204(b), SCACR, and reverse and remand to the ALC for findings in accordance with this opinion.

FACTS/PROCEDURAL BACKGROUND

In 1998, South Carolina was one of many states to enter into a Master Settlement Agreement (MSA) with certain tobacco companies to settle litigation brought by the states to recover tobacco-related health care expenses. The MSA contained a Model Escrow Statute that South Carolina adopted and codified as the South Carolina Escrow Fund Act at S.C. Code Ann. § 11-47-10, *et. seq.* (Supp. 2008). The Escrow Fund Act provides that a "tobacco product manufacturer"[1] (TPM) that sells cigarettes to consumers

[1] The statute defines a "tobacco product manufacturer" as follows:

> (i) "Tobacco product manufacturer" means an entity that after the date of enactment of this act (and not exclusively through any affiliate):
> (1) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer . . .
> (2) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or
> (3) becomes a successor of an entity described in subitem (1) or (2).

within the state must either: (1) join the MSA and make settlement payments required under the MSA, or (2) remain a "non-participating member" and make payments each year to a qualified escrow fund. *Id.* § 11-47-10.

Tobaccoville is an importer and distributor of Seneca brand cigarettes, which are manufactured by Grand River Enterprises Six Nations, Ltd. (Grand River) in Canada. Tobaccoville asserts that it is the exclusive "off-reservation" importer of the Seneca brand, and that Native Wholesale Supply is the exclusive "on-reservation" importer. Based on these and other assertions by Tobaccoville, the AG certified Tobaccoville as a TPM for the Seneca brand in November 2003. Tobaccoville was recertified as a TPM for years 2004 through 2006.

Since that certification, "on-reservation" Seneca cigarettes manufactured by Grand River and distributed by Native Wholesale Supply improperly were being sold "off-reservation" in South Carolina. In April 2007, the AG determined Tobaccoville no longer qualified as a TPM, and that Grand River would have to be certified as a TPM instead if Seneca cigarettes would continue to be sold lawfully in South Carolina. Tobaccoville appealed the AG's determination to the ALC. In the course of discovery, the AG produced thousands of documents and submitted a privilege log indicating numerous documents were confidential and not subject to production. Tobaccoville sought to compel production of some of those documents, arguing that the documents were necessary to properly litigate the case.

The ALC found that the documents at issue were properly discoverable and were not privileged. The AG moved for reconsideration and was denied. The AG then appealed to the court of appeals, which dismissed the appeal.

The term "tobacco product manufacturer" does not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of subitems (1)-(3) above.

The court of appeals, however, later certified this case to this court pursuant to Rule 204(b), SCACR after the AG's petition for rehearing.[2]

STANDARD OF REVIEW

The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). The trial judge's decision will not be overturned absent an abuse of discretion. *Id.*

ANALYSIS

The AG contends that the documents in issue are not relevant to the subject matter of the case and that they are protected by several privileges. The ALC, however, found that the documents were properly discoverable and were not covered by any privileges. We clarify the applicable privileges and remand for the ALC to make further findings in accordance with this opinion.

Attorney-Client Privilege

The AG asserts the documents in question were covered by the attorney-client privilege, and thus were confidential communications not subject to discovery. The ALC found that because neither the National Association of Attorneys General (the NAAG) nor the other state attorneys general were retained as counsel then there could be no attorney-client relationship upon which to premise the privilege. We disagree.

[2] While normally a discovery order is not immediately appealable, this Court found S.C. Code Ann. § 1-23-830(A) (Supp. 2007) applicable in this case and reinstated the AG's appeal. Section 1-23-830(A) states that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

"The attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *State v. Owens*, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "This privilege is based upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor . . . ." *Id.* In *State v. Doster*, this Court explained the attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

276 S.C. 647, 651, 284 S.E.2d 218, 219-20 (1981) (citation omitted).

While the relationship the AG has with the NAAG is not the traditional attorney-client relationship envisioned in *Doster*, we nonetheless find that these communications may be covered by the attorney-client privilege. As the ALC noted, the AG has not "retained" the NAAG attorneys in this matter or with respect to the disputed documents. However, the AG is a paid member of the NAAG, and NAAG staff attorneys are available to provide legal advice relating to the MSA and tobacco regulation and enforcement. We find it instructive that one court has previously held that similar documents between a state attorney general and the NAAG were protected by the attorney-client privilege. *See Grand River Enterprise Six Nations, Ltd. v. Pryor*, No. 02 Civ. 5069(JFK)(DFE), 2008 WL 1826490, at *3 (Apr. 18, 2008 S.D.N.Y.).

Thus we hold that the attorney-client privilege may apply to this very narrow factual scenario because the AG, as a paid member, has solicited the NAAG attorneys for legal advice and consultation on matters relating to the tobacco litigation, the MSA, subsequent enforcement of the MSA, and tobacco regulation. We remand the matter to the ALC to determine if the

allegedly privileged documents are confidential communications pertaining to the above legal matters.

Attorney Work Product Doctrine

The AG also asserts that the documents at issue are protected by the attorney work product doctrine. We disagree.

The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party. *See* Rule 26(b)(3), SCRCP; *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Generally, in determining whether a document has been prepared "in anticipation of litigation," most courts look to whether or not the document was prepared because of the prospect of litigation. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) (document "must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim," as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes."); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (document "should be deemed 'in anticipation of litigation' . . . if . . . [it] can be fairly said to have been prepared or obtained because of the prospect of litigation." (citation omitted)); *In re Kaiser Aluminum & Chemical Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (primary motivation behind creating the document must be to aid in possible future litigation).

Here, to support his contention that the documents are covered by the attorney work product doctrine, the AG merely claims that the privilege applies because the framework of the Escrow Fund Act "contemplates the potential for litigation" and the documents "concern litigation." However, a party must show more than that the statute governing the party's actions considers the possibility of future litigation. The work product doctrine is not implicated here because these documents were not created because of the prospect of litigation, but perhaps more accurately were created because of

efforts to enforce a settlement from previous litigation. Thus, we hold the facts of this case are insufficient to trigger the protection of the attorney work product doctrine.

Deliberative Process Privilege

The AG claims the documents at issue are also protected from disclosure by the deliberative process privilege. South Carolina courts have not previously addressed whether that privilege is recognized in this state. We decline to adopt this privilege in South Carolina.

Common Interest Doctrine

The AG asserts the common interest doctrine operates to preserve the above privileges when the documents at issue have been shared with the other state attorneys general. South Carolina courts have not previously addressed this doctrine and determined its applicability in this state. We now adopt the common interest doctrine for the narrow factual scenario where several states are parties to a settlement agreement, the state laws that regulate and enforce that settlement all have the same provisions, the attorneys general of those settling states are involved in coordinating regulation and enforcement, and the settling states have executed a common interest agreement.

The common interest doctrine is not a privilege in itself, but is instead an exception to the waiver of an existing privilege. The doctrine "protects the transmission of data to which the attorney-client privilege or work product protection has attached" when it is shared between parties with a common interest in a legal matter. John Freeman, *The Common Interest Rule*, 6 S.C. Law. 12 (May/June 1995). It is an exception to the general rule that disclosure of privileged information waives the applicable privilege. *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990). Thus, information covered by the common interest doctrine cannot be waived without the consent of all parties who share the privilege. *Id.*

The AG asserts that the states have a common interest in tobacco regulation and the enforcement of the MSA. As proof of this interest, the AG has provided a Common Interest Agreement, which memorializes the states' common interest and the intent that any applicable privileges not be waived by the sharing of privileged information. Also, the AG provides an affidavit from the Director and Chief Counsel of the NAAG Tobacco Project, stating that the common interest stems from the MSA creation of identical rights and obligations for the settling states.

Tobaccoville argues that there is no common interest applicable in this case because the matters at issue are solely revolving around Tobaccoville's TPM certification. This analysis is misguided. Admittedly, the instant lawsuit itself may not be a matter of common interest. However, the inquiry is more properly whether or not the matters discussed in the allegedly privileged documents are matters of common interest. It is irrelevant that the current lawsuit is not of common interest. So long as the documents at issue were covered by an applicable privilege when created, that privilege continues until waived. When the common interest doctrine applies, it operates as an exception to any potential waiver of privilege, regardless of the subject matter of the present litigation.

We find the AG has a common interest with the other settling state attorneys general in matters relating to the MSA and tobacco regulation and litigation.[3] The settling state attorneys general and the NAAG are working together to have uniform tobacco regulations and enforcement of the MSA. Accordingly, if the documents were privileged and thus exempt from production, that privilege was not waived when the AG shared the information with other state attorneys general.

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[3] Another court has looked at this identical issue and found that a state attorney general who shared with other state attorneys general privileged information regarding the MSA and communications with the NAAG over tobacco litigation did not waive the applicable privilege because the common interest doctrine applied. *Grand River Enterprise Six Nations, Ltd. v. Pryor*, No. 02 Civ. 5068(JFK)(DFE), 2008 WL 1826490, at *3 (Apr. 18, 2008 S.D.N.Y.).

CONCLUSION

For the foregoing reasons, we reverse the ALC's decision and remand for further determinations made in accordance with this opinion.

BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of H. Ray Ham, Respondent.

Opinion No. 26800
Submitted March 9, 2010 – Filed April 12, 2010

INDEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

H. Ray Ham, of West Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an indefinite suspension.[1] Respondent requests that, if the

[1] Since formal charges were not filed prior to January 1, 2010, an indefinite suspension remains a possible sanction under prior Rule 7(b)(2), RLDE. See Amendments to the South Carolina Rules for Lawyer Disciplinary Enforcement, Order dated October 16, 2009 (previous disciplinary rules apply, including possible sanction of indefinite suspension, if disciplinary complaint is pending on January 1, 2010, and formal charges have not been filed).

Court accepts the agreement and imposes an indefinite suspension, that the suspension be made retroactive to the date of his interim suspension. In the Matter of Ham, 361 S.C. 116, 603 S.E.2d 905 (2004). In addition, respondent agrees to reimburse the Lawyers' Fund for Client Protection (Lawyers' Fund) for claims paid on his behalf. We accept the agreement and indefinitely suspend respondent from the practice of law in this state, retroactive to October 4, 2004, the date of respondent's interim suspension. Further, we order respondent to reimburse the Lawyers' Fund for all claims paid on his behalf. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Over a number of years, respondent represented several members of the Doe family in a variety of legal matters. Respondent was named as the personal representative of Ms. Doe's estate. Respondent represents that all money he received from Ms. Doe's estate was properly authorized, although he acknowledges that he cannot properly document the funds.

The sole heir to Ms. Doe's estate was her brother, Mr. Doe. Respondent had represented Mr. Doe over a period of years and had effectively managed Mr. Doe's financial affairs.

In 2004, guardianship and conservatorship actions were filed in Richland County Probate Court concerning Mr. Doe. Respondent was notified of the two scheduled hearings, but he failed to attend either hearing. The probate court issued two orders directing respondent to produce financial records and an accurate accounting for the time period in which he managed Mr. Doe's finances. Respondent failed to produce the requested documentation. Respondent acknowledges he is unable to properly document the monies which he disbursed on Mr. Doe's behalf. During this time period, respondent was admitted to an Upstate hospital and diagnosed with severe depression.

Respondent acknowledges that he withdrew substantial money from his trust account for his own use and benefit. He further acknowledges

that he did not comply with the recordkeeping provisions of Rule 417, SCACR. Respondent admits that, on September 27, 2004, he deposited $45,000 from his personal proceeds into his trust account in order to cover a shortage caused by his unauthorized withdrawals.

Matter II

Respondent represented Complainant in several matters related to her business. Respondent asserts that, in one of these cases in early 2004, he instructed his staff to effect service on the opposing party. Respondent mistakenly believed that service had been accomplished when he informed Complainant of the status of the case. In fact, service was never completed.

Respondent admits that the file in the case was either lost or misplaced and he did not realize until several months later that service had not been accomplished. Respondent acknowledges that it was his responsibility to ensure that the case was handled in a competent and diligent manner.

By letter from ODC dated October 4, 2004, respondent was notified of the complaint in this matter; the letter requested a written response within fifteen (15) days. Respondent failed to respond or otherwise communicate with ODC.

On November 3, 2004, ODC sent respondent a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting a response. Respondent failed to respond or otherwise communicate with ODC within the timeframe requested in the November 3, 2004 letter.

ODC received a letter from respondent dated December 6, 2004, which stated "I have recovered to the point when I can now prepare a reply to their complaint. I will have it filed within a week." As of February 18, 2005, respondent failed to submit any substantive response to the allegations in the complaint. On that date, full investigation was authorized by the Commission on Lawyer Conduct. Respondent accepted service of the Notice of Full Investigation on February 28, 2005. The notice required respondent

submit a written response within thirty (30) days of service. Respondent failed to submit his response until May 2, 2005.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 1.15 (lawyer shall keep client funds separate from lawyer's personal funds); Rule 8.1 (lawyer shall not fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits he has violated the financial recordkeeping provisions of Rule 417, SCACR. Respondent agrees that his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law, retroactive to October 4, 2004, the date of his interim suspension. See In the Matter of Ham, supra. Pursuant to the terms of the agreement, respondent shall enter into a restitution agreement with the Office of Commission Counsel. Under no circumstances shall respondent file a petition for reinstatement until he has reimbursed the Lawyers' Fund for all claims paid on his behalf.[2] Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and

[2] As of the date of the agreement, the Lawyers' Fund for Client Protection had paid $43,474.73 in claims against respondent.

shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFNITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Robert Witcraft, Jr., Respondent.

Opinion No. 26801
Submitted March 8, 2010 – Filed April 12, 2010

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William Robert Witcraft, Jr., of Summerville, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of any sanction ranging from a public reprimand to an indefinite suspension from the practice of law.[1] Respondent requests that, if the Court accepts the agreement

[1] Since formal charges were not filed prior to January 1, 2010, an indefinite suspension remains a possible sanction under prior Rule 7(b)(2), RLDE. See Amendments to the South Carolina Rules for Lawyer Disciplinary Enforcement, Order dated October 16, 2009

and imposes a suspension, that the suspension be made retroactive to the date of his interim suspension, March 27, 2008. In the Matter of Witcraft, 377 S.C. 354, 660 S.E.2d 497 (2008). Further, respondent agrees to enter into a restitution agreement with the Office of Commission Counsel in which he will repay clients harmed by his misconduct and the Lawyers' Fund for Client Protection (Lawyers' Fund) for any claims paid on his behalf. We accept the Agreement and impose a two year suspension, retroactive to March 27, 2008. In addition, we order respondent to reimburse the Lawyers' Fund and clients as specified later in this opinion. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent represented James L. Dingus in a civil matter. After initially accepting a flat fee, respondent entered into an agreement with Mr. Dingus which stated his fee would be contingent on recovery for Mr. Dingus. Respondent did not place the contingent fee agreement in writing.

On December 17, 2007, Mr. Dingus signed a release and endorsed a settlement check in the amount of $21,000 which had been presented to him by respondent. Respondent's fee of $2,000 was to be withheld from the proceeds and Mr. Dingus was to receive the balance of $19,000.

At the time Mr. Dingus executed the documents, respondent informed him that the judge would have to review the settlement documents before the funds could be disbursed. Respondent assured Mr. Dingus that the funds would be held in his trust account.

(previous disciplinary rules apply, including possible sanction of indefinite suspension, if disciplinary complaint is pending on January 1, 2010, and formal charges have not been filed).

Respondent now acknowledges that he delayed communicating with Mr. Dingus because he had misappropriated the money and was waiting to obtain funds from other sources to replace the funds owed to Mr. Dingus.

As of February 1, 2008, respondent still had not disbursed the settlement funds to Mr. Dingus. On or about February 1, 2008, respondent admitted to Mr. Dingus that he no longer had the settlement funds in his trust account and offered to pay Mr. Dingus $5,000 from his personal account and to sign a promissory note for the balance to be paid monthly with interest.

A review of respondent's trust account records revealed that respondent used client funds to pay several personal bills. In particular, respondent used client funds to pay on his accounts with the South Carolina Student Loan Corporation, Discover, Sears, Lowe's, World Market, and Wells Fargo.

Matter II

Respondent represented the plaintiff in a divorce action before the Honorable Richard W. Chewning, III, on November 29, 2007. At the conclusion of the hearing, Judge Chewning ordered respondent to prepare the order. Respondent failed to timely prepare the order in spite of numerous requests from Judge Chewning's assistant.

On March 27, 2008, respondent was placed on interim suspension. In the Matter of Witcraft, supra. Unaware of respondent's suspension, Judge Chewning left a voicemail for respondent in which he requested respondent immediately forward the order.

By letter dated April 8, 2008, respondent sent an order to Judge Chewning. The letter was written on respondent's law office letterhead. Respondent failed to inform Judge Chewning that he had been suspended by the Court. Instead, respondent misrepresented to Judge Chewning that he was "closing the office."

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 1.5 (contingent fee agreement shall be placed in writing signed by client); Rule 1.15 (lawyer shall keep funds belonging to client separately from lawyer's funds); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rule 5.5 (lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction); Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to willfully violate a valid order of the Supreme Court), and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a two year definite suspension from the practice of law, retroactive to March 27, 2008, the date of respondent's interim

suspension. In the Matter of Witcraft, supra. In addition, respondent shall enter into a restitution agreement with the Office of Commission Counsel in which he agrees to repay nineteen thousand dollars ($19,000.00) to James L. Dingus, Jr., eight thousand dollars ($8,000.00) to Clyde Riley, and to fully reimburse the Lawyers' Fund for any claims paid on his behalf. Within thirty days of the date of this opinion, respondent shall pay $522.30, the costs incurred by the Commission on Lawyer Conduct and ODC in handling this matter. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Michael Brown, Respondent.

Opinion No. 26802
Submitted March 8, 2010 – Filed April 12, 2010

DEFINITE SUSPENSION

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

Peter Demos Protopapas, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of no more than one year from the practice of law, with certain conditions of reinstatement. Respondent also requests that the suspension be imposed retroactively to the date of his interim suspension.[1] ODC joins in that request. However, subsequently, respondent informed the Court that the Agreement is not conditioned upon

[1] Respondent was placed on interim suspension on August 19, 2008. In the Matter of Brown, 379 S.C. 159, 666 S.E.2d 235 (2008).

the suspension being retroactive to the date of his interim suspension. We accept the Agreement and suspend respondent from the practice of law in this state for six months, not retroactive, subject to the following conditions of reinstatement: compliance with a two year monitoring contract with Lawyers Helping Lawyers; quarterly reporting to the Commission on Lawyer Conduct by respondent's treating physician regarding his diagnosis, treatment compliance, and prognosis for a two year period; payment of restitution to certain clients and the Lawyers Fund for Client Protection in accordance with the terms of the Restitution Plan entered into with ODC; completion of the Legal Ethics and Practice Program Trust Account School and Ethics School within one year of reinstatement; and quarterly reporting to the Commission on Lawyer Conduct by respondent of the status of his trust account(s), including, but not limited to, submission of complete records maintained pursuant to Rule 417, SCACR, for a period of two years.[2] The facts, as set forth in the Agreement, are as follows.

FACTS

In June 2008, respondent entered into an agreement in bankruptcy court designed to assist him in correcting personal and professional difficulties, including alcohol abuse, which had led to the dismissal of certain clients' cases due to lack of diligence and the return of filing fees due to insufficient funds. The agreement required respondent to seek treatment and mentoring for alcohol abuse; refrain from filing new cases until deficiencies in his pending cases were cured; and establish a trust account in compliance with IOLTA. However, respondent failed to comply with the terms of the agreement and he was held in contempt of court.

In one bankruptcy matter, the client's case was dismissed because respondent failed to file necessary documentation. The client was required to pay an additional $274 to have her case re-filed. Respondent did not re-file the case until after the client's house had been foreclosed upon and eviction

[2] The parties have submitted, along with the Agreement, a Lawyers Helping Lawyers Monitoring Contract and a Restitution Plan, both of which were signed by respondent on the date he signed the Agreement.

proceedings had begun. Moreover, the subsequent petition was dismissed for lack of necessary schedules, statements, or other documents and because of the prior filing.

In another bankruptcy matter, respondent was initially successful in having the sale of the clients' home set aside by filing a bankruptcy petition on the clients' behalf. However, thereafter, he failed to diligently pursue the matter, including failing to file the required documents, which led to the dismissal of the petition. Petitioner also failed to communicate with the clients. Finally, he failed to hold unearned fees paid by the clients in trust. The Lawyer's Fund for Client Protection has reimbursed the clients for the fees paid to respondent.

Respondent was hired by two other clients to, in part, advise them regarding bankruptcy. One of the clients paid respondent a $1,000 fee, while the second client paid respondent a fee of $5,000. With regard to the first client, respondent failed to file a bankruptcy petition. He failed to hold the unearned fee she had paid him in a trust account and failed to refund the $1,000 fee to her as he had promised. With regard to the second client, respondent determined bankruptcy was not an option. Respondent took no further action on behalf of the client, he failed to adequately communicate with the client, and he did not refund the $5,000 fee paid to him by the client. The Lawyers' Fund for Client Protection has reimbursed the client for the fee paid to respondent.

Finally, in a non-bankruptcy matter that had been referred to respondent, respondent failed to communicate with the client following the referral. Although respondent did not have the client's consent to assume representation in the case and did not file a motion to be substituted as counsel, he signed two consent orders related to discovery issues on the client's behalf, one of which allowed the client's deposition to be taken. However, respondent did not appear at the deposition, which had to be rescheduled. Moreover, although respondent was placed on interim suspension on August 19, 2008, he did not inform opposing counsel of that fact until September 2, 2008, the date of the rescheduled deposition.

LAW

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation); Rule 1.2(a) (a lawyer shall consult with the client as to the means by which their objectives are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter, promptly comply with reasonable requests for information, consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law, and shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.5 (a lawyer shall not collect an unreasonable fee from a client); Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property, in a separate account maintained in the state where the lawyer’s office is situated, and the property shall be identified as such and appropriately safeguarded; complete records of such account funds and other property shall be kept by the lawyer; a lawyer shall comply with Rule 417, SCACR; a lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred); Rule 1.16(a)(2) (a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional

Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (It shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers.). Finally, respondent admits he has violated Rule 417, SCACR, by not maintaining a client trust account separate from his law firm business account and not maintaining an accounting journal, client ledgers, records of deposit, or monthly reconciliations related to transactions with or on behalf of his clients.

CONCLUSION

In light of the fact that respondent has provided substantial documentation of substance abuse that explains his conduct in the matters set forth above, has fully cooperated with these proceedings, has expressed significant regret and remorse and is willing to take the necessary steps to correct his mistakes and address his addiction as reflected in the conditions of reinstatement to which he has agreed, we find a six month suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for six months from the date of this opinion. We deny respondent's request that the suspension be made retroactive to the date of his interim suspension. Respondent's reinstatement shall be conditioned upon his compliance with the conditions of reinstatement set forth in the Agreement for Discipline by Consent.[3] Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

[3] Respondent acknowledges in the Agreement that all reporting required by the conditions is his personal responsibility and that his failure to comply with any of the conditions will be considered contempt of this Court and punishable as such.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

Rebecca Lee-Grigg, Petitioner/Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 26803
Heard October 21, 2009 – Filed April 12, 2010

AFFIRMED

C. Rauch Wise, of Greenwood, for Petitioner/Respondent.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Special Assistant Attorney General Amie L. Clifford, all of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent/Petitioner.

JUSTICE PLEICONES: We granted cross-petitions for writs of certiorari to review a Court of Appeals decision which granted petitioner/respondent (Lee-Grigg) a new trial. State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 211 (Ct. App. 2007). We affirm the decision to grant a new trial.

FACTS[1]

Lee-Grigg was the executive director of a shelter for abused women. In 2003, a woman was brought to the shelter by police officers; due to special circumstances, it was decided that the woman should be relocated and her identity changed to protect her from further abuse.

In an attempt to secure funds for the victim relocation, Lee-Grigg contacted the South Carolina Victim Assistance Network (SCVAN). After discussions with various employees of SCVAN, the executive director promised to reimburse Lee-Grigg for mileage and a hotel room for the victim. Lee-Grigg also contacted the Greenwood South Carolina Chief of Police (Chief Brooks) and asked whether his department could help finance the victim's relocation. Chief Brooks told Lee-Grigg that he would provide a driver, car, and fuel for the victim's relocation. Chief Brooks also said that he or the city could pay for the victim's and driver's expenses on the trip, but not costs incurred by Lee-Grigg.

Prior to relocating the victim, Lee-Grigg completed all the paperwork necessary to apply for reimbursement from SCVAN. The application was approved. Lee-Grigg never told anyone with SCVAN that she and the victim would be accompanied by another individual or aided financially by another entity.

Greenwood provided a driver and gave the driver $150 in cash and a gas credit card. During the trip, Lee-Grigg paid for the meals she and the victim ate, while the driver paid for her own food. After dropping the victim

[1] A fuller version of the facts can be found in the Court of Appeals opinion.

off at a shelter in another state, the driver and Lee-Grigg checked into a hotel where they shared a room. The driver paid for the room out of the cash advance she received from the city.

After returning to Greenwood, the driver applied to the city for reimbursement of her expenses. Attached to her application were the receipts from the trip. Pursuant to city policy, the driver and Chief Brooks signed the receipts. After receiving a reimbursement check in the amount of $159.56, the driver repaid the city $150.00 for the cash advance she received prior to the trip.

Both during the trip and after her return, Lee-Grigg gathered information necessary to apply to SCVAN for reimbursement of the funds actually expended by the city. For instance, at the outset of the trip, Lee-Grigg asked the driver for the vehicle's mileage. Soon after returning to Greenwood, Lee-Grigg contacted the driver and asked for the mileage on the vehicle as it appeared upon their return. Additionally, Lee-Grigg had a shelter employee call the city and get copies of the receipts from the trip.

Lee-Grigg completed a reimbursement form and submitted it to SCVAN. The reimbursement form indicated the dates of the trip, the origination and destination of the trip, beginning and ending odometer readings on the city's vehicle, and the total mileage driven. Lee-Grigg also attached copies of the receipts she received from the city, including receipts for meals, fuel, and the hotel stay. Lee-Grigg altered the copies of the receipts so as to remove the signatures and initials of the driver and Chief Brooks. The city also applied to SCVAN for reimbursement of the same expenses and submitted the same documentation, absent the alterations to the receipts made by Lee-Grigg.

After receiving duplicate reimbursement forms from the shelter and the city, SCVAN contacted the shelter's board of directors. After a short investigation, the board of directors found that Lee-Grigg did not commit any wrongdoing.

The South Carolina Department of Public Safety, which oversees the disbursement of funds from SCVAN, notified the State Law Enforcement Division (SLED) of the duplicate reimbursement requests. During the course of SLED's investigation, Lee-Grigg maintained that she and Chief Brooks agreed she would apply to SCVAN for reimbursement of the expenses actually incurred by the city. Additionally, Lee-Grigg claimed that she removed the initials and signatures of the driver and Chief Brooks so as to keep secret the new location of the victim. We note that Lee-Grigg did not delete or otherwise obscure the addresses of the establishments from which the receipts were received.

The travel reimbursement form signed by Lee-Grigg and submitted to SCVAN contained the following statement:

> I hereby certify or affirm that the above expenses were actually incurred by me as necessary traveling expenses in the performance of my official duties.

Lee-Grigg was indicted and tried for the offense of forgery.

At trial, Lee-Grigg's defense was that she lacked the requisite criminal intent to commit forgery because she had a good-faith belief that she was authorized by Chief Brooks to apply for the reimbursement. In support of this defense, Lee-Grigg presented evidence of her good character.

While Lee-Grigg testified that Chief Brooks authorized her to apply for reimbursement of the city's expenses, Chief Brooks testified that he only intended to provide limited assistance to Lee-Grigg and did not authorize her to apply to SCVAN for reimbursement of the city's expenses. Thus Lee-Grigg's state of mind and understanding of the agreement with Chief Brooks was in issue. As it concerned her good character, Lee-Grigg presented several witnesses who testified that she had a reputation for honesty. A state elected official testified that he knew and trusted Lee-Grigg, and three members of the shelter's board of directors and one of its employees testified

that Lee-Grigg was an excellent executive director, and a person of great integrity and honesty.

Lee-Grigg's counsel submitted several requests to charge. Among these requests was one to the effect that there is a good faith defense to the crime of forgery, and another would have instructed the jury that it could consider evidence of Lee-Grigg's good character when deciding whether she possessed the requisite criminal intent to commit the crime of forgery. The trial judge declined to give the jury either of these two charges.

The case was submitted to the jury. After a little more than an hour of deliberation, the jurors asked the judge to reinstruct them on the definition of "intent." Approximately twenty minutes after receiving the judge's supplemental instruction, the jury informed the judge that they were deadlocked. With the consent of the parties, the judge issued an Allen charge and approximately forty-five minutes later, the jury returned a guilty verdict. Lee-Grigg was sentenced to two years, suspended with probation for one year.

On appeal, the Court of Appeals affirmed the trial court's decision not to charge the jury on a good-faith defense, but reversed Lee-Grigg's conviction, finding that the trial court erred in refusing to charge the jury on its use of character evidence and that this error was not harmless. We granted Lee-Grigg's petition to review the good-faith defense issue and the State's petition to review the good character issue.

ISSUES

1. Did the Court of Appeals err when it affirmed the trial court's decision not to charge the jury on a good-faith defense to the crime of forgery?

2. Did the Court of Appeals err when it reversed the trial court's decision not to charge the jury as to its use of character evidence?

ANALYSIS

A. Jury Charge Concerning Good-Faith Defense

Lee-Grigg argues that the Court of Appeals erred in affirming the trial court's decision not to instruct the jury on a good-faith defense to the crime of forgery. We find the omission of this charge harmless here.

Lee-Grigg's intent in submitting the reimbursement form was at issue here, and under South Carolina law, "good faith" can be defense to a criminal forgery charge. See Brown v. Bailey, 215 S.C. 175, 191, 54 S.E.2d 769, 776 (1949).[2] We find no reversible error in the trial court's decision to decline Lee-Grigg's requested charge, however, because as the Court of Appeals held, the charge given here adequately conveyed to the jury the *mens rea* necessary for a forgery conviction. State v. Lee-Grigg, 374 S.C. at 407-409, 649 S.E.2d at 51.

[2] The dissent characterizes the reference to a "good faith" defense in Brown as made "hypothetically in dicta." While it may have been hypothetical, it is not dicta. Brown was a malicious prosecution case against a bank which had instigated forgery charges against Brown. At the criminal trial, Brown had admitted knowingly fabricating notes and mortgages and witnessing/probating forged signatures on these documents. Her defense to the criminal charge was that she acted without any fraudulent intent, that is, in good faith. Brown was acquitted by a jury in her first criminal trial and the judge directed a verdict in her favor at the second trial. This malicious prosecution suit followed. The reference to the good faith defense in Brown is made during the Court's discussion of the relevancy and admissibility of certain hearsay evidence, the holding being that while the disputed evidence might have been competent to prove the good faith defense at the criminal trial, it was not admissible in this malicious prosecution suit.

B. Jury Charge Concerning Good Character

The State argues that the trial court's failure to charge the jury on its consideration of character evidence was harmless, and the Court of Appeals erred by declining to make such a finding. We disagree.

It is well settled that a criminal defendant may introduce evidence of his good character. Rule 404(c)(1); Rule 405, SCRE; see also State v. Lyles, 210 S.C. 87, 92, 41 S.E.2d 625, 627 (1947). Furthermore,

> where requested and there is evidence of good character, a defendant is entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant.

State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982). Because Lee-Grigg presented evidence of good character and requested that the jury be charged on its use of that evidence, the trial court erred when it refused to give such a charge. The State concedes this point but argues that the error was harmless because the evidence presented at trial conclusively established Lee-Grigg's guilt. We disagree.

Here, the dispositive issue presented by the defense was whether Lee-Grigg believed in good faith that she was authorized to apply for reimbursement. The jurors' request for a recharge on the definition of "intent" is evidence that they were struggling with this question. Character evidence of Lee-Grigg's reputation for honesty and trustworthiness was admitted, but without an instruction the jury was not aware that it could consider this evidence in determining her credibility and her culpability. We agree with the Court of Appeals that this error cannot be deemed harmless.

CONCLUSION

The decision of the Court of Appeals granting Lee-Grigg a new trial is

AFFIRMED.

WALLER and BEATTY, JJ., concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion in which Acting Justice James E. Moore, concurs.

CHIEF JUSTICE TOAL: I respectfully concur in result in part and dissent in part from the majority's opinion. First, I concur in result with Part A of the majority's opinion, which concerns the issue of a good-faith defense to forgery. Nonetheless, I disagree with the majority's reasoning as it concerns this issue. Second, in my opinion, the court of appeals erred when it reversed the trial court's decision not to charge the jury as to its use of character evidence. Thus, I dissent as to Part B of the majority's opinion.

A. Jury Charge Concerning Good-Faith Defense

In my view, the court of appeals did not err when it affirmed the trial court's refusal to charge the jury as to a "good-faith" defense to forgery. The majority, however, finds that the trial court erred in this respect but concluded, nonetheless, that the error was harmless. In my view, there is no "good-faith" defense to forgery in South Carolina[3] and I would affirm the court of appeals on this ground, stopping short of applying a harmless error analysis. Therefore, although I concur in result as to this issue, I disagree with the majority's reasoning.

B. Jury Charge Concerning Good Character

Second, in my view, the court of appeals erred when it did not recognize as harmless the trial court's failure to charge the jury as to Lee-Grigg's good character.

The State concedes that it was error not to charge the jury as to Lee-Grigg's character, but argues that the error was harmless because the evidence presented at trial conclusively established Lee-Grigg's guilt. I agree.

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[3] Relying upon this Court's opinion in *Brown v. Bailey*, 215 S.C. 175, 54 S.E.2d 769 (1949), the majority concludes that "good-faith" is a defense to forgery in South Carolina. However, *Brown* does not recognize a good-faith defense to forgery, merely referencing the concept hypothetically in dicta. 215 S.C. at 191, 54 S.E.2d at 776.

To warrant reversal, a trial judge's failure to give a requested jury instruction must be both erroneous and prejudicial. *State v. Hughey*, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). As the court of appeals correctly noted, a trial court's failure to instruct a jury is subject to "harmless error" analysis. *State v. Lee-Grigg*, 374 S.C. 388, 411, 649 S.E.2d 41, 53 (Ct. App. 2007); *see State v. Jefferies*, 316 S.C. 13, 21, 446 S.E.2d 427, 431 (1994) (noting that the harmless error analysis is appropriate where the error complained of is a "trial error" rather than a "structural defect" in the trial mechanism itself). Whether an error is harmless depends on the circumstances of the case. *State v. Reeves*, 301 S.C. 191, 193, 391 S.E.2d 241, 243 (1990). The materiality and prejudicial character of the error must be determined from its relationship to the entire case. *Id*. An error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusions can be reached." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006).

In my view, the evidence presented at trial conclusively proved that Lee-Grigg was guilty of the crime of forgery. Forgery involves the false making or material alteration, with the intent to defraud, prejudice, or damage another, of an instrument which serves as the foundation for legal liability. *State v. Walton*, 107 S.C. 353, 356, 93 S.E. 5, 6 (1917). The State presented overwhelming evidence of Lee-Grigg's guilt. The jury considered uncontroverted evidence that Lee-Grigg applied to SCVAN to obtain reimbursement for expenses she admittedly did not incur. At no time did Lee-Grigg attempt to say that she incurred the expenses for which she sought reimbursement. Furthermore, the evidence presented at trial conclusively established that Lee-Grigg altered the city's receipts that she used to support her application for reimbursement. In short, Lee-Grigg admitted at trial that even though she represented to SCVAN that she incurred the expenses for which she sought reimbursement, they were actually incurred by the city. Additionally, Lee-Grigg admitted at trial that she was aware that the reimbursement application form submitted to SCVAN misrepresented, concealed, or otherwise communicated false information.

In determining that the error was not harmless, the court of appeals was persuaded by the details of the jury's deliberation, specifically its request for an instruction as to the definition of criminal intent. I view this analysis of the relationship between criminal intent and good character as simply another way of asserting a "good faith" defense to forgery. The fact that Lee-Grigg's forgery was motivated by a desire to help her non-profit organization does not impact the analysis of whether she intended to commit this crime.

In my view, the uncontroverted evidence presented at trial conclusively established that Lee-Grigg knowingly made specific misrepresentations in her application for reimbursement from SCVAN and supported those misrepresentations by altering the city's documentation and claiming it as her own. Lee-Grigg admitted these facts at trial. Even if the jury were instructed on its use of character evidence, given the uncontroverted evidence presented at trial, the jury could only have reached one logical conclusion – that Lee-Grigg was guilty of forgery. Thus, I would find that the failure to charge the jury on its use of character evidence was harmless error and the court of appeals should be reversed on this issue.

Acting Justice James E. Moore, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Glenburn M. McGee, Respondent.

Opinion No. 26804
Submitted March 8, 2010 – Filed April 12, 2010

INDEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of Law Offices of Desa Ballard, PA, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand, definite suspension not to exceed two (2) years, or an indefinite suspension.[1] We accept the agreement and indefinitely suspend

[1] Since formal charges were not filed prior to January 1, 2010, an indefinite suspension remains a possible sanction under prior Rule 7(b)(2), RLDE. See Amendments to the South Carolina Rules for

respondent from the practice of law in this state. Further, respondent agrees that, prior to seeking reinstatement or returning to the active practice of law,[2] he will pay restitution to Attorneys' Title Insurance Fund, Inc. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent served as a title agent for Attorneys' Title Insurance Fund, Inc. (the Fund). As a title agent, respondent collected title insurance premiums from clients in conjunction with closings he performed. On at least one hundred and seventy-two (172) occasions, respondent failed to forward the collected title insurance premiums to the Fund. On at least thirty-seven (37) of those occasions, final title policies were not issued to the insured. The amount owed to the Fund for premiums collected by respondent but not forwarded to the Fund is $47,456.42.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.15(d) (lawyer shall promptly deliver to third person any funds that the third person is entitled to receive); Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413,

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Lawyer Disciplinary Enforcement, Order dated October 16, 2009 (previous disciplinary rules apply, including possible sanction of indefinite suspension, if disciplinary complaint is pending on January 1, 2010, and formal charges have not been filed).

[2] Respondent is an inactive member of the South Carolina Bar.

SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

In mitigation, respondent claims that he did not intentionally withhold the Fund's title insurance premiums but failed to disburse the premiums as a result of computer failures and inadequate manual reconciliations of his trust account. Further, respondent asserts he is in poor health and unable to work. We do note that respondent has been a member of the South Carolina Bar for almost forty (40) years and has no prior disciplinary history.

Accordingly, in light of these mitigating circumstances, we accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Respondent shall not seek reinstatement until he has paid the Fund restitution in the amount of $47,456.42.[3] Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

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[3] The parties agree that, in the event the Lawyers Fund for Client Protection makes any payments to the Fund as a result of respondent's misconduct, respondent shall fully reimburse the Lawyers Fund for Client Protection prior to seeking reinstatement.

The Supreme Court of South Carolina

Larry Hendricks, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

The circuit court denied petitioner's motion under Rule 60(b)(5) of the South Carolina Rules of Civil Procedure (SCRCP) to set aside the final judgment in this post-conviction relief (PCR) case. Petitioner has filed a notice of appeal and asks this Court to appoint counsel.

In the Rule 60(b) motion and the accompanying memorandum filed in the circuit court, petitioner asserted that a decision of the Supreme Court of the United States established a new substantive constitutional standard that is to be applied retroactively. He argued, therefore, that under Rule 60(b)(5), SCRCP, it is no longer equitable to give the prior judgment in this action prospective application.

This Court has not previously had the opportunity to address the interplay between Rule 60(b), SCRCP, and S.C. Code Ann. § 17-27-45 (B) (Supp. 2009). Rule 60(b) provides, in part:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> **(1)** mistake, inadvertence, surprise, or excusable neglect;
>
> **(2)** newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> **(3)** fraud, misrepresentation, or other misconduct of an adverse party;
>
> **(4)** the judgment is void;
>
> **(5)** the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

Section 17-27-45 (B), which provides a statute of limitations for filing PCR actions, states:

> When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

In the present case, petitioner is asserting that a new substantive constitutional standard that is to be applied retroactively entitles him to relief from the prior judgment in this PCR case. Under Section 17-27-45 (B), a claim based a new substantive constitutional standard is to be sought by filing an application for PCR, not by filing a motion. Further, the statutory provision and the rule provision on which petitioner relies are inconsistent in that a motion under Rule 60(b)(5) must be made within a reasonable period of time while statutory provision contains a one year statute of limitations.

Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of the SCRCP, the statutory procedure must be followed. Rule 71.1, SCRCP ("The procedure for post-conviction relief is provided by the Uniform Post-Conviction Procedure Act (Act), S.C. Code

Ann. §§ 17-27-10 to -120 (1985). The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act."). Accordingly, we hold that petitioner was not entitled to seek relief based on an alleged new substantive constitutional standard by filing a motion under Rule 60(b).

We dismiss the notice of appeal and remand this matter to the circuit court with instructions to consider his Rule 60(b) motion as an application for PCR relief. The motion to appoint counsel for this appellate proceeding is denied as moot. The remittitur will be sent as provided by Rule 221, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
March 17, 2010

The Supreme Court of South Carolina

The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System and Presbyterian Healthcare System d/b/a Presbyterian Hospital-York, LLC, Petitioners,

Of whom Presbyterian Healthcare System d/b/a Presbyterian Hospital-York, LLC is Appellant/Respondent,

and the Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System is Respondent/Appellant,

v.

South Carolina Department of Health and Environmental Control, Respondent,

and Amisub of South Carolina, Inc. d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Respondent/Appellant.

ORDER

Petitioners and Respondent/Appellant Amisub of South Carolina, Inc. filed notices of appeal in the Court of Appeals from an order of the Administrative Law Court (ALC) dated December 9, 2009. That order granted Amisub's motion for partial summary judgment, granted petitioners motion for summary judgment, and remanded the case to the Department of Health and Environmental Control (DHEC) for a determination as to which party, if any, was entitled to a certificate of need. The Court of Appeals consolidated the appeals.

Petitioner Presbyterian Healthcare System has now filed a motion to certify the appeals to this Court pursuant to Rule 204(b), SCACR, and a motion to expedite the proceedings. Neither Petitioner Charlotte-Mecklenburg Hospital Authority nor Amisub oppose the motions. We hereby certify the appeals to this Court pursuant to Rule 204(b), SCACR. However, we dismiss the appeals because the order of the ALC is not immediately appealable.

The right of appeal arises from and is controlled by statutory law. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). South

Carolina Code Ann. § 14-3-330(1) (1976) provides that an interlocutory order is immediately appealable if it involves the merits. However, where there is a specialized statute, § 14-3-330 does not govern the right to review. *Ex parte Capital U-Drive-It, Inc., supra.*

South Carolina Code Ann. § 1-23-610(A)(1) (Supp. 2009) provides that judicial review may only be sought from a ***final*** decision of the ALC. Therefore, although § 14-3-330 permits appeals from interlocutory orders which involve the merits, that section is inapplicable in cases where a party seeks review of a decision of the ALC because the more specific statute, § 1-23-610, limits review to final decisions of the ALC. *Ex parte Capital U-Drive-It, Inc., supra. See also Spectre, LLC v. S.C. Carolina Dep't of Health and Envtl. Control,* 386 S.C. 357, 688 S.E.2d 844 (2010) (a specific statute prevails over a more general statute). To the extent *Canteen v. McLeod Reg'l Med. Ctr*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009). and *Oakwood Landfill, Inc. v. S.C. Dep't of Health and Envtl. Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009), rely on §14-3-330 to permit the appeal of interlocutory orders of the ALC or an administrative agency, those cases are overruled.

The order of the ALC in this case is not a final order. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. *Hooper v. Rockwell, supra*; *Mid-State Distributors, Inc. v. Century Importers, Inc.*, *supra*; *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. *Good v. Hartford Accident & Indemnity Co., supra.*

The ALC's order upholds DHEC's finding that Amisub was a competing applicant for the certificate of need at issue in this matter. However, the ALC found DHEC erroneously interpreted the State Health Plan to allow only existing providers to obtain a certificate of need. Based on this finding, the ALC remanded the matter to DHEC to determine whether

any of the applicants were entitled to the certificate of need. Although the ALC decided questions of law involved in this matter, a final determination as to the certificate of need has not been made. Therefore, the order of the ALC is interlocutory and is not a final decision which is immediately appealable under § 1-23-610. Accordingly, we dismiss this matter.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 8, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of Spencer R.,
a juvenile under the age of
seventeen, Appellant.

Appeal From Horry County
Jan Bromell-Holmes, Family Court Judge

Opinion No. 4668
Heard February 2, 2010 – Filed April 5, 2010

AFFIRMED IN PART, REVERSED IN PART

David H. Cooley, of Myrtle Beach, for Appellant.

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

PER CURIAM: Spencer R. appeals his conviction for presenting a firearm, alleging the family court erred in finding sufficient evidence to support his conviction. We affirm in part and reverse in part.

FACTS

The State charged Spencer R. with pointing or presenting a firearm after police received a 911 call reporting he was in front of his residence with a gun threatening people at a school bus stop. The police arrested Spencer R. and retrieved a loaded assault rifle containing eighteen rounds of ammunition from his residence.

At trial, Mrs. L. testified she was about to leave for work when she received a text message on her cell phone from her fifteen-year-old daughter, Angela B., stating Spencer R. wanted to shoot and kill Angela B. After receiving the text message, Mrs. L. drove to Angela B.'s school and discovered the school suspended Spencer R. for three days after an altercation occurred between Spencer R. and one of Angela B.'s friends. After the school day concluded, Mrs. L. drove to the bus stop to pick up her children. She testified Spencer R. lived three houses away from the bus stop,[1] and when she passed by, she saw Spencer R. walk onto his driveway carrying a gun. Mrs. L. stated he was holding the gun at a ten o'clock and four o'clock angle, with the bottom of the gun about level with his chest and the barrel in the air. She testified he sat down in a chair on the driveway that was visible from the bus stop, but he did not see her or turn in her direction. Additionally, he did not wave or point the weapon at her. After seeing Spencer R., Mrs. L. called her husband because she felt threatened. Mrs. L.'s husband arrived shortly thereafter, and they waited until the school bus arrived. When Angela B. and her friend, Brett C., exited the school bus, Mrs. L. told them to hurry and get in her car because Spencer R. was "over there with some type of weapon." As she drove past Spencer R.'s house, Mrs. L. stated she told the children to "stay low, don't look, duck down," but she did not look at the children to see if they followed her instructions. After Mrs. L. arrived at her residence, she called the police.

[1] Each house lot was approximately one hundred feet wide.

Brett C. testified when he walked up to the bus stop with Angela B. that morning, he observed one of Angela B.'s friends slap Spencer R. Brett C. explained Spencer R. returned to the bus stop with his parents after the altercation and said he wanted to shoot Angela B. Brett C. testified when he and Angela B. got off the school bus later that afternoon, he saw Spencer R. standing in the driveway with a gun. He explained Spencer R. was not waving or aiming the gun at them, but was holding it up. Brett C. stated after he and Angela B. got into Mrs. L's car, Mrs. L. told them to duck down as they drove by Spencer R.'s house. He testified he looked out of the window as he ducked down and saw Spencer R. holding the gun and "staring us down like he wanted to shoot us."

Rodney T., another student, testified he also observed Spencer R. with a gun that same afternoon. After he left the school bus, he walked by Spencer R.'s house and saw Spencer R. sitting in a lawn chair in the driveway of his house with a gun between his legs and his hands on the barrel of the gun. Rodney T. asked Spencer R. what he was doing, and Spencer R. replied he "was going to shoot the bitch." Rodney T. stated he thought Spencer R. was referring to Angela B.

The family court found Spencer R. guilty of presenting a loaded assault rifle at Mrs. L., Angela B., and Brett C. In its order, the family court defined presenting:

> The court has considered all offered definitions of the term "presenting" and the [c]ourt finds that "presenting" means to offer for observation, show or display. In military terms, to present arms means to hold up a rifle vertically in front of the body with the muzzle up. The court finds that clearly, the muzzle of the gun was up. Clearly, the gun was in plain view; it was observed by Mrs. L., Brett, and Rodney.

This appeal followed.

LAW/ANALYSIS

Section 16-23-410 of the South Carolina Code (2003) states, in pertinent part: "It is unlawful for a person to present or point at another person a loaded or unloaded firearm. A person who violates the provisions of this section is guilty of a felony . . . ." Neither the South Carolina Code nor South Carolina case law squarely define the phrase "to present." However, our supreme court has previously determined what actions amount to presenting a firearm. In State v. Reese, the supreme court held Reese was not entitled to an involuntary manslaughter instruction because he "presented a firearm" when he took out a gun and waved it in the victim's face. 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E. 2d 802 (2009). Likewise, in State v. Cabrera-Pena, the court found the defendant's conduct in showing the victim his pistol as a means of intimidation and forcing her to walk towards a pickup truck constituted a felony of either pointing or presenting a firearm or kidnapping, and thereby precluded an involuntary manslaughter charge. 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004). Here, Spencer R. maintains the court's analysis in Reese provides the only applicable clarification of the term "present," and because he did not wave his firearm, insufficient evidence exists to support his conviction for presenting a firearm. We disagree.

The implication from the court's discussion in Reese and Cabrera-Pena is that either "waving" or "showing" a gun at someone in a direct, actively aggressive, and threatening manner constitutes presenting a firearm. Additionally, in both cases the victims were in close proximity to the defendants. The case at bar presents a more ambiguous set of facts because Spencer R. displayed his assault rifle in the view of Mrs. L., Angela B., and Brett C. while sitting on his driveway a couple of houses away from the bus stop. Because the phrase "to present" has not been defined in either statutory or case law, the task of determining the plain and ordinary meaning of the term "to present" requires an examination of the term as it arises in other contexts. See State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct.

App. 2002) ("When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.").

Although various definitions of the infinitive "to present" exist, two definitions in particular apply in the area of presenting firearms: "to offer to view: show," and "to aim, point, or to direct (as a weapon) so as to face something or in a particular direction." Merriam-Webster's Collegiate Dictionary 921 (10th ed. 1993). There is no formal legal definition of the term "to present" a firearm. See Black's Law Dictionary 1221-22 (8th ed. 2004). While these two definitions provide some guidance, our court has recognized the inquiry cannot end here. See Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001) ("[W]e are reluctant to rely upon either a dictionary or cases that have relied upon a dictionary for a definitive answer as to the definition . . . when extensive case law exists that provides an accurate and reliable definition for the term.").

State legislatures in other jurisdictions have enacted similar statutes criminalizing the presenting of a firearm, but they have not employed the exact phrasing of "to present" as provided in section 16-23-410 of the South Carolina Code. Instead, they describe the crime as "exhibiting" or "brandishing" a firearm. See, e.g., Cal. Penal Code § 417(a)(2) (2009) ("Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel is punishable as follows . . . ."); Mo. Ann. Stat. § 571.030(1)(4) (2009) ("A person commits the crime of unlawful use of weapons if he or she knowingly . . . [e]xhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner . . . . "); Va. Code Ann. § 18.2-282(A) (2009) ("It shall be unlawful for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another . . . .").

While none of these statutes are perfectly analogous to section 16-23-410, an examination of them in the aggregate reveals an effort by the legislatures in these jurisdictions to prohibit not only the overt action of pointing or directing a firearm at someone, but also the more passive action of showing or displaying a firearm in a threatening or menacing manner. Courts in these jurisdictions interpreting their respective statutes are consistent in this view. See Morris v. Commonwealth of Va., 607 S.E.2d 110, 114-15 (Va. 2005) (holding the defendant brandished his gun when he exhibited or exposed the weapon in a shameless or aggressive manner); People v. Sanders, 905 P.2d 420, 457 (Cal. 1995) ("The crime of brandishing consists of drawing or exhibiting, in the presence of another person, any firearm, whether loaded or unloaded, in a rude, angry or threatening manner."); State v. Overshon, 528 S.W.2d 142, 143 (Mo. Ct. App. 1975) ("[I]t [is] unlawful for a person to exhibit, in the presence of one or more persons, a deadly weapon in a rude, angry, or threatening manner."). Thus, we define the phrase "to present" a firearm in section 16-23-410 as: to offer to view in a threatening manner, or to show in a threatening manner. This definition is consistent with the South Carolina Supreme Court's analysis of presenting a firearm in Reese and Cabrera-Pena and also is in accord with the crime as it is enacted in other jurisdictions.

The elements of presenting a firearm are: (1) presenting, (2) a loaded or unloaded firearm, (3) at another.[2] See State v. Burton, 356 S.C. 259, 264,

[2] Unlike other states where the crime of exhibiting or brandishing a firearm is completed after a person has shown the weapon to anyone in view, South Carolina's statute explicitly requires a firearm to be presented at someone. Compare Burton, 356 S.C. at 264, 589 S.E.2d at 8 (stating section 16-23-410 requires a firearm be presented at another person) (emphasis added), with State v. Johnson, 964 S.W.2d 465, 468 (Mo. Ct. App. 1998) (holding the exhibiting of a weapon does not require that the item be observed, but merely that evidence of, or visible signs of the existence of the item be revealed). Thus, the State must offer direct or circumstantial evidence that a person specifically intended to present a firearm at someone before a conviction may be sustained under section 16-23-410. See State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 870 (1975) ("A basic principle of criminal law is that

589 S.E.2d 6, 8 (2003). Thus, we must determine whether Spencer R. showed his rifle in a threatening manner at Angela B., Brett C., and Mrs. L. Initially, we note there is a lack of evidence establishing Spencer R. intended to present a firearm at Brett C. and Mrs. L. No testimony proved Spencer R. intended to specifically threaten Brett C. and Mrs. L. when Spencer R. was sitting on his property, and Mrs. L. admitted Spencer R. did not even turn towards her or see her when she initially observed Spencer R. holding his assault rifle.

However, we find sufficient evidence in the record exists to support Spencer R.'s conviction as to Angela B. See In re John Doe, 318 S.C. 527, 534, 458 S.E.2d 556, 561 (Ct. App. 1995) (holding this court must affirm an adjudication of delinquency unless it is unsupported by the evidence). Here, an evaluation of the attendant circumstances surrounding Spencer R.'s actions establishes Spencer R. presented his assault rifle in a threatening manner at Angela B. Earlier in the morning, Brett C. heard Spencer R. say that he wanted to shoot Angela B., and Mrs. L. testified she received a text message from Angela B. in the morning stating that Spencer R. wanted to shoot and kill Angela B. Later that afternoon, after Angela B. arrived at the school bus stop, Mrs. L. warned Angela B. to quickly enter the vehicle because Spencer R. had a gun and told them to duck as they drove by his house. Additionally, Brett C. observed Spencer R. standing in the driveway holding the assault rifle and staring at both him and Angela B. like he wanted to shoot them. Lastly, Rodney T. testified he believed Spencer R. was referring to Angela B. when Spencer R. stated he "was going to shoot the bitch" as Spencer R. was sitting in the driveway with his assault rifle.

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the State has the burden of proof as to all of the essential elements of the crime."). For example, if A was walking from his garage to place a rifle in his truck and B drove by, the State would have to prove A presented his rifle purposely at B and offer evidence that A specifically intended to threaten B by presenting his rifle at her before A could be convicted of a violation of section 16-23-410.

Taken as a whole, Spencer R.'s actions as to Angela B. were not that of an ordinary citizen engaged in the lawful use of a firearm on his property.[3] Instead, the evidence demonstrates Spencer R. deliberately intended to show his rifle at Angela B. in a threatening manner. Even though Spencer R. did not wave or point the assault rifle directly at Angela B., his decision to sit in view of the school bus stop for an extended period of time while displaying his assault rifle, combined with the events occurring that day and Rodney T.'s and Brett C.'s testimony that Spencer R. said he wanted to shoot Angela B., constitute sufficient evidence to uphold Spencer R.'s conviction.[4]

CONCLUSION

Based on the foregoing, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART.

WILLIAMS and LOCKEMY, JJ., and CURETON, A.J., concur.

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[3] Our Legislature has contemplated situations in which a person may lawfully point or present a firearm at another person and has specifically excluded these types of acts from being punishable as a crime. See S.C. Code Ann. § 16-23-410 (2003) ("This section must not be construed to abridge the right of self-defense or to apply to theatricals or like performances.").

[4] We note the State charged Spencer R. with pointing or presenting a firearm at Mrs. L., Angela B., and Brett C. in a single petition. Because the State did not charge Spencer R. with separate counts as to each individual, we hold there is sufficient evidence to affirm Spencer R.'s conviction as a whole because testimony establishes Spencer R. presented a firearm at Angela B. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Leah Gorecki, Respondent,

v.

Jeffrey Anthony Gorecki, Appellant.

Appeal From Greenwood County
Rochelle Williamson, Family Court Judge

Opinion No. 4669
Heard February 10, 2010 – Filed April 5, 2010

AFFIRMED

C. Lance Sheek, of Greenwood, for Appellant.

LaDonna Sargent Johnson, of Greenwood, for Respondent.

WILLIAMS, J.: In this appeal, Jeffrey Gorecki (Husband) contends the family court erred in (1) awarding Leah Gorecki (Wife) a divorce on the grounds of physical cruelty while denying Husband a divorce on the grounds of adultery; (2) awarding Wife 40% of the marital residence; (3) awarding

Wife permanent periodic alimony; and (4) granting Wife attorneys' fees and costs. We affirm.

FACTS

Husband and Wife married on November 20, 1975. They had three children during the course of their marriage, all of whom were emancipated before the parties' separation in September 2005. At the time of the hearing, Wife worked with mentally disabled children at a middle school, and Husband worked at Cooper Power Systems where he was earning approximately $51,000 per year.

Shortly after the parties separated, Wife filed for divorce on the ground of physical cruelty, seeking spousal and child support, equitable division of the marital estate, and attorneys' fees. Husband counterclaimed, seeking a divorce based on adultery and requesting custody[1] of their granddaughter, equitable division of the marital estate, and attorneys' fees.

At the final hearing on October 2 and 3, 2006, Wife testified to several instances of physical abuse in support of her claim that Husband was physically abusive. In response to Wife's allegations of abuse, Husband claimed Wife had previously engaged in an extramarital affair.[2] After hearing testimony from both parties and their respective witnesses, the family court issued an order on November 9, 2006, awarding Wife a divorce on the grounds of physical cruelty. The family court granted Wife $1,000 per month in permanent periodic alimony, divided the Husband's pension and 401(k) on a 50/50 basis, and split the marital residence on a 60/40 basis in favor of Husband. The family court also required Husband to pay $8,038.65 in Wife's attorneys' fees and costs. This appeal followed.

[1] The child custody issued was resolved prior to the final hearing.

[2] Husband also claimed Wife engaged in two other extramarital affairs but conceded they reconciled after both of those alleged affairs occurred.

STANDARD OF REVIEW

On appeal from a family court order, this court has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). When reviewing decisions of the family court, we are cognizant of the fact the family court had the opportunity to see the witnesses, hear "the testimony delivered from the stand, and had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character." DuBose v. DuBose, 259 S.C. 418, 423, 192 S.E.2d 329, 331 (1972) (internal citation and quotations omitted).

LAW/ANALYSIS

1. Grounds for Divorce

Husband contends the family court erred in awarding Wife a divorce based on physical cruelty when he presented evidence entitling him to a divorce based on Wife's adultery. We disagree.

Physical cruelty is "actual personal violence, or such a course of physical treatment as endangers life, limb or health, and renders cohabitation unsafe." Brown v. Brown, 215 S.C. 502, 508, 56 S.E.2d 330, 333 (1949). In considering what acts constitute physical cruelty, the family court must consider the circumstances of the particular case. Gibson v. Gibson, 283 S.C. 318, 322, 322 S.E.2d 680, 682 (Ct. App. 1984). A single assault by one spouse upon the other spouse can amount to physical cruelty. McDowell v. McDowell, 300 S.C. 96, 99, 386 S.E.2d 468, 469 (Ct. App. 1989). The assault must, however, be life-threatening or must be either indicative of an intention to do serious bodily harm or of such a degree as to raise a reasonable apprehension of great bodily harm in the future. Gibson, 283 S.C. at 323, 322 S.E.2d at 683. The party alleging physical cruelty has the burden of proving it by a preponderance of the evidence. Wood v. Wood, 269 S.C. 600, 605, 239 S.E.2d 315, 317 (1977). A "preponderance of the evidence" is evidence which convinces as to its truth. DuBose, 259 S.C. at 424, 192 S.E.2d at 331.

Similarly, proof of adultery must be "clear and positive and the infidelity must be established by a clear preponderance of the evidence." McLaurin v. McLaurin, 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct. App. 1987) (internal citation and quotations omitted). Because of the "clandestine nature" of adultery, obtaining evidence of the commission of the act by the testimony of eyewitnesses is rarely possible, so direct evidence is not necessary to establish the charge. Fulton v. Fulton, 293 S.C. 146, 147, 359 S.E.2d 88, 88 (Ct. App. 1987). Accordingly, adultery may be proven by circumstantial evidence; however, evidence placing a spouse and a third party together on several occasions, without more, does not warrant a finding of adultery. Hartley v. Hartley, 292 S.C. 245, 246-47, 355 S.E.2d 869, 871 (Ct. App. 1987).

Generally, "proof [of adultery] must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed." Loftis v. Loftis, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985). Furthermore, when issues relate to proof regarding which party, if either, is entitled to a divorce, and the evidence is conflicting and susceptible of different inferences, it becomes the family court's duty to determine not only the law of the case but the facts as well because the family court observed the witnesses and could determine how much credence to give each witness's testimony. Anders v. Anders, 285 S.C. 512, 514, 331 S.E.2d 340, 341 (1985).

In this case, Wife testified to many instances of physical abuse at the hands of Husband over the course of their marriage. She stated Husband slapped her, pushed her into a wall, and knocked her to the ground while they lived in Michigan in the 1980s. Wife also claimed Husband continued to abuse her when they were living in South Carolina, including instances of Husband hitting, shoving, slapping, and cursing at her, which resulted in Wife calling police several times and being hospitalized on one occasion. At least one of these episodes was documented by a police incident report and photographs of Wife's bruises. The parties' eldest daughter corroborated Wife's account of Husband's abuse at the hearing. In contrast to her older sister, the parties' youngest daughter stated that while her parents argued, she

never witnessed Husband physically abuse Wife, and to her knowledge, he had never hit or pushed Wife.

According to Wife, although she and Husband had separated numerous times over the course of their thirty-one-year marriage, she finally decided to leave Husband in September 2005 after he shoved her into a wall, verbally abused her and their grandchild, and then broke her phone when she tried to call for help. Wife testified she was in serious fear of bodily harm as a result of this incident, and even when he was not abusing her, she felt constantly threatened and under his control.

We find the September 2005 assault sufficient to grant Wife a divorce based on physical cruelty. See McDowell, 300 S.C. at 99, 386 S.E.2d at 469 ("A single assault by one spouse upon the other spouse can constitute physical cruelty . . . [if it is] life threatening or . . . indicative of an intention to do seriously bodily harm or of such a degree as to raise a reasonable apprehension of great bodily harm in the future."). In any event, the numerous instances of abuse, culminating in the September 2005 assault, indicate Husband's intent to seriously harm Wife, which warrants a divorce based on physical cruelty. See Brown, 215 S.C. at 508, 56 S.E.2d at 333 ("Continued acts of personal violence producing physical pain or bodily injury and a fear of future danger are recognized as sufficient cause for a divorce for cruelty in nearly all jurisdictions . . ."). The testimony elicited at the final hearing proved that Husband's repeated cycle of abusive behavior over the course of their marriage caused Wife to reasonably fear for her safety. See Gibson, 283 S.C. at 323, 322 S.E.2d at 683 (stating an assault not resulting in actual bodily injury may constitute physical cruelty when it causes reasonable fear of serious danger or bodily harm in the future). Moreover, the family court specifically found Wife's testimony and that of her witnesses to be more credible than that of Husband and his witnesses. Based on the testimony and evidence presented at the final hearing, we discern no error in the family court's decision to grant Wife a divorce on the grounds of physical cruelty. See Tinsley v. Tinsley, 326 S.C. 374, 380, 483 S.E.2d 198, 201 (Ct. App. 1997) (finding the determination of whether conduct falls within the meaning of physical cruelty is governed by the particular circumstances of each case).

Regarding Husband's contention that the family court erred in failing to grant him a divorce on the grounds of adultery, we find Husband's proof of adultery was insufficient.

In support of his claim, Husband called their son's ex-girlfriend, Nikki Hastings (Nikki), to testify at the hearing. Nikki stated she engaged in sexual relations with Wife on several occasions after Wife revealed she had romantic feelings for her. When questioned by Wife's counsel, Nikki denied spreading rumors about sexual encounters she claimed to have had with other women in the community.

Wife denied these allegations and stated Nikki had fabricated this story when Wife and Husband told Nikki that she would have to move out of their residence after Wife caught Nikki viewing pornographic websites. Wife's half-sister testified on behalf of Wife and stated she was certain Wife had never engaged in any homosexual relationships. Susan Mohr, a mutual friend of Husband and Wife, stated Nikki had lied about other sexual relationships with women in the past. Another witness, Hope Jonda, testified her family had allowed Nikki to live with them for a period of time after Nikki was kicked out of her home. Hope stated her mother had to ask Nikki to move out because her mother could not handle Nikki due to Nikki's emotional and behavioral issues. Nikki then began to tell others that Hope and she were engaged in a homosexual relationship, which was untrue.

Husband stated Nikki approached him about her adulterous relationship with Wife, but besides Nikki's testimony, Husband introduced no corroborating evidence to substantiate his claim that Wife had an extramarital affair. Further, Husband set forth no testimony, either direct or circumstantial, identifying the time, place, or circumstances of Wife's alleged adulterous acts. See Brown v. Brown, 379 S.C. 271, 278, 665 S.E.2d 174, 178 (Ct. App. 2008) (finding proof of adultery must be "sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed"). Wife denied any desire to engage in a homosexual relationship, and Nikki identified only one specific occasion—the night of her 18th birthday at the Gorecki's home—where she and Wife had the opportunity to commit adultery. When Nikki testified to this sexual encounter, she provided no details. Nikki vaguely stated that it occurred

between three to five more times before their relationship terminated but failed to identify the time, place, or circumstances surrounding these other alleged interactions. Id. (stating adultery may be proven by circumstantial evidence, but the evidence must be sufficiently definite to establish both a disposition to commit the offense and the opportunity to do so).

Importantly, the family court found Husband and his witnesses' testimony to be less credible than that of Wife, which merits our deference based on the family court's ability to observe witnesses and assess their credibility. See Anders, 285 S.C. at 514, 331 S.E.2d at 341 (stating that when issues relate to proof regarding which party, if either, is entitled to a divorce, and the evidence is conflicting and susceptible of different inferences, it becomes the family court's duty to determine not only the law of the case but the facts as well because the family court observed the witnesses and could determine how much credence to give each witness's testimony). Accordingly, the family court properly denied Husband a divorce on the grounds of adultery.

2. Marital Estate

Husband claims the family court erred in awarding him only 60% of the value of the marital residence because Husband paid off a portion of the home with his inheritance. We disagree.

Marital property includes all real and personal property the parties acquired during the marriage and owned as of the date of filing or commencement of marital litigation. S.C. Code Ann. § 20-3-630(A) (Supp. 2009) (formerly S.C. Code Ann. § 20-7-473(A) (Supp. 2007)). The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner which fairly reflects each spouse's contribution to the economic partnership. Johnson v. Johnson, 296 S.C. 289, 298, 372 S.E.2d 107, 112 (Ct. App. 1988). "Upon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title." Id. at 293, 372 S.E.2d at 109. The division of marital property is within the family court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Craig v. Craig, 365 S.C. 285, 290, 617

S.E.2d 359, 361 (2005). The appellate court looks to the overall fairness of the apportionment. Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004).

The family court's division of the marital home was proper. The parties purchased the mobile home at issue in 1998, which renders it marital property. See § 20-3-630(A) (stating marital property is all real and personal property acquired during the marriage and owned as of the date of filing or commencement of marital litigation). The mobile home and surrounding acreage were appraised at $70,000, and at the time of the order, the mortgage on the home was $25,000, leaving $45,000 in equity to be divided between Husband and Wife.

Husband testified he received $100,000 from his father as an inheritance, and he spent a portion of this inheritance to improve the marital residence. Husband fails to establish the specific dollar amount he spent from his inheritance, contending in his brief that "a remaining portion of this inheritance was placed into the marital home," and stating at the hearing that he spent "almost half of it on [the marital residence] if you're gonna include tractors and everything else to improve the land . . . ." Regardless, the family court took Husband's expenditures from his inheritance into consideration by giving Husband 10% more of the marital estate than Wife as well as awarding Husband the tractors and equipment on the land that he purchased with his inheritance. Accordingly, we discern no error in the family court's decision to allocate 60% of the marital residence's equity to Husband.

3. Alimony

Husband argues the family court's alimony award to Wife was excessive. We disagree.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. Sharps v. Sharps, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

"The purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Love v. Love, 367 S.C. 493, 497, 626 S.E.2d 56, 58 (Ct. App. 2006). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." Craig, 365 S.C. at 292, 617 S.E.2d at 362 (internal citations omitted). The objective of alimony should be to insure that the parties separate on as equal a basis as possible. Patel v. Patel, 347 S.C. 281, 291, 555 S.E.2d 386, 391 (2001). Thus, "[i]t is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 412, 424 (Ct. App. 2001).

When awarding alimony, the family court considers the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2009); Patel, 347 S.C. at 290, 555 S.E.2d at 391 (holding that the family court is required to consider all relevant factors in determining alimony).

The family court awarded Wife $1,000 per month in permanent periodic alimony. In granting Wife alimony, the family court considered the length of the marriage, Husband's and Wife's education, the parties' health, Husband's greater income and ability to pay alimony, and Wife's need for alimony based on the differences in their standards of living. The family court properly considered these relevant statutory factors from section 20-3-130(C) to insure Wife would be able to maintain a standard of living similar to what she enjoyed during the parties' marriage. See Craig, 365 S.C. at 292, 617 S.E.2d at 362 ("Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage.").

Husband's claim that Wife is not entitled to alimony because she is underemployed is unfounded because she works full-time as an aide to mentally disabled children in the public school system and based on her education and past employments, she is working to her full earning potential. Moreover, Husband has the ability to pay Wife the ordered alimony based on his monthly earnings of $4,300, which is far superior to Wife's monthly wages. Any reduction in Wife's alimony would serve to penalize Wife when she has already attempted to defray her expenses by maintaining full-time employment and her own health benefits. Accordingly, the family court's award of alimony to Wife was appropriate.

4. Attorneys' Fees

Husband argues if this court finds Husband was entitled to a divorce based on Wife's adultery, we should reverse the award of $8,038.65 in attorneys' fees to Wife. Our finding that Husband failed to establish Wife committed adultery disposes of Husband's argument regarding the propriety of paying Wife's attorneys' fees. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (stating appellate courts need not address remaining issues when resolution of prior issue is dispositive); Haselden v. Haselden, 347 S.C. 48, 65, 552 S.E.2d 329, 338 (Ct. App. 2001) (finding one of the husband's arguments regarding attorneys' fees without merit when that argument to overturn the award was based on his unsuccessful contention that the family court's contempt ruling was in error).

CONCLUSION

Accordingly, the family court's decision is

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Corrections, Respondent,

v.

Billy Joe Cartrette, Appellant.

Appeal From Jasper County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4670
Submitted March 1, 2010 – Filed April 5, 2010

AFFIRMED IN PART AND REVERSED IN PART

Billy J. Cartrette, pro se, for Appellant.

Lake E. Summers, of Columbia, for Respondent.

CURETON, A.J.: Billy Joe Cartrette filed a grievance with the South Carolina Department of Corrections concerning conditions of his

participation in the Prison Industries Program (PIP). Cartrette appeals the circuit court's order remanding his case to the Administrative Law Court (ALC) for a determination of the prevailing wage for similar work, reversing the ALC's finding that Cartrette was an employee of the private sponsor, affirming the ALC's denial of overtime wages, and affirming the ALC's denial of reimbursement for certain pay deductions.[1] We reverse as to overtime wages and affirm on all remaining issues.[2]

FACTS

Cartrette was an inmate of the Ridgeland Correctional Institution. As a participant in PIP, Cartrette provided on-site labor at the Ridgeland Correctional Institution, sometimes working in excess of ninety hours per two-week period, for PIP sponsor Kwalu Furniture. Cartrette was compensated at a rate of $5.50 per hour. Cartrette filed a grievance with the Department complaining his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector. He asserted non-inmate employees earned $11.00 to $14.00 per hour for the same work. Cartrette further complained he did not receive additional pay for overtime hours and the Department improperly withheld funds from his paychecks. Specifically, Cartrette challenged as unconstitutional the withholding of funds for his room and board and additional funds for Victim's Assistance.[3]

The Department denied Cartrette's grievance, and Cartrette appealed to the ALC. The ALC reversed the Department's refusal to pay Cartrette the prevailing wage and found the prevailing wage was $5.25. Furthermore, the

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[1] This appeal is being considered alongside S.C. Dep't of Corr. v. George Lee Tomlin. The material facts, substantive arguments, and procedural postures of these two appeals are identical.

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

[3] See S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's Compensation Fund from which State Office of Victim Assistance may pay victims' claims); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance).

ALC affirmed the Department's denials of overtime and reimbursement for wage deductions.

Both Cartrette and the Department then appealed to the circuit court. After a hearing, the circuit court found $5.25 was not the prevailing wage and remanded that issue to the ALC with seven questions for the ALC to consider in determining the correct prevailing wage. The circuit court reversed the ALC's apparent finding that Cartrette "worked for . . . or was otherwise ever an employee of Kwalu." Finally, the circuit court affirmed the ALC's determinations Cartrette was ineligible for overtime or reimbursement of wage deductions for room and board and for Victims Assistance. Cartrette now appeals.

STANDARD OF REVIEW

The ALC has subject matter jurisdiction under the Administrative Procedures Act (APA) to hear properly perfected appeals from the Department's final orders in administrative or non-collateral matters. Slezak v. S.C. Dep't of Corr., 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004). Our standard of review derives from the APA. Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). We may affirm, remand, reverse, or modify the appealed decision if the appellant's substantive rights have suffered prejudice because the decision is:

(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. Overtime Pay

Cartrette contends the prevailing wage statutes entitle him to time-and-a-half pay for overtime worked. We agree.

In South Carolina, a non-inmate employee's right of action for overtime lies in § 207(a)(1) of the Federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.A. §§ 201-219 (1998 & Supp. 2009).[4] Under the FLSA, non-inmate workers receive compensation at a rate of one and one-half times their hourly rate for hours worked in excess of forty per week. 29 U.S.C.A. § 207(a)(2) (1998). This court recently examined the legislative intent underlying the FLSA and found:

> The purpose of the FLSA is to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." Tennessee Coal, Iron & R.R. Co. v.

[4] Our supreme court has held for purposes of payment of wages, inmate workers are not employees of PIP sponsors. Williams v. S.C. Dep't of Corr., 372 S.C. 255, 260, 641 S.E.2d 885, 888 (2007). Other courts, including the Federal Court of Appeals for the Fourth Circuit, have declined to extend the protections of the FLSA and state labor statutes to inmates. See, e.g., Harker v. State Use Indus., 990 F.2d 131, 135 (4th Cir. 1993).

> Muscoda Local No. 123, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944). The FLSA was enacted in response to a congressional finding that some industries, engaged in commerce, maintained labor conditions which were detrimental to a minimum standard of living necessary for health, efficiency, and the general well-being of workers. See 29 U.S.C. § 202(a) (1998). The Act attempts to eliminate unfair labor practices without substantially curtailing employment or earning power. 29 U.S.C. § 202(b). Because the FLSA is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals. Tennessee Coal, Iron & R.R. Co., 321 U.S. at 597, 64 S.Ct. 698; Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999).

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 221, 616 S.E.2d 722, 730 (Ct. App. 2005).

The prevailing wage statutes require that inmate workers in a PIP enjoy pay and working conditions comparable to those enjoyed by non-inmate workers. According to our supreme court, the overall purpose of these statutes "is to prevent unfair competition." Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004).

> The [Department] must determine prior to using inmate labor in a [PIP] that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the rates of pay and other conditions of employment are not less than those paid and provided for work of [a] similar nature in the locality in which the work is performed.

S.C. Code Ann. § 24-3-315 (2007). "No inmate participating in [PIP] may earn less than the prevailing wage for work of [a] similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). While the prevailing wage statutes do not entitle inmates to a private right of action in tort, inmates may protest through the grievance process the Department's failure to comply with these statutes. Adkins, 360 S.C. at 419, 602 S.E.2d at 55.

Cartrette properly brought this action as a grievance and alleged the Department denied him time-and-a-half overtime wages for the hours he worked beyond forty each week. The Department's decision not to pay inmates time-and-a-half overtime undermines the legislative intent of the statutes. Paying inmates straight-time overtime while private-sector employees receive time-and-a-half overtime creates an unintended and unfair advantage for inmate labor over private labor. Consequently, the circuit court erred in denying Cartrette time-and-a-half pay for overtime. We reverse the circuit court's decision on this issue.

II. Remaining Issues

With regard to Cartrette's remaining issues, we affirm based upon the following authorities:

1. As to the circuit court's remand to the ALC for determination of the prevailing wage: Condor, Inc. v. Bd. of Zoning Appeals, City of N. Charleston, 328 S.C. 173, 178, 493 S.E.2d 342, 344 (1997) (preventing an appellant from arguing on appeal an issue conceded in the trial court); Bowman v. Bowman, 357 S.C. 146, 160, 591 S.E.2d 654, 661 (Ct. App. 2004) (holding a party cannot seek and receive a particular result at trial and then challenge it on appeal).

2. As to whether Cartrette was an employee of the private sponsor: S.C. Code Ann. § 24-3-40(A) (2007) ("Unless otherwise provided by law, the employer of a prisoner authorized to work . . . in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections."); Williams v. S.C. Dep't of Corr.,

372 S.C. 255, 258-59, 641 S.E.2d 885, 887 (2007) (holding a prison industries program sponsor is not an employer of inmates because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue).

3. As to whether Cartrette is entitled to reimbursement of monies deducted from his pay for room and board because he was double-billed for this cost: Rule 210(h), SCACR (limiting appellate review to facts appearing in the record on appeal); State v. Mitchell, 330 S.C. 189, 199, 498 S.E.2d 642, 647 (1998) (placing on appellant the burden of presenting a sufficient record to allow appellate review).

4. As to whether Cartrette is entitled to reimbursement of monies deducted from his pay for room and board because the deduction was unconstitutional: S.C. Const. art. XII, § 2 ("The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates."); S.C. Code Ann. § 24-3-40 (2007) (allocating portions of inmates' wages for restitution, the State Office of Victim Assistance, child support, room and board, and inmate use); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute.").

5. As to whether Cartrette is entitled to reimbursement of monies deducted from his pay for victim's assistance because inmate wages are outside the funds available for appropriations by the General Assembly: S.C. Code Ann. § 24-3-40 (2007) (allocating portions of inmates' wages for restitution, the State Office of Victim Assistance, child support, room and board, and inmate use); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance); S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's

Compensation Fund from which State Office of Victim Assistance may pay victims' claims).

CONCLUSION

We find the prevailing wage statutes entitle inmate workers in a PIP to pay and working conditions comparable to those enjoyed by workers in private industry, including time-and-a-half pay for overtime hours worked. Accordingly, we reverse the circuit court's decision on this issue. For the foregoing reasons, we affirm the circuit court's decision on the remaining issues.

AFFIRMED IN PART AND REVERSED IN PART.

GEATHERS, J., concurs.

PIEPER, J., concurring in part and dissenting in part:

I concur in the majority's conclusion to affirm the decision to remand to determine a prevailing wage. I also concur in the determination that the inmate is not an employee of the private sponsor or entitled to reimbursement for room and board and other costs. However, I respectfully dissent as to any finding that the inmate is entitled to overtime pay. Section 24-3-430 establishes an inmate's right to the prevailing wage, stating "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). Our supreme court recognizes that a critical purpose of the prevailing wage provision is to prevent unfair competition. Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004). Nonetheless, I would distinguish between prevailing wages and any right to overtime pay for inmates participating in a prison industries program. In fact, there is no authority within the applicable statutory scheme recognizing any right to

overtime pay for inmates.[5] See § 24-3-430(D) (2007) (stating only that no inmate participating in the program may earn less than the prevailing wage).

While the Fair Labor Standards Act (FLSA) provides a right to overtime pay for certain employees, the protections of the act do not apply to inmates working within the prison setting. See Harker v. State Use Indus., 990 F.2d 131, 136 (4th Cir. 1993) ("For more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor. If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts."). As noted by the Fourth Circuit in Harker, inmates participating in these types of programs perform work not to "turn profits for their supposed employer, but rather as a means of rehabilitation and job training." Id. at 133.

In sum, I am not convinced the current statutory scheme provides for overtime pay to inmates. Inmates are not employees entitled to the protections of the FLSA, and I do not find it appropriate to read into the prevailing wage statute any such right to inmates voluntarily participating in a prison industries program.[6] As Judge Posner of the Seventh Circuit has explained:

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[5] Although not within the applicable statutory scheme, section 8-11-55 of the South Carolina Code mentions overtime in the context of state employees. That statute only applies to state employees and provides that "[a]ny state employee who is required to work overtime during any particular week may, as a result, be given compensatory time . . . ." S.C. Code Ann. § 8-11-55 (Supp. 2009). The statute further provides that any compensatory time granted must be in accordance with the FLSA. As indicated, the FLSA does not apply to inmates and the prevailing wage statute at issue specifically states that inmates participating in the prison industries program are not considered employees of the state. See S.C. Code Ann. § 24-3-430(F) (2007).

[6] An inmate's participation in the prison industries program is voluntary and contingent upon consent to the conditions of the employment. S.C. Code Ann. § 24-3-430(C) (2007) ("An inmate *may* participate in the program established pursuant to this section only on a voluntary basis and only after

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.

Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005). Accordingly, I concur in the decision of the majority to affirm the circuit court and remand to the ALC to determine a prevailing wage; however, I respectfully dissent as to the overtime issue, and I would affirm the finding of the ALC and the circuit court that the inmate is not entitled to overtime pay.

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he has been informed of the conditions of his employment.") (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Corrections, Respondent,

v.

George Lee Tomlin, Appellant.

Appeal From Jasper County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4671
Submitted March 1, 2010 – Filed April 5, 2010

AFFIRMED IN PART AND REVERSED IN PART

George Tomlin, pro se, for Appellant.

Lake E. Summers, of Columbia, for Respondent.

CURETON, A.J.: George Lee Tomlin filed a grievance with the South Carolina Department of Corrections concerning conditions of his

participation in the Prison Industries Program (PIP). Tomlin appeals the circuit court's order remanding his case to the Administrative Law Court (ALC) for a determination of the prevailing wage for similar work, reversing the ALC's finding that Tomlin was an employee of the private sponsor, affirming the ALC's denial of overtime wages, and affirming the ALC's denial of reimbursement for certain pay deductions.[1] We reverse as to overtime wages and affirm on all remaining issues.[2]

FACTS

Tomlin was an inmate of the Ridgeland Correctional Institution. As a participant in PIP, Tomlin provided on-site labor at the Ridgeland Correctional Institution, sometimes working in excess of eighty hours per two-week period, for PIP sponsor Kwalu Furniture. Tomlin was compensated at a rate of $5.25 per hour. Tomlin filed a grievance with the Department complaining his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector. He asserted non-inmate employees earned $11.00 to $14.00 per hour for the same work. Tomlin further complained he did not receive additional pay for overtime hours and the Department improperly withheld funds from his paychecks. Specifically, Tomlin challenged as unconstitutional the withholding of funds for his room and board and additional funds for Victim's Assistance.[3]

The Department denied Tomlin's grievance, and Tomlin appealed to the ALC. The ALC reversed the Department's refusal to pay Tomlin the

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[1] This appeal is being considered alongside S.C. Dep't of Corr. v. Billy Joe Cartrette. The material facts, substantive arguments, and procedural postures of these two appeals are identical.

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

[3] See S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's Compensation Fund from which State Office of Victim Assistance may pay victims' claims); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance).

prevailing wage and found the prevailing wage was $5.25.[4] Furthermore, the ALC affirmed the Department's denials of overtime and reimbursement for wage deductions.

Both Tomlin and the Department then appealed to the circuit court. After a hearing, the circuit court found $5.25 was not the prevailing wage and remanded that issue to the ALC with seven questions for the ALC to consider in determining the correct prevailing wage. The circuit court reversed the ALC's apparent finding that Tomlin "worked for . . . or was otherwise ever an employee of Kwalu." Finally, the circuit court affirmed the ALC's determinations Tomlin was ineligible for overtime or reimbursement of wage deductions for room and board and for Victims Assistance. Tomlin now appeals.

STANDARD OF REVIEW

The ALC has subject matter jurisdiction under the Administrative Procedures Act (APA) to hear properly perfected appeals from the Department's final orders in administrative or non-collateral matters. Slezak v. S.C. Dep't of Corr., 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004). Our standard of review derives from the APA. Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). We may affirm, remand, reverse, or modify the appealed decision if the appellant's substantive rights have suffered prejudice because the decision is:

(a) in violation of constitutional or statutory provisions;

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

(c) made upon unlawful procedure;

[4] The ALC's order seems to presume Tomlin complained of receiving a "training wage" of less than $5.25 per hour. However, Tomlin appears to have complained only that $5.25 per hour was below the prevailing wage.

(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. Overtime Pay

Tomlin contends the prevailing wage statutes entitle him to time-and-a-half pay for overtime worked. We agree.

In South Carolina, a non-inmate employee's right of action for overtime lies in § 207(a)(1) of the Federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.A. §§ 201-219 (1998 & Supp. 2009).[5] Under the FLSA, non-inmate workers receive compensation at a rate of one and one-half times their hourly rate for hours worked in excess of forty per week. 29 U.S.C.A. § 207(a)(2) (1998). This court recently examined the legislative intent underlying the FLSA and found:

> The purpose of the FLSA is to protect "the rights of those who toil, of those who sacrifice a full measure

[5] Our supreme court has held for purposes of payment of wages, inmate workers are not employees of PIP sponsors. Williams v. S.C. Dep't of Corr., 372 S.C. 255, 260, 641 S.E.2d 885, 888 (2007). Other courts, including the Federal Court of Appeals for the Fourth Circuit, have declined to extend the protections of the FLSA and state labor statutes to inmates. See, e.g., Harker v. State Use Indus., 990 F.2d 131, 135 (4th Cir. 1993).

> of their freedom and talents to the use and profit of others." Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944). The FLSA was enacted in response to a congressional finding that some industries, engaged in commerce, maintained labor conditions which were detrimental to a minimum standard of living necessary for health, efficiency, and the general well-being of workers. See 29 U.S.C. § 202(a) (1998). The Act attempts to eliminate unfair labor practices without substantially curtailing employment or earning power. 29 U.S.C. § 202(b). Because the FLSA is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals. Tennessee Coal, Iron & R.R. Co., 321 U.S. at 597, 64 S.Ct. 698; Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999).

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 221, 616 S.E.2d 722, 730 (Ct. App. 2005).

The prevailing wage statutes require that inmate workers in a PIP enjoy pay and working conditions comparable to those enjoyed by non-inmate workers. According to our supreme court, the overall purpose of these statutes "is to prevent unfair competition." Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004).

> The [Department] must determine prior to using inmate labor in a [PIP] that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the rates of pay and other conditions of employment are not less than those paid and provided for work of [a]

> similar nature in the locality in which the work is performed.

S.C. Code Ann. § 24-3-315 (2007). S.C. Code Ann. § 24-3-315 (2007). "No inmate participating in [PIP] may earn less than the prevailing wage for work of [a] similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). While the prevailing wage statutes do not entitle inmates to a private right of action in tort, inmates may protest through the grievance process the Department's failure to comply with these statutes. Adkins, 360 S.C. at 419, 602 S.E.2d at 55.

Tomlin properly brought this action as a grievance and alleged the Department denied him time-and-a-half overtime wages for the hours he worked beyond forty each week. The Department's decision not to pay inmates time-and-a-half overtime undermines the legislative intent of the statutes. Paying inmates straight-time overtime while private-sector employees receive time-and-a-half overtime creates an unintended and unfair advantage for inmate labor over private labor. Consequently, the circuit court erred in denying Tomlin time-and-a-half pay for overtime. We reverse the circuit court's decision on this issue.

II. Remaining Issues

With regard to Tomlin's remaining issues, we affirm based upon the following authorities:

1. As to the circuit court's remand to the ALC for determination of the prevailing wage: Condor, Inc. v. Bd. of Zoning Appeals, City of N. Charleston, 328 S.C. 173, 178, 493 S.E.2d 342, 344 (1997) (preventing an appellant from arguing on appeal an issue conceded in the trial court); Bowman v. Bowman, 357 S.C. 146, 160, 591 S.E.2d 654, 661 (Ct. App. 2004) (holding a party cannot seek and receive a particular result at trial and then challenge it on appeal).

2. As to whether Tomlin was an employee of the private sponsor: S.C. Code Ann. § 24-3-40(A) (2007) ("Unless otherwise provided by law, the employer of a prisoner authorized to work . . . in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections."); Williams v. S.C. Dep't of Corr., 372 S.C. 255, 258-59, 641 S.E.2d 885, 887 (2007) (holding a prison industries program sponsor is not an employer of inmates because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue).

3. As to whether Tomlin is entitled to reimbursement of monies deducted from his pay for room and board because he was double-billed for this cost: Rule 210(h), SCACR (limiting appellate review to facts appearing in the record on appeal); State v. Mitchell, 330 S.C. 189, 199, 498 S.E.2d 642, 647 (1998) (placing on appellant the burden of presenting a sufficient record to allow appellate review).

4. As to whether Tomlin is entitled to reimbursement of monies deducted from his pay for room and board because the deduction was unconstitutional: S.C. Const. art. XII, § 2 ("The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates."); S.C. Code Ann. § 24-3-40 (2007) (allocating portions of inmates' wages for restitution, the State Office of Victim Assistance, child support, room and board, and inmate use); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute.").

5. As to whether Tomlin is entitled to reimbursement of monies deducted from his pay for victim's assistance because inmate wages are outside the funds available for appropriations by the General Assembly: S.C. Code Ann. § 24-3-40 (2007) (allocating portions of inmates' wages for restitution, the State Office of Victim Assistance, child support, room and

board, and inmate use); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance); S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's Compensation Fund from which State Office of Victim Assistance may pay victims' claims).

CONCLUSION

We find the prevailing wage statutes entitle inmate workers in a PIP to pay and working conditions comparable to those enjoyed by workers in private industry, including time-and-a-half pay for overtime hours worked. Accordingly, we reverse the circuit court's decision on this issue. For the foregoing reasons, we affirm the circuit court's decision on the remaining issues.

AFFIRMED IN PART AND REVERSED IN PART.

GEATHERS, J., concurs.

PIEPER, J., concurring in part and dissenting in part:

I concur in the majority's conclusion to affirm the decision to remand to determine a prevailing wage. I also concur in the determination that the inmate is not an employee of the private sponsor or entitled to reimbursement for room and board and other costs. However, I respectfully dissent as to any finding that the inmate is entitled to overtime pay. Section 24-3-430 establishes an inmate's right to the prevailing wage, stating "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). Our supreme court recognizes that a critical purpose of the prevailing wage provision is to prevent unfair competition. Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004). Nonetheless, I would distinguish between prevailing wages and any right to overtime pay for inmates participating in a prison industries program. In fact, there is no

authority within the applicable statutory scheme recognizing any right to overtime pay for inmates.[6] See § 24-3-430(D) (2007) (stating only that no inmate participating in the program may earn less than the prevailing wage).

While the Fair Labor Standards Act (FLSA) provides a right to overtime pay for certain employees, the protections of the act do not apply to inmates working within the prison setting. See Harker v. State Use Indus., 990 F.2d 131, 136 (4th Cir. 1993) ("For more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor. If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts."). As noted by the Fourth Circuit in Harker, inmates participating in these types of programs perform work not to "turn profits for their supposed employer, but rather as a means of rehabilitation and job training." Id. at 133.

In sum, I am not convinced the current statutory scheme provides for overtime pay to inmates. Inmates are not employees entitled to the protections of the FLSA, and I do not find it appropriate to read into the prevailing wage statute any such right to inmates voluntarily participating in a prison industries program.[7] As Judge Posner of the Seventh Circuit has explained:

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[6] Although not within the applicable statutory scheme, section 8-11-55 of the South Carolina Code mentions overtime in the context of state employees. That statute only applies to state employees and provides that "[a]ny state employee who is required to work overtime during any particular week may, as a result, be given compensatory time . . . ." S.C. Code Ann. § 8-11-55 (Supp. 2009). The statute further provides that any compensatory time granted must be in accordance with the FLSA. As indicated, the FLSA does not apply to inmates and the prevailing wage statute at issue specifically states that inmates participating in the prison industries program are not considered employees of the state. See S.C. Code Ann. § 24-3-430(F) (2007).

[7] An inmate's participation in the prison industries program is voluntary and contingent upon consent to the conditions of the employment. S.C. Code Ann. § 24-3-430(C) (2007) ("An inmate *may* participate in the program

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.

Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005). Accordingly, I concur in the decision of the majority to affirm the circuit court and remand to the ALC to determine a prevailing wage; however, I respectfully dissent as to the overtime issue, and I would affirm the finding of the ALC and the circuit court that the inmate is not entitled to overtime pay.

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established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.") (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Johnell Porter, Appellant.

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

Opinion No. 4672
Submitted March 1, 2010 – Filed April 5, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, all of Columbia; Solicitor Kevin Scott Brackett, of York, for Respondent.

WILLIAMS. J.: Johnell Porter (Porter) appeals his convictions for conspiracy to commit armed robbery, armed robbery, entering a bank with intent to steal, kidnapping, and possession of a firearm during the commission of a violent crime. On appeal, we must determine whether the trial court erred in (1) refusing to quash the indictments or dismiss the case when Porter was arrested in North Carolina by South Carolina officers who did not take him before a magistrate; (2) admitting into evidence items found in the parking lot where Porter's vehicle stopped; (3) excluding Porter from a bench conference during the trial when Porter was representing himself pro se; and (4) refusing to issue the kidnapping charge requested by the defense. We affirm.

FACTS/PROCEDURAL HISTORY

On December 22, 2006, at approximately 10:30 a.m., Porter, along with Kenneth Young (Young) and Donshavis Jones (Jones), entered the front door of the Lake Wylie Branch of the Bank of York (the Bank). All three men wore dark ski masks, dark clothing, and gloves. All three were armed with handguns and at least one had a canister of pepper spray. Porter and Young approached the teller line and the customer service desk, pointed their guns at the employees, and ordered them to lie down. Porter and Young then ordered some of the employees and customers to crawl into the main vault and told some of the tellers to open their individual vaults.[1] At the same time, Jones carried a pillowcase into the main vault and began filling it with money. After Jones retrieved roughly $18,000, the three men left, leaving all of the employees and customers locked in the main vault. The three men got into a rented Ford Taurus (the Taurus) driven by Angela Laws (Laws).[2] The Taurus

[1] According to testimony from Bank employees, each teller had his or her own individual vault contained within the larger, main vault.

[2] Young testified that prior to the robbery, he duct-taped a dealer tag over the South Carolina license plate of the Taurus.

exited the Bank's parking lot and drove east on Highway 49 towards Charlotte.

Fortunately, it was the Bank's policy to leave a key in the main vault at all times for such an event, so the employees and customers were able to get out of the main vault soon after the robbers left. The vice president of the Bank, Mike Lubiato (Lubiato), immediately called 9-1-1. While he was on the phone with the 9-1-1 dispatcher, Lubiato spoke to a customer who had been waiting outside at the drive through window. The customer stated the getaway car was a gray or bluish gray Ford Taurus with a dealer tag. Lubiato relayed this information to the dispatcher.

Officer Terry Vinesett (Officer Vinesett) of the York County Sheriff's Department was on duty in his patrol car on the morning of December 22, 2006, when he received a call about an armed robbery at the Bank. The dispatcher stated the robbery involved four to five people, and the robbers fled the Bank in a blue or gray Ford Taurus. Constable Wes Scott (Constable Scott) was riding along with Officer Vinesett that day. Driving directly behind Officer Vinesett was Officer Randy Gibson (Officer Gibson). While the officers were about to make a left turn onto Highway 49 from Carowinds Boulevard, Officer Gibson saw the Taurus turning south on Carowinds Boulevard towards York County. When Officer Gibson alerted Officer Vinesett over his radio that he had seen the Taurus, he and Officer Vinesett immediately made a U-turn and followed the Taurus. As soon as the Taurus crossed over the York County line, Officer Vinesett and Officer Gibson turned on their lights and sirens.[3] Upon seeing the officers' lights, Laws began to speed up and turned onto Interstate 77 northbound towards Charlotte. Laws traveled several miles on the interstate before exiting at Arrowood Road in Charlotte.

[3] The activation of the lights automatically activated the dashboard cameras inside the patrol car, which captured the ensuing chase of the Taurus until it stopped in the parking lot of an apartment complex in North Carolina. The video taken from the cameras was admitted into evidence without objection.

Eventually, Laws turned into the parking lot of an apartment complex and came to a stop. Jones, who was seated in the back seat on the driver's side of the Taurus, attempted to flee. Before he could exit the Taurus, however, Officer Vinesett drove his patrol car into the left side of the Taurus, injuring Jones' left leg. Officer Gibson arrived in the parking lot just as the collision occurred.

Officer Vinesett, Constable Scott, and Officer Gibson exited their respective patrol cars and ordered all four suspects out of the Taurus. The officers placed the suspects in handcuffs and searched them for weapons. They did not read the suspects their Miranda rights. A short time later, officers from the Charlotte Police Department arrived and took custody of the four suspects. Both Officer Vinesett and Officer Gibson testified they did not take any of the suspects before a magistrate that day.

On the back of the Taurus, Officer Vinesett found a dealer tag duct-taped over a South Carolina license plate. In the backseat floorboard of the Taurus, Officer Vinesett found bullets, a blue ski mask, rubber gloves, a revolver, and a pillowcase containing a nine millimeter pistol, several rounds of ammunition, and roughly $18,000. In the passenger seat, Officer Vinesett found a pack of cigarettes and a wig. On the ground outside the Taurus, Officer Vinesett found another blue ski mask, a pair of black gloves, a blue shirt, a pair of black boots with one containing a pocket knife, a black jacket, a pair of black tennis shoes, and a pillowcase containing a pair of white tennis shoes, a white dew rag, a can of pepper spray, and a black t-shirt.[4]

On December 27, 2006, officials from the York County Sheriff's Office obtained warrants for the four suspects and faxed them to the Charlotte Mecklenburg Police Department. Thereafter, York County officials commenced the extradition process in January 2007. In June 2007, Porter was indicted for kidnapping, entering a bank with intent to steal, armed robbery, possession of a firearm during the commission of a violent crime, and conspiracy to commit armed robbery. Laws and Jones pled guilty to

[4] The State's forensic technicians all testified that none of the items found in the Taurus had any fingerprints on them.

armed robbery. Young and Porter were tried before the Honorable John C. Hayes, III in July 2007. Porter proceeded pro se but was appointed standby counsel.

At trial, the State presented testimony from the employees and customers in the Bank. None of the employees or customers could identify any of the robbers because they were all wearing ski masks and gloves during the robbery. However, Lubiato testified that the tellers at the Bank is instructed to keep a record of the serial numbers of five $100 bills in their vault at all times. This is commonly referred to as "bait money." In the event the Bank is robbed, the money stolen can be identified because it will contain the bait money. Lubiato testified that the $18,000 stolen from the Bank on the morning in question contained bait money. He further testified the money the police found in the Taurus and returned to the Bank contained all of the bait money from one of the teller's vaults at the Bank.

The State also presented video footage from security cameras mounted inside and outside the Bank and also from the dashboard cameras mounted inside Officer Vinesett's and Officer Gibson's vehicles. The footage from the Bank showed three men in dark clothing and ski masks enter the Bank, order the employees and customers at gun point into the main vault, and then leave in a gray Ford Taurus. The footage from the dashboard cameras showed the chase from Highway 49 into the apartment complex in Charlotte.

Finally, the State presented testimony from Laws and Jones, both of whom had already pled guilty to the armed robbery. Both testified that on the morning of December 22, 2006, they, along with Porter and Young, drove a rented gray Ford Taurus to the Bank. They further testified Jones, Young, and Porter entered the Bank carrying guns and wearing dark clothing and ski masks. Jones specifically testified Porter had called him earlier that week to ask him to be the "money man" in a bank robbery and to bring a pillowcase to hold the money.

The jury found Porter guilty on all counts. The trial court sentenced Porter to life in prison without the possibility of parole for armed robbery,

kidnapping, and entering a bank with intent to steal, and five years for both the conspiracy and possession of a firearm. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000).

LAW/ANALYSIS

a. Motion To Quash The Indictments or Dismiss The Case

Porter argues the trial court erred in refusing to quash the indictments or dismiss this case because the South Carolina officers who arrested him in North Carolina failed to comply with the North Carolina law that would have permitted his arrest. However, we do not believe this issue is preserved for our review.

An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). In his brief, Porter argues:

> The trial judge erred in refusing to quash the indictments or to dismiss the case against appellant where appellant was arrested by South Carolina officers in North Carolina and where the officers failed to comply with the North Carolina statute which would have permitted such an arrest.

In that section of his brief, however, he does not cite to any authority that supports this argument. The only citations in that section of his

argument are to two cases that define an arrest. Thus, while the argument contains citations to authority, those authorities do not support his argument whatsoever. Consequently, we hold this issue unpreserved for failure to cite any supporting authority. See State v. Howard, 384 S.C. 212, __, 682 S.E.2d 42, 45 (Ct. App. 2009) (holding argument abandoned when defendant failed to cite any authority in specific support of his assertion that the trial court erred in denying his motion for a mistrial).

b. Admission of Items Found Near Car

Porter argues the trial court erred in admitting into evidence items[5] that were found in the parking lot near the Taurus because (1) there was no testimony tying these items to the defendants, (2) the items were not found in the possession of the defendants or in the car, and (3) the police found no fingerprints on the items. We disagree.

The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice. Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001).

[5] Porter objected to the admission of (1) a blue ski mask, (2) a pair of black gloves, (3) a blue shirt, (4) a pair of black boots, (5) a pocket knife that was found in the left black boot, (5) a black jacket, (6) a pair of black tennis shoes, and (7) a pillowcase containing a pair of white tennis shoes, a white do rag, a can of pepper spray, and a black t-shirt. Porter objected only to the admission of the pillowcase; he did not the object to the items contained inside the pillowcase.

We find no error in the trial court's decision to admit these items. First, we believe there was sufficient evidentiary support for the trial court's finding there was a nexus between these items, the defendants, and the robbery. See State v. Adams, 377 S.C. 334, 337, 659 S.E.2d 272, 274 (Ct. App. 2008) (holding the decision to admit evidence will not be reversed unless the conclusions of the trial court either lack evidentiary support or are controlled by an error of law). As to the ski mask, gloves, blue shirt, black jacket, black boots, and black tennis shoes, the State presented testimony from numerous Bank employees and customers that the robbers all wore ski masks, black or dark blue clothing, and gloves.

The same is true of the pillowcase. Several of the State's witnesses testified the robber who took the money from the Bank carried it in a pillowcase. Further, Jones testified Porter instructed him to bring two pillowcases to the robbery, and he took one of the pillowcases into the Bank on the day of the robbery. The mere fact that the pillowcase and the other items found in the parking lot were not in the defendants' exclusive possession when the police detained them does not render them inadmissible. See State v. Jackson, 265 S.C. 278, 283, 217 S.E.2d 794, 796 (1975) (holding exclusive possession of items by accused is not required for such items to be admissible in armed robbery prosecution; the accused need only bear a distinctive relationship to the property).

Second, we believe Porter waived any objection to the admission of the items by cross-examining the State's witness about the items without reserving his objection. See State v. Puckett, 237 S.C. 369, 380, 117 S.E.2d 369, 375 (1960) (holding where an exhibit was admitted over defendant's objection, and defendant, without reserving objection, cross-examined a witness concerning the exhibit, the objection was lost, and any error in admission was cured). In this case, the trial court overruled Porter's objection both as to the chain of custody and as to the sufficiency of the nexus between the robbery and the items. Thereafter, Porter cross-examined the State's witness regarding the lack of fingerprints found on the items and the witness's lack of knowledge of how long the items had been in the parking lot. Neither

Porter nor his standby counsel reserved the objection. Consequently, under Puckett, any error in the admission of the items was cured.

Finally, to the extent any of these items were improperly admitted, their admission was harmless in light of the overwhelming evidence that established Porter's guilt. See State v. Allen, 269 S.C. 233, 242, 237 S.E.2d 64, 68 (1977) (holding overwhelming proof of guilt rendered harmless the admission of the evidence in question). In this case, the money found in the Taurus contained the bait money that was stolen from the Bank. Furthermore, surveillance video from the Bank showed three men in dark clothing and ski masks exit the Bank with a pillowcase filled with money and get into a grey Ford Taurus. When the defendants were arrested, they were wearing dark clothes, and they were driving a grey Ford Taurus in which the police found a pillowcase filled with money, ski masks, and other dark clothing. Finally, Laws and Young both testified in specific detail as to Porter's involvement in the robbery.

Accordingly, we find no reversible error in the admission of these items at trial.

c. Exclusion of Porter from Bench Conference

Porter argues the trial court erred in excluding him from a bench conference during jury selection. We believe this issue is not preserved for review.

The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). A contemporaneous objection is required to preserve issues for direct appellate review. State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005). Issues not raised and ruled upon in the trial court will not be

considered on appeal. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001).

During jury voir dire and selection, the trial court stated, "Let me ask counsel to come up here and Mr. Porter, I'll ask Mr. Jamison[6] to tell you what I mention up here." The court then held a conference in Porter's absence. However, Porter did not make a contemporaneous objection to his exclusion. Consequently, we believe this issue is not preserved for our review.[7]

d. Kidnapping Charge

Porter argues the trial court erred in refusing to instruct the jurors if they found Porter guilty of armed robbery, then in order for them to also find him guilty of kidnapping, they would have to find Porter did something more than constrain the bank employees and customers for the purposes of robbing them. In other words, the jurors could not base a conviction for kidnapping on the restraint of the employees and customers that was incidental to the armed robbery. We disagree.

Generally, the trial judge is required to charge the current and correct law of South Carolina. State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). Pursuant to section 16-3-910 of the South Carolina Code (Supp. 2009), a person is guilty of kidnapping if he "unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s] or carr[ies]

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[6] Mr. Jamison was counsel for Porter's co-defendant, Young.

[7] Porter urges this court to adopt the reasoning of the First Circuit Court of Appeals in Oses v. Comm. of Mass., 961 F.2d 985 (1st Cir. 1992). In that case, the court found the appellant's Sixth Amendment right of pro se representation was violated due to his exclusion from over seventy bench and lobby conferences. Id. at 986. However, Oses is distinguishable because Oses actually moved to be admitted to any bench or lobby conferences held during the trial. Id. In this case, neither Porter nor his standby counsel moved to be admitted to any bench conferences either before or during the trial.

away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, ..." Kidnapping is a continuous offense that commences when one is wrongfully deprived of freedom and continues until freedom is restored. State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999). Armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996).

Logically, in order to commit armed robbery, an assailant must constrain his victim's activities in some way; otherwise, the victim could simply walk away. The issue here is whether the same act of constraining the employees and customers that was necessary to commit the armed robbery could also be the basis for a kidnapping conviction.

Our supreme court has held "[w]hen a single act combines the requisite ingredients of two distinct offenses, the defendant may be severally indicted and punished for each." State v. Steadman, 216 S.C. 579, 589, 59 S.E.2d 168, 173 (1950). The question of whether an act of confinement can constitute kidnapping when that confinement is incidental to the commission of another crime was raised in State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). In that case, the victim was abducted at knifepoint as she placed a call from a phone booth. Id. at 75, 310 S.E.2d at 430. The perpetrator forced the victim to walk to an adjacent pool area where he sexually assaulted her and forced her to walk to different locations around the pool. Id. At each location, the perpetrator assaulted the victim. Id. On appeal of his conviction for assault and battery of a high and aggravated nature, first degree criminal sexual conduct, and kidnapping, Hall argued the trial court erred in failing to charge the jury that in order to establish kidnapping, the State must prove the confinement of the victim was more than incident to the commission of another crime. Id. at 77, 310 S.E.2d at 431. Our supreme court disagreed, holding the restraint of the victim constituted kidnapping "regardless of the

fact that the purpose of the seizure was to facilitate the commission of a sexual battery." Id. at 78, 310 S.E.2d at 431.[8]

In this case, the State presented voluminous testimony from Bank employees and customers that they were confined while the robbery was taking place. Under Hall, that single act of confinement could support a finding of kidnapping regardless of whether it was merely incidental to the commission of the armed robbery. Moreover, the testimony established there were people in the Bank who were being confined against their will but were not being robbed. We believe this act of confining the customers would support the kidnapping conviction independently of the confinement required to commit the armed robbery.

Accordingly, we find no error in the trial court's refusal to issue the kidnapping charge that Porter requested.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.[9]

SHORT, and LOCKEMY, JJ., concur.

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[8] Interestingly, the South Carolina rule appears to be the minority view among other jurisdictions that have considered this issue. See State v. Anthony, 817 S.W.2d 299, 305 (Tenn. 1991) (citing to at least fifteen states' appellate court decisions on this issue and stating that "[b]y an overwhelming margin, the majority view in other jurisdictions is that kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other crimes"); see also Model Penal Code § 212.1 (2001) (requiring movement over a substantial distance or confinement for a substantial period of time).

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James J. Bailey, Appellant,

v.

South Carolina Department of Health and Environmental Control and Jean Townsend, Respondents.

Appeal From Richland County
John D. Geathers, Administrative Law Judge

Opinion No. 4673
Heard February 10, 2010 – Filed April 6, 2010

AFFIRMED

Mary D. Shahid, of Charleston, for Appellant.

Elizabeth A. Dieck, of Mount Pleasant and Davis Arjuna Whitfield-Cargile, of Charleston, for Respondent South Carolina Department of Health and Environmental Control; and Christopher M.

Holmes, of Mount Pleasant, for Respondent Jean Townsend.

SHORT, J.: In this dispute involving a dock, James Bailey appeals from the Administrative Law Court's (ALC) order, arguing the ALC erred in: (1) finding the dock was a private dock; (2) failing to remand the permit application for consideration of the use of the proposed construction and the impact of the use on Bailey; and (3) determining Bailey lacked legal standing to contest the permit decision. We affirm.

FACTS

James Bailey, a landowner and part-time resident of Wadmalaw Island (the Island) in South Carolina, challenged DHEC's decision to issue a permit to Jean Townsend, a nearby property owner, for the modification of a private recreational dock. Bailey's property is downstream from Townsend's property, and it is separated from Townsend's property by two pieces of land, each owned separately by Dana Beach and James Wells, neither of which are a party to this case.[1] Wells' property is situated next to Townsend's property.

Townsend and her two sisters inherited the property and dock in 1996.[2] The dock was permitted by the War Department in 1948, and used as a commercial dock until 1995. Townsend's father ran a commercial shrimping operation from the dock for years until he became ill, and then he leased the dock to another commercial shrimping company. The dock was larger than most other docks in the area, and although the Island had been rezoned in the 1980s, the dock was grandfathered and allowed to exist in the form it was in during 1977.

In 2005, several portions of the dock's walkway collapsed, and DHEC granted two permits for repairs to the dock. Bailey objected to the repairs to

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[1] James Wells is Townsend's son.

[2] Townsend and her sisters jointly own the property as members of an LLC; however, we refer to the property as the Townsend's property to be consistent with the ALC's order.

the dock, and in response to Bailey's complaints, DHEC brought a revocation action in 2007, to remove a 64-foot portion of the dock that had already been approved and rebuilt.[3] The action was heard in 2008, by Administrative Law Judge Ralph King Anderson, III. Judge Anderson denied the revocation, which is not at issue in this case.

At issue in this case is a permit granted by DHEC on September 6, 2007, for modifications to Townsend's dock.[4] Although the construction involved adding a floating dock, it did not enlarge or alter the dock's original footprint because other parts of the dock were being removed. On September 19, 2007, Bailey mailed DHEC a request for final review of the decision, claiming the dock was being used commercially.[5] Specifically, Bailey argued the modification was not for Townsend's personal use but was to accommodate a fishing boat owned by John Bittner and a sailboat owned by Robert Johnson. Townsend claimed Bittner and Johnson were friends that she allowed to use her dock as a favor; however, Bailey asserted Bittner and Johnson's use of the dock was part of a commercial arrangement, indicating the beginning of a marina. Bittner's boat was a charter boat at one time, but it had not been since 1996 or 1997. Also, the boat did not have a captain, DNR charter license, business license, or tuna license, and it did not dock at a commercial facility as would be required if it were run as a charter. At times, both Bittner and Johnson had given money to Townsend to help pay for repairs to the dock or dock expenses, such as electricity and insurance; however, Townsend did not have a written agreement with them, and she did not rent slips or allow the general public access to the dock. As a result of Bailey's complaints, in 2008, Townsend requested that Bittner and Johnson stop giving her money for dock-related costs.

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[3] Based on Bailey's allegations, DHEC and the Charleston Planning Department conducted an investigation in 2006, but neither found any evidence of commercial activity taking place at the dock.

[4] For the purpose of this appeal, Bailey only objected to the conversion of a portion of the fixed dock to a floating dock with a walkway.

[5] According to Bailey's brief, the DHEC board decided not to hear the matter on October 18, 2007; however, a copy of this decision is not included in the Record on Appeal.

On November 16, 2007, Bailey filed a notice of request and request for a contested case hearing with the ALC. In his request, Bailey stated the grounds for review involved the permit's improper characterization of the construction as being for private recreational use when the dock was originally permitted as a commercial dock. Bailey asserted if Townsend wanted to use the dock for private use, she had to request a change of use from commercial to private, and if the change was permitted, the dock would have to be modified to conform with the regulations pertaining to private docks. A hearing was held on June 17, 2008, before Administrative Law Judge John Geathers, and was concluded by conference call on the record with counsel for all parties on July 3, 2008. Judge Geathers issued his order on July 23, 2008, finding Bailey lacked standing to contest the permit. This appeal followed.

STANDARD OF REVIEW

The ALC presides over all hearings of contested DHEC permitting cases and, in such cases, serves as the fact-finder and is not restricted by the findings of the administrative agency. S.C. Code Ann. § 1-23-600(A) (Supp. 2009); Terry v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 569, 573, 660 S.E.2d 291, 293 (Ct. App. 2008); Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 573, 577, 595 S.E.2d 851, 853 (Ct. App. 2004). This court's scope of review is set forth in section 1-23-610(B) of the South Carolina Code (Supp. 2009). That section 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:
>
> (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.

Id.; see S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 380 S.C. 349, 360, 669 S.E.2d 899, 904-05 (Ct. App. 2008) (finding this court's review of an ALC judge's order to be governed by S.C. Code Ann. § 1-23-610(C) (Supp. 2007)); Reliance Ins. Co. v. Smith, 327 S.C. 528, 535 n.6, 489 S.E.2d 674, 678 n.6 (Ct. App. 1997) (noting the standards of review established under S.C. Code Ann. §§ 1-23-380(A)(6) and 1-23-610(D) (Supp. 1996) are essentially identical, but declining to decide which section would apply to the case due to the similarities between the two sections).[6]

"Under our standard of review, we may not substitute our judgment for that of the [ALC] as to the weight of the evidence on questions of fact unless the [ALC's] findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control, 372 S.C. 351, 358, 641 S.E.2d 763, 766-67 (Ct. App. 2007). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would

[6] These sections can now be found in S.C. Code Ann. §§ 1-23-380(5) and 1-23-610(B) (Supp. 2009).

allow reasonable minds to reach the conclusion the ALC reached. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 130, 530 S.E.2d 643, 650 (Ct. App. 2000).

LAW/ANALYSIS

Bailey argues the ALC erred in finding he lacked legal standing to contest the permit decision. We disagree.

In Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), the United State Supreme Court enunciated a three-part standing test:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (internal citations omitted); see Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting Lujan).

Bailey asserts "his use and enjoyment of the creek and his dock have been and will continue to be harmed by the existing commercial use of Townsend's dock and the failure of [DHEC] to give proper review to that use." Bailey claims he has standing because he "has a concrete and particularized injury which is actual or imminent and not conjectural." He asserts this based on the following claims: (1) he uses his dock almost every weekend; (2) his enjoyment of the creek and his property has been adversely

affected by the continued commercial use of the dock and DHEC's failure to properly evaluate the dock's use; (3) there is a causal connection between the injury to his interests and the conduct complained of; and (4) his injury can be redressed by a remand to DHEC to require review of the actual use of the dock, which would provide a forum for Bailey to have his concerns evaluated and may lead to either a denial of the permit or an official recognition of the actual use of Townsend's dock.

Judge Geathers found Bailey lacked standing to challenge the dock permit because he failed to meet all three of the elements of the standing test. First, Judge Geathers found Bailey did not show an injury in fact from the permitted conversion of the fixed dock into a floating dock, and Bailey presented no evidence to support his contention that the dock was being used for commercial purposes. Further, he found that Bailey's concern that the dock would become a marina was conjectural and speculative. Second, Judge Geathers found no causal connection between Bailey's alleged injury and the permitted conversion of the fixed dock into a floating dock because the boats had been docked there for years, and they would continue to be docked there regardless of the permitting decision. Third, Judge Geathers found it was not likely that Bailey's alleged injury would be redressed by a favorable decision because the boats would remain at Townsend's dock regardless of whether the dock was a fixed or floating dock.

We find the evidence supports Judge Geathers' finding that Bailey lacks standing to contest the permit. Bailey admitted the dock interfered with the quiet enjoyment of his property whether it was fixed or floating. He also admitted he would not have a problem with the floating dock if there were no boats at the dock. Further, he admitted he did not have a problem with the Johnsons' sailboat being at the dock. He stated his concern was with Bittner's motor boat because it was large, and he worried about the boat breaking away from Townsend's dock and destroying his dock or hurting his children while they were in the water. Curtis Joyner, manager of wetland permitting and certification at DHEC, testified that regardless of the changes, the potential of having boats mooring at the dock would still exist. He also testified that the permitted dock changes that involved removing a portion of the dock and

adding a floating dock would not have any impact on the current navigation of the waterway because the dock would be the same length.

Bailey testified that his objection was over the dock being used in a commercial manner as a marina, and he asserted the Townsends did not need a forty-foot floating dock for their personal use. However, Bailey failed to present any evidence showing that Townsend's dock was being used for commercial purposes. Townsend asserted Bittner and Johnson were friends that she allowed to use the dock as a favor, not as a commercial arrangement. Townsend did not have a written agreement with Bittner or Johnson to pay her for using the dock, and she did not rent slips or allow the general public access to the dock. Further, due to Bailey's claims, Townsend requested that Bittner and Johnson stop giving her money for dock-related costs.

Therefore, we find no error in Judge Geathers' determination that Bailey lacked standing to challenge the dock permit because he failed to meet all three of the elements of the standing test. Because we affirm the ALC's order finding Bailey lacks standing to contest the permit decision, we need not address Bailey's remaining arguments. 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 review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the ALC's order is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.