The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF MICHAEL JAMES SARRATT, PETITIONER

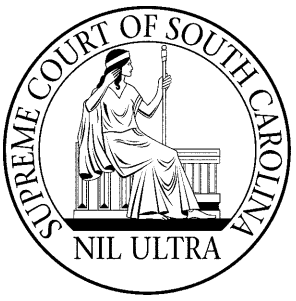
On January 7, 2011, Petitioner was definitely suspended from the practice of law for nine (9) months, retroactive to February 4, 2010. In the Matter of Sarratt, 390 S.C. 649, 407 S.E.2d 349 (2011). He has now filed a petition to be reinstated.

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

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

These comments should be received no later than June 13, 2011.

Columbia, South Carolina
April 12, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
April 25, 2011
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

MRI at Belfair, LLC, and Hilton Head Regional Medical Center, Appellants,

v.

South Carolina Department of Health and Environmental Control and Southern MRI, LLC, Respondents.

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

Opinion No. 26962
Heard October 5, 2010 – Filed April 25, 2011

REVERSED IN PART, VACATED IN PART, AND REMANDED

M. Elizabeth Crum and Kelly M. Jolley, of McNair Law Firm, P.A., of Columbia, for Appellant MRI at Belfair, LLC.

Daniel J. Westbrook, Travis Dayhuff, and Holly G. Gillespie, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant Hilton Head Regional Medical Center.

Carlisle Roberts, Jr., Nancy S. Layman, Ashley C. Biggers, and Kristin L. Pawlowski, all of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

E. Wade Mullins, III, of Bruner, Powell, Robbins, Wall & Mullins, LLC, of Columbia, for Respondent Southern MRI, LLC.

JUSTICE KITTREDGE: In this appeal, Appellants challenge a determination by the Department of Health and Environmental Control ("DHEC") that the total project cost of Respondent Southern MRI's purchase of magnetic resonance imaging equipment was less than $600,000. If the total project cost exceeded $600,000, Southern MRI should have applied to DHEC for a Certificate of Need ("CON"). If the total project cost did not exceed $600,000, Southern MRI did not need to apply for a CON. We reverse in part, vacate in part, and remand for further proceedings.

I.

The State Certification of Need and Health Facility Licensure Act ("the CON Act") requires "[a] person or health care facility . . . to obtain a Certificate of Need . . . before undertaking any" of several types of projects enumerated in the Act. S.C. Code Ann. § 44-7-160 (2002 & Supp. 2010). One type of project that requires a CON is "the acquisition of medical equipment which is to be used for diagnosis or treatment," if the total project cost for the acquisition exceeds $600,000. Id. § 44-7-160(6); 24A S.C. Code Ann. Regs. 61-15 § 102(1)(f) (1976 & Supp. 2010).

When there is a question about whether a particular project exceeds the $600,000 threshold, the "potential applicant" must request "a formal

determination by the Department as to the applicability of the certificate of need requirements to [that] project." 24A S.C. Code Ann. Regs. 61-15 § 102(3). A formal determination that the total project cost does not exceed $600,000 is called a Non-Applicability Determination ("NAD").

Southern MRI requested a NAD for MRI equipment to be located at a new imaging center in Hilton Head, South Carolina. The imaging center would also include a host of other equipment, specifically a computed tomography ("CT") unit, two ultrasound machines,[1] a DEXA (which is used for measuring bone density), and an x-ray unit. These various forms of imaging equipment are referred to throughout the record, and this opinion, as "modalities."

DHEC treated each of these six modalities as a separate project for the purpose of the NAD request. However, because all six modalities would be located in a single building, they shared certain capital costs. For this reason, DHEC attributed a portion of each shared cost to each modality. Significantly, DHEC chose to allocate each modality an equal share. Using this allocation method, DHEC determined the total project cost for the MRI was less than $600,000. Thus, DHEC issued a NAD to Southern MRI, allowing Southern MRI to construct the imaging center and acquire the MRI.

Appellants MRI at Belfair and Hilton Head Regional Medical Center challenged the NAD in a contested case hearing before the Administrative Law Court ("ALC"), arguing the total project cost for the MRI exceeded $600,000.[2] The ALC upheld the NAD. The appeal was certified to this Court pursuant to Rule 204, SCACR.

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[1] Southern MRI later determined that it would not pursue a second ultrasound machine. Instead, it entered into a purchase agreement for a mammography unit.

[2] After receiving its NAD, Southern MRI successfully moved to lift the automatic stay imposed by section 1-23-600 of the South Carolina Code during the pendency of the contested case. Southern MRI proceeded with construction, opened the imaging center, and began serving patients.

On appeal, the parties present us with two main disputes. First, Appellants contend DHEC's method for allocating shared costs equally among the six modalities was improper. Second, Appellants contend DHEC undervalued the land and building leased by Southern MRI. Appellants contend that a proper calculation of the value of the property and a proper allocation of shared costs would result in a determination that the total project cost for the MRI exceeded $600,000.

II.

On appeal from a final decision of the ALC in a contested case, we "may reverse or modify the decision if the substantive rights of the [Appellants] have been prejudiced because the finding, conclusion, or decision is: . . . (d) affected by [an] 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) (2005 & Supp. 2010).

III.

A. Allocation of Shared Costs

DHEC regulations define "total project cost" as:

> [T]he estimated total capital cost of a project including land cost, construction, fixed and moveable equipment, architect's fee, financing cost, and other capital costs properly charged under generally accepted accounting princip[le]s as a capital cost. The determination of project costs involving leased equipment o[r] buildings will be calculated based on the total value (purchase price) of the equipment or building being leased.

24A S.C. Code Ann. Regs. 61-15 § 103(25). The six modalities in the imaging center shared several of the costs enumerated in this definition. For example, they shared common areas of the leased building, certain fixed and moveable equipment, and financing costs. Appellants argue it was improper for DHEC to allocate these shared costs equally among the modalities. We agree under the circumstances of this case.

The parties have focused much debate on whether DHEC was required to apply generally accepted accounting principles ("GAAP") when allocating shared costs. Each party contends application of GAAP can only lead to one result, and that result is the one advocated by its expert. The competing opinions of the GAAP experts refute the premise of a single answer. GAAP are not a precise science. GAAP require the exercise of professional judgment and can lead to varying results. Here, the parties presented conflicting expert testimony with regard to whether DHEC's method of allocating shared costs was GAAP-compliant. Thus, given the inherent mix of objective and subjective considerations at play in a GAAP determination, application of GAAP is easier said than done. There is no bright-line application of GAAP in this case that easily answers the CON monetary threshold. Instead, we turn to "[t]he cardinal rule of statutory construction" that we must "ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998).

The express purposes of the CON Act are "to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002). The calculation of total project cost, then, is part of the mechanism by which the CON Act achieves its goal of cost containment. As such, DHEC must calculate total project cost in a manner that reflects the **true** cost of the project at issue. If a reasonable estimate of the cost of a project exceeds $600,000, it would be directly contrary to the purposes of the CON Act to allow that project to avoid CON review. See id. ("To achieve these purposes,

this article requires: (1) the issuance of a Certificate of Need before undertaking a project prescribed by this article . . . ."). The CON regulations require DHEC to use "[c]ommon practice and common sense" in determining whether a proposal presents a single expenditure for purposes of the $600,000 threshold, and further provide that "[a]n applicant should not be allowed to split what is really one expenditure into two or more for the purpose of avoiding review." 24A S.C. Code Ann. Regs. 61-15 § 102(2). Accordingly, DHEC must not allow a potential CON applicant to avoid the CON process based on an arbitrary factor. DHEC's method for allocating shared costs in this case had precisely that effect.

At the contested case hearing, DHEC witnesses explained that DHEC had recently changed its approach to allocating shared costs in imaging centers. Previously, DHEC's practice had been to calculate the total project cost using two alternative allocation methods, then use whichever figure was higher to make its Non-Applicability Determination. DHEC would (1) divide shared costs by the number of modalities and (2) allocate shared costs in proportion to the amount of clinical space dedicated to each modality. The latter method, referred to as the "relative square footage" method, is one of the allocation methods now advanced by Appellants.

When a new DHEC employee assumed responsibility for NAD requests, she proposed a change to DHEC's practice. This employee testified as follows:

> [I]t made more sense to -- to allocate as a percentage [of] clinical space with physician practices because often within physician practices there's only one modality. And that's certainly not their -- their sole practice or -- or their main function. Their main function is to see patients, and this is there as a service to their patients.
>
> With an imaging center there's often more than one modality, and their main function is to provide imaging services. It made sense to me to prorate based on the amount of clinical

> space to physician's practices and to prorate based on the number of modalities with imaging centers.

On the suggestion of this employee, DHEC began allocating shared costs in imaging centers by dividing by the number of modalities. DHEC nevertheless continued to apply the relative square footage method advanced by Appellants to other entities, such as physicians' offices, that submitted NAD requests for the same equipment.

We find this distinction arbitrary because the differing purposes of imaging centers, physicians' offices and other facilities have no real impact on the cost of the equipment each might seek to acquire. Clearly, DHEC's policy shift and distinction in allocation method can have a profound impact on the total project cost. For example, using the relative square footage method, the MRI in this case would have been allocated 32.422 percent of each shared cost, rather than one-sixth (16.667 percent) of each shared cost.[3] Moreover, the statutory and regulatory framework contemplates that imaging centers seeking to purchase the same equipment as other facilities must compete with those other facilities in the CON process. See 24A S.C. Code Ann. Regs. 61-15 § 307(2) ("In the case of competing applications, [DHEC] shall award a Certificate of Need, if appropriate, on the basis of which [application], if any, most fully complies with the requirements, goals, and purposes of the [CON] program, State Health Plan, project review criteria, and any regulations developed by [DHEC]."). Thus, DHEC's calculation of total project cost was affected by an arbitrary factor that strayed substantially from legislative intent and worked substantial prejudice to Southern MRI's competitors.

Given legislative intent, specifically the need for DHEC's calculation to reflect the practical reality of the proposal, it follows that the function of multiple modalities in a single facility can be relevant to the choice of an

[3] The ALC found the imaging center included 616.86 square feet of clinical space dedicated to the MRI and 1285.72 square feet of clinical space dedicated to the other imaging modalities. Thus, the MRI accounted for 32.422 percent of the total clinical space in the imaging center.

appropriate allocation method. For example, if the equipment sought to be purchased forms the main basis for the construction of the facility as a whole, then it might be reasonable in light of the purposes of the CON Act to charge that equipment with a greater portion of the overhead costs of the facility than might be charged to other, smaller projects within the same building. In this way, DHEC retains the flexibility to choose an allocation method that best suits the realities, and more accurately captures the true capital cost, of a project proposal. Cf. 24A S.C. Code Ann. Regs. 61-15 § 102(2) (requiring DHEC to apply "[c]ommon practice and common sense," to prevent applicants from splitting "what is really one expenditure into two or more for the purpose of avoiding review," and to avoid "lump[ing] projects together arbitrarily to bring them under review"). Where, as here, DHEC's chosen method has no basis in the facts of the proposal and arbitrarily allows a potential applicant to avoid the CON review process, it is contrary to the purposes of the CON Act and therefore an error of law.

We note that by maintaining a rational fit between the allocation method and the proposal at issue, DHEC can avoid creating incentives for potential applicants to manipulate the NAD process and avoid CON review. If DHEC always divides shared costs by the number of modalities in an imaging center, an imaging center seeking to avoid CON review could purchase unnecessary but inexpensive equipment in order to drive down the total project cost of other, more expensive equipment. This danger is especially pronounced where, as here, the modalities at issue are different in every meaningful way. For example, DHEC acknowledged at oral argument that the MRI was significantly more expensive and required considerably more space than the other imaging modalities. The MRI was also expected to generate more patient traffic and more revenue than the other modalities. DHEC's current allocation method left such disparities in the investment in and importance of each modality unaccounted for, making the NAD process vulnerable to manipulation.[4]

[4] Other allocation methods could also invite manipulation. For example, a relative square footage method could be manipulated by placing inexpensive equipment in unnecessarily large rooms. The key to avoiding such gamesmanship is to look at the practical realities of the proposal.

In sum, DHEC's policy shift concerning imaging centers and its choice of allocation method in this case are manifestly at odds with legislative intent. Thus, the deference we normally accord an agency's policy determinations is not warranted. See S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."). Where modalities are truly similar, a division by modalities may be an appropriate method of capturing and allocating total project costs for CON purposes. Here, however, DHEC conceded that the MRI was the key financial producer and main expenditure for the proposed imaging center.[5] Treating the other lesser modalities equally did not reflect the true cost of this project. DHEC's approval of an equal allocation of costs among manifestly unequal modalities resulted in an artificial reduction in total project cost. As a result, we find that DHEC erred as a matter of law. In so holding, we do not mandate any particular allocation formula, nor do we foreclose the possibility that DHEC might return to its previous practice of applying the highest figure obtained under any allocation method. Nevertheless, the method chosen by DHEC must provide a reasonable estimate of the true cost of the project at issue.

We turn now to Appellants' challenge to the appraised value of the property.

B. Value of the Property

As defined by regulation, the total project cost for the MRI included the cost of leasing the building in which the imaging center was located, and this cost was to be calculated "based on the total value (purchase price) of the . . . building being leased." 24A S.C. Code Ann. Regs. 61-15 § 103(25). Thus, Southern MRI provided DHEC with an appraisal by Gary Beaver, an appraiser licensed in South Carolina, valuing the property at $500,000. DHEC accepted this appraisal and attributed one-sixth of that cost to the MRI

[5] At oral argument, DHEC referred to the six modalities as "one big thing and five little things." The "one big thing" was the MRI.

project. The ALC upheld this decision. Appellants contend the ALC erred in relying on the Beaver appraisal. We vacate this finding and place the property valuation issue before the ALC for a *de novo* determination.

At the contested case hearing, Appellants presented evidence that Beaver was disciplined by the Colorado Board of Real Estate Appraisers for failure to properly understand and employ recognized appraisal methods, and his license in Colorado was eventually revoked. More importantly for our purposes on appeal, Appellants presented evidence that several assumptions underlying the $500,000 appraisal in this case were inaccurate. For example, Appellants presented evidence—and the ALC found—that the building measured 5,083 square feet. Beaver's appraisal, however, stated the building was 5,016 square feet. As another example, Beaver made deductions from the appraised value of the building to account for the cost of mold remediation estimated at $30,000, but Appellants presented evidence that the actual cost of mold remediation was only $1,200. Appellants offered an alternative value for the property of $775,000, based on their expert's appraisal. Southern MRI also offered an alternative value through Thomas Pietras, a certified public accountant and GAAP expert. Pietras valued the property at $634,500.

The ALC found Appellants "did not prove by a preponderance of the evidence that it was contrary to the applicable regulations to rely on Beaver's appraisal." However, the ALC acknowledged the Beaver appraisal was questionable, stating:

> Applying GAAP to Beaver's appraisal may bring into question its reliability. In that event, the court is persuaded by Pietras's land valuation, which he determined by capitalizing the purchase option contained in the lease executed between Southern MRI and its landlord. The market value of the land and building would then be $634,500.

As discussed above, the total project cost must be a reasonable estimate of the true capital cost of the project at issue. Accordingly, to show that

using Beaver's appraisal was "contrary to the applicable regulations," Appellants needed only show that Beaver's appraisal was unreasonable. To the extent the ALC's decision implies Appellants needed to make some additional showing, the decision was affected by an error of law. It appears to us that the ALC felt constrained to follow DHEC's acceptance of the Beaver appraisal; as the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence. The reasonableness of an appraisal is clearly an issue of fact, subject to the substantial evidence standard of review. Here, the ALC did not make a finding that Beaver's appraisal was reasonable and expressly found a higher value for the property "persuasive." We vacate and remand for a *de novo* determination of the value of the property.

IV.

The express purposes of the CON Act, which include preventing unnecessarily duplicative facilities and services and containing costs, require DHEC to calculate total project cost in a manner that reflects the true cost of the project at issue. DHEC's method of allocating shared costs in this case—which was accepted by the ALC—permitted Southern MRI to reduce its total project cost based on a factor unrelated to the realities of its proposed imaging center. This was an error of law, and we reverse the portion of the ALC's order that relied on an equal division of shared costs. Moreover, the ALC failed to recognize that it would be contrary to the CON Act and its applicable regulations to rely on an appraisal that was not a reasonable estimate of the value of the property leased by Southern MRI. Thus, if the Beaver appraisal was unreasonable, it was error to rely on it. For this reason, we vacate the portion of the ALC's order that relied on the Beaver appraisal. We remand for further proceedings.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of J.M. Long, III, Respondent.

Opinion No. 26963
Submitted March 28, 2011 – Filed April 25, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Susan B. Hackett, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Russell Blake Long, of Myrtle Beach, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent 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 admonition, public reprimand, or definite suspension from the practice of law for any period up to and including nine (9) months. In addition, respondent agrees to obtain mental health counseling for a period of one year and to provide the Commission on Lawyer Conduct (the Commission) with quarterly reports from his mental health counselor certifying his cooperation with counseling. Respondent requests that the period of suspension be made retroactive to the date of his interim

suspension.[1] We accept the agreement and impose a nine month suspension, retroactive to the date of respondent's interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

On November 23, 2009, the City of Conway Police Department issued two warrants for respondent's arrest on charges of indecent exposure. The arrest warrants alleged that on November 10, 2009, and November 16, 2009, respondent exposed his private parts in plain view of the public. According to statements by witnesses, respondent was inside his law office standing behind a clear glass storm door at the time of the exposures.

On November 24, 2009, respondent voluntarily surrendered to the police. He was released on bond the same day.

On January 25, 2010, respondent was served with two additional warrants for indecent exposure. The warrants alleged that during the spring and summer of 2006, respondent indecently exposed himself while standing behind the glass storm door of his home.

In 2011, a grand jury indicted respondent on two counts of exposure of private parts in a lewd and lascivious manner. On January 6, 2011, respondent entered a plea to two counts of exposing private parts pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). The remaining counts of indecent exposure were dismissed by the prosecutor. Respondent was sentenced to thirty (30) days in jail or a fine of $300 on each count. Respondent paid the fines.

LAW

Respondent admits that by his misconduct he has violated the following Rule of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it

[1] On March 1, 2010, the Court placed respondent on interim suspension. In the Matter of Long, 387 S.C. 19, 690 S.E.2d 774 (2010).

is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects). In addition, respondent admits that his actions constitute grounds for discipline under Rule 7(a)(5), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months, retroactive to the date of his interim suspension. Further, respondent shall obtain mental health counseling for a period of one (1) year from the date of this opinion and shall provide quarterly reports from his mental health counselor to the Commission certifying his cooperation with counseling. Respondent shall pay the costs incurred in the investigation and prosecution of this matter no later than thirty (30) days from the date of this opinion. Within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating he has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, 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 Anonymous
Member of the South Carolina
Bar, Respondent.

Opinion No. 26964
Heard September 22, 2010 – Filed April 25, 2011

LETTER OF CAUTION

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

David Dusty Rhoades, of Charleston, and Cynthia Barrier Patterson, of Columbia, for Respondent.

PER CURIAM: In this attorney discipline matter, the Hearing Panel (the Panel) determined Respondent was subject to discipline for violating Rule 7(a)(5), RLDE, Rule 413, SCACR, and Rule 8.4(e), RPC, Rule 407, SCACR, both of which provide that a lawyer may be disciplined for engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute, and Rule 7(a)(6), RLDE, Rule 413, SCACR, which provides it is a ground for discipline for an attorney to violate the attorney's oath of office. A majority of the Panel concluded Respondent's action warranted an admonition and would require Respondent to pay the costs of this proceeding, while one member of the Panel recommended Respondent receive a Letter of Caution with a finding of minor misconduct. We find that

Respondent did violate the rules outlined above, but we disagree with the majority of the Panel's recommendation. We find Respondent's acknowledgement of misconduct and remorse to be sincere and effective in the mitigation of our sanction. Accordingly, we issue a private Letter of Caution with a finding of minor misconduct to Respondent.

Additionally, for the benefit of the bar, we take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. We are concerned with the increasing complaints of incivility in the bar. We believe United States Supreme Court Justice Sandra Day O'Connor's words elucidate a lawyer's duty: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Sandra Day O'Connor, *Professionalism*, 76 Wash. U. L.Q. 5, 8 (1998).

FACTS

The formal charges in this matter arose out of a disciplinary complaint regarding an e-mail message Respondent sent to opposing counsel (Attorney Doe) in a pending domestic matter. Respondent represented the mother and Attorney Doe represented the father in an emotional and heated domestic dispute. It was within this context that Respondent sent Attorney Doe the following e-mail (the "Drug Dealer" e-mail):

> I have a client who is a drug dealer on . . . Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly

> educated and financially successful and their child turning out buying drugs from a crack head at night on or near . . . Street. Think about it. Am I right?

Attorney Doe's spouse, also an attorney, filed the complaint in this matter after Attorney Doe disclosed the "Drug Dealer" e-mail to him. At the hearing, Respondent admitted that Attorney Doe's daughter had no connection to the domestic action.

At the hearing, Respondent asserted that the e-mail was in response to daily obnoxious, condescending, and harassing e-mails, faxes, and hand-delivered letters from Attorney Doe. These communications allegedly commented on the fact that Respondent is not a parent and therefore could not advise Respondent's client appropriately.[1] In support of this contention, Respondent submitted five e-mail exchanges between Respondent and Attorney Doe, four of which were dated after the "Drug Dealer" e-mail. In further support of Respondent's assertions, Respondent claimed to possess ten banker's boxes full of e-mails and other documents that constituted daily bullying from Attorney Doe; however, these documents were not produced. Due to a lack of evidence supporting Respondent's assertions, the Panel found Respondent's testimony to be entirely lacking in credibility. Ultimately, the Panel found Respondent was subject to discipline for sending the "Drug Dealer" e-mail to Attorney Doe.

STANDARD OF REVIEW

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000) (citations omitted). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses." *In re Marshall*, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998)

[1] A complaint filed by Respondent against Attorney Doe was concluded in a confidential manner.

(citation omitted). "However, this Court may make its own findings of fact and conclusions of law." *Id.* (citation omitted).

LAW

I. Conduct Prejudicial to the Administration of Justice

"It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(e), RPC, Rule 407, SCACR. Additionally, a lawyer is subject to discipline for "engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute . . . ." Rule 7(a)(5), RLDE, Rule 413, SCACR. This Court has stated that a lawyer "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client." *In re Goude*, 296 S.C. 510, 512, 374 S.E.2d 496, 497 (1988).

We agree with the Panel that Respondent's e-mail was conduct tending to bring the legal profession into disrepute and was prejudicial to the administration of justice. By sending the "Drug Dealer" e-mail to Attorney Doe, Respondent was doing a disservice to Respondent's client. An e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client. This kind of personal attack against a family member of opposing counsel with no connection to the litigation brings into question the integrity of the judicial system and prejudices the administration of justice.

II. Violation of the Lawyer's Oath

Respondent contends that the civility clause contained within the lawyer's oath is unconstitutionally vague and overbroad. We disagree.

Respondent took the lawyer's oath which includes the following clause, "To opposing parties and their counsel, I pledge fairness, integrity, and

civility, not only in court, but also in all written and oral communications . . . ." Rule 402(k), SCACR. The United States Supreme Court has noted that lawyers are not entitled to the same First Amendment protections as laypeople. *See In re Snyder*, 472 U.S. 634, 644–45, 105 S. Ct. 2874, 2881 (1985). Moreover, attorneys' "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In re Sawyer*, 360 U.S. 622, 646–47, 79 S. Ct. 1376, 1388 (1959) (Stewart, J., concurring). "Even outside the courtroom, . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071, 111 S. Ct. 2720, 2743 (1991).

A. Vague

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001) (citation omitted).

In *Grievance Administrator v. Fieger*, 719 N.W.2d 123 (Mich. 2006), *cert. denied*, 549 U.S. 1205, 127 S. Ct. 1257 (2007), an attorney challenged the constitutionality of Michigan's "civility" and "courtesy" rules for lawyers. That court held, "Such a challenge cannot be successfully advanced here because there is no question that even the most casual reading of these rules would put a person clearly on notice that the kind of language used by Mr. Fieger would violate MRPC 3.5(c) and MRPC 6.5(a)." *Fieger*, 719 N.W.2d at 139. In this case, there is no question that even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's "Drug Dealer" e-mail violates the civility clause. Casting aspersions on an opposing counsel's offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause. While no one argued it in this case, it could be argued that the language used by Respondent in the "Drug Dealer" e-mail constituted fighting words. Moreover, a person of common

intelligence does not have to guess at the meaning of the civility oath. We hold, as the court held in *Fieger*, that the civility oath is not unconstitutionally vague.

B. Overbroad

"The First Amendment overbreadth doctrine is an exception to the usual rules regarding the standards for facial challenges." *In re Amir X.S.*, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006). Under the overbreadth doctrine, "the party challenging a statute simply must demonstrate that the statute could cause someone else—anyone else—to refrain from constitutionally protected expression." *Id.* (citation omitted). The overbreadth doctrine has "been implemented out of concern that the threat of enforcement of an overly broad law may deter or 'chill' constitutionally protected speech—especially when the overly broad law imposes criminal sanctions." *Id.* at 384-85, 639 S.E.2d at 146 (citation omitted). The overbreadth doctrine:

> . . . permits a court to wholly invalidate a statute only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep—until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protected expression.

Id. at 385, 639 S.E.2d at 146–47 (citation omitted).

A court analyzing whether a disciplinary rule violates the First Amendment must balance "the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073, 111 S. Ct. 2720, 2744 (1991). "In those instances where a lawyer's unbridled speech amounts to misconduct which threatens a significant state interest, a state may restrict the lawyer's exercise of personal rights guaranteed by the Constitutions." *In re Johnson*, 729 P.2d 1175, 1178 (Kan. 1986) (*citing N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340–41 (1963)). "A layman may, perhaps, pursue his theories of free speech . . . until

he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics." *In re Woodward*, 300 S.W.2d 385, 393–94 (Mo. 1957).

The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked Attorney Doe. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client. There is no substantial amount of protected free speech penalized by the civility oath in light of the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad.

CONCLUSION

We find Respondent violated Rule 7(a)(5), RLDE, Rule 413, SCACR, and Rule 8.4(e), RPC, Rule 407, SCACR, both of which provide that a lawyer may be disciplined for engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute, and Rule 7(a)(6), RLDE, Rule 413, SCACR, which provides it is a ground for discipline for an attorney to violate the attorney's oath of office. Because we find Respondent's acknowledgement of misconduct and remorse to be sincere, we issue a private Letter of Caution with a finding of minor misconduct to Respondent. We publish this Letter of Caution in the *In re Anonymous* format so as to provide guidance to the bar. We caution the bar that henceforth, this type of conduct could result in a public sanction.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. JUSTICE PLEICONES has filed a separate opinion.

JUSTICE PLEICONES: As I would impose no sanction or other requirement in connection with this matter, I respectfully decline to join in the opinion.

The Supreme Court of South Carolina

In the Matter of James Michael Brown, Respondent.

ORDER

On April 8, 2011, respondent was arrested and charged with felony driving under the influence resulting in death,[1] leaving the scene of an accident, open container, and driving under the influence, second offense. The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a) RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

Columbia, South Carolina

April 13, 2011

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[1] At the time of the arrest, the pedestrian victim was not expected to live. However, as of the date of the Petition for Interim Suspension, the victim has survived.

The Supreme Court of South Carolina

In re: Amendments to Rule 424, SCACR

_____

O R D E R

_____

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 424, SCACR, is hereby amended as follows:

The term "$500" shall be amended to "$1,000" in Rule (b).

This amendment shall take effect immediately.

Further, Rule (e) shall state:

(e) Disciplinary Provisions: A person licensed to practice as a foreign legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the Bar of this State and to this end:

(1) every person licensed to practice as a foreign legal consultant under these Rules:

(A) shall be subject to control by the Supreme Court and to admonition, reprimand, or suspension of his or her license to practice by the Supreme Court of the State of South Carolina and shall otherwise be governed by Rule 407, South Carolina Appellate Court Rules; and

(B) shall execute and file with the Clerk of the Supreme Court, in such form and manner as such court may prescribe:

(i) his or her commitment to observe the Rules of Professional Conduct Rule 407, South Carolina Appellate Court Rules, to the extent applicable to the legal services authorized under Section (c) of this Rule;

(ii) a written undertaking to notify the Supreme Court of any change in such person's good standing as a member of the foreign legal profession referred to in Section (a)(1) of this Rule and of any final action of the professional body or public authority referred to in (b)(1) of this Rule imposing any disciplinary censure, suspension, or any other sanction upon such person; and

(iii) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the Clerk of the Supreme Court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State whenever, after due diligence, service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such Clerk by means of a duly

acknowledged supplemental instrument in writing.

This amendment shall take effect immediately and shall apply to all pending Applications for Certification as a Foreign Legal Consultant.

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 22, 2011

The Supreme Court of South Carolina

Maria A. Hollins, as Parent and Guardian ad Litem for Jane Doe, a minor under the age of fourteen years, Petitioner,

v.

Wal-Mart Stores, Inc., Respondent.

ORDER

This Court granted petitioner's request for a writ of certiorari to review the Court of Appeals' decision in *Hollins v. Wal-Mart Stores, Inc.*, 381 S.C. 245, 672 S.E.2d 805 (Ct. App. 2008). After briefing and oral argument, the Court dismissed the writ of certiorari as improvidently granted. *Hollins v. Wal-Mart Stores, Inc.*, Op. No. 26937 (S.C. Sup. Ct. filed March 7, 2011). Petitioner has filed a petition for rehearing, and respondent moves to strike the petition for rehearing.

Rule 221(a), SCACR, prohibits petitions for rehearing from the denial of a writ of certiorari to the Court of Appeals. For purposes of Rule 221(a), a dismissal of a writ of certiorari as improvidently granted is

equivalent to the denial of a petition for a writ of certiorari since both dispositions indicate this Court has determined there is no need to discuss or further review the merits of the case. *Cf., Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009) (prohibiting further review in post-conviction relief actions when the Court of Appeals determines the matter does not merit discussion). Accordingly, no petition for rehearing is permitted from a dismissal of a writ of certiorari as improvidently granted. We, therefore, grant the motion to strike the petition for rehearing in this matter.

IT IS SO ORDERED.

s/ Costa M. Pleicones A.C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Moore, A.J., and Waller, A.J., not participating

Columbia, South Carolina

April 21, 2011

The Supreme Court of South Carolina

In the Matter of George E. Lafaye, III, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that T. Lowndes Pope, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Pope shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Pope may make disbursements from respondent's

trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that T. Lowndes Pope, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that T. Lowndes Pope, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Pope's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

April 21, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances S. Hudson, Deceased Employee, by Kenneth L. Hudson and Keith B. Hudson, Co-Executors of her Estate, as well as Matthew Deese and/or Andrew Deese, Respondents,

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company, In Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier, Appellants.

Opinion No.4705
Heard March 3, 2010 – Filed June 30, 2010
Withdrawn, Substituted and Refiled February 4, 2011
Withdrawn, Substituted and Refiled April 21, 2011

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

AFFIRMED IN PART AND REVERSED IN PART

E. Ros Huff, Jr., of Irmo, for Appellants Lancaster Convalescent Center and Legion Insurance Company, and Mark D. Cauthen and Peter P. Leventis, both of Columbia, for Appellant South Carolina Property and Casualty Insurance Guaranty Association.

Andrew Nathan Safran and Pope D. Johnson, both of Columbia, and Ann McCrowey Mickle, of Rock Hill, for Respondents.

LOCKEMY, J.: In this workers' compensation action, Lancaster Convalescent Center (Employer) and Legion Insurance Company (Legion), in liquidation through South Carolina Property and Casualty Insurance Guaranty Association (the Guaranty Association), appeal the circuit court's decision affirming the decision of the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) to award Frances S. Hudson certain workers' compensation benefits. We affirm in part and reverse in part.

FACTS

This appeal comes to this court after several workers' compensation hearings. In 1997, Frances S. Hudson sustained an injury to her left leg while in the course and scope of her employment with Employer for which she received workers' compensation benefits. Later, in an order dated October 3, 2001, the single commissioner found Hudson permanently and totally disabled based on a combination of injuries stemming from her original 1997 work-related injury. Due to the combination of her injuries, the single commissioner found Hudson unable to perform any kind of work.

Thereafter, Hudson requested a lump-sum payment of her disability award, but Employer and Legion objected. After a hearing on the matter, the single commissioner found it was in Hudson's best interests to receive the

lump-sum payment of her previous award. The single commissioner noted that the South Carolina Code vests authority in the Workers' Compensation Commission to determine, with discretion, whether a lump-sum payment is in an employee's best interest. During the pendency of the lump-sum workers' compensation proceedings, Hudson died from cancer on June 30, 2002.

Employer and Legion appealed the single commissioner's ruling to the Appellate Panel and argued it was error to award Hudson the lump-sum award. Thereafter, the Appellate Panel affirmed all of the single commissioner's findings of facts and conclusions of law, sustaining his order in its entirety. On July 28, 2003, Legion became insolvent. Accordingly, after the ruling regarding the lump-sum payment was rendered, the circuit court stayed the appeal due to Legion's insolvency. During the stay, the Guaranty Association assumed all rights, duties, and obligations of Legion as the insolvent insurance carrier pursuant to section 38-31-60 of the South Carolina Code (Supp. 2009). Thereafter, Employer and the Guaranty Association appealed the Appellate Panel's order to the circuit court and argued it was error to award the lump-sum award, and the Appellate Panel's order must be vacated in light of Hudson's untimely death.

The Honorable Paul E. Short, then a circuit court judge, affirmed the Appellate Panel's order in its entirety by written order. The circuit court found substantial evidence supported the Appellate Panel's lump-sum award and that the award was not inconsistent with section 42-9-301 of the South Carolina Code (1985). Concerning whether Hudson's death impacted the workers' compensation proceedings, the circuit court found this issue was not preserved for review. Additionally, the circuit court found Employer and Legion's assertion regarding the abatement of Hudson's claim was unpersuasive. Employer and the Guaranty Association appealed the circuit court's decision to this court, but they subsequently withdrew the appeal. Consequently, our clerk of court signed an order of dismissal and remittitur on April 20, 2004.

At some point during the proceedings, Employer and the Guaranty Association learned of Hudson's death and ceased making payments. In response, Kenneth and Keith Hudson, as executors of their mother's estate (the Estate), requested payment of the lump-sum award. The Hudson sons

raised the issue on behalf of Matthew and Andrew Deese, Hudson's dependent grandchildren. Specifically, the Estate argued the grandchildren were entitled to payment of the lump sum, as Hudson's dependents. Employer and the Guaranty Association argued Hudson's lump-sum payment abated upon her death and maintained they were not obliged to pay any sum. The single commissioner found Judge Short's 2004 order, which addressed Hudson's lump-sum award, could not be challenged or relitigated. Specifically, the single commissioner found: (1) Hudson's disability award could reasonably fall within section 42-9-10 of the South Carolina Code (Supp. 2009); (2) all of the current beneficiaries had colorable claims to the lump-sum proceeds; and (3) the Guaranty Association failed to establish abatement under section 42-9-280 of the South Carolina Code (1985). Further, the single commissioner ordered the Guaranty Association to pay the lump sum with interest and a ten percent penalty within seven days of the order.

Again, Employer and the Guaranty Association appealed the single commissioner's order. On appeal, the Appellate Panel affirmed all of the single commissioner's factual findings and legal conclusions with the exception of the ten percent penalty imposed. Specifically, the Appellate Panel noted the Guaranty Association did not pursue a frivolous defense. Thereafter, the Estate and the Guaranty Association cross-appealed to the circuit court. The Honorable Kenneth Goode issued an order affirming the Appellate Panel with the exception of the ten percent penalty it vacated. In his order, Judge Goode concluded section 42-9-90 of the South Carolina Code (1985) compelled a penalty; accordingly, he reinstated the penalty. This appeal followed.

STANDARD OF REVIEW

"The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission." Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d

874, 877 (Ct. App. 2006). Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Forrest, 373 S.C. at 306, 644 S.E.2d at 785; see also S.C. Code § 1-23-380(5) (Supp. 2009). The appellate court may reverse or modify the Appellate Panel's decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Forrest, 373 S.C. at 306, 644 S.E.2d at 785-86. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

LAW/ANALYSIS

I. Abatement

Employer and the Guaranty Association argue the circuit court erred in affirming the Appellate Panel's decision finding Hudson's lump-sum award survived her death. However, Judge Short's order found this issue was not properly before the circuit court in 2004 because Employer and the Guaranty Association failed to raise it to the Appellate Panel after Hudson died. Employer and the Guaranty Association appealed Judge Short's ruling but later withdrew the appeal. Thus, we find Judge Short's ruling finding the abatement issue unpreserved is the law of the case. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Appellant may not seek relief from the prior unappealed order of the circuit court because the order has become the law of the case. Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."). Accordingly, we decline to address the issue on the merits.

II. Beneficiaries/Next of Kin Dependents

Employer argues the circuit court erred in failing to address whether all four beneficiaries have legitimate claims. The Guaranty Association argues the circuit court erred in affirming the Appellate Panel's decision to award Hudson's lump sum to her Estate rather than to her beneficiaries pursuant to section 42-9-280 of the South Carolina Code (1985). In response, the Estate argues Employer and the Guaranty Association acknowledged and accepted the beneficiaries' valid and reasonable settlement of their respective claims to the lump-sum proceeds. Thus, based on this stipulation, the Estate argues Employer and the Guaranty Association cannot now contest the manner in which the lump-sum award will be distributed. We agree with Employer and the Guaranty Association.

We disagree with the Estate's assertion that Employer and the Guaranty Association acknowledged and accepted the beneficiaries' valid and reasonable settlement of their respective entitlements to the lump-sum proceeds. On the contrary, during the hearing before the single commissioner on January 25, 2005, Employer's counsel consistently questioned to whom the lump-sum award should go and the manner of the payment. We note there was a discussion among the parties during which they agreed to divide the award evenly between Hudson's sons and minor grandsons. The single commissioner noted Employer's counsel had no objection to the manner in which the funds were split but reserved the right to claim that the funds were payable. However, we do not find such a stipulation by Employer's counsel on the record and note he stated: "our position is the [E]state takes nothing." Thereafter, Employer and the Guaranty Association appealed the single commissioner's decision to award Hudson's lump sum to her Estate, rather than to her beneficiaries, to both the Appellate Panel and the circuit court. Therefore, we find this issue is properly preserved for our review and do not find Employer stipulated to the manner of dividing the lump-sum award. Accordingly, we will address this issue on the merits.

Pursuant to section 42-9-280:

> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. (emphasis added)

Here, Hudson's cause of death, cancer, was unrelated to her work injury. Pursuant to section 42-9-280, the workers' compensation commission must pay the unpaid balance of her lump-sum award to her dependent grandchildren rather than to her sons as beneficiaries of the Estate. Therefore, we find the circuit court erred in affirming the Appellate Panel's decision to award Hudson's lump sum to the Estate rather than to her beneficiaries pursuant to section 42-9-280 of the South Carolina Code (1985). Accordingly, we reverse that portion of the circuit court's order and direct all lump-sum payments to be paid directly to Hudson's dependent grandsons.

III. Interest Award

Next, Employer and the Guaranty Association argue the circuit court erred in affirming the Appellate Panel's decision to award Hudson's Estate interest on the lump-sum award. Specifically, the Guaranty Association maintains section 38-31-20(8)(h) (Supp. 2009) of the South Carolina Property and Casualty Insurance Guaranty Association Act disallows claims for interest. Section 38-31-20(8) provides:

> "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an

> insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State. 'Covered claim' does not include: . . . (h) any claims for interest. (emphasis added)

In response, the Estate points to section 38-31-60 of the South Carolina Code (1985 & Supp. 2009) which reveals broad duties owed by the Guaranty Association. We agree with Employer and the Guaranty Association on this issue.

Section 38-31-60(b) states that the Guaranty Association "is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." As we already indicated, interest is not covered. Accordingly, based on the plain reading of the statute, we reverse the circuit court's order affirming the Appellate Panel's decision to award interest.

IV. Penalty Imposed

Finally, Employer and the Guaranty Association argue the circuit court erred in reversing the Appellate Panel's decision not to award Hudson's Estate a ten percent penalty. Originally, the single commissioner imposed a ten percent penalty under section 42-9-90 of the South Carolina Code (Supp. 2009) based on Employer and the Guaranty Association's frivolous defense. Thereafter, the Appellate Panel reversed the penalty after finding Employer and the Guaranty Association did not pursue a frivolous defense. Finally, the circuit court reinstated the penalty and relied on Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006). The Estate argues Martin is

inapplicable to the facts of their case, and therefore, the circuit court erred by reinstating the ten-percent penalty.[1]

In response, the Estate maintains the circuit court properly found that the ten percent penalty pursuant to section 42-9-90 was mandatory. Their reasoning is that Judge Short's order was final and should not have been relitigated. Further, the Estate maintains that under section 42-9-90, an employer or carrier must prove that circumstances beyond their control prevented payment of all compensation owed. Also, the Estate maintains this section does not afford the Commission any discretion when deciding whether to impose a penalty. We agree with the Estate.

Section 42-9-90 provides:

> If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in § 42-9-230, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in § 42-9-240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

Here, Employer and the Guaranty Association simply stopped paying compensation to the Estate. We agree that they had a non-frivolous defense, as the Appellate Panel found. However, as the single commissioner and

[1] We find Martin analogous yet distinguishable from the present situation.

Judge Goode found, the imposition of the penalty is mandatory under the statute. Therefore, we affirm the circuit court's reinstatement of the ten-percent penalty.

CONCLUSION

Judge Short's ruling finding the abatement issue unpreserved is the law of the case. Therefore, we decline to address this issue on the merits. Pursuant to section 42-9-280 of the South Carolina Code, we reverse the portion of Judge Goode's order affirming the Appellate Panel's decision to pay Hudson's remaining lump sum balance to her sons as beneficiaries and order the balance be paid to her grandsons as beneficiaries. Finally, based on applicable statutes, we reverse the interest award and affirm the ten-percent penalty imposed. Accordingly, the decision of the circuit court is

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Holly Woods Association of Residence Owners, Respondent,

v.

Joe W. Hiller, Robert E. Hiller, David Hiller, and HHH, Ltd. of Greenville, and Holly Woods Association of Residence Owners, Inc., Defendants,

of whom

Joe W. Hiller and HHH, Ltd. of Greenville, are the Appellants.

Opinion No. 4790
Heard March 10, 2010 – Filed February 3, 2011
Withdrawn, Substituted and Refiled April 21, 2011

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

AFFIRMED

Tucker S. Player, of Columbia, for Appellants.

John T. Crawford, Jr., and Keven Kenison, both of Greenville, for Respondent.

LOCKEMY, J.: The plaintiffs in this action were property owners in the Holly Woods Development in Greenville or members of the Holly Woods Association of Residence Owners (the Association). The Association brought suit against the property developers in 2005. After a trial, the jury awarded the Association $971,000 in actual damages for its negligence claim and $1 for the breach of implied warranty of workmanlike service claim. On appeal from this tort action, Joe W. Hiller, Robert E. Hiller, and David Hiller of HHH, Ltd. of Greenville, and Joe Hiller, individually, (Appellants) argue the trial court erred in: (1) allowing the Association to present a damages estimate from its expert witness; (2) denying Appellants' motions for directed verdict and judgment non obstante verdict; (3) submitting verdict forms to the jury without separating the respective defendants; (4) failing to grant a new trial absolute; (5) finding in favor of the Association on its equitable causes of action; (6) failing to grant a mistrial; and (7) allowing the Association to amend its complaint on the day of trial. We affirm.

FACTS

On May 2, 2005, the Association brought suit against Joe Hiller and HHH, Ltd. of Greenville. The Association alleged six causes of action, including: (1) specific performance to compel defendants to turn over control of the homeowners' association to the resident owners; (2) quiet title as to the common areas in favor of the Association; (3) breach of fiduciary duty with respect to Appellants turning over control of the homeowners' association and the Holly Woods Horizontal Property Regime in good repair or with adequate reserves to make repairs; (4) negligence in the construction of the project and the infrastructure associated thereto; (5) breach of contract; and (6) violation of the South Carolina Unfair Trade Practices Act. On December 7, 2005, the Association amended its complaint and added two defendants, Robert E. Hiller and David Hiller, and added three causes of action: (1) breach of implied warranty of workmanlike service; (2) breach of implied warranty of good title and fair dealing; and (3) veil piercing as to the individual defendants for any damages recovered. Thereafter, defendant HHH, Ltd. of

Greenville answered the amended complaint and argued the claims were barred by the statute of limitations, standing, estoppel, waiver, and the statute of repose. The court held two hearings prior to trial. The first hearing was related to discovery issues, and the second hearing involved Appellants' affirmative defenses.

By court order, in July 2006, defendant Joe Hiller continued with his case pro se after his counsel's motion to be relieved was approved. The Association then filed a motion to compel discovery from Appellants, and after a hearing, Judge Cooper ordered Appellants to turn over certain documents to the Association on December 18, 2006. Subsequently, the Association filed a motion for sanctions for Appellants' failure to comply with Judge Cooper's order. Judge Few heard the Association's sanction argument and the Appellants' motion for summary judgment based on standing, the statute of limitations, and the statute of repose on January 7, 2007. After the hearing, Judge Few granted the Association's motion for sanctions against defendants pursuant to Rule 37(b), SCRCP. Additionally, he denied Appellants' summary judgment motions. Specifically, Judge Few (1) denied Appellants' motion for summary judgment based on the applicable statute of limitations because the Association claimed no damages were incurred more than three years before the commencement of this action; (2) denied Joe Hiller's motion to dismiss for lack of standing and motion to compel; (3) denied Joe Hiller's motion for sanctions; and (4) denied the Association's motion to amend its complaint to add an additional developer.

On January 8, 2007, the Association filed a motion to amend its complaint to correct a scrivener's error and remove the "Inc." from its name. Judge Miller granted the Association's motion to amend the complaint to reflect the Association's correct name. The peculiar effect of Judge Miller's ruling was that the original plaintiff became a named defendant. After trial, the jury returned a $971,000 verdict in favor of the Association for actual damages as to the negligence claim. The jury awarded $1 in actual damages on the breach of contract claim, breach of fiduciary duty claim, and breach of implied warranty of workmanlike service claim, but it did not award punitive damages. All defendants filed notices of appeal, including Joe Hiller in his individual capacity. These appeals were consolidated into this final appeal.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of this court extends merely to correction of errors of law. Small v. Pioneer Mach., Inc., 329 S.C. 448, 460, 494 S.E.2d 835, 841 (Ct. App. 1997). We will not disturb the jury's factual findings unless a review of the record discloses there is no evidence that reasonably supports the jury's findings. Id. at 461, 494 S.E.2d at 841.

When a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. West v. Newberry Elec. Co-op., 357 S.C. 537, 542, 593 S.E.2d 500, 502 (Ct. App. 2004). "In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence." Id. "[A]n action to quiet title to property is an action in equity." Jones v. Leagan, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct. App. 2009). Specific performance is also an equitable action. Fesmire v. Digh, 385 S.C. 296, 303-04, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

Appellants present numerous issues on appeal. We begin our analysis of this case by examining a timeline to determine if the Association was procedurally barred from bringing its lawsuit either under the statute of repose or the statute of limitations.

I. Statute of Repose

Appellants maintain the trial court should have granted a directed verdict because the damages the Association complained of occurred more than thirteen years after construction was completed on the property. We disagree.

The version of the statute of repose in effect at the time the Association initiated its lawsuit required it bring its action within thirteen years of

substantial improvement to real property.[1] S.C. Code Ann. 15-3-640 (Supp. 2003). Specifically, section 15-3-640 provided:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
> (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
> (3) an action to recover damages for personal injury, death, or damage to property;
> (4) an action to recover damages for economic or monetary loss;
> (5) an action in contract or in tort or otherwise;
> (6) an action for contribution or indemnification for damages sustained on account of an action described in this subdivision;
> (7) an action against a surety or guarantor of a defendant described in this section;
> (8) an action brought against any current or prior owner of the real property or improvement, or against

[1] However, we note the current version prohibits "actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property" that arise more than eight years after substantial completion of the improvement. S.C. Code Ann. § 15-3-640 (Supp. 2009).

> any other person having a current or prior interest in the real property or improvement;
> (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.
>
> This section describes an outside limitation of thirteen years after the substantial completion of the improvement, within which normal statutes of limitations continue to run. (emphasis added)

The purpose of the statute of repose is to provide a substantive right to developers to be free from liability after a certain time period. See Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) ("A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation."). Further, "[s]tatutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." Id. at 404, 438 S.E.2d at 244.

The development at issue was built in several stages. According to plats and testimony submitted in the record, buildings one through eight were built between 1978 and 1983. The rest of the buildings in the development were built in 1996 or later. Here, the Association's complaints concern the common areas of Holly Woods. Specifically, the Association based its suit on problems with the road that runs throughout the development, continued erosion which caused infrastructure problems, continued problems with the undeveloped portion of the development, defective sewer line construction, lack of firewall installation in certain units other than those in buildings one through eight, and other problems relating to the common areas of Holly

Woods. We find the statute of repose would have barred the Association from suing for construction problems relating to the infrastructure of buildings one through eight. We note the problems that form the basis of the Association's suit included general irrigation and design problems throughout the development, which ultimately led to moisture and foundation problems in building five. However, we hold the statute of repose did not bar the Association from bringing its suit in 2005 because it related to the common areas of the development built in 1996 or later.

II. Statute of Limitations and Compliance with Judge Few's Order

Appellants maintain the trial court erred in refusing to grant their directed verdict motion based on the statute of limitations. We disagree.

A. Statute of Limitations

In South Carolina, a party must commence an action within three years of the date the cause of action arises. S.C. Code Ann. § 15-3-530 (2005). The three-year statute of limitations "begins to run when the underlying cause of action reasonably ought to have been discovered." Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). Under the discovery rule, "the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." Id. at 575-76, 593 S.E.2d at 627 (internal citation omitted). The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective. Id. at 576, 593 S.E.2d at 627. Therefore, this court must determine "whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." Young v. S.C. Dep't of Corrs., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

The record contains evidence that the Association did not learn of several problems within the development until 2002. Therefore, the Association was allowed to present evidence of damages from 2002 to 2005. Here, Appellants argue the Association knew of problems prior to 2002.

Accordingly, Appellants maintain the Association should have brought its action earlier and was barred from bringing its action under the statute of limitations.

The Association claims it experienced a series of problems within the development. However, the Association maintains the problems existing when it brought suit were different from problems it experienced prior to 2002. Specifically, the minutes from an annual meeting of the Association's board meeting from 1991 reveal the Association knew of certain problems in 1991, including a pool leak, drainage around building five, and termite bonding. However, witnesses testified the damages that formed the basis of the Association's 2005 lawsuit stem from different problems than those that existed in 1991.

Mary Louise Reeves, secretary of the Association's Board, testified the Association was only seeking damages that occurred from 2002 to 2005. Reeves testified problems have always existed within the development and some are the same problems, but some are different problems. Richard H. Roubard, a member of the Association's Board since 1998, testified the damage around building five that existed in 1991 was corrected. Roubard testified Gray Engineering came up with a design for a culvert that went over the existing road and a head wall and drainage to pick up the run off. According to Roubard, the culvert repair resolved the 1991 drainage issues. Additionally, Roubard explained new problems with drainage arose between 1998 and 2000; however, he claimed the Association also addressed and corrected those problems. Roubard testified the Association learned of the most current drainage problems in September 2002 after a rainstorm.

Steven John Geiger, the Association's expert, also testified as to the damages the Association claimed could have been discovered in 2002 or later. Geiger categorized the condition of Holly Woods into three distinct occurrences contributing to the problems: (1) the general random nature that storm water flows across the site, (2) the presence of poor loose compressible soil, and in some cases soil that contains organic matter underlying the construction; and (3) the open excavation around the eastern and southern perimeters of building five. Geiger testified he knew about the 1991 report, but he testified the 1991 report did not affect the content of his damage report

and had nothing to do with his research. Further, he testified that the majority of the damages on Holly Woods could be attributable to conditions since 2002.

We find it is a jury question as to whether the damages the Association claimed in 2005 were different from those it experienced in the past. There is evidence from board members and Geiger that the problems, though similar in nature, were different. Therefore, we find the circuit court did not err in denying Appellants' directed verdict motion based on the statute of limitations.

B. Compliance with Judge Few's order

Judge Few issued an order prior to the Association's trial responding to Appellants' motion for summary judgment based on the statute of limitations. In his order, Judge Few ordered the Association to limit the presentation of its damages to only those incurred within three years of the commencement of its action. Appellants maintain the Association presented damages incurred as early as 1979, although Judge Few specifically ordered the Association to present damages "incurred" from 2002 to 2005. Appellants argue there is a difference between when the damages were "incurred" and when damages were "manifested." Appellants failed to raise the compliance objection contemporaneously during trial when these alleged violations of Judge Few's order occurred. Therefore, this issue is not preserved for our review. State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (holding a broad and non-contemporaneous objection is not enough to properly preserve an error for appellate review).[2]

III. Expert Witness Testimony

Appellants maintain the trial court erred in allowing the Association to present evidence from an expert witness regarding a damages estimate.

[2] Any res judicata argument in relation to Judge Few's order is not preserved. Hopkins v. Harrell, 352 S.C. 517, 522 n.1, 574 S.E.2d 747, 750 n.1 (Ct. App. 2002) (holding an issue must be raised to and ruled upon by the trial court in order to be preserved for review).

Specifically, Appellants argue the Association disclosed the damages estimate only one week prior to trial. Therefore, Appellants contend the trial court erred in allowing this testimony as it resulted in unfair surprise and substantial prejudice because Appellants could not prepare for trial. We disagree.

To prevent a trial from becoming a surprise or a guessing game for either party, discovery involves full and fair disclosure. Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Id. at 113-14, 495 S.E.2d at 217. Therefore, we must determine whether a discovery violation occurred, and if so, whether that violation prejudiced Appellants.

On appeal, Appellants maintain the Association violated Rule 33, SCRCP, concerning the use of interrogatories. Pursuant to Rule 33, a party is required to promptly update the information in the interrogatories as it becomes available. See Rule 33(b), SCRCP ("The interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party.").

First, we find no discovery violation occurred because the Association supplemented its responses to interrogatories throughout trial. We note the damages amount changed significantly throughout discovery. The first damage estimate from June 2006 totaled $653,227. Thereafter, in December 2006, the damages estimate changed to $233,681. The second damage estimate specifically stated: "Total does not include estimate for infrastructure damages currently being assessed by expert witness." Further, the Association provided Geiger's assessment report to Appellants when Geiger finalized it. Moreover, even if there was a discovery violation, we find no prejudice because Appellants failed to depose Geiger. We note Geiger only developed a final damage estimate approximately ten days before he testified because he did not finish his field investigation work until then. However, had Appellants deposed Geiger, he could have given an

approximate damages estimate. Therefore, we find the trial court did not abuse its discretion in admitting Geiger's damages estimate.

IV. Directed Verdict and JNOV Motion on Gross Negligence

Appellants argue the trial court erred in submitting the issue of gross negligence to the jury. The jury only awarded actual damages. Assuming without deciding that the trial court erred, Appellants failed to demonstrate any resulting prejudice from the alleged error. See Hall v. Palmetto Enters. II, Inc., 282 S.C. 87, 94, 317 S.E.2d 140, 145 (Ct. App. 1984) ("In the absence of prejudice, an erroneous instruction does not justify a reversal and warrant a new trial."). Accordingly, we find no error in the trial court's decision to submit gross negligence to the jury.

V. Mistrial

Appellants argue the trial court erred in failing to grant its motion for a mistrial because Geiger's testimony contradicted Judge Few's order denying Appellants' motion for summary judgment based upon the statute of limitations. We disagree.[3]

The grant or refusal of a mistrial lies within the sound discretion of the trial court and the court's ruling will not be disturbed on appeal absent an abuse of discretion. Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc., 384 S.C. 441, 446, 682 S.E.2d 489, 492 (2009). "In order to receive a mistrial, the moving party must show error and resulting prejudice." Id. Here, assuming the trial court erred in failing to restrict the evidence Holly Woods could present, Appellants suffered no prejudice because the trial court charged the jury on the law of the statute of limitations. Accordingly, we find the trial court did not abuse its discretion in denying Appellants' motion for a mistrial. See id. (finding a mistrial should

[3] Several copies of the record on appeal provided by Appellants are missing pages 792 to 797 where Appellants moved for a mistrial. Although Appellants bear the burden of providing a sufficient record for review, because this Court was able to locate a copy submitted by Appellant that included the missing pages we address this issue on the merits.

only be granted when absolutely necessary and "the trial court should exhaust other methods to cure possible prejudice before aborting a trial").

VI. Directed Verdict Based on Standing

Appellants maintain the trial court erred in failing to grant their motion for a directed verdict based on the Association's lack of standing. Specifically, Appellants contend the Association lacked standing because it possesses no interest in any property or common area in Holly Woods. We disagree.

Generally, a successor is "[a] person who succeeds to the office, rights, responsibilities, or place of another." Black's Law Dictionary (9th ed. 2009). The word successor can mean one who is entitled to succeed, or it can mean one who has in fact succeeded. Battery Homeowners Ass'n v. Lincoln Fin. Res., Inc., 309 S.C. 247, 250, 422 S.E.2d 93, 95 (1992). Here, "Holly Woods Association of Residence Owners, Inc." was dissolved in 1987 by the South Carolina Secretary of State for failing to file tax returns. Between 1991 and 2000, the individual residence owners filed tax returns for the Holly Woods Association of Residence Owners, Inc. In 2000, the individual residence owners formed "Holly Woods Association of Residence Owners" and filed an Amended and Restated Master Deed establishing the Holly Woods Association of Residence Owners as the nonprofit corporation responsible for the management and operation of Holly Woods. We find evidence supports the trial court's determination that Holly Woods Association of Residence Owners was the successor to Holly Woods Association of Residence Owners, Inc., and therefore, had standing. Accordingly, the trial court properly denied Appellants' motion for a directed verdict on this ground.

VII. Directed Verdict on Negligence

Appellants contend the trial court erred in failing to grant a directed verdict on negligence. Specifically, they maintain the existence and scope of a duty are legal questions, and no evidence was presented pertaining to duties owed by Appellants to the Association.

We find this issue is not preserved for our review. Although Appellants moved for a directed verdict at the close of all testimony, they did not move for a directed verdict on the specific basis that no evidence indicated they owed a duty to the Association. Creech v. S.C. Wildlife & Marine Res. Dep't, 328 S.C. 24, 34, 491 S.E.2d 571, 576 (1997) (holding the appellant's failure to raise a particular issue in its directed verdict motion precludes appellate review of that issue); see also Rule 50(a), SCRCP ("A motion for a directed verdict shall state the specific grounds therefor."). Therefore, we decline to address this issue on the merits.

VIII. Directed Verdict Based on Construction Post-1981

Appellants contend the trial court erred in failing to grant a directed verdict because the Association presented no evidence that any named defendant performed any construction at Holly Woods after 1981. We disagree.

Though evidence does not demonstrate Appellants specifically performed the construction at Holly Woods after 1981, the Association had a cause of action against Appellants as developers. Furthermore, the Association is permitted to sue any party as long as the party is properly served and the Association has standing. See Sloan v. Sch. Dist. of Greenville Cnty., 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) ("A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing."). Accordingly, we find the trial court properly declined to direct a verdict for Appellants on this basis.

IX. Directed Verdict on Equitable Causes of Action

Appellants argue the trial court erred in failing to direct a verdict on the Association's equitable causes of action for specific performance and quiet title because the Association knew problems existed prior to May 2002. We decline to address this argument on the merits. In their brief, Appellants fail to cite any case law or authority in support of their argument. 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. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding appellant

abandoned issue when he failed to provide argument or supporting authority); Shealy v. Doe, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) (declining to address an issue on appeal when appellant failed to cite any supporting authority and made conclusory arguments). Therefore, Appellants are deemed to have abandoned this issue.

X. Directed Verdict or New Trial Based on Causation or Time of Occurrence

Appellants argue the trial court erred in failing to grant their directed verdict motion because only speculative evidence was presented during the trial to support a finding of damages for the time period allowed. We disagree.

In Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981), our supreme court stated:

> Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required.

After several investigations, Geiger, a qualified expert, testified regarding the amount of damages. We find Geiger's damage assessment was enough evidence for the jury to determine an appropriate damages award with reasonable certainty. Therefore, we find the trial court properly denied Appellants' motion for a direct verdict.

XI. Improper Verdict Form

Appellants maintain the trial court erred in failing to submit a special verdict form to the jury. We disagree.

HHH, Ltd. and Joe Hiller requested they be separated on the verdict form for the jury. Specifically, they asked for the verdict form to be "divided between HHH and Joe Hiller [because] [t]here was a distinct time period when HHH did not exist." Additionally, there was a discussion as to whether joint and several liability was proper in this case because of the timeline. The trial court decided to submit the verdict form to the jury and stated it could submit a special interrogatory if the jury came back with a plaintiff's verdict. Once in deliberations, the jury submitted several questions to the court. Thereafter, the jury returned a plaintiff's verdict. After the verdict was published, the trial court asked both parties if they had anything more for the jury, and both sides responded they did not.

Here, the trial court gave the parties an opportunity to request a special interrogatory after the jury returned a plaintiff's verdict, but Appellants failed to do so. We find that Appellants had an obligation to request a special interrogatory once the jury returned its verdict. Appellants waived appellate review of this issue because they failed to request a special interrogatory when the deciding jury was available and in place to review such a matter. See Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding a party cannot acquiesce to an issue at trial and then complain on appeal). Accordingly, we decline to address this issue.

XII. New Trial Based on Jury Prejudice

Appellants argue the trial court erred in failing to grant their motion for a new trial because the $971,000 verdict on the negligence claim was grossly excessive and a result of passion, caprice, prejudice, or some other influence outside the evidence. We disagree.

The decision of whether to grant a new trial based on a jury's passion, caprice, prejudice, or some outside influence is highly discretionary. Mims v. Florence Cnty. Ambulance Serv. Comm'n, 296 S.C. 4, 7-8, 370 S.E.2d 96, 99 (Ct. App. 1988) ("The granting of a new trial on the ground that the verdict is so excessive as to indicate caprice, passion, or prejudice on the part of the jury is committed to the sound discretion of the trial judge and his decision thereon will not be disturbed on appeal, absent a showing of an abuse of discretion."). We find no evidence of caprice, passion, or prejudice on part of

the jury. Furthermore, the amount awarded in actual damages was lower than the $1.4 million damage estimate of the expert witness. Therefore, evidence exists to sustain the jury's verdict. See Wright v. Craft, 372 S.C. 1, 36, 640 S.E.2d 486, 505 (Ct. App. 2006) (finding a jury's verdict will not be overturned if any evidence exists to sustain the factual findings implicit in its decision). Accordingly, we find the trial court did not err in declining to grant a new trial absolute on this basis.

XIII. New Trial Based on Inconsistent Jury Verdict

Appellants maintain the trial court erred in failing to grant their motion for a new trial because the jury's verdict was inconsistent on its face. Specifically, Appellants argue breach of warranty of implied workmanlike service is encompassed within negligence; therefore, the jury's verdict was facially inconsistent. We disagree.

"It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found." Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 334, 450 S.E.2d 66, 74 (Ct. App. 1994); see also Camden v. Hilton, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004) ("In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features."). The causes of action for negligence and breach of implied warranty of workmanlike service are separate and distinct and are not mutually exclusive. Furthermore, the jury awarded $971,000 in actual damages for the Association's negligence claim and only awarded $1 in actual damages for the Association's claims for breach of implied warranty of workmanlike service. Although the jury returned plaintiff verdicts on these causes of action, the respective damage awards were vastly different. However, this discrepancy does not indicate the verdicts are irreconcilable. See Orangeburg Sausage Co., 316 S.C. at 345, 450 S.E.2d at 74 ("Although the jury awarded different amounts under each theory, this does not mean the verdicts are inconsistent. Different damages are recoverable under each claim, and the trial court instructed the jury as to the appropriate measure of damages under each claim."). Therefore, we find the trial court did not err in declining to grant a new trial based on inconsistent verdicts.

XIV. Equitable Causes of Action

Appellants argue the trial court erred in finding in favor of the Association on its causes of action for specific performance and quiet title. Essentially, Appellants reiterate their standing argument. Our prior determination that the Association had standing is dispositive of this issue. Accordingly, we decline to consider this issue. 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).

XV. Conversion of Plaintiff to Defendant on Day of Trial

Appellants maintain the trial court erred by allowing the Association to be converted to a defendant on the day of trial and entering a new plaintiff. We disagree.

Here, "Inc." was removed from the plaintiff's name, and the trial court found Appellants had actual notice of who the plaintiff was in this case. We agree with the trial court. Changing the name of the plaintiff in this tort action did not affect whether Appellants received proper notice. There is no evidence in the record that either party failed to comply with proper service of process.

As to the issue of adding a new defendant to the action, we note that Holly Woods Association of Resident Owners, Inc. is defunct. Further, Holly Woods Association of Resident Owners Inc. did not file a notice of appeal with our court. Therefore, this issue is moot because we cannot exercise jurisdiction over them. Accordingly, we affirm the decision of the trial court.

CONCLUSION

For the above stated reasons, the decisions of the trial court are

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Randolph Frazier, Appellant.

Appeal From Lancaster County
Paul M. Burch, Circuit Court Judge

Opinion No. 4818
Heard January 11, 2011 – Filed April 13, 2011

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia, and Solicitor Douglas A. Barfield, Jr., of Lancaster, for Respondent.

LOCKEMY, J.: Randolph Frazier was convicted of first-degree burglary and sentenced to life in prison. On appeal, Frazier argues the trial court erred in (1) denying his motion to suppress, (2) allowing the victim and two neighbors to identify him in court, and (3) denying his motion for a mistrial based upon Rule 5, SCRCrimP, and Brady v. Maryland, 373 U.S. 83 (1963). We affirm.

FACTS

On February 5, 2008, Sherika Sanders entered her apartment on Eula Street in Lancaster, South Carolina. Sanders noticed her back door was open and the blinds in the window adjacent to the door were askew. As Sanders looked around the first floor, she heard someone quickly descending the stairs from the second floor. Sanders watched to see who was descending the stairs and observed a man with gray hair and wearing a leather coat turn, look at her, and flee out the front door. Sanders fled out the back door and called for help. Patricia Cauthen, a neighbor, heard Sanders screaming, and shortly thereafter, observed a man she knew as Randolph Frazier peer in her apartment through her glass storm door and then flee. Another neighbor, Jerry Franklin Strain, also observed a black man with gray hair wearing a black jacket and black shoes run by his apartment.

Approximately a block from Sanders's apartment, Officer Susan Hunter was traveling along Chesterfield Avenue in an unmarked police car. Hunter observed a man walking from the Chesterfield Villas apartment complex, adjacent to the Eula Street apartments, and cross Chesterfield Avenue. Hunter thought the man looked similar to an individual who was the subject of an ongoing investigation. After passing the man, Hunter turned around and drove past the man a second time, but was unable to make an identification. Hunter turned onto a secondary street and proceeded around the 1200 block of Chesterfield Avenue. Before emerging onto Chesterfield Avenue again, Hunter received a radio dispatch regarding a burglary at the Eula Street apartments and indicating the suspect was a black male with gray hair wearing a brown jacket. Hunter responded to the radio dispatch indicating she located a subject matching the description walking west on Chesterfield Avenue. Officer John Poovey heard the radio dispatch and Hunter's radio call and responded to the scene in a marked patrol car. As

Poovey approached the scene, he observed Frazier walking "in a brisk manner" along Chesterfield Avenue.

Poovey and Hunter approached Frazier in their patrol cars at the same time, but from opposite directions. As Poovey approached Frazier, he observed him remove a dark object from his pocket or coat and throw it on the ground near a telephone pole. As Hunter approached Frazier, she also observed Frazier remove a dark object from his pocket, but lost sight of the object as Frazier passed behind a telephone pole. Poovey notified Hunter of his observation over the radio, exited his vehicle, and accosted Frazier. Poovey asked Frazier his name, where he was going, and where he was coming from. After establishing Frazier's identity, Poovey placed Frazier in handcuffs. Poovey also noticed Frazier was "sweating profusely." While Poovey talked with Frazier, Hunter searched the area around the telephone pole and discovered a black bag containing jewelry. As Frazier was being detained, Officer Pat Parsons arrived at the scene. Parsons took the jewelry bag to Sanders's apartment, and Sanders identified the jewelry as hers.

The police then conducted three "show-ups." An officer drove Sanders to the location where Frazier was detained, and Sanders identified Frazier as the man she observed in her apartment. Officer Kristin Grant drove Cauthen to the location where Frazier was detained. Grant stopped her vehicle at a stop sign on the opposite side of the street from Frazier, and Cauthen identified Frazier as the man who peered in her apartment after she heard Sanders scream. Finally, an officer drove Strain by Frazier. Strain recognized Frazier was wearing shoes and a jacket similar to those worn by the man he observed run past his apartment.

Frazier was indicted for first-degree burglary. At trial, Frazier moved to suppress the identifications. After a Neil v. Biggers, 409 U.S. 188 (1972), hearing, the trial court found the show-ups conducted by the police were not unduly suggestive and noted even if the show-ups were unduly suggestive they were nevertheless reliable. Ultimately, the jury found Frazier guilty of

first-degree burglary, and the trial court sentenced him to life in prison.[1] This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in denying Frazier's motion to suppress?

2. Did the trial court err in allowing Sanders and two neighbors to make an in-court identification of Frazier?

3. Did the trial court err in denying Frazier's motion for a mistrial based upon Rule 5(a)(1)(C), SCRCrimP, and Brady v. Maryland, 373 U.S. 83 (1963)?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." Id. "The trial [court's] factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error." Id. at 48-49, 625 S.E.2d at 220.

LAW/ANALYSIS

I. Motion to Suppress

Frazier argues the trial court erred in denying his motion to suppress the evidence emanating from his detention. Specifically, Frazier contends any evidence gathered was inadmissible because Hunter and Poovey lacked reasonable and articulable suspicion for the initial stop. We disagree.

The State concedes Frazier's stop was more than an investigatory detention. Thus, the pertinent analysis is not whether the police had

[1] Frazier has an extensive criminal record of property crimes dating back to 1973.

reasonable suspicion to stop Frazier and whether a subsequent on-the-scene warrantless seizure was reasonable. See State v. Rodriquez, 323 S.C. 484, 493, 476 S.E.2d 161, 166 (Ct. App. 1996) (outlining and applying seven factors for determining whether a warrantless seizure was reasonable). Rather we must determine whether the police had probable cause to arrest Frazier. "The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). "Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." Id. "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id.

Based on a totality of the circumstances, we find Hunter and Poovey had probable cause to believe Frazier committed a burglary. At the time Frazier was arrested, Hunter and Poovey knew Frazier matched the general description of the subject suspected of burglarizing Sanders's apartment. Hunter observed Frazier leaving the area around the Chesterfiled Villas adjacent to, and less than a block from, where the burglary occurred. Poovey observed Frazier walking "in a brisk manner" and noticed Frazier was "sweating profusely" when he approached him. Both Hunter and Poovey observed Frazier discard a black bag shortly before they approached him. While Poovey accosted Frazier, Hunter found the black bag and determined it contained jewelry. Finally, Frazier was a person of interest in another burglary and a known individual to Hunter and Poovey. We conclude the circumstances within Hunter's and Poovey's knowledge were sufficient to lead a reasonable person to believe Frazier committed a burglary.

Finally, even if the seizure was unlawful, the black bag was discovered as a result of Hunter's and Poovey's observations not the illegal arrest. Thus, the exclusionary rule does not provide a remedy. See State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010) ("The exclusionary rule provides that evidence obtained as a result of an illegal search must be excluded."). Accordingly, the trial court properly denied Frazier's motion to suppress.

II. In-court Identifications

Frazier argues the trial court erred in allowing Sanders and two neighbors to identify him in-court because their identifications were based upon impermissibly suggestive show-ups. We disagree.

"An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). Thus, this court must determine whether the out-of-court identification process was unduly suggestive, and if so whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification occurred. Id. at 287, 540 S.E.2d at 447.

Single person show-ups are disfavored in the law and are unduly suggestive. Id. at 287, 540 S.E.2d at 448. Because the out-of-court identification procedure used here is unduly suggestive, we must determine whether it was nevertheless so reliable that no substantial likelihood of misidentification occurred. Reliability is determined by examining the totality of the circumstances in light of the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Moore, 343 S.C. at 289, 540 S.E.2d at 448-49. Here, the police conducted show-ups for Sanders, Cauthen, and Strain. Each is discussed in turn.

First, Sanders was able to observe Frazier face-to-face from a distance of ten feet as he descended the stairs in her apartment. Sanders explained Frazier "looked at me and I looked at him" before he fled. Nothing in Sanders's testimony indicates any distractions during her opportunity to view Frazier. Although Sanders's description of Frazier's jacket was incorrect, she demonstrated a high degree of certainty in her identification during the show-up. Finally, Sanders testified fifteen to twenty minutes elapsed between her opportunity to view Frazier and the show-up. Based on the totality of the circumstances, especially considering the short length of time between the

burglary and the show-up, Sanders's out-of-court identification was sufficiently reliable such that no substantial likelihood of misidentification occurred.

Second, Cauthen observed Frazier's face shortly after the burglary as he peered into her apartment through her glass storm door. Even though Cauthen had just begun to eat at the time she observed Frazier, her testimony does not reveal any other distraction during her opportunity to view Frazier. Cauthen did not provide a description of Frazier's physical appearance, but testified she knew Frazier and recognized his face when he peered through her glass storm door. Cauthen also exhibited a very high degree of certainty in her identification of Frazier at the show-up. Grant explained the length of time between the burglary and Cauthen's identification of Frazier was approximately fifteen minutes. Placing particular weight on Cauthen's acquaintance with Frazier, an analysis of the totality of the circumstances reveals her out-of-court identification was sufficiently reliable such that no substantial likelihood of misidentification occurred.

Finally, Frazier's argument Strain's in-court identification was tainted by an impermissibly suggestive show-up is manifestly without merit. Although the police conducted a show-up with Strain, he was unable to identify Frazier at the show-up and did not identify Frazier in court. Accordingly, we decline to consider this argument. Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

Based on the forgoing, the trial court's determination the show-ups were not unduly suggestive was error. However, the trial court's finding the identifications by Sanders and Cauthen were nevertheless admissible was proper because they were sufficiently reliable such that no substantial likelihood of misidentification occurred. Accordingly, the trial court properly denied Frazier's motion to suppress the in-court identifications.

III. Motion for a Mistrial

Frazier argues the trial court erred in denying his motion for a mistrial because the State failed to disclose Diedre Sturdivant was unable to identify

him from a photographic lineup as the person she saw the day of the burglary. We disagree.

The decision to grant or deny a motion for mistrial is within the sound discretion of the trial court. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). The trial court's decision to deny a motion for mistrial will not be overturned on appeal absent an abuse of discretion amounting to an error of law. Id. A mistrial should not be granted unless absolutely necessary, and in order to receive a mistrial the defendant must show error and resulting prejudice. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

Generally, the State has a duty to disclose evidence that is favorable to the defendant. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Rule 5, SCRCrimP. A defendant asserting a Brady violation must demonstrate the evidence the State failed to disclose was (1) favorable to the defendant, (2) in possession of or known to the State, (3) suppressed by the State, and (4) material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the proceedings. Id.

Here, the State proffered the testimony of Sturdivant, who explained that on the day of the burglary she observed a man with gray hair and wearing a leather coat run from the Eula Street apartments shortly before she heard a women scream. According to Sturdivant, later that day the police showed her a photographic line-up, but she was unable to identify the man in the leather coat. Frazier elicited the same testimony on cross-examination. Here, there is no prejudice to be remedied by a mistrial because both the State and Frazier elicited the favorable testimony from Sturdivant. See State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for a mistrial is an extreme measure which should be taken only

where an incident is so grievous that prejudicial effect can be removed in no other way."). Accordingly, the trial court properly denied Frazier's motion for a mistrial.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

HUFF, J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Columbia/CSA-HS Greater Columbia Healthcare System, LP d/b/a Providence Hospital, Appellant,

v.

The South Carolina Medical Malpractice Liability Joint Underwriting Association and Michael P. Taillon, Respondents.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4819
Heard December 9, 2010 – Filed April 13, 2011

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., Michael J. Anzelmo, and Monteith P. Todd, all of Columbia, for Appellant.

Andrew F. Lindemann and J. Edward Bradley, both of West Columbia, for Respondents.

LOCKEMY, J.: In this action for equitable indemnification, Columbia/CSA-HA Greater Columbia Healthcare System d/b/a Providence Hospital (Providence Hospital) appeals, arguing the trial court erred in granting the South Carolina Medical Malpractice Liability Joint Underwriting Association (the JUA) and Dr. Michael P. Taillon's motion for summary judgment based upon the six-year medical malpractice statute of repose. We affirm.

FACTS

On May 31, 1997, Arthur Sharpe sought treatment for chest pain at Providence Hospital's emergency room. Dr. Michael Hayes treated Sharpe initially; however, shortly thereafter Taillon assumed Sharpe's care. Taillon diagnosed Sharpe with reflux and discharged him. Several days later, Sharpe sought treatment at Lexington County Hospital and was diagnosed as having suffered a heart attack. Two years later, on May 25, 1999, Sharpe sued Dr. Hayes and Providence Hospital based upon an apparent agency theory. See, e.g., Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000). Discovery revealed Taillon examined, diagnosed, and treated Sharpe. At some point afterward, the record is silent as to exactly when, Providence Hospital demanded indemnification from Taillon and the JUA. Taillon and the JUA declined to assume the defense or indemnify Providence Hospital on May 4, 2004. On June 10, 2004, Providence Hospital settled Sharpe's lawsuit for $350,000.[1]

Three years later, on June 7, 2007, Providence Hospital brought this action against Taillon and the JUA for equitable indemnification. Approximately a year after filing an answer, Taillon and the JUA moved to amend their answer to assert a statute of repose defense pursuant to section 15-3-545(A) of the South Carolina Code (2005), and for summary judgment

[1] Providence Hospital never sought to implead Taillon and the JUA pursuant to Rule 14(a), SCRCP.

based upon the statute of repose. After a hearing, the trial court granted Taillon and the JUA leave to amend their answer and granted summary judgment, finding Providence Hospital's action for equitable indemnification was barred by the statute of repose. Providence Hospital filed a Rule 59(e), SCRCP, motion, arguing the trial court erred in allowing Taillon and the JUA to amend their answer and in granting summary judgment. The trial court denied Providence Hospital's motion. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in finding section 15-3-545(A) of the South Carolina Code (2005) barred Providence Hospital's claim for equitable indemnification against Taillon and the JUA?

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Pursuant to Rule 56(c), summary judgment is appropriate when "there is no genuine issue as to any material fact [such] that the moving party is entitled to a judgment as a matter of law." "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860.

LAW/ANALYSIS

Providence Hospital argues the trial court erred in finding section 15-3-545(A) of the South Carolina Code (2005) barred its claim for equitable indemnification. Specifically, Providence Hospital contends the plain language of section 15-3-545(A) indicates it does not apply to its action for equitable indemnification. We disagree.

Section 15-3-545(A), titled "Actions for medical malpractice," provides:

> In any action . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

The plain language of section 15-3-545(A) indicates it applies to "any action" that seeks "to recover damages for injury to the person" arising out of medical malpractice. See First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992) ("In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.").

Generally, "[a] plaintiff may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as the result of another's tortious act." Fowler v. Hunter, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010). In order to prove it is entitled to equitable indemnification, Providence Hospital must show (1) Taillon was liable for causing Sharpe's damages, (2) it was exonerated from any liability for those damages, and (3) it suffered damages as a result of Sharpe's medical malpractice action which was eventually proven to be the fault of Taillon. See id. To recover settlement costs under the rule of equitable indemnification, Providence Hospital must also prove (1) the settlement is bona fide, with no fraud or collusion by the parties, (2) under the circumstances, the decision to settle was a reasonable means of protecting its interest, and (3) the amount of the settlement was reasonable in light of Sharpe's damages and the risk and extent of its exposure if the case is tried. See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 62, 518 S.E.2d 301, 306 (Ct. App. 1999).

Under our equitable indemnification rule, Providence Hospital's entitlement to equitable indemnification is predicated upon Taillon's liability to Sharpe in tort. Here, Taillon's liability for Sharpe's injuries is undetermined. Because Providence Hospital must establish Taillon's liability for Sharpe's damages in order to show it is entitled to equitable indemnification, we find Providence Hospital's action is an action to recover damages for injury to the person.

Providence Hospital argues it is seeking settlement costs, not damages for injury to the person. We find this distinction unavailing. Providence Hospital's entitlement to equitable indemnification rests upon its obligation to pay damages because of negligence imputed to it as the result Taillon's allegedly tortious acts. Further, settlement costs are recoverable only if they are reasonable in light of plaintiff's damages and the risk and extent of the defendant's exposure if the case is tried. Id. The $350,000 Providence Hospital paid for a release from Sharpe's action is directly related to and arises from Shape's damages.

Furthermore, section 15-3-545 defines its scope negatively. Section 15-3-545(A) defines the general scope of the medical malpractice statute of repose, while sections 15-3-545(B)-(D) enumerate the specific claims to which statute of repose is inapplicable. Section 15-3-545 does not expressly exclude actions for equitable indemnification predicated upon proving liability in the underlying medical malpractice action. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 607, 576 S.E.2d 150, 153 (2003) (internal quotation marks and citation omitted). "Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Id. (internal quotation marks and citation omitted). For the foregoing reasons, we conclude section 15-3-545(A) bars Providence Hospital's claim for equitable indemnification.

Our conclusion is consistent with the holdings of several other courts which have considered similar issues. See, e.g., Hayes v. Mercy Hosp. & Med. Ctr., 557 N.E.2d 873, 876 (Ill. 1990) (holding an action for contribution is an "action for damages" under Illinois's medical malpractice statute of

repose because the basis for a contributor's liability rests in tort to the injured party); Ashley v. Evangelical Hosp. Corp., 594 N.E.2d 1269, 1271-76 (Ill. App. Ct. 1992) (applying the reasoning employed in Hayes and holding Illinois's medical malpractice statute of repose applies to actions for indemnity); Krasaeath v. Parker, 441 S.E.2d 868, 870 (Ga. Ct. App. 1994) (finding an action for contribution was barred by Georgia's medical malpractice statute of repose because it was predicated on proof of the alleged contributor's professional negligence); cf. Virginia Ins. Reciprocal v. Pilzer, 599 S.E.2d 182, 184 (Ga. 2004) (holding Georgia's medical malpractice statute of repose does not apply to contribution actions when the contributor's negligence was established in the underlying medical malpractice action).

Finally, our conclusion comports with the policy considerations supporting South Carolina's medical malpractice statute of repose. "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993). The Langley court continued:

> Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.
>
> Society benefits when claims and causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. This is not only for the convenience of society but also due to necessity. At that point, society is secure and stable.

Id. at 404-05, 438 S.E.2d at 244 (quoting Kissel v. Rosenbaum, 579 N.E.2d 1322, 1328 (Ind. Ct. App. 1991)). The expiration of a statute of repose extinguishes all causes of action, including those that may later accrue and those that have already accrued. Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Here, Providence Hospital brought its action for equitable indemnification ten years after the date of treatment and four years after the statute of repose expired. Providence Hospital knew Taillon may be responsible for some or all of Sharpe's damages as early as discovery in the underlying medical malpractice action. Allowing Providence Hospital's claim for equitable indemnification predicated upon proving Taillon's liability would, in effect, allow Providence Hospital to subject Taillon to liability for medical malpractice after the legislatively proscribed six-year statute of repose expired and run afoul of the policy considerations supporting section 15-3-545(A).

CONCLUSION

We hold the trial court properly granted Taillon and the JUA's motion for summary judgment. The decision of the trial court is hereby

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shannon Hutchinson, Personal Representative of the Estate of Stephen F. Ney, a/k/a Steve F. Ney, Respondent,

v.

Liberty Life Insurance Company, Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4820
Heard February 8, 2011 – Filed April 20, 2011

REVERSED AND REMANDED

Kevin K. Bell and Rebecca A. Roser, both of Columbia, for Appellant.

Kenneth C. Anthony, Jr., of Spartanburg, for Respondent.

PER CURIAM: Liberty Life Insurance Co. (Liberty Life) denied life insurance proceeds to Stephen Ney's beneficiary after toxicology reports reflected the presence of methamphetamines in Ney's blood when he was killed in a single vehicle accident. Shannon Hutchinson, Ney's daughter and beneficiary, sued Liberty Life for the insurance benefits arguing the policy exclusion for injury resulting from an insured being "under the influence of any narcotic" did not apply to Ney's claim because methamphetamine is not a narcotic. The circuit court granted summary judgment to Hutchinson on the ground that methamphetamine is not a narcotic within the definition of the insurance policy exclusion.

On appeal, Liberty Life argues the circuit court erred in granting summary judgment to Hutchinson when (1) the circuit court adopted a specialized medical definition of the term "narcotic" in the context of an insurance policy written for laypersons, as opposed to the plain and ordinary meaning of "narcotic" as understood by laypersons, and (2) the operative language of the Liberty Life policy exclusion providing that benefits will not be payable when the insured is "under the influence of any narcotic" was taken verbatim from the South Carolina Insurance Code. We reverse the grant of summary judgment and remand for further proceedings.

FACTS / PROCEDURAL HISTORY

Ney purchased an accidental death insurance policy from Liberty Life in connection with a mortgage on property he owned in Inman, South Carolina. The policy, effective October 1, 2006, provided it would pay off the balance on Ney's mortgage in the event of Ney's accidental death. Two days after the policy came into effect, on October 3, 2006, Ney was killed as a result of driving his tractor-trailer off an interstate highway directly into a bridge abutment.[1] The death certificate listed the cause of death as blunt

[1] Dr. Barry Logan reviewed the accident reconstruction report and submitted an affidavit noting there was no evidence of braking on the roadway or on the 200+ feet of median Ney traveled before the point of impact with the bridge support.

force trauma to the chest in connection with a motor vehicle crash, but it also listed methamphetamine use under "other significant conditions contributing to death." A coroner's inquest determined the manner of death to be an accident.

In her capacity as personal representative of her father's estate, Hutchinson filed a claim for insurance proceeds (the unpaid balance on the mortgage) after Ney's death. Liberty Life refused to pay any benefits due pursuant to the accidental death policy, and Hutchinson lost Ney's home due to foreclosure. Hutchinson brought suit against Liberty Life for a declaratory judgment that she was entitled to all proceeds payable under the policy, for bad faith, and for violation of the South Carolina Unfair Trade Practices Act.[2] Liberty Life answered, noting the insurance company denied benefits after an investigation revealed "Insured's illegal drug use contributed to his death" and the policy contained an exclusion for "illegal drug use." Hutchinson moved for summary judgment on all three claims, and the circuit court conducted a hearing on the motion.

During the hearing, Hutchinson presented an affidavit from Dr. Donald O. Allen. Dr. Allen noted narcotic drugs are those drugs that induce pain relief, drowsiness, sleep, and similar states of stupor. In contrast, Dr. Allen stated methamphetamines are stimulants that induce wakefulness, alertness, focus, and a heightened sense of awareness. Therefore, Dr. Allen opined that methamphetamine is not a narcotic drug.

Hutchinson's counsel argued the South Carolina Legislature repeatedly separates narcotics from other controlled substances in our state's code. See, e.g., S.C. Code Ann. §§ 17-13-140, 44-53-210 (2002 & 2003). Hutchinson also relied on a Court of Appeals case from New Mexico (Ortiz v. Overland Express, 207 P.3d 1147, 1150-51 (N.M. Ct. App. 2009)) for the proposition that methamphetamines are not narcotic drugs.[3]

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[2] S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2010).

[3] The Court of Appeals' Ortiz decision was reversed on appeal to the New Mexico Supreme Court subsequent to the summary judgment hearing in this case. 237 P.3d 707, 716 (N.M. 2010).

Liberty Life noted Ney's blood concentration of methamphetamine was ten times greater than the threshold for impairment. Liberty Life submitted affidavits from two medical experts who described Ney's methamphetamine blood concentration as being in the toxic to lethal range. Liberty Life's medical experts reported the symptoms that usually accompany this level of methamphetamine use included euphoria, excitation, rapid speech, insomnia, hallucinations, delusions, psychosis, poor impulse control, perceptual distortion, and aggressive behavior. Withdrawal symptoms included dysphoria, extreme fatigue, uncontrollable sleepiness, restlessness, agitation, irritability, nervousness, and paranoia. In addition, Liberty Life's experts noted a link between methamphetamine use and driving impairment, including reports of decreased ability to concentrate, inability to divide attention, and errors in judgment. Both experts opined Ney was under the influence of methamphetamines when he drove his truck off the highway and struck a bridge support, thereby resulting in his death.

Liberty Life further noted the phrase "under the influence of any narcotic" appears in insurance codes in at least thirty-three states including South Carolina. Liberty Life relied on a case from the Eastern District of Missouri (Doe v. General American Life Insurance Co., 815 F. Supp. 1281, 1285 (E.D. Mo. 1993)), which held that cocaine is commonly understood by lay persons to be a narcotic drug despite the fact that it is technically a stimulant. Therefore, Liberty Life reasoned methamphetamine should also be classified as a narcotic. Liberty Life suggested the court should adopt a definition of narcotic to include any illegal mood or behavior altering drug or controlled substance.

The circuit court issued an order granting summary judgment to Hutchinson on the basis that methamphetamine is not a narcotic within the definition of the policy exclusion. The circuit court found Liberty Life had no right to deny coverage to Ney as the exclusion for injury while under the influence of any narcotic did not apply. The circuit court ordered Liberty Life to pay Hutchinson the balance due on the home at the time of Ney's death, in addition to 20% of the loan balance due in accordance with the additional death benefit provided in the policy, plus pre-judgment interest. This appeal followed.

ISSUES ON APPEAL

(1) Did the circuit court err in adopting a specialized medical definition of the term "narcotic" in the context of an insurance policy which did not define the term, as opposed to adopting the plain and ordinary meaning of "narcotic" as understood by laypersons?

(2) Did the circuit court err in granting summary judgment to Hutchinson when the operative language of the Liberty Life policy exclusion providing that benefits will not be payable when the insured is "under the influence of any narcotic" was taken verbatim from section 38-71-370(9) of the South Carolina Code (2002)?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the circuit court under Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides summary judgment shall be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In ascertaining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW / ANALYSIS

I. Definition of the Term "Narcotic"

Liberty Life argues the circuit court erred in adopting a specialized medical definition of the term "narcotic" in the context of an insurance policy written for laypersons, as opposed to the plain and ordinary meaning of "narcotic" as understood by laypersons. We agree.

"Where the words of an insurance policy are capable of two reasonable interpretations, the interpretation most favorable to the insured will be adopted." State Farm Fire & Cas. Co. v. Barrett, 340 S.C. 1, 8, 530 S.E.2d 132, 135 (Ct. App. 2000). "We should not, however, torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties." Id.

"When a policy does not specifically define a term, the term should be defined according to the usual understanding of the term's significance to the ordinary person." Id. at 8, 530 S.E.2d at 136; USAA Prop. & Cas. Ins. Co. v. Rowland, 312 S.C. 536, 539, 435 S.E.2d 879, 881-82 (Ct. App. 1993) ("In the absence of a prescribed definition in the policy, the term should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person.").

Dictionaries can be useful starting points for interpreting undefined terms in an insurance policy. See S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 382-83, 588 S.E.2d 643, 646 (Ct. App. 2003) (citing Heilker v. Zoning Bd. of Appeals, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001)). One dictionary defines "narcotic" as "a drug or other substance affecting mood or behavior and sold for nonmedical purposes, esp. an illegal one." The New Oxford American Dictionary 1129 (2d ed. 2005). The Oxford dictionary also provides a specialized medical definition of the term "narcotic." The second definition of "narcotic" states "Medicine a drug that relieves pain and induces drowsiness, stupor, or insensibility." Id. at 1129.

Although no South Carolina case law directly addresses the question of whether methamphetamine is commonly understood by ordinary laypersons

to be a narcotic drug, one case from Missouri is analogous to the present case and warrants discussion. In Doe v. General American Life Insurance, Co., 815 F. Supp. 1281 (E.D. Mo. 1993), the Eastern District Court of Missouri interpreted the terms of a health plan exclusion for injury or sickness arising out of the use of "a) narcotics; b) hallucinogens; c) barbiturates; d) marijuana; e) amphetamines; or similar drugs or substances." Id. at 1283. The district court found that the five categories of drugs listed in the health plan were ambiguous, as cocaine was not listed as being covered or excluded. Id. at 1285. To clarify this ambiguity, the district court looked to the ordinary, not specialized, meaning of these terms as a layperson would understand them. Id.

The district court noted "narcotics" were the broadest category because "the term 'narcotic' has come to have a generic meaning for drugs considered to be illegal." Id. The district court concluded that a layperson would commonly understand cocaine to be classified as a narcotic because it is a drug that is illegal to buy, sell, and possess in this country. Id. Therefore, the district court reasoned "this Court need not be concerned with cocaine's 'pharmacological' similarities or dissimilarities with narcotics, hallucinogens, barbiturates, marijuana, or amphetamines." Id.

Other jurisdictions have used the terms "narcotic" and "methamphetamine" interchangeably. See, e.g., United States v. Campos, 306 F.3d 577, 580 (8th Cir. 2002) ("A large quantity of narcotics is indicative of an intent to distribute, and we have previously held that possession of approximately 50 grams of methamphetamine is consistent with an intent to distribute."); United States v. Robinson, No. 4:08CR386(HEA), 2008 WL 4790324, *7 (E.D. Mo. October 29, 2008) (finding a search warrant was not deficient for referring to "certain narcotic drugs" at a residence because "the fact that methamphetamine may technically not be a narcotic is a distinction without a difference," and further finding that the term "narcotics" was used generically as a synonym for "controlled substances"); United States v. Real Property Known as 77 East 3rd Street, 869 F. Supp. 1042, 1058-59, 1064 (S.D.N.Y. 1994) (using the terms narcotic and methamphetamine interchangeably); State v. Carmichael, 53 P.3d 214, 232 (Haw. 2002) (noting although methamphetamine is not a narcotic from a scientific point of view, the term narcotic has evolved to include any addictive drug).

In the case at hand, the circuit court's order adopted the definition of "narcotic" supplied by Dr. Allen. Dr. Allen opined that methamphetamine is not a narcotic drug because narcotic drugs are those drugs that induce pain relief, drowsiness, sleep, and similar states of stupor. Methamphetamines, according to Dr. Allen, are stimulants that induce wakefulness, alertness, focus, and a heightened sense of awareness. The scientific description of the term "narcotic" according to a medical doctor is not representative of the ordinary and usual understanding of the term to an ordinary person. See Rowland, 312 S.C. at 539, 435 S.E.2d at 881-82 ("In the absence of a prescribed definition in the policy, the term should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person."). Therefore, we hold the circuit court erred in adopting the specialized medical definition of "narcotic" supplied by Dr. Allen.

The Liberty Life policy did not define the term "narcotic" to exclude or include methamphetamines. Like the district court in General American Life Insurance, this court need not be concerned with methamphetamine's pharmacological similarities to other narcotic drugs. 815 F. Supp. at 1285. Instead, we look to the usual understanding of the term's significance to an ordinary person. Barrett, 340 S.C. at 8, 530 S.E.2d at 136. Based on its widespread illegal use, we believe a layperson would commonly understand methamphetamine to be a narcotic drug.

Accordingly, we hold the circuit court erred in granting summary judgment to Hutchinson. Because we reverse on the issue of how the circuit court defined the term "narcotic," we need not reach the additional issue raised on appeal. See Whiteside v. Cherokee Cnty. Sch. Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (holding an appellate court need not address the remaining issue on appeal when the resolution of a prior issue is dispositive).

REVERSED AND REMANDED.

WILLIAMS, GEATHERS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter Brown, Appellant,

v.

South Carolina Department of Health and Human Services, Respondent.

Appeal From Administrative Law Court
Judge Carolyn C. Matthews

Opinion No. 4821
Heard February 9, 2011 – Filed April 20, 2011

REVERSED and REMANDED

Patricia Logan Harrison, of Columbia, for Appellant.

Byron Ronald Roberts, of Columbia, for Respondent.

FEW, C.J.: In this case we determine that the South Carolina Department of Health and Human Services (DHHS) has jurisdiction to decide an appeal from the termination of Medicaid waiver services. We reverse

DHHS's and the Administrative Law Court's decisions to the contrary and remand for a hearing on the merits.

I. Facts and Medicaid Background

Peter Brown is a forty-three-year-old Medicaid recipient with mental retardation. He has related disabilities of epilepsy and diabetes. His IQ is 44, and his psychological evaluation places him at the juncture between the mild and moderate levels of mental retardation. He lives in Spartanburg, South Carolina at the Charles Lea Center, a supervised living arrangement for people with mental disabilities. Peter's expenses at the Center are paid with federal funds through Medicaid. Before Peter lived at the Center, he had been required under federal Medicaid law to live in an institutional intermediate care facility for the mentally retarded (ICF/MR). In 1991, however, Peter began participating in a program that allowed him to move out of the ICF/MR institution and into the Center. Under this program, the United States Department of Health and Human Services waives the statutory requirement that individuals with mental disabilities live in an institution in order to receive money for Medicaid services.[1] This "waiver" program provides services to certain Medicaid recipients, like Peter, in a less restrictive setting, such as the Center.[2] The program saves money and improves the quality of life for Medicaid recipients by keeping them out of an institution.

Each state applies for approval of its customized waiver program by submitting a "waiver document" to the federal Centers for Medicare and

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[1] 42 U.S.C. § 1396n(c) (Supp. 2010); 42 C.F.R. § 441.300 (2010); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007).

[2] See S.C. Code Ann. § 44-20-20 (2002) ("It is the purpose of this chapter to assist persons with mental retardation . . . by providing services to enable them to participate as valued members of their communities to the maximum extent practical and to live . . . in the least restrictive environment available.").

Medicaid Services.[3] The South Carolina Department of Disabilities and Special Needs (DDSN) operates South Carolina's Mental Retardation/Related Disabilities (MR/RD) waiver, which specifically lists and defines the services it may provide to qualifying individuals.[4] The services provided under the waiver are intended to prevent an individual from regressing to the point of requiring institutionalization, and only a person who would otherwise qualify to live in an ICF/MR may receive waiver services.[5] Peter was allowed to forego institutionalization, and instead receives the residential habilitation waiver service through the Center. This includes services to help him meet his daily living needs at the Center such as cleanliness, chores, and food preparation.

Peter also received another Medicaid service—twelve hours per week of one-on-one service. However, that service is not listed in the waiver document. Peter's one-on-one service has been provided since 1992, when he was diagnosed with a pre-diabetic condition. The initial purpose of the service was to have someone with Peter to ensure he ate enough food and followed his diabetic diet. By the time the Center notified Peter of its intent to terminate the service in 2005, it included grocery help and community socialization activities. To manage his diabetes dietary restrictions, Peter has set menus and corresponding grocery lists for each week. The employee providing the one-on-one service helped Peter inventory his food supply and make a grocery list to match his weekly menu. The employee also helped Peter choose and attend activities in the community with non-disabled people.

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[3] 42 C.F.R. §§ 440.180(b), 431.55 (2010).

[4] S.C. Code Ann. § 44-20-270 (2002).

[5] The services provided and descriptions of them are found in the MR/RD Waiver Document (effective Oct. 1, 2004-Sept. 30, 2009) (on file with SCDDSN).

II. Procedural History

In February 2005, the Center sent Peter's mother, Carolyn Brown, a letter notifying her of its intention to terminate Peter's twelve hours per week of one-on-one service.[6] In March 2005, Peter appealed the termination to DDSN. Based on its determination that the residential habilitation waiver service was "sufficient to meet Peter's needs," DDSN upheld the Center's decision to terminate the one-on-one service. DDSN's letter notifying Mrs. Brown of its decision stated: "Ultimately there has been no reduction or termination of MR/RD Waiver Services to Peter. Sufficient services and supports can be provided to Peter based on his assessed needs . . . ." In April 2005, Peter appealed the final DDSN agency decision to DHHS.

The DHHS hearing officer found as a matter of law that "if a service cannot be shown to keep a person out of an institutional facility for the mentally retarded, it is not a service covered by the Medicaid waiver." He then concluded: "If a service is not covered by Medicaid . . . it is not under the subject matter jurisdiction of a SCDHHS Hearing Officer." Applying that conclusion to Peter's complaint, the hearing officer determined he did not have subject matter jurisdiction because Peter "has not met his burden of proof, by preponderance of the evidence, to establish that the one[-]on[-]one services are necessary to keep him out of an institution for the mentally retarded . . . and thereby establishing the subject matter jurisdiction of this Hearing Officer."

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[6] Peter is also a plaintiff in an action proceeding simultaneously in federal court that alleges DHHS and DDSN violated the Americans with Disabilities Act and other federal statutes. Peter B. v. Sanford, No. 6:10-cv-00767-JMC (D.S.C. Mar. 7, 2011). On March 7, 2011, the United States District Court for the District of South Carolina granted the plaintiffs a temporary injunction prohibiting the defendants from reducing or terminating certain Medicaid services. As a result, Peter is currently receiving his one-on-one service.

Peter appealed to the ALC. The ALC affirmed the hearing officer's decision, finding the one-on-one service is not a waiver service because it is not mentioned in the waiver document, and Peter did not show it is necessary to keep him out of an ICF/MR. Peter also argued his one-on-one service met the definition of the adult companion waiver service, and thus was covered by Medicaid and within the hearing officer's jurisdiction. The ALC rejected this argument. The ALC denied Peter's motion to alter or amend the judgment.

III. Jurisdiction

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Majors v. S.C. Sec. Comm'n, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007). It refers to a tribunal's constitutional or statutory power to decide a case. Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). "The question of subject matter jurisdiction is a question of law . . . ." Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993).

Jurisdiction in this case is defined by federal and state regulations. When an individual believes his Medicaid-covered services or benefits have been wrongfully denied, terminated, suspended, changed, or reduced, he may appeal. 42 C.F.R. §§ 431.220(a)(1)-(2), 431.201 (2010); S.C. Code Regs. 126-380(A)-(B) (1992). The waiver document provides the right to appeal first to DDSN and then to DHHS. We find a DHHS hearing officer has subject matter jurisdiction to hear an appeal from the denial, termination, suspension, or reduction of a service or benefit which the individual alleges is covered by Medicaid. The jurisdiction of any tribunal is determined by the allegations, not by the answer to the questions raised by the allegations. See 21 C.J.S. Courts § 17 (2006) ("If the pleadings contain sufficient matter to challenge the attention of the court, and such a case is thereby presented as to authorize the court to deliberate and act, this is sufficient for the purpose of conferring jurisdiction. Thus, if a complaint sets forth a case belonging to the general class over which the authority of the court extends, the fact that it

fails to state a cause of action does not affect the jurisdiction of the court."). Here, Peter alleges his one-on-one service is covered by Medicaid. Because jurisdiction is determined by the question to be answered, not by the answer itself, DHHS is the proper tribunal to determine whether he is correct.

Nevertheless, the ALC and DHHS hearing officer found Peter's one-on-one service is not covered by Medicaid as a waiver service because Peter did not prove it was necessary to keep him out of an institution. This supposed requirement comes from the following statement in the waiver document:

> This waiver is requested in order to provide home and community-based services to individuals who, but for the provision of such services, would require the following level(s) of care, . . . : Intermediate care facility for mentally retarded or persons with related disabilities (ICF/MR).

From this statement, the hearing officer determined "if a service cannot be shown to keep a person out of an institutional facility for the mentally retarded, it is not a service covered by the Medicaid waiver" and therefore outside of his jurisdiction. On appeal, Peter argues the hearing officer erred in requiring him to prove that he would immediately be returned to an ICF/MR facility if his one-on-one service was terminated. We agree.

The statement that the ALC order cites is not intended to provide a legal standard for establishing jurisdiction. Rather, a person must first qualify as one who would require institutionalization without the availability of the waiver-provided *services*, but is not also required to show that *each* waiver service provided prevents him from institutionalization. For example, the waiver provides for "Prevocational services," which "are aimed at preparing an individual for paid or unpaid employment . . . . Services include teaching such concepts as compliance, attendance, task completion, problem solving and safety." It is highly unlikely a person would need to be institutionalized absent prevocational skills; however, they are provided under the waiver. To read the document as the ALC interpreted it would

necessitate a waiver-qualifying individual to prove that each service he requested was necessary to avoid institutionalization. The ALC erred by imposing upon Peter an incorrect legal standard to establish jurisdiction.

Finally, the ALC noted "one-on-one services are not 'waiver services' . . . over which the DHHS hearing officer would have subject matter jurisdiction" because "[t]he waiver document does not mention one-on-one services" and "there is sworn testimony in the record . . . that one-on-one services are not MR/RD Waiver services." Peter argues the service was covered under the waiver because it met the definition of the adult companion waiver service. We do not reach the question of whether the service qualifies as a waiver service. We note, however, that the answer to the question is not controlled by whether the service is labeled as one-on-one as opposed to adult companion services.

IV. Conclusion

We reverse the ALC's conclusion that the hearing officer did not have subject matter jurisdiction to hear Peter's appeal and its application of an incorrect legal standard. Accordingly, the remainder of the order is vacated, and the case is remanded to DHHS for a hearing on the merits in accordance with this opinion and pursuant to 42 C.F.R. § 431.220(a)(1)-(2).

REVERSED and REMANDED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tyquan Jared Amir Jones, Appellant.

Appeal From Florence County
Judge Thomas A. Russo, Circuit Court Judge
Jerry D. Vinson, Jr., Family Court Judge

Opinion No. 4822
Submitted June 22, 2010 – Filed April 20, 2011

AFFIRMED

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

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all

of Columbia; Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

KONDUROS, J.: Tyquan Jared Amir Jones was charged as a juvenile with murder, armed robbery, and unlawful possession of a pistol. The family court waived jurisdiction and ordered he be treated as an adult. Jones then pled guilty in the circuit court to a lesser charge pursuant to a plea agreement. On appeal, he argues the family court erred in waiving jurisdiction because it did not properly apply the Kent[1] factors. He also contends the family court erred in admitting a statement he gave to police because his mother was not present during the interrogation or when he signed the waiver of rights form. He further maintains the statement was based on an unfulfilled promise by an officer. We affirm.[2]

FACTS/PROCEDURAL HISTORY

On December 3, 2005, Jones, who was fifteen years old at the time, met his friends, Donte Gurley and Chris Gurley, at another friend's house. The group planned to rob Desmond Keith because he purportedly owed Chris money. Antonio Crawford joined the group and the four then confronted Keith. When Jones pulled out a gun, a shot fired, hitting Keith. Keith later died from the injury.

Jones was charged as a juvenile with murder, armed robbery, and unlawful possession of a pistol. The State moved to waive Jones to the court of general sessions and have him tried as an adult. Following a hearing, the family court waived its jurisdiction. Jones was then indicted for murder, attempted armed robbery, and conspiracy. Pursuant to a plea agreement, Jones pled guilty to voluntary manslaughter and the State dismissed the armed robbery and conspiracy charges and recommended Jones's sentence be capped at twenty years' imprisonment. The circuit court sentenced Jones to

[1] Kent v. United States, 383 U.S. 541, 566-67 (1966).

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

twenty years' imprisonment with credit for time served. This appeal followed.

LAW/ANALYSIS

I. Waiver of Jurisdiction

Jones contends the family court erred in waiving jurisdiction because it did not properly apply the Kent[3] factors. He further maintains the family court failed to take into account that the shooting was an accident. We disagree.

The family court has exclusive jurisdiction over children[4] accused of crimes. S.C. Code Ann. § 63-3-510(A)(1)(d) (2010). However, the family court may transfer jurisdiction over a criminal matter to the court of general sessions. S.C. Code Ann. § 63-19-1210(6) (2010). Section 63-19-1210(6) provides:

> Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of murder . . . , the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child coming within the purview of this chapter. The judge of the family court is authorized to determine this request.

"Upon a motion to transfer jurisdiction, the family court must determine if it is in the best interest of both the child and the community before granting the

[3] Kent v. United States, 383 U.S. 541, 566-67 (1966).

[4] The statute defines a child or juvenile as "a person less than seventeen years of age." S.C. Code Ann. § 63-19-20(1) (2010). However, the statute further limits the definition to someone under sixteen for certain felony charges. Id.

transfer request." State v. Pittman, 373 S.C. 527, 558, 647 S.E.2d 144, 160 (2007).

The family court must consider the following factors when deciding whether to waive its jurisdiction over a juvenile:

> (1) The seriousness of the alleged offense.
>
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
>
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> (4) The prosecutive merit of the complaint.
>
> (5) The desirability of trial and disposition of the entire offense in one court.
>
> (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
>
> (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the

> alleged offense) by the use of procedures, services and facilities currently available.

Id. at 558-59, 647 S.E.2d at 160 (citing Kent, 383 U.S. at 566-67).

"The family court must provide a sufficient statement of the reasons for the transfer in its order." Id. at 559, 647 S.E.2d at 160. "'The order should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court.'" State v. Avery, 333 S.C. 284, 293, 509 S.E.2d 476, 481 (1998) (quoting In re Sullivan, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980)). The decision to transfer jurisdiction lies within the discretion of the family court, and the appellate court will affirm the family court's decision absent an abuse of discretion. Id. at 292, 509 S.E.2d at 481.

In Pittman, 373 S.C. at 560, 647 S.E.2d at 161, the juvenile argued the family court erred in finding he would not benefit from the rehabilitation program at the Department of Juvenile Justice (DJJ). The supreme court found:

> Because we review the lower court's decision only for an abuse of discretion, this [c]ourt would have to find the family court's order wholly unsupported by the record in this regard to find error. Instead, we find that this record contains a great deal of evidence supporting the family court's decision. Looking at events occurring both before the waiver hearing and after, while there is evidence in the pre-trial motions hearings which suggests that [the juvenile] was cooperative and capable of rehabilitation, the record also reflects that [the juvenile] engaged in escape plans, made shanks, and caused other disruptions while in the custody of DJJ.

Id.

In this case, we find the family court properly considered all of the Kent factors in deciding to waive jurisdiction. It made specific findings as to each of the eight factors. It found the crimes with which Jones was charged are classified as most serious offenses and evidence indicated "the suspects approached the victim, attempted to rob him, and shot him." It further noted, "These crimes were premeditated and committed in an aggressive, violent, and willful manner. . . . The community requires protection from the persons who committed these offenses." Additionally, the court found the crimes were committed against people, which elevated the seriousness of the offenses.

Although the court "sympathize[d] with [Jones's] lack of opportunities and the environment in which he lives," it observed that Jones had previously received a probationary sentence after being adjudicated delinquent for armed robbery. After he violated probation, he was committed to DJJ, where his sentence was extended after he was found in possession of a small amount of marijuana. The court noted that Jones thought about the need to change his lifestyle while he was at DJJ but upon his release he renewed his relationship with at least one of his co-defendants and retrieved the handgun he had entrusted to the co-defendant.

Jones places importance on his belief the trial court failed to take into account the shooting was an accident or that he did not intend to hurt the victim. However, the family court noted in its order, "While the death of the victim was not premeditated, it is reasonable to assume that harm could occur during the commission of the armed robbery." Accordingly, we find the family court did not abuse its discretion in waiving jurisdiction.

II. Voluntariness of the Statement

Jones argues the family court erred in admitting into evidence his statement to police because his mother was not present during the interrogation or when he signed the waiver of rights form. He also contends the statement was based on an unfulfilled promise by an officer that he would

speak to the court and ask for lenient treatment. We find his argument concerning the officer is unpreserved. Additionally, his argument concerning his mother's presence is abandoned.

"An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). Further, "[a] party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); see also State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (finding an issue unpreserved when the appellant argued one ground in support of a jury charge at trial and another ground in support of the charge on appeal).

Additionally, "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). "An issue is also deemed abandoned if the argument in the brief is merely conclusory." State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), aff'd as modified, 337 S.C. 622, 525 S.E.2d 246 (2000).

Jones's argument regarding his being induced into making the statement by the officer is not preserved because he never argued the statement was involuntary for this reason at trial. Further, although Jones's issue statement contends the statement was involuntary because his mother was not present as well as he was induced into making the statement by the officer, the body of his brief revolves around only the contention that the statement was induced. He provides no case law or argument regarding whether a parent is required to be present during questioning or signing of the waiver. Nor does he explain how a parent's failure to be present makes a statement involuntary. Accordingly, we find Jones's argument relating to his mother's failure to be present is abandoned.

CONCLUSION

We find the family court did not abuse its discretion in waiving jurisdiction. Additionally, Jones's argument regarding the officer inducing him to make a statement is unpreserved. Further, Jones's argument about his mother's failure to be present during his questioning or signing of his statement is abandoned. Accordingly, the family court's decision is

AFFIRMED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lawrence Burgess, Appellant.

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

Opinion No. 4823
Heard January 11, 2011 – Filed April 20, 2011

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, Office of the Attorney General, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

FEW, C.J.: In Lawrence Burgess's appeal from his conviction for possession of crack cocaine with intent to distribute, we consider the validity of a multijurisdictional narcotics enforcement agreement, the admissibility of an arresting officer's employment records, and the circumstances under which a trial judge must charge "mere presence." We find no error and affirm.

I. Facts and Procedural History

On March 2, 2006, officers on the Lexington County Narcotics Enforcement Team (NET) executed a search warrant for drugs at a trailer on Two Notch Road in Batesburg, South Carolina. When Agent Bill Laney and Officer Emmitt Gilliam pulled into the driveway, they saw Burgess and another individual standing by a trailer which was not the target of the search warrant. They then saw Burgess "run around the back side of the trailer and flee." Gilliam ran around the other side of the trailer "to cut him off." Gilliam got to within five to six feet of Burgess and told him to stop and put his hands up. He then saw Burgess drop an empty pill bottle with no top. Gilliam testified "the pill bottle had crack residue in it." Laney backtracked Burgess's steps to where Burgess had been standing and located a pill bottle top and pieces of crack cocaine on the ground. Burgess denied owning or dropping the pill bottle. He was arrested and indicted for possession with intent to distribute crack cocaine in violation of South Carolina Code section 44-53-375 (Supp. 2010), based on the crack found by Laney.

At the time of the arrest, Gilliam was a police officer with the Batesburg-Leesville Police Department. The arrest occurred outside of the Batesburg-Leesville town limits. However, Gilliam was acting with NET, which has jurisdiction for all of Lexington County pursuant to a Multijurisdictional Drug Enforcement Unit Agreement (NET Agreement) signed by the police chief of the Batesburg-Leesville Police Department.

Burgess alleged Gilliam lacked authority to make an arrest outside the Batesburg-Leesville town limits, and made a pre-trial motion to dismiss the charge. He argued the NET agreement did not comply with the statutes authorizing such extra-territorial jurisdiction. The trial judge denied the motion because he found the agreement valid, and therefore that Gilliam had authority to make the arrest.

After the ruling on the validity of the NET agreement, but before opening statements, the State made a motion in limine to exclude Gilliam's employment records. The trial judge sustained the objection and told Burgess's counsel: "If you, depending on how the case goes, decide you want to get into that bring it to the court's attention . . . ." During Gilliam's testimony, Burgess sought to cross-examine him about why he was no longer with the NET and to introduce the employment records. The records outline three incidents, spanning from approximately March 2006 until February 16, 2007, in which Gilliam disagreed with other officers about the use of confidential informants, used profanity, and threatened to harm another officer. The judge refused to admit the records.

After the jury charge, Burgess requested the trial judge charge the jury on "mere presence." Relying on State v. Peay, 321 S.C. 405, 410-11, 468 S.E.2d 669, 672-73 (Ct. App. 1996) and State v. Ballenger, 322 S.C. 196, 199-200, 470 S.E.2d 851, 854 (1996), the judge denied the request, and stated: "The State indicated that they rely only on actual possession and not constructive possession. Those cases indicate that mere presence is not required and would be improper and for that reason I did not charge that."

The jury found Burgess guilty, and the judge sentenced him to three years in prison.

II. The Multijurisdictional Drug Enforcement Unit Agreement

In September 2001, eleven law enforcement agencies in Lexington County entered into an agreement creating the NET. The agreement states it is made pursuant to South Carolina Code sections 23-1-210 (1981) (amended 2007) and 23-1-215 (1987) (amended 2007).[1] The agreement states its purpose as follows:

[1] These code sections have been amended. See S.C. Code Ann. §§ 23-1-210, -215 (Supp. 2010). However, because the agreement was executed in 2001, we use the prior versions of the statutes in deciding this case.

> [T]he parties . . . consent and agree to span the geopolitical boundaries of all areas of Lexington County to the fullest extent allowed under South Carolina law for the express purpose of investigating the illegal use of controlled substances and related crimes by creating this Lexington County Multi-Agency Narcotics Enforcement Team[.]

The Batesburg-Leesville police chief signed the agreement. The State put into evidence a videotape of the August 13, 2001 Batesburg-Leesville town council meeting at which "the chief of police informed council of that pending matter between the solicitor and the town of Batesburg/Leesville forming a multi-jurisdictional agreement for continued narcotics work in Lexington County." A town council member testified the police chief had "the advice and consent to enter into this agreement of town council."

Our analysis of Gilliam's authority to arrest Burgess begins with the premise that "[t]he jurisdiction of a municipal police officer, absent statutory authority, generally does not extend beyond the territorial limits of the municipality." State v. Harris, 299 S.C. 157, 159, 382 S.E.2d 925, 926 (1989); see S.C. Code Ann. § 5-7-110 (2004) ("Any such police officers shall exercise their powers on all private and public property within the corporate limits of the municipality . . . ."). However, there are exceptions to this general rule, including the two statutes listed as authority for creating the NET agreement: section 23-1-210, allowing the temporary transfer of an officer to another municipality or county; and section 23-1-215, providing for agreements between multiple law enforcement jurisdictions for criminal investigation.[2]

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[2] There are other instances of extra-territorial jurisdiction which are inapplicable to this case. See, e.g., S.C. Code Ann. § 5-7-120 (2004) (requesting help from other subdivisions in emergency situations); S.C. Code Ann. § 17-13-40 (2003) (extending authority to three-mile radius outside town limits or an adjacent county if an officer is in pursuit of one who violated an ordinance or statute within the officer's jurisdiction); S.C. Code Ann. § 17-13-45 (2003) (responding to a distress call or request for assistance in an adjacent jurisdiction).

The trial judge ruled the NET agreement valid under section 23-1-210, which provides in part:

> (A) Any municipal or county law enforcement officer may be transferred on a temporary basis to work in law enforcement[3] in any other municipality or county in this State under the conditions set forth in this section, and when so transferred shall have all powers and authority of a law enforcement officer employed by the jurisdiction to which he is transferred.
>
> (B) Prior to any transfer as authorized in subsection (A), the concerned municipalities or counties shall enter into written agreements stating the conditions and terms of the temporary employment of officers to be transferred. The bond for any officer transferred shall include coverage for his activity in the municipality or county to which he is transferred in the same manner and to the same extent provided by bonds of regularly employed officers of that municipality or county.
>
> (C) Agreements made pursuant to subsection (B) shall provide that temporary transfers shall in no manner affect or reduce the compensation . . . of transferred officers and such officers shall continue to be paid by the county or municipality where they are permanently employed . . . .

The judge found the NET Agreement complied with section 23-1-210 because "there is nothing in here . . . that would prohibit either a county or a

[3] The 2007 amendment to this section includes the phrase "within multijurisdictional task forces established for the mutual aid and benefit of the participating jurisdictions, or . . . ."

municipality or a town from authorizing in some way the chief of police or the sheriff to enter into such agreements."

An action involving the interpretation of a statute is an action at law, which we review de novo. Town of Summerville v. City of North Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). We agree with the trial judge that the NET agreement meets the requirements of section 23-1-210. First, the concerned municipalities and county entered into a written agreement to create multijurisdictional law enforcement authority. Second, the agreement complies with the requirements of 23-1-210, such as stating the employment conditions and maintaining compensation from permanent employment. Finally, the officers acting with the NET were transferred to it on a temporary basis.

Nevertheless, Burgess argues the agreement fails to provide jurisdiction under 23-1-210 for two reasons. First, Burgess argues "Gilliam was not temporarily transferred but rather he was involved in an investigation focused on a case and location." We disagree. Even if Gilliam had been transferred for only this one investigation, it was still a temporary transfer. Second, Burgess argues the Batesburg-Leesville police chief who signed the agreement lacked the authority to enter into it under section 23-1-210. We agree with the trial judge's determination that nothing in the statute "would prohibit either a county or a municipality or a town from authorizing in some way the chief of police or the sheriff to enter into such agreements." The Batesburg/Leesville police chief informed the town council of the agreement *before its execution*, and the council gave him the authority to enter into it.

The supreme court's recent opinion in State v. Boswell, Op. No. 26941 (S.C. Sup. Ct. filed March 14, 2011) (Shearouse Adv. Sh. No. 9 at 22), does not change this analysis. In Boswell, the court applied section 23-20-50(A) of the South Carolina Code (2007) to a multijurisdictional agreement entered into between the Calhoun County and Lexington County Sheriffs' Departments pursuant to the Law Enforcement Assistance and Support Act.[4] Id. at 30-32. The court held the agreement was invalid because it was "not

[4] S.C. Code Ann. §§ 23-20-10 to -60 (2007).

voted on by the county council" as required by section 23-20-50(A) of the Act. Id. at 31.

Burgess did not argue to the trial court and does not argue on appeal that section 23-20-50(A) applies to the NET agreement in this case. In any event, we find Boswell distinguishable because the NET agreement here was not entered pursuant to the Law Enforcement Assistance and Support Act. Therefore, section 23-20-50(A) of the Act does not apply. By its own terms, the section applies to "[a]n agreement entered into . . . *pursuant to this chapter* . . . ." § 23-20-50(A) (emphasis added).[5] Section 23-20-30(B) specifically provides that the Act does not "alter, amend, or affect any rights, duties, or responsibilities of law enforcement authorities established by South Carolina's . . . statutory laws . . . except as expressly provided for in this chapter." The NET agreement here was made pursuant to section 23-1-210, part of a different chapter from the Law Enforcement Assistance and Support Act entitled "General Provisions." The NET agreement does not mention the Act or section 23-20-50. We find that the requirements of section 23-20-50(A) do not apply to the NET agreement.

Accordingly, we find the agreement is valid under section 23-1-210 and conferred upon Gilliam the authority to arrest Burgess outside of the Batesburg-Leesville town limits. Because we find the agreement valid under section 23-1-210, we do not address whether it meets the requirements of section 23-1-215. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate

[5] Section 23-1-210 and the NET agreement in this case authorize the temporary transfer of a law enforcement officer under different circumstances from the "public safety functions" contemplated by the Law Enforcement Assistance and Support Act. The Act allows law enforcement agencies to enter agreements, such as the one in Boswell, "as may be necessary for the proper and prudent exercise of public safety functions." § 23-20-30(A). The section defines "public safety functions" to "include traditional public safety activities which are performed over a specified time period for patrol services, crowd control and traffic control, and other emergency service situations." Id.

court need not address remaining issues when resolution of one issue is dispositive).

III. Cross-Examination on Employment Records

Burgess sought to introduce portions of Gilliam's employment records as "evidence of bias and motive to misrepresent" pursuant to Rule 608(c), SCRE. The judge sustained the State's objection and refused to admit the records. On appeal, Burgess argues the records "portray Gilliam as an overzealous narcotics officer who was willing to use unreliable confidential informants in order to make an arrest and who violated protocols of the NET concerning the use of confidential informants." The records include a summary of three incidents concerning Gilliam. First, in approximately March 2006, shortly after Burgess's arrest, a superior told Gilliam he did not think the NET should use a particular confidential informant. Gilliam "got upset, jumped out of his chair and went upstairs saying that he was going back to Batesburg and would not be coming back to NET." Second, in approximately October 2006, Gilliam's partner requested to be transferred away from him due to disagreements and his "bad attitude." Third, in February 2007, Gilliam used profanity and threatened another officer over a disagreement about a controlled drug buy, and then he drove off with the confidential informant in his car, in violation of NET protocol. In March 2007, the Batesburg-Leesville Police Department formally disciplined Gilliam with a two-day suspension, a ninety-day probationary period, and a demotion to the rank of Corporal.

Evidence of bias is governed by Rule 608(c), SCRE, which states: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Our courts have held that "anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded to his or her testimony." State v. Baker, 390 S.C. 56, 66, 700 S.E.2d 440, 444 (Ct. App. 2010) (citing State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (applying this rule of evidence to bias under Rule 608(c), SCRE)). In excluding the evidence in this case, the judge stated: "It is irrelevant and highly prejudicial and I don't think it is relevant to any of the issues in this

case at least at this point in time." Although the judge did not use the language of Baker and Jones in his ruling, we interpret the ruling as a finding that the records did not have a legitimate tendency to show bias on the part of the officer. Each incident in the records occurred after Burgess's arrest, and none of them relate directly to Burgess. Though Burgess argues the incidents relate to Gilliam's use of confidential informants, the arrest of Burgess had nothing to do with confidential informants. Gilliam detained Burgess because he fled from police during the execution of a search warrant, and arrested him because the officers determined he dropped crack cocaine as he fled. While the incidents might show Gilliam to be hot-tempered and uncooperative with other officers, they do not show his bias against Burgess, or otherwise relate to Gilliam's credibility. Under these circumstances, we find the judge's decision to exclude the evidence was within his discretion. See Baker, 390 S.C. at 65, 700 S.E.2d at 444 ("The admission of evidence rests in the sound discretion of the trial court. The trial court's decision will not be overturned unless controlled by an error of law resulting in undue prejudice." (citing State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995))).

IV. Mere Presence Jury Charge

The judge charged the jury as follows:

> In this case, the State is charging the defendant with actual possession of a controlled substance[;] actual possession of a controlled substance exist[s] when the controlled substance is found in the actual physical custody of the person charged with possession. Circumstantial evidence may be used to prove actual possession, but actual possession must be proven beyond a reasonable doubt. It must be shown that the defendant has possession of the controlled substance and that the defendant knew that he had the controlled substance in his possession. . . . Again, in this case the State has charged and must prove actual possession of crack cocaine as I have defined that term for you.

Burgess's counsel objected to the charge, stating: "I guess . . . I should go ahead and except to the mere presence, the failure to charge mere presence but I understand the court's ruling."[6] We find no error.

"In criminal cases, the appellate court sits to review errors of law only. A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." State v. Wharton, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009) (internal citations omitted). The law to be charged to the jury is determined from the evidence presented at trial. State v. Davis, 374 S.C. 581, 585, 649 S.E.2d 132, 134 (Ct. App. 2007).

Our supreme court "has held mere presence instructions are required where the evidence presented at trial reasonably supports the conclusion that the defendant was merely present at the scene where drugs were found, but it was questionable whether the defendant had a right to exercise dominion and control over them." State v. Lee, 298 S.C. 362, 364-65, 380 S.E.2d 834, 836 (1989). This court addressed the necessity of a mere presence charge in Peay, 321 S.C. at 411, 468 S.E.2d at 673. The State had presented evidence that the defendant put a bag of cocaine down his pants when he bought it from an informant. 321 S.C. at 410, 468 S.E.2d at 672. When he was arrested, however, the bag of cocaine was on the front seat of the car in which he had been riding. Id. This court determined that "[b]ecause the evidence the [S]tate produced tended to show Peay had actual control over the cocaine, a charge distinguishing actual and constructive possession was unnecessary." 321 S.C. at 411, 468 S.E.2d at 673 (finding "the trial judge did not err in refusing Peay's request to charge constructive possession or mere presence").

Burgess argues his case is distinguishable from Peay because "[n]one of the officers in the present case can testify that Burgess actually possessed the crack cocaine found on the ground." We disagree. The State's theory of

[6] A mere presence jury charge would have instructed the jury that a defendant cannot be found guilty of possession of narcotics simply because he was present at the scene where the narcotics were found. State v. Robinson, 306 S.C. 399, 401 n.1, 412 S.E.2d 411, 413 n.1 (1991).

the case depended on Burgess's actual possession of the crack. The State presented evidence that Gilliam saw Burgess drop the bottle with crack cocaine residue, and that both the top to the bottle and the crack pieces were found in Burgess's flight path. This evidence indicated Burgess had actual possession of the cocaine. Moreover, the jury charge limited the State to proving actual possession and gave the jury no option to find constructive possession. When constructive possession is not an issue in the case, it is not necessary to explain the concept of mere presence in the jury charge. In drug possession cases, the concept of mere presence relates exclusively to constructive possession, not actual possession. State v. James, 386 S.C. 650, 654-55, 689 S.E.2d 643, 646 (Ct. App. 2010) (noting "'a charge on mere presence is necessary only when the [S]tate attempts to establish constructive possession of contraband'" (quoting Peay, 321 S.C. at 411, 468 S.E.2d at 673)). Therefore, in this case it was unnecessary for the judge to charge mere presence.

V. Conclusion

We affirm the trial judge's decision that Gilliam had jurisdiction to arrest Burgess because the multijurisdictional agreement was valid under section 23-1-210. We also affirm the trial judge's exclusion of Gilliam's employment records and his decision not to charge mere presence to the jury.

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stevie Lawson, Respondent,

v.

Hanson Brick America, Inc.
and Zurich North America, Appellants.

Appeal From Richland County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 4824
Heard December 9, 2010 – Filed April 20, 2011

REVERSED AND REMANDED

Jason W. Lockhart, Weston Adams, III, and Helen F. Hiser, all of Columbia, for Appellants.

Creighton B. Coleman, of Winnsboro, for Respondent.

LOCKEMY, J.: In this workers' compensation case, Hanson Brick America, Inc. and Zurich North America (collectively the Appellants) appeal the circuit court's order reversing the Appellate Panel of the South Carolina Workers' Compensation Commission's (Appellate Panel) finding that Stevie Lawson's knee problems were not causally related to his back injury and awarding Lawson temporary total disability benefits. The Appellants argue (1) the circuit court engaged in improper fact finding, (2) substantial evidence supported the Appellate Panel's decision, (3) the Appellate Panel made sufficiently detailed findings of fact, and (4) the circuit court improperly relied on late-filed medical evidence. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Hanson Brick, Inc. employed Lawson as a fork-lift operator. On May 10, 2005, Lawson was injured while moving a bag of mortar. In December 2005, Dr. Thomas Holbrook diagnosed Lawson with "degenerative disk disease L5/S1; spondylothesis, L5/S1 with persistent low back pain refractory to conservative care." Dr. Holbrook performed a posterior lumbar interbody fusion with bilateral pedicle screw instrumentation on Lawson in March 2006. Following surgery, Lawson's back pain did not improve and he complained of a sensation that the hardware in his lower back was loose. Lawson also developed left and right knee pain six or seven months after his back surgery. According to Lawson, he suffered from a burning sensation in both of his knees that affected his ability to walk. Lawson was treated for his knee problems by Dr. Frank Noojin, who prescribed him pain medication.

In December 2006, Dr. Holbrook determined Lawson had reached maximum medical improvement (MMI) with respect to his back injury and released him for medium-duty work. Dr. Holbrook assigned Lawson a 21% impairment rating to the lumbar spine. Lawson returned to work and eventually resumed his duty as a forklift operator. Lawson stopped working in February 2007 due to the pain in his knees. In April 2007, Dr. Noojin opined Lawson suffered from osteoarthritis in both knees. According to Dr. Noojin, Lawson's osteoarthritis was a pre-existing condition and not work-related. In addition, Dr. William Lehman opined Lawson had a 25% whole person impairment, which translates to a "regional lumbar spine impairment

of 33%." Dr. Lehman also found Lawson's "osteoarthritis of the knees" was not compensable. Dr. Noojin referred Lawson to another physician in his practice, Dr. Bradley Presnal, for further evaluation of his knees. Dr. Presenal determined Lawson's knee pain was "consistent with osteoarthritis" and concluded Lawson's "back may be somewhat contributing to his [knee] pain."

In January 2007, Lawson filed a Form 50 with the Commission reporting an accidental injury to his lower back, left leg, right hand, and right thumb.[1] The Appellants admitted Lawson sustained a compensable lower back injury but denied that any injuries to his left leg, right hand, or right thumb were compensable. In May 2007, the Appellants filed a Request to Pay Compensation on the basis that Dr. Holbrook determined Lawson had reached MMI with respect to his lower back and assigned Lawson a 21% impairment rating to the lumbar spine. At the hearing before the single commissioner, Lawson argued he sustained a compensable injury to his back, his knees, and his right hand and needed additional medical treatment. Lawson also sought total temporary disability benefits. In response, the Appellants maintained Lawson had reached MMI with respect to his back and denied Lawson sustained compensable injuries to his right hand and knees. On August 20, 2007, the single commissioner submitted a Request for Proposed Order including findings that: (1) Lawson had not reached MMI with regard to his back and was entitled to further treatment and evaluation; (2) Lawson's right hand, left knee, and right knee were not compensable; and (3) Lawson was entitled to temporary total disability benefits.

In September 2007, prior to the issuance of the single commissioner's final order, Lawson submitted a motion to admit/consider additional and newly discovered evidence. Lawson asked the single commissioner to admit and consider medical records from Dr. Donald Johnson, who opined that Lawson had a "symptomatic exacerbation of a pre-existing osteoarthritis of

[1] Lawson subsequently filed an amended Form 50 alleging additionally that he suffered compensable neck, left shoulder, left arm, and left hand injuries. The Appellants filed an amended Form 51 denying these additional injuries were compensable. Lawson has not pursued his claim with regard to these additional alleged injuries and they are not at issue in this appeal.

his knees" caused by "gait secondary to his lumbar spinal fusion." The Appellants objected to the admission of these records; however, the single commissioner allowed them into evidence.

In October 2007, the single commissioner determined Lawson sustained a compensable injury by accident to his back arising out of and in the course and scope of his employment. The single commissioner also found (1) Lawson had not reached MMI with regard to his back and was entitled to further evaluation and treatment; (2) Lawson's right hand injury was not compensable; (3) Lawson was entitled to further evaluation of his right and left knee problems to determine whether they were causally related to his accident; and (4) Lawson was entitled to temporary total disability benefits from February 5, 2007 to the present and continuing.

The Appellants appealed the single commissioner's order to the Appellate Panel. The Appellate Panel affirmed the single commissioner's finding that Lawson sustained a work-related injury to his back and had not reached MMI with regard to the injury. However, the Appellate Panel reversed the single commissioner's determination that Lawson was entitled to temporary total disability benefits. The Appellate Panel also reversed the single commissioner's finding that Lawson was entitled to further evaluation of his knees. The Appellate Panel found Lawson's knee problems were not causally related to his work-related accident. The Appellate Panel also concluded Dr. Johnson's medical report was improperly admitted into evidence.

On appeal, the circuit court determined the Appellate Panel erred in ceasing temporary total benefits. The circuit court ordered the case be remanded and temporary total benefits and further knee evaluation be continued pending further hearing by the single commissioner. This appeal followed.

STANDARD OF REVIEW

"In an appeal from the [Appellate Panel], neither this [c]ourt nor the circuit court may substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but it may reverse when

the decision is affected by an error of law." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 164 (Ct. App. 2007). However, an appellate court may reverse or modify a decision of the Appellate Panel "if the findings and conclusions of the [Appellate Panel] are affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Gray v. Club Grp., Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000).

LAW/ANALYSIS

I. Findings of Fact/Dr. Johnson's Report

The Appellants argue the circuit court erred in reversing the Appellate Panel's determination that Lawson's knee problems were not causally related to his back injury and in finding Lawson was entitled to temporary total disability benefits. The Appellants contend the circuit court improperly analyzed the facts and drew its own conclusions regarding whether Lawson's knee problems were causally related to his back injury instead of determining whether substantial evidence supported the Appellate Panel's findings. We agree.

Lawson contends the Appellate Panel failed to cite any relevant evidence to support its conclusion that his knee problems were not causally related to his back injury. Lawson argues he was prejudiced by the Appellate Panel's failure to consider the medical evidence from Dr. Presnal relating to his knee problems.

We find the circuit court improperly weighed the evidence and engaged in fact finding. On appeal, the circuit court was charged with determining whether substantial evidence supported the Appellate Panel's findings of fact or whether an error of law affected its order. Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). However, the circuit court improperly weighed the evidence and made its own determinations as to whether Lawson's knee problems were causally related to his back injury. The circuit court concluded that although Dr. Noojin opined the cause of Lawson's knee problems was osteoarthritis, "it is equally reasonable, as Dr.

Presnal and Dr. Johnson found, that the symptoms have resulted or been exasperated by a pre-existing injury of his knees from back surgery."[2] The circuit court found that "whatever Dr. Noojin thinks of the causation," Lawson "clearly has significant lower extremity symptoms." Furthermore, the circuit court noted Dr. Lehman's finding that Lawson suffered from "some left radicular pain" was "evidence which would reasonably support the opinion of the [s]ingle [c]ommissioner." The circuit court also concluded the single commissioner's order regarding further investigation into the cause of Lawson's knee problems was a "reasonable response" and "completely within his authority."

The Appellants also argue the circuit court erred in relying on Dr. Johnson's medical report. We agree with the Appellants that the circuit court improperly weighed Dr. Johnson's report, along with other evidence, instead of determining whether substantial evidence supported the Appellate Panel's decision. However, we find the Appellate Panel should have considered Dr. Johnson's report in determining whether Lawson's knee problems were causally related to his back injury and whether Lawson was entitled to temporary total disability benefits.

Regulation 67-707 of the South Carolina Code (Supp. 2010) governs additional and newly discovered evidence in workers' compensation cases. It provides that in order to present additional and newly discovered evidence

> the moving party must establish the new evidence is of the same nature and character required for granting a new trial and show: (1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing; and (2) The evidence was not

[2] The Appellate Panel determined the single commissioner improperly admitted Dr. Johnson's report into evidence because the report "was known to [Lawson] and/or could have been secured prior to the hearing by reasonable diligence." The circuit court did not directly reverse this finding; however, it references Dr. Johnson's report in its order.

> known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.

Reg. 67-707(C).

Lawson satisfied his burden of proving Dr. Johnson's report should have been admitted into evidence. According to an affidavit of Lawson's counsel, Dr. Johnson's office lost the tape recording in which Dr. Johnson dictated his opinion as to the cause of Lawson's knee problems, and counsel was not aware of Dr. Johnson's opinion at the hearing. Dr. Johnson's report was not cumulative or impeaching of character and would have likely produced a different result. Furthermore, although Lawson possessed Dr. Johnson's notes, Dr. Johnson's opinion was not known to Lawson at the time of the hearing and reasonable diligence on the part of Lawson could not have secured Dr. Johnson's lost tape. Accordingly, we reverse and remand the issue of whether Lawson's knee problems were causally related to his back injury and whether Lawson was entitled to temporary total disability benefits to the Appellate Panel for a reconsideration of all the evidence, including Dr. Johnson's medical report.

II. Remaining Issue

The Appellants also argue the circuit court erred in reversing the Appellate Panel's order for failing to make sufficiently detailed findings of fact supported by detailed reasoning. Based upon our reversal of the circuit court's order, we need not address this issue. 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).

CONCLUSION

We reverse the circuit court's determination that Lawson was entitled to temporary total disability benefits and further evaluation of his knees. We

remand to the Appellate Panel for a reconsideration of all evidence including Dr. Johnson's medical report to determine whether Lawson's knee problems were causally related to his back injury and whether Lawson was entitled to temporary total disability benefits.

REVERSED AND REMANDED.

HUFF and KONDUROS, JJ., concur.