The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
E-MAIL: dshearouse@scjd.state.sc.us

N O T I C E

IN THE MATTER OF GEORGE TURNER PERROW, PETITIONER

On August 27, 2001, Petitioner was indefinitely suspended from the practice of law, retroactive to August 2, 2000. In the Matter of Perrow, 346 S.C. 515, 552 S.E.2d 295 (2001). He has now filed a petition to be reinstated.

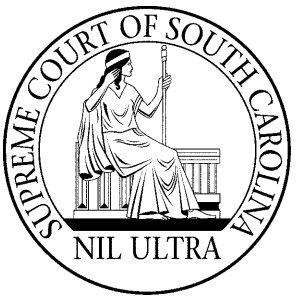
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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

These comments should be received no later than June 23, 2003.

Columbia, South Carolina

April 22, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 28, 2003

ADVANCE SHEET NO. 16

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

2003-MO-027 - Samuel Burt v. State	Denied 04/23/03
25614 - State v. John Peake	Denied 04/23/03
25625 - Charles Bailey v. Ralph Segars	Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

25624 - Lamar Dawkins v. Richard Fields	Granted 04/09/03

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3599 - The State v. Grubbs	Denied 4/25/03
3600 - The State v. Lewis	Pending
3608 - The State v. Padgett	Pending
3610 - Wooten v. Wooten	Pending
3620 - Campbell v. Marion County Hospital	Pending
3630 - The State v. Turron, Danny	Pending
2001-UP-522 - Kenney v. Kenney	Held in Abeyance
2003-UP-102 - The State v. Patterson	Pending
2003-UP-112 - Northlake v. Continental	Pending
2003-UP-147 - The State v. Reed	Denied 4/22/03

2003-UP-184 - Tucker v. Kenyon	Denied 4/22/03
2003-UP-191 - The State v. Massey	Pending
2003-UP-196 - T.S. Martin Homes v. Cornerstone	Pending
2003-UP-225 - Cassidy v. Wilson	Pending
2003-UP-227 - Lynn v. Rebashares	Pending
2003-UP-228 - Pearman v. Sutton	Pending
2003-UP-234 - Williamsburg v. Williamsburg	Pending
2003-UP-237 - Green v. Medical University	Pending
2003-UP-244 - The State v. Fowler	Pending
2003-UP-245 - Bonte v. Breenbrier	Pending
2003-UP-255 - BB&T v. Williamsburg	Pending
2003-UP-258 - Glaze v. Glaze	Pending
2003-UP-271 - Bombardier v. Green	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3314 - The State v. Woody, Minyard	Pending
3489 - The State v. Jarrell	Pending
3500 - The State v. Cabrera-Pena	Pending
3505 - L-J v. Bituminous	Pending
3518 - Chambers v. Pingree	Pending
3521 - Pond Place v. Poole	Pending

3533 - Food Lion v. United Food	Pending
3539 - The State v. Charron	Denied 4/24/03
3540 - Greene v. Greene	Pending
3541 - Satcher v. Satcher	Pending
3543 - SCE&G v. Town of Awendaw	Pending
3545 - Black v. Karrottukunnel	Pending
3546 - Lauro v. Visnapuu	Denied 4/24/03
3548 - Mullis v. Trident	Denied 4/24/03
3549 - The State v. Brown	Pending
3550 - State v. Williams	Pending
3551 - Stokes v. Metropolitan	Pending
3552 - Bergstrom v. Palmetto Health Alliance	Pending
3558 - Binkley v. Burry	Pending
3559 - The State v. Follin	Pending
3561 - Baril v. Aiken Medical	Denied 4/24/03
3562 - Heyward v. Christmas	Pending
3563 - The State v. Missouri	Pending
3568 - Hopkins v. Harrell	Pending
3573 - Gallagher v. Evert	Pending
3574 - Risinger v. Knight	Pending
3587 - The State v. Vang	Pending

3588 - In the Interest of Jeremiah W.	Pending
3591 - Pratt v. Morris Roofing, Inc.	Pending
3592 - Gattis v. Murrells	Pending
3597 - Anderson v. Augusta Chronicle	Pending
3598 - Belton v. Cincinnati	Pending
2002-UP-220 - The State v. Hallums	Pending
2002-UP-329 - Ligon v. Norris	Pending
2002-UP-368 - Roy Moran v. Werber Co.	Pending
2002-UP-401 - The State v. Warren	Denied 4/24/03
2002-UP-485 - Price v. Tarrant	Denied 4/24/03
2002-UP-489 - Fickling v. Taylor	Pending
2002-UP-498 - Singleton v. Stokes Motors	Pending
2002-UP-513 - Frazier, E'Van v. Badger	Pending
2002-UP-514 - McCleer v. City of Greer	Pending
2002-UP-537 - Walters v. Austen	Pending
2002 -UP-538 - The State v. Ezell, Richard	Pending
2002-UP-547 - Stewart v. Harper	Denied 4/24/03
2002-UP-586 - Ross v. USC	Denied 4/24/03
2002-UP-587 - Thee Gentlemen's Club v. Hilton Head	Pending
2002-UP-594 - Williamson v. Bermuda	Pending
2002-UP-598 - Sloan v. Greenville	Pending

2002-UP-599 - Florence v. Flowers	Pending
2002-UP-603 - The State v. Choice	Pending
2002-UP-609 - Brown v. Shaw	Pending
2002-UP-613 - Summit Contr. v. General Heating	Pending
2002-UP-615 - The State v. Floyd	Pending
2002-UP-623 - The State v. Ford, Chris	Pending
2002-UP-656 - SCDOT v. DDD(2)	Pending
2002-UP-657 - SCDOT v. DDD	Pending
2002-UP-691 - Grate v. Georgetown	Pending
2002-UP-704 - The State v. Webber	Pending
2002-UP-715 - Brown v. Zamias	Pending
2002-UP-724 - The State v. Stogner	Denied 4/24/03
2002-UP-734 - SCDOT v. Jordan	Pending
2002-UP-742 - The State v. Johnson	Pending
2002-UP-748 - Miller v. DeLeon	Pending
2002-UP-749 - The State v. Keenon	Pending
2002-UP- 753 - Hubbard v. Pearson	Pending
2002-UP-760 - State v. Hill	Pending
2002-UP-769 - Babb v. Estate of Charles Watson	Pending
2002-UP-775 - The State v. Charles	Pending
2002-UP-785 - The State v.Lucas	Pending

2002-UP-787 - Fisher v. Fisher	Pending
2002-UP-792 - SCDSS v. Ihnatiuk	Denied 4/24/03
2002-UP-794 - Jones v. Rentz	Pending
2002-UP-795 - Brown v. Calhoun	Pending
2002-UP-800 - Crowley v. NationsCredit	Pending
2003-UP-018 - Rogers Grading v. JCM Corp	Pending
2003-UP-019 - The State v. Wigfall	Pending
2003-UP-021 - Capital Coatings v. Browning	Pending
2003-UP-023 - The State v. Killian	Pending
2003-U-029 - SCDOR v. Springs	Pending
2003-UP-036 - The State v. Traylor	Pending
2003-UP-054 - University of GA v. Michael	Pending
2003-UP-062 - Lucas v. Rawl	Pending
2003-UP-083 - Miller v. Miller (3)	Pending
2003-UP-084 - Miller v. Miller (4)	Pending
2003-UP-085 - Miller v. Miller (5)	Pending
2003-UP--088 - The State v. Murphy	Pending
2003-UP-098 - The State v. Dean	Pending
2003-UP-101 - Nardone v. Davis	Pending
2003-UP-113 - Piedmont Cedar v. Southern Original	Pending
2003-UP-125 - Carolina Travel v. Milliken	Pending

0000-00-000 - Dreher v. Dreher Pending

PETITIONS - UNITED STATES SUPREME COURT

2002-UP-680 - Strable v. Strable Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patricia L. Harrison, as Guardian ad Litem for her Ward, James Lennon McLean, Jr., Petitioner,

v.

Joseph J. Bevilacqua, Jaime E. Condom, Betty R. Guerry and South Carolina Department of Mental Health, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25631
Heard September 19, 2002 - Filed April 28, 2003

AFFIRMED

Arthur K. Aiken, of Hammer, Hammer, Carrigg & Potterfield; and Rebecca M. Monroy, of Collins and Lacy, P.C., both of Columbia, for Petitioner.

Andrew F. Lindemann and William H. Davidson, II, of Davidson, Morrison, & Lindemann, P.A., of Columbia; for Respondents.

JUSTICE WALLER: Petitioner Patricia Harrison, guardian ad litem for James Lennon McLean, Jr. (McLean), sued respondent South Carolina Department of Mental Health (the Department) for professional negligence.[1] The jury found in favor of petitioner but awarded damages in the amount of only $1.00. Petitioner appealed, and in an unpublished decision, the Court of Appeals affirmed. Harrison v. Bevilacqua, Op. No. 2000-UP-441 (S.C. Ct. App. filed June 13, 2000). We granted the petition for a writ of certiorari to review the Court of Appeals' decision, and we now affirm.

FACTS

McLean is a diagnosed schizophrenic. He was involuntarily committed to Crafts-Farrow State Hospital (run by the Department) in 1982. He remained in the Department's continuous care until his discharge on March 6, 1995. While in the hospital, McLean resided in a locked ward. He had a very small room, but it was locked during the day. McLean had lobby privileges, but he declined yard privileges.

One day while in the hospital lobby, McLean saw some representatives from an organization called Protection and Advocacy for the Handicapped. He told them he wanted to be discharged so they became involved in his case. In 1994, after being contacted by Protection and Advocacy, petitioner was appointed guardian ad litem for McLean. In March 1994, all parties agreed at a probate court hearing that McLean could be released from the Department's care pending a home study. Eventually, McLean did go home where he has 24-hour, one-on-one care.

---

[1] Petitioner sued the individual respondents for various causes of action all of which were disposed in their favor on a directed verdict motion. She did not appeal the directed verdict.

While in the hospital, McLean's estate paid for his care. At the time of the probate court hearing in 1994, McLean's assets, both cash and real estate, were valued at over $1 million.

At trial, petitioner attempted to prove that the Department had been negligent because McLean: (1) had been confined in the hospital too long; (2) should not have resided in a locked ward; and (3) had been improperly medicated. In her complaint, which was filed on June 1, 1995, petitioner alleged that the Department should have discharged McLean as early as October 1983. Other allegations included that the Department failed to follow its own Level of Care reports which, at various times, recommended McLean's transfer to an open ward or a community facility or his home.

There was conflicting expert testimony on the allegations of negligence. Regarding damages, petitioner presented undisputed evidence of how much McLean paid the Department for his care.[2] McLean did not testify, and there was no evidence admitted regarding mental anguish or pain and suffering. The jury found in favor of petitioner but only awarded $1.00 in damages. The trial court denied petitioner's motions for a new trial nisi additur, JNOV, or new trial absolute. On appeal, the Court of Appeals affirmed.

ISSUES

1. Should the Court adopt the continuous treatment rule or the doctrine of continuing tort to determine that McLean's causes of action accrued when his treatment ended on March 6, 1995, his discharge date?

2. Did the Court of Appeals err in affirming the trial court's application of S.C. Code Ann. § 15-3-40, the tolling statute for disability?

3. Did the Court of Appeals err in affirming the denial of petitioner's motion for a new trial absolute based upon the $1.00 verdict?

---

[2] As will be further discussed below, petitioner was restricted in the presentation of evidence. Therefore, the amount of damages presented to the jury represented expenses from June 1, 1990, through December 1, 1994. According to petitioner, this amount is $129,885.00.

1. CONTINUOUS TREATMENT/CONTINUING TORT RULE

Petitioner asserts that McLean's claims are of a continuous character given the continuing treatment he received over a 13-year period. She therefore argues that this Court should adopt the continuous treatment rule, or the doctrine of continuing tort, to find McLean's causes of action accrued at the termination of his treatment by the Department, i.e., the date of discharge, March 6, 1995.

Prior to trial, the Department moved for summary judgment on the basis of the statute of limitations. The Department argued that petitioner's allegations began in October 1983 yet the complaint was not filed until 1995, and therefore the action was time-barred. Petitioner contended that because this was a "continuous tort," or pursuant to the "continuous treatment rule," the statute did not begin to run until McLean was discharged. Alternatively, petitioner argued the tolling statute for disability, S.C. Code Ann. § 15-3-40 (Supp. 2001), would allow her to "go back at least five years from the date of filing…in pursuing this claim." The trial court decided § 15-3-40 would apply; it therefore ruled petitioner could not present any evidence of negligence which occurred more than five years prior to the filing of the complaint. As a result, the only evidence of negligence presented at trial was related to events after June 1, 1990.

Petitioner's suit for negligence against the Department arises under the South Carolina Tort Claims Act; the applicable statute of limitations reads as follows in pertinent part: "Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered…." S.C. Code Ann. § 15-78-110 (Supp. 2001). The statute, however, is tolled if the plaintiff is under a disability. See § 15-3-40. Section 15-3-40 provides:

> If a person entitled to bring an action … under Chapter 78 of this title … is at the time the cause of action accrued either:
>
> (1) within the age of eighteen years; or

(2) **insane**;

the time of the disability is not a part of the time limited for the commencement of the action, **except that the period within which the action must be brought cannot be extended:**

(a) **more than five years** by any such disability, except infancy; nor

(b) in any case longer than one year after the disability ceases.

§ 15-3-40 (emphasis added).

Neither the trial court nor the Court of Appeals stated exactly when petitioner's claims accrued. Petitioner argues that the proper date is March 6, 1995, when McLean's treatment by the Department ended. The Court of Appeals, however, declined to adopt the continuous treatment rule, or the continuing tort doctrine, stating that the power to adopt them "lies within the exclusive domain of our supreme court or legislature." Harrison, supra. The Court of Appeals upheld the trial court's application of section 15-3-40 and its decision "limiting [petitioner's] claims to the five years preceding the filing of her complaint." Id.

In Preer v. Mims, 323 S.C. 516, 476 S.E.2d 472 (1996), this Court recognized that the continuous treatment rule had been adopted "by a significant number of courts around the country." Id. at 519, 476 S.E.2d at 473. The rule can be summarized as follows:

> The so-called "continuous treatment" rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated -- unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

Id. (quoting David W. Louisell & Harold Williams, Medical Malpractice, § 13.02[3] (1996)); see also Anderson v. Short, 323 S.C. 522, 524-25, 476 S.E.2d 475, 476-77 (1996).

In both Preer and Anderson, the Court stressed that if the continuous treatment rule were adopted as the law in South Carolina, it would contain the discovery exception, as outlined above. Because in both those cases the discovery exception would have precluded the plaintiffs' claims, and thus they would not have benefited from the adoption of the continuous treatment rule, the Court expressly declined to adopt the rule. Id.

The Department argues McLean likewise would not benefit from the rule because he should have discovered the alleged negligence. However, we agree with petitioner that it is not reasonable to expect McLean – a diagnosed, institutionalized schizophrenic who has been adjudged to be incompetent – to have been able to discover negligent psychiatric treatment. Therefore, we are faced with the issue of whether to adopt the continuous treatment rule.

"There are a number of policy considerations behind the 'continuous treatment' rule;"[3] however, most often, application of the rule is justified by reasoning that, without such a rule, a plaintiff would be required to bring suit against his or her physician before treatment is even terminated. See, e.g., Tullock v. Eck, 845 S.W.2d 517, 519 (Ark. 1993) (noting "the most often stated rationale" for the rule is that "the patient should not be required to interrupt the treatment to bring suit against the physician because a statute of limitations is about to run."); Cooper v. Kaplan, 585 N.E.2d 373, 374 (N.Y. 1991) ("The premise underlying the doctrine is that a plaintiff should not have to interrupt ongoing treatment to bring a lawsuit, because the doctor not only is in a position to identify and correct the malpractice, but also is best placed to do so."). Yet this justification would be undermined by the discovery exception to the rule, which would be part of the rule were we

[3] David W. Louisell & Harold Williams, Medical Malpractice, § 13.02[3] (2002) (footnote omitted).

inclined to adopt it. See Preer, supra; Anderson, supra. Surely, a patient could only interrupt treatment if she had (or should have) discovered the negligence.

As for other reasons for the rule, the Court of Appeals for the Fourth Circuit has stated that the "continuous treatment doctrine is based on a patient's right to place trust and confidence in his physician." Otto v. Nat'l Inst. of Health, 815 F.2d 985, 988 (4th Cir. 1987); accord Haberle v. Buchwald, 480 N.W.2d 351, 355 (Minn. Ct. App. 1992) (the rule is based on the policy "the patient must repose reliance upon his physician in the completion of the course of curative treatment, a relationship of trust which inhibits the patient's ability to discover acts of omission or commission constituting malpractice."). Additionally, "[a] 'practical reason' for this termination of treatment rule is that 'actionable treatment does not ordinarily consist of a single act or, even if it does, it is most difficult to determine the precise time of its occurrence.'" Haberle, 480 N.W.2d at 354-55. Finally, basic tort principles of fairness and deterrence also provide justifications for the rule. See Melanie Fitzgerald, Comment, *The Continuous Treatment Rule: Ameliorating the Harsh Result of the Statute of Limitations in Medical Malpractice Cases*, 52 S.C. L. Rev. 955, 966-67 (2001).

The primary argument against adoption of the continuous treatment rule is that it offends the clear policy set by the Legislature in its adoption of statutes of limitations and statutes of repose. See id. at 965-66 (primarily discussing statutes of limitations). Indeed, respondents maintain that adoption of the rule would be "entirely inconsistent" with the six-year statute of repose for medical malpractice actions. See S.C. Code Ann. § 15-3-545 (Supp. 2001).

Section 15-3-545(A) provides that:

> 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**.

(Emphasis added). In Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993), we discussed this section and stated the following:

> Subsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors. Inclusion of the phrase "**or as tolled by this section"** in subsection (A) clearly indicates that the **only** tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D).
>
> Moreover, this Court has recognized that the six-year repose provision in § 15-3-545 "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." Hoffman v. Powell, 298 S.C. 338, 339, 380 S.E.2d 821, 821 (1989).

Id. at 403, 438 S.E.2d at 243 (emphasis in original). We further noted that "'a statute of repose is typically an **absolute time limit beyond which liability no longer exists and is not tolled for any reason** because to do so would upset the economic balance struck by the legislative body.'" Id. at 404, 438 S.E.2d at 243 (emphasis added, citations omitted).

After careful consideration, it is our opinion the continuous treatment rule should not be judicially adopted. See id. (statute of repose is an absolute time limit not tolled for any reason). We note the instant case implicates not only the general medical malpractice six-year repose statute, but also the repose portion of the disability tolling statute, section 15-3-40, which provides for an extension of the statute of limitations by five years when the plaintiff is insane. Hence, under the peculiar facts of this case, application of the continuous treatment rule would infringe upon two areas which the Legislature has spoken on regarding **absolute** limitations: (1) medical malpractice; and (2) delay of commencement of action due to disability.

Put simply, we find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above. See Hecht v. First Nat. Bank & Trust Co. 490 P.2d 649, 656 (Kan. 1971) (describing other states' adoption of the continuous treatment rule as "a judicial effort to soften the harshness of the statutory accrual rule" and refusing to judicially legislate in this area). Certainly, this is an area where the Legislature can create statutory law if it so chooses.[4]

Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree.

Under Georgia law, the doctrine of continuing tort:

> applies "where any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time." … Under this theory, the statute of limitation does not begin to run "until such time as the continued tortious act producing injury is eliminated."

Mears v. Gulfstream Aerospace Corp., 484 S.E.2d 659, 664 (Ga. Ct. App. 1997) (citations omitted). However, the Georgia Court of Appeals has stated that the "continuing tort" theory is inapplicable to actions for medical malpractice "since it would nullify the intent of the General Assembly that, after five years, no medical malpractice action could be brought, even when a disability attaches to toll the running of the statute because the statute of

[4] For example, Texas' medical malpractice statute of limitations expressly provides the last date of treatment as the triggering date if the treatment is the subject of the claim. See Texas Rev. Civ. Stat. Ann. art. 4590i § 10.01. ("Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort **or from the date the medical or health care treatment that is the subject of the claim** or the hospitalization for which the claim is made **is completed** … .") (emphasis added).

repose abolishes any action five years after the negligent or wrongful act or omission." Charter Peachford Behavioral Health Sys. v. Kohout, 504 S.E.2d 514, 521 (Ga. Ct. App. 1998). Thus, for the same reasons we reject adoption of the continuous treatment rule, Georgia has rejected application of its own continuous tort theory to medical malpractice claims. Accordingly, we find petitioner's argument on the continuing tort doctrine unavailing.

2. APPLICATION OF SECTION 15-3-40

Petitioner argues that the trial court erred in applying section 15-3-40, the disability tolling statute, to bar McLean's claims related to events before June 1, 1990. Specifically, petitioner contends that the causes of action did not accrue until March 6, 1995, the date of McLean's release from the hospital.

Because we decline to adopt the continuous treatment rule, there is no merit to petitioner's argument that the date of accrual is March 6, 1995. Furthermore, respondents correctly point out that it was petitioner's own "alternative" argument to the trial court to apply section 15-3-40. Therefore, petitioner cannot now complain the trial court erred when it took her own suggestion. Cf. Ex parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995) (party cannot acquiesce to issue at trial and then complain on appeal). [5]

---

[5] We note the Court of Appeals addressed this issue and concluded the trial court correctly limited petitioner's claims to five years preceding the filing of the complaint. The Court of Appeals held the express language of section 15-3-40 "reflects a clear legislative intent to set a **five year limit** for the commencement of tort actions against the state by a plaintiff who is laboring under a disability other than infancy." Harrison, supra (emphasis added). We disagree with the Court of Appeals' interpretation of section 15-3-40. The express language of the statute allows the time for commencement of an action to be "extended" by a maximum of five years. Thus, an insane plaintiff would apparently have seven years from discovery to bring a negligence action under the Tort Claims Act. See §§ 15-78-110, 15-3-40; see also Fricks v. Lewis, 26 S.C. 237, 1 S.E. 884 (1886). We note, however, if the action is one for medical malpractice, there is also the six-year statute of

3. NEW TRIAL ABSOLUTE

The jury returned a verdict in petitioner's favor but awarded only $1.00 damages. Petitioner contends this is grossly inadequate in light of the $129,885.00 McLean paid to the Department from June 1, 1990 to December 1, 1994. Petitioner argues that because she presented this uncontested evidence of damages, the trial court erred in failing to grant the new trial absolute motion based on inadequate damages. We disagree.

"If the amount of the verdict is **grossly** inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (emphasis in the original). The jury's determination of damages, however, is entitled to substantial deference. See, e.g., Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993). "The decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal." Rush v. Blanchard, 310 S.C. 375, 380, 426 S.E.2d 802, 805 (1993).

The Court of Appeals decided there was "no way to determine the basis for the jury's decision in this case as no special interrogatories were prepared" and three different theories of negligence were presented. Specifically, the Court of Appeals stated as follows:

> It is conceivable that the jury believed the Department properly cared for McLean and released him at the appropriate time, but that he should have been placed in an open ward. Under such a verdict, the jury could have reasonably valued McLean's actual

---

repose. See § 15-3-545. Consequently, it is unclear how this statute would interact with the seven years allowed by sections 15-78-110 and 15-3-40. In any event, because these questions have not been raised by the parties, they need not be resolved for disposition in the instant case.

damages at $1.00 because the evidence does not prove that the relative freedom of the open ward was of much value to him.

Alternatively, the Court of Appeals noted that because McLean requires constant care, the jury could have determined that "McLean received good value for" the $129,885.00 he paid the Department.

We agree with the Court of Appeals' analysis on this issue and find the amount of the verdict is not grossly inadequate. Accordingly, the Court of Appeals correctly affirmed the trial court's denial of a new trial absolute. O'Neal v. Bowles, supra; Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton, supra.[6]

CONCLUSION

We decline to adopt the continuous treatment rule or the doctrine of continuing tort. For the reasons stated above, the Court of Appeals' decision is

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

[6]We affirm petitioner's remaining issue pursuant to Rule 220(b)(1), SCACR and the following authority: Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc., 316 S.C. 292, 450 S.E.2d 41 (1994) (absent a showing of prejudice, an appellate court will not reverse for an alleged error in the exclusion of evidence).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Susan Olson,	Petitioner/Respondent,
v.	
Faculty House of Carolina, Inc. and The University of South Carolina,	Defendants,
South Carolina Department of Labor, Licensing and Regulation,	Intervenor,
of whom Faculty House of Carolina, Inc., is	Respondent/Petitioner,
and The University of South Carolina, is	Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge
James R. Barber, III, Circuit Court Judge

Opinion No. 25632
Heard January 8, 2003 - Filed April 28, 2003

AFFIRMED IN RESULT

Robert A. McKenzie and Gary H. Johnson, II, of McDonald, McKenzie, Rubin, Miller, and Lybrand, LLP, of Columbia, for Petitioner/Respondent.

Andrew F. Lindemann, of Davidson, Morrison, and Lindemann, PA, of Columbia, for Respondent/Petitioner.

William L. Pope, of Pope and Rogers, of Columbia, for Respondent.

Michael K. Lesesne, of the South Carolina Department of Labor, Licensing and Regulation, of Columbia, for Intervenor.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001). We affirm in result.

FACTS

Olson is a childhood polio victim who, prior to November 6, 1995, was able to walk with the assistance of crutches. On that day, Olson ate lunch at the Faculty House, a dining club located on the campus of the University of South Carolina (University).[1] While Olson was walking toward the ladies room, the tip of one her crutches slipped in an unknown liquid substance, causing the crutch to skid away from Olson's body. Although she did not fall to the floor, Olson suffered a torn rotator cuff and other injuries, and has been confined to a wheel chair since the accident.

Olson instituted this action against the Faculty House alleging common law negligence, and violation of S.C. Code Ann. § 10-5-210 et seq. (Accessibility Act or Act).[2] Thereafter, the University was added as a defendant. The trial court granted summary judgment to both Faculty House and the University. With respect to Olson's claim against the Faculty House,

[1] The building was leased to the Faculty House by the University.

[2] This Article is entitled "Construction of Public Buildings for Access By Persons with Disabilities."

the trial court ruled Olson had not demonstrated any violation of the Accessibility Act. As to the University, the court ruled Olson had failed to timely file her complaint within the applicable statute of limitations. The court denied summary judgment on Olson's common law negligence claims, and the Court of Appeals affirmed. Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001).[3]

ISSUES

1. Did the Court of Appeals err in affirming the grant of summary judgment on Olson's Accessibility Act claims?

2. Should the Court of Appeals have addressed the denial of Faculty House's motion for summary judgment as to Olson's common law claims?

1. ACCESSIBILITY ACT

Whether the trial court correctly granted summary judgment depends upon whether the Accessibility Act creates a higher standard of care in foreign substance slip and fall cases to physically disabled individuals than to other business patrons. Although we are sympathetic to Olson, we find nothing in the Act evinces a Legislative intent to alter traditional common law principles of foreign substance slip and fall liability.

As noted by the Court of Appeals, the General Assembly enacted legislation in 1963 for the construction of public buildings in such a manner as to make them accessible to physically disabled persons. Act No. 174, 1963 Acts 189. Olson, supra. Thereafter, the Legislature enacted the Accessibility Act. The purpose of the Act is to "enable persons with disabilities to achieve maximum personal independence; to use and enjoy . . . public buildings. . . , and to participate fully in all aspects of society." S.C. Code Ann. § 10-5-210 (2001 Supp.). In furtherance of these goals, the S.C.

[3] Olson's common law claims remain pending.

Board for a Barrier Free Design[4] was created and required to adopt the latest revisions of the American National Standards Institute (ANSI) specifications A117.1, with modifications as the Board deems appropriate. S.C. Code Ann. § 10-5-250 (Supp. 2001). Section 4.5.1 of the ANSI standards, which was adopted by the Board, provides that floors "shall be stable, firm, and **slip resistant**, and shall comply with section 4.5."[5] (emphasis supplied).

It is conceded by all parties to this case that the floor of the Faculty House was sufficiently slip resistant **when dry**. Accordingly, the issue is whether, by virtue of the Act, Faculty House had a duty, solely with respect to its disabled patrons, to ensure that its floor were **more slip resistant**, in the presence of a foreign substance, than required by common law.

In Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35-36, 542 S.E.2d 728, 730 (2001), we adhered to our common law foreign substance analysis stating,

> although there may be a foreseeable risk that substances will wind up on the floor, there is no specific act of the defendant which causes the substance to arrive there, i.e., it generally arrives there through the handling of a third party. To require shopkeepers to anticipate and prevent the acts of third parties is, in effect, to render them insurers of their customers' safety. This is simply not the law of this state.

Olson asserts that section 10-5-260 of the Act establishes a higher duty of care than owed under the common law. We disagree.

Section 10-5-260 provides, in pertinent part,

---

[4] The Board was abolished in 2000 when the Accessibility Act was re-written. In its place, there is now an Accessibility Committee for the South Carolina Building Codes Council. S.C. Code § 10-5-235 (2001 Supp.).

[5] Section 4.5 of the ANSI standards provides, "Slip resistance is based on a frictional force necessary to keep a shoe or crutch tip from slipping on a walking surface under the conditions of use likely to be found on the surface. Although it is known that the static coefficient of friction is one basis of slip resistance, there is not as yet a generally accepted method to evaluate the slip resistance of walking surfaces for all use conditions." Under the 1961 ANSI standards, floors were required to have a floor that was nonslip. The 1961 standards were in effect at the time the floor was constructed in 1976, but the current version were in effect at the time of the accident. Regardless, both versions require essentially the same thing, i.e., either nonslip, or slip resistant floors.

> "It is the responsibility of the owner or the occupant of property which contains **structural or building elements** or components required to be in compliance with this article, to **continuously maintain these elements and components in a condition that is safe and usable by persons with disabilities at all times**. (Emphasis supplied).

We agree with the Court of Appeals' holding that the plain and ordinary meaning of "maintain" under § 10-5-260 refers to the safety of the structural elements of the floor, not to the presence of a foreign substance on its surface. To hold otherwise would impose a duty upon merchants to continuously inspect and maintain floors to ensure their freedom from foreign substances. Such a duty would be contrary to our traditional foreign substance analysis. We find nothing in the Accessibility Act which alters these very basic tenets of South Carolina law. While we agree with Olson that the Act does, indeed, impose some heightened burdens upon merchants and business owners to ensure that buildings are accessible and barrier free, we simply cannot agree that the Act also requires those merchants to essentially ensure the safety of physically disabled patrons in foreign substance situations. Had the Legislature intended such a broad departure from our common law analysis, it would have said so. City of Myrtle Beach v. Juel Corp., 344 S.C. 43, 543 S.E.2d 538 (2001)(In construing statutes, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation; statutes in derogation of common law must be strictly construed and should not be impliedly extended to cases not within their scope and purpose).

We cannot escape the conclusion, as reached by the trial court and the Court of Appeals, that there is simply nothing in the Act or the ANSI standards which requires, in foreign substance cases, a merchant's floors to have a higher degree of "slip-resistance" when wet than when dry, or which imposes upon merchants a duty to continuously inspect for foreign substances. Likewise, we find no indication the Legislature intended to abrogate the common law as regards physically disabled foreign substance

slip and fall victims. Accordingly, we affirm the Court of Appeals' holding that Faculty House was properly granted summary judgment.[6]

2. MERITS OF FACULTY HOUSE APPEAL

The Faculty House contends the Court of Appeals erred in declining to address the merits of its appeal of the denial of its motion for summary judgment. We disagree.

The Court of Appeals recognized that the denial of a motion for summary judgment is not immediately appealable. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). In Ballenger, supra, we stated,

> This Court has repeatedly held that the denial of summary judgment is not directly appealable. Willis v. Bishop, 276 S.C. 156, 276 S.E.2d 310 (1981); Mitchell v. Mitchell, 276 S.C. 44, 275 S.E.2d 1 (1981); Neal v. Carolina Power and Light, 274 S.C. 552, 265 S.E.2d 681 (1980); United States Fidelity & Guaranty Co. v. City of Spartanburg, 267 S.C. 210, 227 S.E.2d 188 (1976); Medlin v. W.T. Grant, Inc., 262 S.C. 185, 203 S.E.2d 426 (1974); Greenwich Savings Bank v. Jones, 261 S.C. 515, 201 S.E.2d 244 (1973); Geiger v. Carolina Pool Equipment Distributors, Inc., 257 S.C. 112, 184 S.E.2d 446 (1971); see also Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986); Associates Financial Services Co. of South Carolina, Inc. v. Gordon Auto Sales, 283 S.C. 53, 320 S.E.2d 501 (Ct.App.1984). A majority of the other jurisdictions have reached this same conclusion. 4 C.J.S. Appeal and Error, § 98 (1993); 4 Am.Jur.2d Appeal and Error, § 104 (1962 & Supp.1993); 15 A.L.R.3d 899 (1967 & Supp.1993). Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment. Raino v.

---

[6] To the extent the Court of Appeals addressed other issues in affirming the grant of summary judgment to the Faculty House, its opinion is vacated. Moreover, given our holding that the Act creates no higher duty in this situation than does the common law, we need not address Olson's issues concerning the grant of summary judgment to the University, and we affirm the grant of summary judgment to it for the reasons stated in Issue 1. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (court can affirm for any reason appearing in the record). The Court of Appeals' discussion of the grant of summary judgment to the University is vacated.

Goodyear Tire, 309 S.C. 255, 422 S.E.2d 98 (1992); Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986).

313 S.C. at 476-77. Ballenger specifically overruled two cases which were inconsistent with this rule, and noted that "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable." 313 S.C. at 477-78. See also Silverman v. Campbell, 326 S.C. 208, 486 S.E.2d 1 (1997)(reiterating that denial of summary judgment is not appealable, even after final judgment). The only recent exception to this rule by this Court was in a case **prior** to Ballenger, Davis v. Lunceford, 287 S.C. 242, 335 S.E.2d 798 (1985), in which we allowed the appeal of the denial of summary judgment to proceed in the third appeal of a medial malpractice action which had been pending for thirteen years.[7]

We adhere to recent precedent and hold that the denial of a motion for summary judgment is not appealable, even after final judgment. To the extent the cases cited by the Court of Appeals are inconsistent, they are expressly overruled.[8] Accordingly, the Court of Appeals' refusal to consider the merits of Faculty House's appeal is affirmed.

CONCLUSION

The grant of summary judgment on Olson's Accessibility Act claims is affirmed. We find that the Legislature did not, in enacting the Accessibility Act, intend to impose upon merchants a duty to continuously inspect and maintain floors for foreign substances, nor did it intend to create a higher standard of care in foreign substance slip and fall cases to physically disabled

[7] Contrary to Faculty House's suggestion, this Court's opinion in State Farm Mutual Auto Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) does not amount to a holding that the denial of summary judgment is immediately appealable. In that case, this Court reversed the grant of summary judgment to the respondents, in a declaratory judgment action, and held that respondents injuries were not covered under the policy as a matter of law.

[8] Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct.App.1999); Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct.App.1992); Garret v. Snedigar, 293 S.C. 176, 359 S.E.2d 283 (Ct.App.1987).

individuals than to other patrons. For the same reasons, we affirm the grant of summary judgment to the University.

We adhere to Ballenger and hold the denial of summary judgment is not appealable, even after final judgment. Accordingly, the Court of Appeals properly declined to address the merits of Faculty House's appeal.

AFFIRMED IN RESULT.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cynthia Bensch and Gary Bensch, d/b/a Bensch-Mark Custom Builders, Respondents,

v.

Jim Davidson, Linda Davidson and Randy West, Defendants,

Of whom Jim Davidson and Linda Davidson are Appellants.

Appeal From Beaufort County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25633
Heard March 6, 2003 - Filed April 28, 2003

AFFIRMED

Otto W. Ferrene, Jr., of Ferrene & Associates, PA, of Hilton Head Island, and William E. Bird, of Bird Law Firm, PA, of Columbia; for appellants.

Curtis Lee Coltrane, of Coltrane & Alford, PC, of Hilton Head Island, for respondents.

JUSTICE MOORE: We are asked to determine whether the trial court made certain errors in this breach of contract action. We affirm.

FACTS

Respondents, residential home builders, and appellants entered into a contract for the construction of a home in the Rose Hill Plantation development. No fixed time was set for the completion of the contract.

From the outset of construction, appellants requested several material changes to both the construction method and the house design. These changes resulted in more expenses and affected the timeline of finishing the house, especially when some of the changes were requested after work had been completed. Some, but not all, of the changes were reduced to writing in the form of change orders.

Respondents also encountered problems when appellants had additional contractors appear unannounced on the jobsite to do certain jobs. In March 1998, respondents sent a letter to appellants regarding their use of third-party contractors and informed them that two of the contractors appellants hired had created drainage problems.

The contract between appellants and respondents called for respondents to submit regular requests for progress payments as construction was completed.[1] Respondents submitted draw requests and written change orders to appellants. Appellants paid the first three draw requests and some of the change orders. The last payment respondents received was on November 5, 1997. Subsequently, two draw requests were submitted to appellants, however, the requests were not paid. Respondents continued working for

[1]The contract stated, "Progress payments shall be paid immediately to Contractor as billed on completed work. After five (5) days, failure to pay progress payments constitutes default under this contract."

four months after receiving the last payment and continued to pay suppliers and subcontractors until they ran out of money.[2]

On April 9, 1998, appellants' attorney sent a letter to respondents terminating them from the job immediately. Appellant Jim Davidson admitted on cross-examination that, at the time of termination, there was still work to be done under the contract and the change orders.

Prior to terminating respondents, appellants contacted Randy West, a general contractor, to have him determine whether the percentage of completion of the house was consistent with the amount of money that had been paid to respondents. West visited the job site and determined the statement of completion was not consistent with the amount that had been paid. However, West recommended that respondents be allowed to finish the job. After respondents were terminated, West agreed to complete the job and correct certain items.

Respondents brought an action against appellants. Appellants counterclaimed seeking damages for breach of contract as a result of respondents' defective and incomplete performance and damages for two other counterclaims.

Appellants alleged respondents built the house approximately two feet below the elevation level called for in the plans and failed to put in fill dirt to raise the level of the lot where the house would be placed. Appellants alleged the lack of fill dirt caused water to pool in and around the home.

At the close of the evidence, the court found appellants had breached the contract as a matter of law. Appellants' counterclaim for damages alleged to result from the failure of respondents to site the house properly on the lot and respondents' claims for damages and lost profits were submitted to the jury.

---

[2]As a result, one supplier received a judgment against respondents for failure to pay.

The jury returned a verdict in respondents' favor for appellants' breach of contract. The jury also, on a separate verdict form, found for appellants on their claim regarding the failure of respondents to site the house properly on the lot; however, the jury did not award any damages to appellants.

ISSUE I

> Did the trial court err by charging the wrong measure of damages for prevention of contractual performance?

DISCUSSION

Respondents requested the trial court charge the law under Warren v. Shealy, 83 S.C. 113, 65 S.E. 1 (1909), that appellants cannot recover for the costs they incurred to complete the house because they had refused to permit respondents to fulfill their performance of the contract. Appellants objected that the proposed charge would allow respondents to recover the full amount left on the contract when, due to their termination, they had not incurred certain costs. The trial court charged the jury as requested by respondents:

> An owner of a building under construction, under a contract providing for payment of the price of the completion of work, who refuses to permit the contractor to complete the work is liable for the contract price less payments made and cannot counterclaim for the amount paid for finishing the building.

Appellants contend the expenses respondents did not incur should be reduced from the claim for the balance of the contract that was due to be paid. Appellants distinguish Warren v. Shealy because that case involved a contract for services only, and not a contract, as here, for services *and* materials. In Warren, appellants argue, it was appropriate for the non-breaching party to recover the full amount due under the contract because those damages represented profit or unpaid labor, not material costs that otherwise did not occur as a result of performance being prevented.

Appellants' assessment of Warren v. Shealy is correct. However, the trial court in this case in fact charged exactly what appellants are arguing the court should have charged. The trial court charged that after partially performing a contract, one who is wrongfully prevented from completing the contract may recover actual expenditures and damages for lost profits. The court also charged that the measure of damages for the breach of a contract is the loss actually suffered as a result of the breach. Further, the court charged that respondents' damages consist of out-of-pocket costs actually incurred as a result of the contract and the gain above the costs that would have been realized had the contract been performed. Therefore, appellants' argument that the trial court failed to charge the correct measure of damages is without merit. *See* South Carolina Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960) (measure of damages for breach of contract is loss actually suffered by contractee as result of breach).

Appellants further assert Warren should not have been charged because the issue of appellants' counterclaim for the cost to complete the house had been removed from the jury's consideration. While it may have been unnecessary for the trial court to give the Warren charge, reading the charge as a whole, it is clear the court informed the jury of the correct measure of damages. The charge adequately covered the law of damages resulting from a breach of contract where one party is prevented from completing performance under the contract. We find the jury was not confused or misled by the Warren instruction. *See* Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 514 S.E.2d 570 (1999) (jury charge correct if when charge read as whole, it contains correct definition and adequately covers law); *see also* State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) (jury instructions should be considered as whole, and if as whole they are free from error, any isolated portions which may be misleading do not constitute reversible error); State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980) (jury charge which is substantially correct and covers law does not require reversal).

ISSUE II

Did the trial court err by failing to require jury re-deliberation to correct the verdict?

DISCUSSION

The jury was given two verdict forms. One form represented respondents' action against appellants for breach of contract. This form requested the jury answer whether they found for respondents and if they found for respondents, they were to determine the amount of damages. The second verdict form covered appellants' counterclaim for breach of contract against respondents. The form asked whether the jury found for appellants and if the jury found for appellants, they were to "state the total amount of actual damage, if any, sustained by [appellants.]"

The jury returned a verdict finding for respondents in the amount of $129,000. On appellants' counterclaim, the jury found for appellants but did not find any damages. The trial court *sua sponte* clarified with the jury that their verdict on the counterclaim was a breach by respondents but no damages. At appellants' request, the court polled the jury and found the verdict stood.

Appellants argue the jury should have re-deliberated given the jury found for appellants on their claim, but nevertheless did not find any damages. They argue the court dismissed the jury without giving appellants an opportunity to request re-deliberation.

This issue is not preserved for our review. Appellants did not object to the verdict at the time it was rendered, failed to request that the verdict be resubmitted for clarification, and allowed the jury to be discharged before voicing their objection to the verdict. *See* Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 560 S.E.2d 894 (2002) (party may not allow jury to be discharged in face of obviously defective verdict, which could easily be corrected upon resubmission to jury); Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000) (when issue raised, trial judge should resubmit verdict

assessing liability but awarding zero damages to jury with instructions to either find for defense or award some amount of damages); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (no duty imposed on trial judge to question jury's verdict of liability, but no damages, unless requested to by a party); Limehouse v. Southern Ry., 216 S.C. 424, 58 S.E.2d 685 (1950) (where verdict is objectionable as to form, party who desires to complain should call that fact to court's attention when verdict is published. Otherwise, right to do so is waived). Further, appellants did not object to the trial court's charge on the verdict form or the actual verdict form itself which stated that if the jury should find for appellants on their counterclaim, the jury was to "state the total amount of actual damage, *if any*, sustained by" appellants. The "if any" language in the verdict form indicated the jury could find no damages even if they found for appellants on their counterclaim. *See* Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000) (to preserve issue for appellate review, issue must have been raised to and ruled upon by trial court).

ISSUE III

Did the trial court err by eliminating from the jury's consideration the issue whether appellants had breached the contract?

DISCUSSION

The trial court found appellants had breached the contract as a matter of law because appellants admitted they terminated respondents from the job without giving respondents an opportunity to correct the errors they alleged.

Given appellants admitted on cross-examination that, at the time they terminated respondents, there was still work to be done under the contract, the trial court properly found that appellants breached the contract as a matter of law because the evidence on this issue was not susceptible of more than one reasonable inference. *Cf.* Jones v. Ridgely Communications, Inc., 304 S.C. 452, 405 S.E.2d 402 (1991) (jury issue exists where evidence is susceptible of more than one reasonable inference).

Appellants argue the jury was entitled to determine whether appellants' termination of respondents was justifiable. However, appellants did not present any evidence that the termination was justifiable. Appellants' own advisor, Randy West, testified that, although he felt respondents' statements of completion on their draw requests were not consistent with the amount that had been paid by appellants, he advised appellants to allow respondents to finish the job. Further, while West testified that he corrected certain items performed by respondents after the contract termination, there was no evidence that respondents were given a chance to correct these items prior to termination or that they would not have corrected these items on their own accord prior to completing the house.

Accordingly, the trial court properly found appellants had breached the contract as a matter of law when they terminated respondents from the job prior to completion of the house.

ISSUE IV

Did the trial court abuse its discretion by excluding expert testimony?

DISCUSSION

Prior to trial, in response to interrogatories propounded by respondents, appellants stated: "[Appellants,] at this time, do not plan to use any expert witnesses. If an [sic] when one is identified, his identity will be revealed to [respondents.]" In response to the interrogatory asking what witnesses, other than experts, appellants planned to use, appellants listed West. When this response was supplemented by a second response several months later, no expert witnesses were identified.

At trial, respondents moved to exclude the expert testimony of Randy West. Respondents argued they were not informed West would be used as an expert at trial. Appellants countered that because they had indicated West

would be a witness and that respondents had deposed West, allowing him to testify as an expert would not be a surprise to respondents.

The trial court ruled West could not testify as an expert due to appellants' failure to list him as an expert witness. The court found the failure to list West as an expert prevented respondents from possibly hiring their own expert. The court also felt that, given appellants terminated respondents from the job before they had completed the job or been given an opportunity to correct any alleged defects in the work, West's testimony about the quality of the workmanship would be irrelevant. The court stated West could testify as to his observations of the property, but not the quality of the workmanship.

By the terms of Rule 33, SCRCP, "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." Therefore, there is a continuing duty on the part of the party from whom information is sought to answer a standard interrogatory, such as the one requesting the party list any expert witnesses whom the party proposes to use as a witness at the trial of the case.

The parties' disclosure of information before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing. Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982). When it appears a violation of Rule 33 has occurred, it lies within the discretion of the trial court to decide what sanction, if any, should be imposed. Jackson v. H&S Oil Co., Inc., 263 S.C. 407, 211 S.E.2d 223 (1975) (case decided under former Circuit Court Rule 90). The sanction of excluding a witness should never be lightly invoked. Kirkland v. Peoples Gas Co., 269 S.C. 431, 237 S.E.2d 772 (1977). Before so ruling, the trial court should ascertain the type of witness involved, the content of the evidence, the explanation for the failure to name the witness in answer to the interrogatory, the importance of the witness' testimony, and the degree of surprise to the other party. Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974).

We find the trial court justifiably determined appellants should be sanctioned for failing to list West as an expert witness in their responses to the interrogatories. The trial court properly considered several factors as dictated by Laney v. Hefley, *supra*.

First, the court looked at appellants' explanation for their failure to name West as an expert. Appellants informed the court West was not listed as an expert because appellants did not think West would have to be qualified as an expert to testify to defects in the construction.

Second, the court considered the importance of West's testimony. The court indicated West's testimony on the quality of workmanship was irrelevant given appellants had breached the contract by terminating respondents from the job before the work was completed. The court also noted that the content of West's proposed testimony had already been presented to the jury through appellant Jim Davidson's testimony.

Finally, the court considered the degree of surprise to respondents. The court found, by not listing West as an expert witness, respondents were prevented from possibly hiring their own expert.

Considering the factors as outlined in Laney, the trial court did not abuse its discretion by excluding West's testimony regarding the quality of respondents' workmanship. *See* Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993) (trial court's ruling on admission of evidence will not be disturbed on appeal absent abuse of discretion amounting to error of law).

AFFIRMED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bryan M. Gantt, Respondent,

v.

State of South Carolina, Petitioner.

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 25634
Submitted February 20, 2003 - Filed April 28, 2003

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General David A. Spencer, of Columbia, for petitioner.

Assistant Appellant Defender Aileen P. Clare, of S.C. Office of Appellate Defense, of Columbia, for respondent.

PER CURIAM: We granted the State's petition for a writ of certiorari to review the grant of post-conviction relief (PCR). We now reverse.

FACTS

Respondent Gantt was convicted and sentenced for first degree criminal sexual conduct, kidnapping, armed robbery, grand larceny of a vehicle, possession of crack cocaine, and resisting arrest. These convictions all stemmed from a single incident.

The thirty-one-year-old victim (Victim) testified she was cleaning her car at a car wash when respondent approached her from behind, put a gun to her back, and demanded her money and jewelry. After she complied, he threatened to kill her if she screamed and told her to get in the car. They drove to a wooded area where respondent raped Victim in the front seat of the car and threw the used condom out the car window.

Respondent then had Victim drive to a bank to withdraw money for him. When Victim asked a teller for help, respondent drove off in Victim's car leaving her at the bank. Victim took police to the scene of the rape where an officer recovered the used condom. The DNA profile recovered from the semen in the condom matched respondent's.

Respondent was arrested the same day. He was in Victim's car, a gun was in the car,[1] and he had a piece of crack cocaine in his pocket. He fought with the arresting officers.

At trial, respondent testified that he met Victim at a crack house and she agreed to have sex with him in exchange for crack. They had consensual sex in her car then drove to the bank so she could withdraw money to buy more crack. Victim was acting paranoid from the drugs

---

[1]The gun was a B.B. gun. The victim testified she knew nothing about guns.

so respondent followed her into the bank. When she was belligerent to him, he left in her car.

Shortly after respondent's arrest, Officer Davis went to the jail with a search warrant to obtain blood, saliva, and hair from respondent. Officer Davis testified that respondent refused to cooperate at that time. The samples were subsequently taken pursuant to court order. Respondent testified he initially refused to cooperate because he wanted his lawyer present. Evidence corroborated that respondent willingly gave the requested samples when presented with the proper order.

On appeal, respondent claimed the trial judge erred in allowing evidence of his refusal to cooperate because the search warrant was invalid under S.C. Code Ann. § 17-13-140 (2002). In an unpublished opinion, the Court of Appeals declined to address the issue because there was no objection to the validity of the search warrant.

Respondent subsequently brought this PCR action claiming counsel was ineffective for failing to object to the search warrant's validity.[2] The PCR judge found counsel was ineffective and respondent was prejudiced because the State used the evidence of respondent's non-compliance as evidence of his guilt.

ISSUE

Was respondent prejudiced by evidence that he refused to comply with the search warrant?

---

[2] At the hearing, counsel agreed he was ineffective for failing to preserve this issue but he believed the outcome of the trial would not have been different. Counsel's admission is unlike the testimony of counsel in Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991), where trial counsel admitted the testimony of a potential witness could have made a difference.

DISCUSSION

A lawful arrest does not in itself justify a warrantless search that requires bodily intrusion. The Fourth Amendment protects against intrusions into the human body for the taking of evidence absent a warrant unless there are exigent circumstances such as the imminent destruction of evidence.[3] Schmerber v. California, 384 U.S. 757 (1966); *see also* State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) (applying Schmerber analysis to search of suspect's mouth). Where blood is needed only to determine blood type to match existing evidence as here, a warrant must be obtained even though there has been a lawful arrest.

A warrant allowing a bodily intrusion must comply with § 17-13-140[4] and requires the following: 1) a finding there is a clear indication that material evidence of guilt will be found; 2) a finding the method used to secure the evidence is safe and reliable; and 3) a balancing of the seriousness of the crime, the importance of the evidence, and the unavailability of less obtrusive means against the right to be free from bodily intrusion. State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992); In re: Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992). The search warrant in this case did not meet these requirements.

Respondent's refusal to comply with an invalid search warrant was essentially a refusal to comply with a warrantless search. We have held under Doyle v. Ohio,[5] the prosecution may not comment on the accused's refusal to comply with a warrantless search. Simmons v.

---

[3]For example, blood alcohol level is considered evidence subject to imminent destruction. Schmerber, 384 U.S. at 770-71.

[4]This section provides generally for the issuance of a search warrant based on probable cause.

[5] 426 U.S. 610 (1976).

State, 308 S.C. 481, 419 S.E.2d 225 (1992).[6] Had trial counsel challenged the validity of the search warrant, respondent could have objected to evidence that he refused to comply. Counsel was therefore ineffective in failing to challenge the search warrant's validity.

An applicant for PCR, however, must show prejudice from counsel's deficient performance. Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). When a Doyle violation has occurred, as alleged here, we will consider the following factors in determining prejudice on PCR: 1) whether the reference to the accused's exercise of his constitutional right was a single reference; 2) whether the State tied the exercise of this right directly to the accused's exculpatory account; 3) whether the accused's exculpatory account was totally implausible; and 4) whether the evidence of guilt was overwhelming. McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000).

As argued by the solicitor in closing, this case turned on credibility. The evidence that respondent kidnapped and raped Victim was not overwhelming in contrast to respondent's exculpatory account of a consensual encounter. The reference to respondent's refusal to comply with the search warrant, however, was only a single reference and was not tied to respondent's guilt. The solicitor's entire colloquy with Officer Davis was:

> Q: What was [respondent's] response to you in the request for these samples?
>
> A: That he did not want to do it.
>
> Q: Did he refuse?
>
> A: Yes, sir.

---

[6]This holding effectively overruled State v. Middleton, 266 S.C. 251, 222 S.E.2d 763 (1976), which held where the search is refused and therefore not conducted, there is no fourth or fifth amendment right implicated and testimony regarding the refusal is admissible.

In argument, the solicitor referred once to respondent's refusal in the context of "he knew his rights" when police arrived with the search warrant, but the solicitor did not argue this refusal as evidence of guilt.

We find respondent failed to make the requisite showing that there is a reasonable probability the result of the trial would have been different but for counsel's error. Patrick v. State, *supra.* Because there is no evidence supporting the PCR judge's finding of prejudice, we reverse.

REVERSED.

TOAL, C.J., MOORE, WALLER, BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. The post-conviction relief (PCR) judge granted respondent's application, finding respondent had proven both that his trial counsel's performance was deficient and that respondent was prejudiced by this deficient performance. The majority and I agree that trial counsel should have objected both to the evidence of respondent's refusal to comply with the unlawful search warrant, and to the solicitor's reference to this refusal in his closing argument since "it is clearly established that the state cannot, through evidence or argument, comment on the accused's exercise of a constitutional right." Simmons v. State, 308 S.C. 481, 484, 419 S.E.2d 225, 226 (1992). Further, since as the majority acknowledges the evidence of respondent's guilt was not overwhelming and the case turned on credibility, I would defer to the PCR judge's finding that respondent was prejudiced by this deficient performance. See, e.g., Burnett v. State, Op. No. 25582 (S. C. Sup. Ct. filed January 13, 2003) (this Court is required to affirm the PCR judge's findings where they are supported by any evidence of probative value).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Irvin W. Campbell, J. C. Lawyer, Backus Ferguson, and Thomas Hanahan, III, on behalf of themselves and all others similarly situated, Respondents

v.

Hilton Head No. 1 Public Service District and Beaufort County South Carolina, Appellants.

Appeal From Beaufort County
Perry M. Buckner, Circuit Court Judge

Opinion No. 25635
Heard February 20, 2003 - Filed April 28, 2003

REVERSED

Steve A. Matthews and Benjamin T. Zeigler, of Haynsworth Sinkler Boyd, P.A., of Columbia, Stephen P. Hughes and Mary Bass Lohr, of Howell, Gibson & Hughes, of Beaufort, for Appellants.

A. Camden Lewis, Mary G. Lewis, and Ariail E. King, of Lewis, Babcock & Hawkins, L.L.P., of Columbia; Joel D.

Bailey, of The Bailey Law Firm, P.A., of Beaufort, for Respondents.

JUSTICE WALLER: This is a direct civil appeal. On cross-motions for summary judgment, the trial court granted summary judgment for respondents and also granted respondents' request for class certification. Appellants appeal both decisions. We reverse.

FACTS[1]

In 1969, the Legislature created appellant Hilton Head No. 1 Public Service District (the District) as a special purpose district to supply water and sewer services to the northern portion of Hilton Head Island. The District is governed and managed by a commission whose members are appointed by the Governor upon the recommendation of the Beaufort County legislative delegation. Prior to this Court's decision in Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997), the District levied taxes on property within the District's service area. Appellant Beaufort County collected the taxes.

In Weaver, we ruled that the statute which authorized the recreation district's appointed commission to levy a property tax violated the State Constitution's provision forbidding taxation by unelected officials.[2] The general holding from Weaver is that any legislative delegation of taxing authority to an **appointed** body unconstitutionally permitted "taxation without representation." Id. The Weaver Court, however, ordered only prospective relief, stating the following:

---

[1] The facts in this matter are undisputed.

[2] See S.C. CONST. art. X, § 5 ("No tax ... shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled....").

> We are cognizant … of the disruptive effect today's holding could have on the financial operation of numerous special purpose districts, local commissions and boards throughout this state. Accordingly, in order to give the General Assembly an opportunity to address this problem, we hold this decision shall be applied prospectively beginning December 31, 1999.

Id. at 87-88, 492 S.E.2d at 82. In response, the Legislature passed legislation in 1998 that removed the taxing power from appointed bodies such as the District's commission. See S.C. Code Ann. § 6-11-271 (Supp. 2002).

The individual respondents in the instant action represent people who own real and/or personal property located in the District, paid taxes on the property in the years 1995 through 1998, and did not receive water or sewer service from the District.[3] On June 1, 1998, respondents filed their lawsuit. The case has a tortured procedural history;[4] however, respondents' only remaining cause of action is a 42 U.S.C. § 1983 claim based on an alleged violation of the United States Constitution.[5]

---

[3] Additionally, respondents include only those who still do not receive any water or sewer service from the District.

[4] For example, the case began with two similar complaints filed in state and federal court, each alleging several causes of action. The state court case was removed to federal court, consolidated with the federal case, and then eventually remanded to state court. See Lawyer v. Hilton Head Public Serv. Dist. No. 1, 220 F.3d 298 (4th Cir. 2000), aff'g Campbell v. Hilton Head No. 1 Public Serv. Dist., 114 F.Supp.2d 482 (D.S.C. 1999).

[5] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to **the deprivation of any rights, privileges, or immunities secured by the Constitution and laws**, shall be

The trial court granted summary judgment in favor of respondents finding that taxation without representation is a violation of the federal Constitution. Specifically, the trial court found that the privilege of no taxation without representation is embodied in Article IV, section 4 of the federal constitution, which guarantees a republican form of government. The trial court noted "it was taxation without representation that spurred on the American Revolution," and therefore could not accept appellants' argument that the federal constitution did not forbid taxation without representation. In addition, the trial court granted respondents' motion for class certification.

ISSUES

1. Did the trial court err in finding that taxation without representation violates the Republican Guarantee Clause of the United States Constitution?

2. Did the trial court err in certifying the class?

DISCUSSION

Respondents argued to the trial court that "taxation without representation" is not permitted under the United States Constitution. Respondents reasonably continue to contend that this founding principle of our nation necessarily is embodied in the federal constitution. Appellants, on the other hand, argue the trial court erred in finding the Republican Guarantee Clause prohibits taxation without representation. Moreover, appellants do not suggest that our nation has abandoned its founding principles, but rather argue that the limited delegation of taxing power that occurred prior to Weaver in no way violated a right guaranteed by the **federal** constitution.

> liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(Emphasis added). Thus, the statute creates a civil rights action for the deprivation of a **federal** right.

After reviewing the relevant authorities, we agree with appellants, and reverse the trial court's decision.

The Republican Guarantee Clause of the federal Constitution provides as follows: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4. By its express terms, this clause does not guarantee against taxation without representation.

Furthermore, "[a]lthough it may surprise innumerable generations of American schoolchildren and adults who have studied the American [R]evolution and the Boston Tea Party, there is firm Supreme Court precedent to support taxation without representation." Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 How. L.J. 333, 337 (1994); see also Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 Tenn. L. Rev. 549, 574 (1985) ("The Court … has refused to transmute the Revolutionary slogan 'no taxation without representation' into a constitutional principle.").

Indeed, the United States Supreme Court (USSC) has repeatedly rejected the contention that the federal constitution guarantees no taxation without representation. For instance, in Heald v. District of Columbia, 259 U.S. 114 (1922) (Brandeis, J.), residents of the District of Columbia challenged a property tax which Congress levied, arguing it subjected them to taxation without representation. The USSC clearly stated: "There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." Id. at 124.

Likewise, in Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820) (Marshall, C.J.), residents of the District of Columbia challenged the right of Congress to impose a direct tax on the District. They argued that Congress' right to legislate on matters related to the District "must be limited by that great principle which was asserted in our revolution, that representation is

inseparable from taxation." Id. at 324. However, Chief Justice Marshall, writing for a unanimous Court, noted that it was "obvious" the situation was completely different from that complained of during the Revolution, and held "that Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia." Id. at 324-25.[6]

Heald and Loughborough remain good law. Recently, a three-judge panel of the federal district court rejected a claim by residents of the District of Columbia that they had a right to vote for Congress. Adams v. Clinton, 90 F.Supp.2d 35 (D.D.C.), aff'd, 531 U.S. 941 (2000). As part of the extensive

---

[6] See also Thomas v. Gay, 169 U.S. 264 (1898). In this case, the appellants were non-residents of Oklahoma who objected to Oklahoma's tax on their personal property – herds of cattle that were kept and grazed on an Indian reservation in Oklahoma. The appellants argued the tax constituted taxation without representation. The USSC commented as follows:

> Undoubtedly there are general principles, familiar to our systems of state and federal government, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. **But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be taxed, unless he was represented by some one for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out.** Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen.… So, likewise, it is settled law that the property, both real and personal, of nonresidents may be lawfully subjected to the tax laws of the state in which they are situated.

Id. at 276-77 (emphasis added, citation omitted).

discussion on the plaintiffs' various constitutional claims, the Adams court reviewed Heald and Loughborough, as well as other authorities that have rejected "the cry of 'no taxation without representation.'" Id. at 55. Interestingly, the court commented as follows on Loughborough:

> If there were a Justice who would have been particularly sensitive to this reprise of the Revolutionary War battle cry of "no taxation without representation," surely it would have been Marshall--who served as a company commander at Valley Forge. See Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION 62-65 (1996). Nonetheless, speaking for a unanimous Court, Marshall held that Congress had the power to tax residents of the District of Columbia despite their lack of representation.

Id. The USSC affirmed Adams.

Respondents rely on Kelley v. Metropolitan County Bd. of Educ. of Nashville and Davidson County, 836 F.2d 986 (6th Cir. 1987), cert. denied, 487 U.S. 1206 (1988), in support of their argument. In Kelley, the court held that the federal district court erred in ruling that the state of Tennessee, as opposed to the local school board, should bear certain costs of school desegregation. In dicta, the Kelley court commented as follows:

> In language of majestic simplicity, our Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government...." U.S. Const. Art. IV, § 4. A "republican" form of government, as Madison suggested in Number Ten of the Federalist Papers, is "a Government in which the scheme of *representation* takes place." (Emphasis supplied.) In few (if any) areas of government is Madison's "scheme of representation" more important than it is in the area of government finance and taxation. A principal cause of our Revolutionary War, after all, was the imposition of taxes without representation. The concept that "taxation without representation is tyranny" was one for which a number of the Framers had put their very lives on the line. Our Constitution was not adopted to

> perpetuate the evil that led us to break our ties with the British Crown.

Id. at 997. Kelley, however, is inapposite to the issue in the instant case. The Kelley court was concerned with a federal judge apportioning state money the court felt was more appropriately done by the legislative branch. Kelley did not resolve the issue of whether there is an independent, federal right to no taxation without representation.

Accordingly, while the American Revolution may have been spurred on by the rallying cry 'no taxation without representation,' the federal Constitution that was subsequently drafted contained no express provision guaranteeing that as a right. In contrast, this Court has interpreted the South Carolina constitution as clearly prohibiting taxation without representation. See, e.g., Weaver, supra. Respondents simply cannot rest on the Weaver holding for their federal section 1983 claim. Because we find there is no **independent, federal right** found in the Republican Guarantee Clause prohibiting taxation without representation, respondents have no available section 1983 action against appellants.[7]

We therefore hold the trial court erred in granting summary judgment to respondents; instead, summary judgment should have been granted in appellants' favor. Given this conclusion, we need not address the issue of whether the trial court erred in certifying a plaintiff class.

REVERSED.

---

[7] In addition, we note that claims made pursuant to the Republican Guarantee Clause generally have been held by the USSC to be nonjusticiable, political questions. See, e.g., Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); see also Baker v. Carr, 369 U.S. 186, 223-24 (1962) (stating the USSC has "consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question") (and cases cited therein); Adams v. Clinton, 90 F.Supp.2d at 71; but see New York v. United States, 505 U.S. 144, 185 (1992) (questioning whether all claims under the Republican Guarantee Clause present nonjusticiable, political questions).

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John H. Parker, Respondent.

Opinion No. 25636
Submitted April 10, 2003 - Filed April 28, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

John H. Parker, of Memphis, Tennessee, pro se.

PER CURIAM: By way of the attached order of the Board of Professional Responsibility of the Supreme Court of Tennessee, respondent was publicly censured for misconduct involving an irrevocable family trust agreement he established for a client.[1]

We find that the misconduct established warrants a public reprimand in this state as well. See Rule 29(d), RLDE, Rule 413, SCACR. Accordingly, respondent is hereby publicly reprimanded for the misconduct set forth in the order of the Board of Professional Responsibility of the Supreme Court of Tennessee.

PUBLIC REPRIMAND.

[1] Respondent was suspended in 1983 for non-payment of Bar fees and failure to comply with continuing legal education requirements.

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

IN DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE: JOHN H. PARKER, BOPR #10326, Respondent. An Attorney Licensed to Practice Law in Tennessee (Shelby County)

FILE NO. 24997-9-JJ
CL-22631

PUBLIC CENSURE

A complaint alleging ethical misconduct was filed against the respondent by William S. Rhea, Esq., of Somerville, TN. The Board of Professional Responsibility considered the matter under Tennessee Supreme court Rule 9 at its December, 2002 meeting and determined that issuance of a Public Censure was appropriate.

Respondent drafted several estate planning documents and an irrevocable Family Trust Agreement for Thomas H. Fowler, grantor, in 1999. Within this Thomas H. Fowler Family Trust executed by Mr. Fowler in 1999, respondent named himself as trustee and could not be removed as trustee since the trust could not produce income given that all of its assets were in the form of life insurance. Respondent could not be involuntarily removed as trustee unless court action were commenced by the beneficiaries, and relief were obtained from the court.

While the trust allowed respondent to resign as trustee, and although the beneficiaries had demanded such resignation since the fall of 2001, respondent refused to do so until early December of 2002. Moreover, between 2000 and 2001, respondent encroached upon the corpus of the trust and paid himself the sum of $14,006.36, which represented the amount of attorney fees unpaid by Mr. Fowler, and which was disputed by Mr. Fowler. There was no written employment contract between respondent and

the grantor, and Mr. Fowler disputes that he authorized respondent to prepare all of the estate planning documents which respondent prepared. Further, there is no provision within the trust which grants respondent the authority to encroach upon the corpus to pay himself disputed attorney fees. There was no consent by Mr. Fowler or by any beneficiaries to the encroachment, and respondent's reliance upon the general powers of trustees described in Title 50, T.C.A., in justifying his actions, is misplaced.

The Board concludes that respondent misappropriated entrusted funds of his client, and was exceedingly dilatory in resigning as trustee as requested by his client and the beneficiaries. We find somewhat mitigating respondent's belated restoration of the $14,006.36 to the corpus of the trust in early December of 2002, and his decision to resign as trustee. Absent such mitigation, respondent's actions could warrant suspension of his law license.

Based thereon, respondent John. H. Parker has violated DR 1-102(A)(1)(4)(5)(6); DR 7-101(A)(1)(4)(c); DR 7-102 (A)(8); DR 9-102(A)(2) and Canon 9 of the Code of Professional Responsibility. Accordingly, he is hereby **PUBLICLY CENSURED** and the captioned file is hereby closed.

FOR THE BOARD:

Charles E. Carpenter, Chairman
Board of Professional Responsibility
of the Supreme Court of Tennessee

DATED: January 28, 2003

Parker, JH. BOPR Public Censure.wpd

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Therl Avery Taylor, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25637
Heard November 6, 2002 - Filed April 28, 2003

REVERSED

Katherine Carruth Link, and South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Thomas E. Pope, of the Sixteenth Judicial Circuit; for respondent.

CHIEF JUSTICE TOAL: Petitioner, Therl Avery Taylor ("Petitioner"), petitioned this Court to review the Court of Appeals' decision affirming his conviction for murder on grounds that the trial court erred in charging mutual combat to the jury.

FACTUAL / PROCEDURAL BACKGROUND

On December 16, 1998, Petitioner hired Robert Murphy ("Murphy"), fourteen year-old Shane Wallace, and Shane's teenaged friend Dean, to help him in his tree service business. After working that day, Petitioner and Murphy drove the two young men to the home of Shane's mother, Angela Wallace, an acquaintance of both Murphy and Petitioner. When they arrived at Angela's house, Petitioner and Murphy went inside and joined Angela, Myranda Stillinger, and Kevin Carter who had been drinking heavily all day. Shane, Dean, and Shane's sister, Chrystal, played outside.

While the testimony varied widely regarding many of the relevant facts, all witnesses agreed that, at some point in the evening, Kevin and Myranda began arguing. Petitioner testified that Kevin forcefully pushed Myranda into a counter. All parties agreed that Petitioner intervened, either physically or verbally, to stop the apparently escalating argument between Kevin and Myranda. Kevin and Petitioner then engaged in a violent, physical confrontation; however, the witnesses disagree about who started the fight and about its intensity at various points.

At trial, Murphy testified that the fight began when Petitioner "sucker-punched" Kevin. Murphy reported, "[a]nd that's when [Petitioner] said, you know, I'm not afraid of you, big man. And [Kevin] said, I'm not afraid of you either. And that's when [Petitioner] said, we're going to hell or jail. And all of sudden, he just hauled off and punched [Kevin] in the head while [Kevin] was sitting down."[1]

[1] Murphy neglected to report any of these facts in the signed statement he gave to the police on the night Kevin was killed, including his later contention that Petitioner had started the fight.

Petitioner, on the other hand, testified that Kevin threw the first punch, and that he tried to withdraw from the fight, but that Kevin would not release him and continued to beat him. Other witnesses asserted that Kevin, not Petitioner, attempted to quit fighting. All witnesses agree that Angela insisted the two take the fight outside, and that they continued their struggle on the porch of the trailer and into the front yard.

At some point thereafter, Petitioner drew a buck knife from his pocket, and began stabbing Kevin. The autopsy report disclosed that Kevin was stabbed fifteen times and died of a stab wound to the heart. The autopsy reported Kevin was six feet two inches tall and weighed approximately 270 pounds at the time of his death. A physical examination of Petitioner a few days after the fight revealed Petitioner had undergone abdominal surgery in the weeks preceding this incident after a car accident, but indicated no new cuts or bruises. Petitioner was substantially smaller than Kevin.

At trial, Petitioner admitted he stabbed Kevin, but alleged he did so in self-defense. The trial judge charged the jury on self-defense and, over Petitioner's objection, on mutual combat, as follows:

> We also have the law in this state regarding what is sometimes referred to as mutual combat. This premise is in the law where two persons are mutually engaged in combat and one kills the other. And at the time of the killing it being maliciously done as murder.
>
> If it be done in the sudden heat of passion upon sufficient provocation or without premeditation, it would be manslaughter.
>
> One who provokes or initiates an assault and not [sic] escape from the liability may find in self-defense a defense to a prosecution arising with respect to injury or death of their adversary.
>
> And where a person voluntarily participates in mutual

> combat for purposes other than protection you cannot justify or excuse the killing of the adversary in the course of such conduct on the ground of self-defense, regardless of what extremity or even peril he may be introduced to in the process of the combat. Unless in either event before the homicide is committed the person withdraws and does in good faith decline from the conflict and either by word or by act makes that known to their adversary.
>
> Then if the adversary pursues them the aggressor may upon the belief that they are in danger injure or kill the adversary. Communication by one to an adversary or attempt to withdraw may be explicit or verbal by use of words or may be implicit by conduct, such as retiring or attempting to retire from the scene and abandoning conflict.

The jury convicted Petitioner of murder and possession of a weapon during commission of a violent crime. The trial judge sentenced Petitioner to thirty-six years for murder and five years, concurrent, for the weapons charge. The Court of Appeals affirmed Petitioner's convictions. *The State v. Therl Avery Taylor,* Op. No. 2000-UP-484 (S.C. Ct. App., filed June 26, 2000). This Court granted certiorari to review the following issue:

> Did the trial court err in delivering a charge on mutual combat to the jury, and, if so, was Petitioner prejudiced by the charge?

LAW/ANALYSIS

Petitioner argues that the Court of Appeals erred in affirming the trial court's jury charge on mutual combat. We agree.

In general, the trial judge is required to charge only the current and correct law of South Carolina, *Cohens v. Atkins,* 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), and the law to be charged to the jury is determined by the evidence at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). To warrant reversal, a trial judge's charge must be both erroneous

and prejudicial. *Ellison v. Parts Distributors, Inc.,* 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years. The case law does establish that there must be "mutual intent and willingness to fight" to constitute mutual combat. *State v. Graham,* 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." *Id.* Whether or not mutual combat exists is significant because "the plea of self-defense is not available to one who kills another in mutual combat." *Id.* (citing *State v. Jones,* 113 S.C. 134, 101 S.E. 647 (1919)). In order to claim self-defense, the defendant "must be without fault in bringing on the difficulty." *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the "no fault" element of self-defense cannot be established.

If the defendant is engaged in mutual combat, self-defense is unavailable unless the defendant withdraws from the conflict before the killing occurs.[2] A finding that a defendant was engaged in mutual combat does not preclude the jury from convicting the defendant of manslaughter as opposed to murder. "Where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation

[2] In *State v. Graham,* the Court quoted 40 C.J.S. Homicide § 122 for an explanation of the basic principles of mutual combat: " 'Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he endeavors in good faith to decline further conflict, and either by word or act, makes that fact known to his adversary, . . .' " 260 S.C. at 451, 196 S.E.2d at 495-96.

without premeditation or malice, it would be manslaughter." *State v. Andrews*, 73 S.C. 257, 53 S.E.423 (1906).

The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs. *State v. Porter,* 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where Appellant returned to injured party's property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots); *Graham,* 260 S.C. at 451, 196 S.E.2d at 496 (finding mutual combat charge proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); *State v. Mathis,* 174 S.C. 344, 177 S.E. 318 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other).[3]

Although South Carolina has not explicitly required that the fight arise out of a pre-existing dispute, other states have made this prerequisite to mutual combat explicit. Texas and Colorado adhere to the rule that an "antecedent agreement to fight" must exist for the court to charge mutual combat. *Eckhardt v. People,* 247 P.2d 673 (Colo. 1952); *People v. Cuevas,* 740 P.2d 25 (Colo. App. 1987); *Lujan v. State,* 430 S.W.2d 513, 514 (Tex. Crim. App. 1968); *Carson v. State*, 230 S.W. 997 (Tex. Crim. App. 1921).

Georgia has limited the application of mutual combat in another way by holding that mutual combat arises only when the parties are armed with deadly weapons, and that mutual combat does not arise from "a mere fist

[3] In the only modern South Carolina case to refer to mutual combat in a fist-fight setting, this Court apparently assumed it could apply, but held there was no evidence to support it. *Nauful v. Milligan*, 258 S.C. 139, 187 S.E.2d 511 (1972) (verbal fighting precipitated by injured party's insult to the defendant's children, but injured party never made any accompanying threat of physical violence and never fought back when defendant became physical).

fight or scuffle." *Flowers v. State,* 247 S.E.2d 217, 218 (Ga. App. 1978); *Grant v. State,* 170 S.E.2d 55, 56 (Ga. App. 1969). In both *Flowers* and *Grant*, the defendant admitted to killing the decedent, but claimed self-defense. In both cases, the disputes that ended in death began as fist fights, and so the court found the mutual combat charge erroneous. Significantly, the court found that commingling charges on mutual combat and justification was "ipso facto harmful" because "it placed upon the defendant a heavier burden than required" for self-defense. *Grant*, 170 S.E.2d at 56. The court in *Flowers* explained, "[t]o charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." 247 S.E.2d at 218.

We believe the restrictions placed on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas are warranted. These limitations are consistent with the South Carolina cases in which the mutual combat charges given were deemed to be proper: *Porter, Graham, and Mathis*. As mentioned, mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the "no fault" finding necessary to establish self-defense. As such, it is only logical that the evidence of agreement to fight be plain, like the evidence of mutual combat present in the *Porter, Graham*, and *Mathis* cases. In holding that mutual combat was properly charged in *Graham*, this Court reasoned as follows:

> *[t]here was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point.* Under these circumstances, the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing, and required that the issue be submitted to the jury for determination.

260 S.C. at 452, 196 S.E.2d at 496. (emphasis added).

In this case, the evidence of events leading up to and during the fight between Petitioner and Kevin is sketchy at best. The witnesses, with the exception of the child witnesses, were extremely intoxicated, and arguably exhibited bias toward the decedent. There is no evidence, and the State does not contend, that there was any pre-existing ill-will or dispute between Kevin and the Petitioner, and there is no evidence that Kevin was willing to engage in an *armed* encounter with Petitioner. In their determination of mutual willingness to fight, the South Carolina cases discussed emphasize that *each party knew* the other was armed. Here, there is no indication that Kevin knew Petitioner was armed with a knife, and there was no pre-existing ill-will between the parties. Under these circumstances, there is insufficient evidence of mutual willingness to fight to submit the issue of mutual combat to the jury.

As noted, to warrant reversal, a jury charge must be both erroneous and prejudicial. In our opinion, the mutual combat charge was prejudicial to Petitioner as well as erroneous. *Ellison,* 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

The mutual combat doctrine is triggered when both parties contribute to the resulting fight. Self-defense, on the other hand, is available only when the defendant is without fault in bringing on the difficulty. *Davis.* Despite this fundamental difference between the doctrines of mutual conflict and self-defense, the Court of Appeals found that charging mutual combat to the jury did not destroy Petitioner's self-defense theory because *Petitioner* still could have proven that he withdrew from the fight in good faith. *Graham,* 260 S.C. at 451, 196 S.E.2d at 496. This finding, however, fails to recognize that requiring Petitioner to prove he withdrew from the fight removes the burden to disprove self-defense from the State, and improperly places it on the Petitioner.

Petitioner admitted to killing Kevin and relied entirely on self-defense at trial. Recently, in *State v. Burkhart*, a majority of this Court found the trial judge's failure to properly charge the jury on self-defense was prejudicial because self-defense versus murder was the sole issue in the case. 350 S.C. 252, 565 S.E.2d 298 (2002). Through *Burkhart* and the line of cases

preceding it, this Court has placed great emphasis on the importance of a defendant's right to assert self-defense when there is "any evidence" to support it, and has taken pains to make sure the burden to disprove self-defense remains on the State. *See State v. Addison*, 343 S.C. 290, 540 S.E.2d 449 (2000)*; State v. Wiggins,* 330 S.C. 538, 500 S.E.2d 489 (1998).

Although the court charged self-defense properly in Petitioner's case, that charge was negated by the court's unwarranted charge on mutual combat. We find that the court's mutual combat charge acted as a limitation on the Petitioner's ability to claim self-defense, and prejudiced him by transferring the *State's burden* to disprove self-defense onto the Petitioner, forcing him to prove self-defense in violation of *Burkhart, Addison, and Wiggins*.

CONCLUSION

For the foregoing reasons, we **REVERSE** the Court of Appeals and **REMAND** for a new trial on the murder charge.

MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I agree with the majority that petitioner is entitled to a new trial because the evidence did not warrant a charge on the doctrine of mutual combat. I write separately, however, because while I concur in the result reached here, and in most of the majority's reasoning, I continue to believe that we should not place the burden on the State to disprove a claim of self-defense. See State v. Burkhart, 350 S.C. 252, 265, 565 S.E.2d 298, 305 (2002).

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edisto Island Historical Preservation Society, Inc., Respondent,

v.

John Gregory, Margaret Gregory, Mary Davis, and William Scott, if they be alive and Richard Roe and Mary Roe, adults whose true names are unknown and John Doe and Jane Doe, infants, incompetents, or persons under disability or in the military service, if any, whose true names are unknown, these four names being fictitious names designating the unknown heirs, devisees, distributees, issue, executors, administrators, personal representative, successors and/or assigns of Joseph Gregory, deceased, and also all other persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the complaint herein, Defendants,

Of whom

John Gregory and Mary Davis are Petitioners.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young, Master-in-Equity

Opinion No. 25638
Heard March 5, 2003 - Filed April 28, 2003

AFFIRMED

Edward M. Brown, of Charleston, for petitioner John Gregory.

Hugh Davis, of Neighborhood Legal Assistance, of St. Helena Island, for petitioner Mary Davis.

Adam E. Barr and Capers G. Barr, III, both of Barr, Unger & McIntosh, L.L.C., of Charleston, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' unpublished opinion affirming summary judgment in this action for specific performance. We affirm.

FACTS

Respondent Edisto Island Historical Preservation Society (Buyer) is a nonprofit organization that operates a museum located on Edisto Island. Buyer entered into a contract for the purchase of land adjacent to the museum for $27,000. Petitioner John Gregory (John) is the personal representative of the estate of Alexander Gregory, the last

record owner of the property in question. John, his brother Joseph,[1] and three other purported heirs of Alexander signed the contract as sellers on September 13, 1995.

The contract in question is a form real estate contract. It identifies Harper Real Estate as the sellers' agent and acknowledges the realtor's receipt of $500 earnest money from Buyer. The contract provides a closing date of November 30,1995, and states:

> ENCUMBRANCES AND RESTRICTIONS. Seller shall convey marketable title to Buyer, in fee simple, free from all liens, except those Buyer has agreed to assume. . . . .**If Seller is unable to convey marketable title without a court action, or incurring any unusual expense or within 30 days after herein specified closing date, Buyer or Seller has the option of terminating this contract by giving written notice to the other.** In such case, Seller shall pay Actual Cost Incurred.

(emphasis added).

No closing occurred on November 30 as provided by the contract. Nearly a year later, John sent the following letter in his capacity as personal representative. The letter is dated October 7, 1996, and is addressed to Buyer.

> Ms. McCollum called me, in September of 1995, to indicate [Buyer's] interest in the purchase of the property. I advised Harper Realty of [Buyer's] interest in the purchase of the property. Mrs. Siegling, of Harper Realty, followed through and negotiated a Buyer/Seller Agreement. Mrs. Siegling, of Harper Realty, stated that she would obtain a $500.00 earnest money check, from [Buyer]. Mrs.

---

[1]Petitioner Mary Davis is the heir of Joseph who died after the contract was signed.

> Siegling advised me that she would send me a copy of your deposit check.
>
> I have tried, on numerous occasions to secure a copy of your cancelled earnest money check. The South Carolina Real Estate Commission contacted Harper Realty to get a copy of your cancelled check. Harper Realty has declined to honor my request, for a copy of your earnest money check.
>
> I explained to Harper Realty and to the South Carolina Real Estate Commission that without an earnest money deposit, you were in breach of contract. . . .
>
> The recent real estate transaction was done in good faith, on my part. However, I can no longer deny others the right to purchase the property.
>
> Harper Realty has not maintained contact, with me, since my request for a copy of your earnest money cancelled check.
>
> Harper Realty should have notified you, several months ago, of your breach of contract and that you no longer have the right to purchase the property.

On July 31, 1997, Buyer commenced this action for specific performance of the contract and moved for summary judgment. In response, petitioners argued the contract was terminated pursuant to the "ENCUMBRANCES AND RESTRICTIONS" provision which allows termination for failure of marketable title. Petitioners claimed title was not marketable at the time set for closing because John mistakenly deeded the property to three people who were later determined not to be legitimate heirs of Alexander.[2] Petitioners relied on John's October

---

[2] These three people, in addition to John and Joseph, signed the contract for sale. By decree issued July 2, 1997, the probate court

7 letter as notice of termination. The master found the October 7 letter was not sufficient notice of termination because it did not relate to marketable title.

ISSUE

Was the October 7 letter sufficient notice of termination?

DISCUSSION

Petitioners contend the master and the Court of Appeals erred in finding the October 7 letter insufficient as notice of termination. They argue there is no requirement that the notice of termination state the reason the contract is being terminated and that termination is not limited to marketability of title.

First, under the contract the right to terminate upon notice is clearly limited to marketability of title. It is included in the "ENCUMBRANCES AND RESTRICTIONS" provision and is specifically prefaced by the phrase "if Seller is unable to convey marketable title."

Further, notice of termination must be given in accordance with the terms of the contract. Retailers Serv. Bureau v. Smith, 165 S.C. 238, 163 S.E. 649 (1932); *see also* Zullo v. Smith, 427 A.2d 409 (Conn. 1980) (written notice of termination is sufficient if it specifies a reason for termination provided in the contract); Stovall v. Publishers Paper Co., 584 P.2d 1375 (Or. 1978) (notice of termination must be clear and unambiguous). Here, John's October 7 letter does not reference marketability of title, the only reason for termination upon notice as provided by the contract.[3] The letter is at best ambiguous

---

found that only John and his brother Joseph were legitimate heirs and quieted title to the property in them.

[3] Counsel agreed at oral argument there is no outstanding dispute regarding the $500 earnest money referenced in the October 7 letter.

since it charges Buyer with an alleged breach based on petitioners' difficulties with their own agent, Harper Realty.

Moreover, where the purchaser is aware of an encumbrance and is willing to purchase, title is marketable. Ingram v. Kasey's Assocs., 328 S.C. 399, 493 S.E.2d 856 (Ct. App. 1997); *see also* Gibbs v. G.K.H., Inc., 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993) (marketable title is that which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept). In view of Buyer's willingness to accept title as is, marketability cannot be asserted as a ground for termination.

We find the master and the Court of Appeals properly found the October 7 letter was not sufficient notice of termination.

AFFIRMED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Newberry
Municipal Court Judge Barry
S. Koon, Respondent.

Opinion No. 25639
Submitted April 15, 2003 - Filed April 28, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Deborah Stroud McKeown, both of Columbia, for the Office of Disciplinary Counsel.

Barry S. Koon, of Newberry, Pro Se.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. Therein, respondent admits he violated the Code of Judicial Conduct, Rule 501, SCACR, and agrees to the imposition of a letter of caution with a finding of

minor misconduct, a confidential admonition or a public reprimand. We accept the agreement and issue a public reprimand.[1]

Facts

The facts, as stated in the agreement, are as follows. Respondent is a former magistrate for the County of Newberry. Respondent is currently a part-time municipal court judge for the Town of Newberry. While serving as a part-time municipal court judge, respondent participated in a taped telephone message, used in placing telephone calls to potential voters, requesting voter support for a candidate for Lieutenant Governor. In the telephone message, respondent referred to himself as "a former magistrate for Newberry County."

Canon 5(A)(1) of the Code of Judicial Conduct provides that a judge shall not "publicly endorse or publicly oppose another candidate for public office." Part-time judges, such as respondent, are exempt from the requirements of Canon 5(A)(1). However, respondent acknowledges that by mentioning his former judicial position in the telephone message, it appeared he was attempting to use his judicial office to influence voters to vote for one candidate over another. Canon 2(B) of the Code of Judicial Conduct states that a judge "shall not lend the prestige of judicial office to advance the private interests of the judge or others . . . ."

Law

By his conduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A)(a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the

[1] Respondent has been disciplined on two previous occasions for unrelated misconduct. On July 20, 2000, respondent received a letter of caution for unrelated minor misconduct causing little or no harm to the public or the administration of justice. On August 9, 2002, respondent received a confidential admonition from the Commission on Judicial Conduct for unrelated misconduct.

integrity and impartiality of the judiciary); and Canon 2(B)(a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, shall not lend the prestige of judicial office to advance the private interests of the judge or others, and shall not convey or permit others to convey the impression that they are in a special position to influence the judge).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of York County Magistrate Deborah D. McCullough, Respondent.

Opinion No. 25640
Submitted April 15, 2003 - Filed April 28, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Deborah Stroud McKeown, both of Columbia, for the Office of Disciplinary Counsel.

Deborah D. McCullough, of Fort Mill, Pro Se.

PER CURIAM: In this judicial disciplinary action, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. Therein, respondent admits she violated the Code of Judicial Conduct, Rule 501, SCACR, and agrees to the imposition of a confidential admonition, a public reprimand or a definite suspension not to

exceed six months. We accept the agreement and suspend respondent for six months.[1]

Facts

The facts, as stated in the Agreement, are as follows. Respondent accepted $1,826 in bond money from a defendant. Instead of depositing the funds into her bond account and transmitting them to Magistrate Edward H. Harvey, the trial judge, respondent maintains she placed them in her briefcase for safekeeping. When respondent went to deposit the funds into her bond account, she could not locate them in her briefcase. However, respondent failed to report the missing funds to South Carolina Court Administration or to the Office of Disciplinary Counsel as required by order of the Chief Justice of this Court dated November 9, 1999.

Some seven months later, York County Chief Magistrate Brenda Ervin contacted respondent and asked that respondent produce her bond account records the following day because the County was conducting an audit of respondent's bond account. The same day, respondent telephoned Judge Harvey and advised him she had located the envelope containing the bond money in her briefcase. Respondent forwarded to Judge Harvey a check in the amount of $1,826. Respondent maintains she located the bond money while gathering her financial records for the audit and while cleaning out her briefcase before an upcoming conference.

A review by the Office of Disciplinary Counsel of the records of respondent's bond account revealed that on more than one occasion checks written from respondent's bond account were returned for insufficient funds. Respondent failed to report the dishonored checks to South Carolina Court Administration and the Office of Disciplinary Counsel.

---

[1] Respondent has been disciplined previously for unrelated misconduct. On October 21, 2002, she received a confidential admonition from the Commission on Judicial Conduct for actions which gave the appearance that she was attempting to use her judicial position to convince an attorney to handle a defendant's case and to influence Judge Ervin's handling of the defendant's case.

Law

By her conduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A)(a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3(a judge shall perform the duties of judicial office impartially and diligently); Canon 3(B)(2)(a judge shall be faithful to the law and maintain professional competence in it); Canon 3(B)(8)(a judge shall dispose of all judicial matters promptly, efficiently and fairly); and Canon 3(C)(1)(a judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business).

Conclusion

We find that respondent's misconduct warrants a six month suspension. Respondent is therefore suspended for six months.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte Charles W. Whetstone, Jr., Appellant,

In Re: Thomas Ivey, Applicant/Respondent,

v.

William D. Catoe, Director, South Carolina Department of Corrections, Respondent.

ORIGINAL JURISDICTION

Appeal From Orangeburg County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 25641
Heard March 5, 2003 - Filed April 28, 2003

RELIEF GRANTED

Deputy Attorney General Treva G. Ashworth; Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Appellant;

Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, for Respondent William D. Catoe, Director, South Carolina Department of Corrections.

H. Wayne Floyd, of West Columbia, and Melissa Jane Reed Kimbrough, of Columbia, for Respondent Thomas Ivey.

JUSTICE BURNETT: Charles W. Whetstone, Jr., ("Whetstone"), a former circuit court judge, brings this action in our original jurisdiction through a common law writ of certiorari to quash a subpoena requiring him to testify in a Post Conviction Relief ("PCR") hearing for Thomas Ivey ("Ivey"). We reverse.

FACTS

Ivey filed a PCR petition alleging, *inter alia*, his trial counsel, Michael Culler ("Culler"), provided ineffective assistance of counsel. Ivey alleges Culler had a conflict of interest because of his friendship with Officer Thomas Harrison ("Officer Harrison"), a man for whose murder Ivey was convicted in an earlier trial.[1]

[1] The facts of the underlying criminal cases involved Ivey and an accomplice who escaped from an Alabama prison in January 1993. The two traveled to Columbia, South Carolina, where they kidnapped and eventually murdered Robert Montgomery ("Montgomery"). Later the two, joined by Patricia Perkins, purchased goods using forged checks in the name of Montgomery. Suspicious of the trio, a store employee contacted the police.

The police stopped the three in a mall parking lot to question them about the checks. As Officer Harrison questioned Ivey, Ivey's pistol discharged. The ricocheted bullet struck Officer Harrison. Ivey proceeded to shoot Officer Harrison five more times.

Buttressing Ivey's claim is a letter signed by Culler stating he could not represent Patricia Perkins ("Perkins"), an individual tangentially involved in the murder of Officer Harrison, because he was a friend of the slain officer. Culler does not deny signing the letter, but stated he was not aware why he did so because he only casually knew Officer Harrison, and would not consider him a close friend.

The PCR judge denied Whetstone's Motion to Quash the Subpoena. The PCR judge's order allowed Ivey to question Whetstone on two grounds: 1) whether he ever had a conversation with Culler discussing his association with Officer Harrison; and 2) whether he ever saw the Perkins' letter in which Culler asked to be relieved as counsel in the related case. The order specifically precluded Ivey's asking Whetstone what he might have done had he known of a potential conflict of interest.

ISSUE

Did the PCR court err in allowing the questioning of a former circuit court judge who presided over the applicant's trial?

DISCUSSION

It is not disputed that a judge may testify on matters not touching upon his official duties. At issue is the extent to which a judge may be required to testify about a case over which he previously presided.

Ivey was convicted for the murder of Officer Harrison. He was sentenced to death. See State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (Ivey I). Ivey was also convicted of the murder, kidnapping, and armed robbery of Montgomery in a trial conducted by Judge Whetstone. See State v. Ivey, 331 S.C. 118, 502 S.E.2d 92 (1998) (Ivey II). Culler represented Ivey in Ivey II only. Ivey was again sentenced to death in Ivey II. The Officer Harrison murder conviction was an aggravating circumstance in the sentencing phase of Ivey II.

The South Carolina Code of Judicial Conduct provides little guidance by confining its directives only against judges serving as character witnesses. See Rule 501, Canon 2(B) cmt., SCACR. Our search of relevant South Carolina case law has produced only State v. Talbert, 41 S.C. 526, 19 S.E. 852 (1894).

In Talbert, the defense sought a judge's testimony concerning an arrest warrant issued against the defendant. The State's objection was sustained at trial.

The issue on appeal was whether the trial court should allow a judge to testify as a witness concerning actions taken in his official capacity. This Court affirmed, reasoning the defendant's position was "clearly untenable" because the warrant itself was the best evidence of the fact sought to be proved, not the testimony of the judge. The Court further found the judge's testimony irrelevant.[2]

This reasoning is echoed by the modern trend of courts not allowing a judge to testify regarding a case in which he previously presided unless the testimony is: 1) critical; and 2) can be obtained by no other means. See United States v. Dowdy, 440 F. Supp. 894 (W.D. Va. 1977); Commonwealth v. Ellis, 10 Mass. L. Rptr. 333 (Mass. 1999) available at 1999 WL 855196; State ex rel. Carroll v. Junker, 79 Wash.2d 12, 482 P.2d 775 (Wash. 1971); Helmbrecht v. St. Paul Ins. Co., 117 Wis.2d 74, 343 N.W.2d 132 (Wis. Ct. App. 1983); see generally Michael D. Wade, "The Judge as a Witness," Mich. B.J. 906 (1995) (providing six reasons why courts traditionally do not allow a judge to testify regarding a case in which he previously presided).

---

[2] The defense asserted, if called to testify, the judge would testify he signed a warrant for the arrest of another individual, not Talbert. The defense's theory was the other individual committed the crime, and the judge's opinion the other individual was the guilty party would support Talbert's claim.

Ivey contends Whetstone's testimony is critical in determining whether Culler provided ineffective assistance of counsel due to a conflict of interest. The PCR court agreed and found the judge's testimony "relevant as to the limited issues of whether [Whetstone] had been informed about any association of Mr. Culler with Officer Harrison by means of communication from Mr. Culler, by being shown [the Perkins' letter asking to be relieved], by Mr. Whetstone's seeing anything regarding such matters in the clerk's file, or from other sources."

Ivey's argument and the PCR court's order, however, fail to address why Whetstone's testimony is critical to assist the court in determining whether Culler provided ineffective assistance of counsel. Ivey asserts Whetstone's knowledge of a possible conflict of interest is relevant because, under Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), Ivey "must prove that the judge had an affirmative duty to inquire into the conflict disclosed by Mr. Culler in his signed letter filed with the Clark [sic] of Court in the Patricia Perkins file." Ivey concludes "if Mr. Whetstone had personal knowledge of the letter, then he should have made inquiry under Holloway v. Arkansas." We disagree.

Holloway is inapplicable to the facts of this case. Holloway focused on the responsibility of a trial court to resolve a potential conflict of interest of an attorney representing multiple co-defendants. Holloway does not stand for a per se rule that a trial court must *sua sponte* inquire into whether trial counsel has a conflict of interest as Ivey seems to suggests. See also Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (a trial court must inquire into potential conflicts of interest **in multiple representation situations** where "the trial court knows or reasonably should know that a particular conflict exists." 446 U.S. at 347).

Further, Ivey's claim of ineffective assistance of counsel is founded upon the actions, or more properly the inaction, of Culler. Ivey argues Culler's failure to recuse himself from the case or his failure to notify Ivey of any potential conflict establishes an ineffective assistance claim. Ivey's claim, therefore, rests on allegations of improper actions by defense counsel not on the actions or failures of the trial judge.

There is no critical, relevant reason to require Whetstone's testimony regarding whether he discussed possible conflicts of interests with Culler or whether he became aware of possible conflicts of interests by reviewing the Perkins' letter. Culler does not deny he wrote the letter regarding the Perkins' case or was subsequently excused from representing her. Culler does not deny that he did not inform Ivey of the letter. Culler now, however, denies that he had any type of relationship with Officer Harrison other than a passing acquaintance.

No relevant need for Whetstone's testimony overcomes the presumption judges should not be called to testify regarding matters from a case over which they previously presided. Further, Whetstone need not be called to testify about the existence of a conversation with Culler, when an alternate means of obtaining such information may be found in the testimony of Culler himself. The trial record and PCR testimony of the witnesses provide ample resources from which Ivey's claims may be reviewed.

Conclusion

For the above cited reasons, we quash the subpoena.

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

The Supreme Court of South Carolina

South Carolina Department of Social Services, Respondent,

v.

Jason Ihnatiuk, John Doe, whose true name is unknown, Summer Bowie, a minor, born June 25, 1996 and Winter Bowie, a minor, born December 2, 1997, Defendants,

Of Whom Jason Ihnatiuk is Petitioner.

ORDER

Petitioner has filed a petition for a writ of certiorari from an opinion of the Court of Appeals affirming the family court's termination of petitioner's parental rights. Petitioner's appeal in the Court of Appeals was filed pursuant to Ex parte Cauthen, 291 S.C. 465, 354 S.E.2d 381 (1987), and he was allowed to proceed without payment of costs.

Counsel for petitioner has now filed a motion to be allowed to proceed without costs in this Court. Counsel states that petitioner is indigent

and cannot afford to bear the costs of continuing to pursue his appeal by filing a petition for a writ of certiorari with this Court. Counsel requests that petitioner not be required to pay filing fees and that the Department of Social Services (DSS) be required to bear the costs of petitioner's appeal to this Court.

In Ex parte Cauthen, supra, this Court established the procedure to be followed when an indigent person appeals an order terminating his parental rights in an action to which DSS is a party. Therein, the Court stated that if the appellant is found to be indigent, filing fees shall be waived and DSS shall bear the cost of the transcript. Counsel for the appellant shall review the transcript for meritorious issues. If counsel determines there are meritorious issues, he shall file a brief as set forth in the SCACR. If, however, counsel determines there are no meritorious issues, he shall docket the transcript with the appellate court and file an affidavit stating his belief that the appeal lacks merit. Thereafter, the appellate court will review the transcript in its entirety for potential issues of merit.

When an appeal from a order terminating parental rights is heard by the Court of Appeals in the first instance, a subsequent petition for a writ

of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which a petitioner is entitled as a matter of right. Rule 226(b), SCACR. In South Carolina Dep't of Social Serv. v. Hickson, 350 S.C. 213, 565 S.E.2d 763 (2002), Billy Hickson sought to file a petition for a writ of certiorari in this Court, pursuant to Ex parte Cauthen, after the Court of Appeals affirmed the termination of Hickson's parental rights. Hickson was allowed to proceed without paying filing fees pursuant to Ex parte Cauthen. The Court denied the petition for a writ of certiorari, but stated

> we take this opportunity to hold that it is unnecessary to file a petition for a writ of certiorari after a Cauthen appeal has been decided by the Court of Appeals. The filing of a Cauthen appeal ensures that the trial transcript will be reviewed for any possible issues of arguable merit. Thus, it is unnecessary to file a petition for a writ of certiorari after the Court of Appeals has affirmed pursuant to Cauthen.

Because we realize our holding in Hickson is not entirely clear, we take this opportunity to clarify our intention therein. In Hickson, the Court intended to hold, as it did with Anders cases in State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), that petitions for discretionary review to this Court, after full review of the merits by the Court of Appeals pursuant to Ex parte Cauthen, are outside the standard review process. See also In re

Exhaustion of State Remedies in Criminal and Post-Conviction Relief, 321 S.C. 563, 471 S.E.2d 454 (1990). The rights afforded an indigent parent pursuant to Ex parte Cauthen, specifically the appointment of counsel and the waiver of filing fees and costs of perfecting the appeal, apply only to the first appeal of right, which in this case was before the Court of Appeals, and not to discretionary review by this Court. We therefore deny petitioner's motion to be allowed to proceed without costs.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 24, 2003

The Supreme Court of South Carolina

In the Matter of George Eugene Lafaye, IV, Petitioner.

ORDER

On December 3, 2001, petitioner was suspended for one year from the practice of law in this state. In the Matter of Lafaye, 347 S.C. 441, 556 S.E.2d 390 (2001). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted, subject to the following conditions:

> 1. If petitioner returns to the practice of law after readmission, he must practice under the guidance of a licensed attorney at law; this mentor shall report to the Supreme Court at six month intervals for twenty-four months.
>
> 2. Petitioner must repay the financial obligations arising from his misconduct that were paid on his behalf by Moore, Taylor & Thomas, including those amounts forgiven by Moore, Taylor & Thomas.

We grant the petition, subject to the conditions set forth by the Committee on Character and Fitness, and reinstate petitioner to the practice

of law in South Carolina. Petitioner shall have one year form the date of this order to repay the amounts owed to Moore, Taylor & Thomas. Petitioner shall provide proof that he has met this requirement to the Office of Disciplinary Counsel. In addition, all required reports from petitioner's mentor should be filed with the Office of Disciplinary Counsel instead of this Court.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 24, 2003

The Supreme Court of South Carolina

In the Matter of Henry H. Cabaniss, Petitioner.

ORDER

On January 26, 1998, petitioner was suspended for two years from the practice of law in this state. In the Matter of Cabaniss, 329 S.C. 366, 495 S.E.2d 779 (1998). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted, subject to the following conditions:

> 1. After reinstatement, petitioner must establish and continue a patient/psychologist relationship with a psychologist for one year with the psychologist filing written reports with the Court every six months during that period.
>
> 2. Petitioner must practice under the supervision of a mentor if he returns to the private practice of law or, if he enters corporate practice, must practice under the direction of a supervisor, and the mentor or supervisor must file a written report with the Court every six months for a one year period.

We grant the petition, subject to the conditions set forth by the Committee on Character and Fitness, and reinstate petitioner to the practice of law in South Carolina. However, all required reports from petitioner's psychologist and supervisor or mentor should be filed with the Office of Disciplinary Counsel instead of this Court.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

Pleicones, J., not participating

Columbia, South Carolina

April 24, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Loren John Murphy, Appellant,

v.

NationsBank, N.A., Respondent.

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

Opinion No. 3633
Submitted February 20, 2003 - Filed April 28, 2003

AFFIRMED

James J. Raman, of Spartanburg; for Appellant.

Donald E. Rothwell and Scott L. Hood, both of Irmo; for Respondent.

PER CURIAM: Loren John Murphy appeals from a circuit court order denying his request for a witness fee and mileage for attending a deposition in an action in which Murphy was the plaintiff. Murphy contends the circuit court erred because a party who testifies at a deposition is a witness entitled to the witness fee and mileage pursuant to Rule 30(a)(2), SCRCP.

FACTS/PROCEDURAL HISTORY

In 1984, Murphy executed a Money Line Agreement with NationsBank in order to obtain a $25,000.00 revolving line of credit. Murphy defaulted on his repayment obligation to NationsBank, and in 1993, the bank agreed to accept a lump sum payment from him in full satisfaction of the account. NationsBank continued to report the account as charged off to consumer credit reporting agencies. Murphy commenced this action against NationsBank in 1999, seeking actual and punitive damages because of the bank's action in allegedly filing a false credit report about Murphy. NationsBank answered, denying liability and asserting numerous defenses, among them that the credit information provided by it concerning Murphy was true.

During the course of the lawsuit, NationsBank noticed the deposition of Murphy. Counsel for Murphy then notified NationsBank that Murphy expected to receive a witness fee of $25.00 and mileage, for a total of $29.14. NationsBank then filed a notice of motion and motion to enforce discovery. On June 28, 2001, a hearing on NationsBank's motion was heard before the Honorable John C. Hayes, III. Judge Hayes ruled that a party such as Murphy was not entitled to the witness fee and mileage under Rule 30(a)(2), and compelled Murphy to appear for his deposition. Thereafter, by order dated February 1, 2002, the Honorable Donald W. Beatty granted summary judgment to NationsBank based on the statute of limitations. Murphy appeals Judge Hayes' decision to deny him the witness fee and mileage.

DISCUSSION

Rule 30(a)(2), SCRCP, sets forth certain limitations on depositions. The first paragraph of the subsection provides: "A witness (excluding a party) may be compelled to attend only in the county in which he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court." (Emphasis added.) The second paragraph states: "The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel

or by order of the court for good cause shown." (Emphasis added.) The third paragraph of the subsection, which is the one at issue here, provides:

> A witness attending any deposition held pursuant to these rules shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same, $25.00 per day, and mileage for going from and returning to his place of residence, in the same amounts as provided by law for official travel of state officers and employees.

(Emphasis added.)

Judge Hayes, in ruling that Murphy, as a party, was not entitled to the witness fee and mileage, noted that Rule 30(a)(2) accorded different status to witnesses and parties. Murphy, however, relied upon the case of Perry v. Minit Saver Food Stores of South Carolina, Inc., 255 S.C. 42, 177 S.E.2d 4 (1970), for the proposition that a party who testifies at a deposition is a witness and is entitled to the witness fee and mileage. This 1970 decision is the basis for the truncated argument in Murphy's brief.

We agree with Judge Hayes that Rule 30(a)(2), SCRCP, clearly treats witnesses and parties differently. The first paragraph of the subsection deals with witnesses and specifically excludes parties. The second subsection, by its language, applies to both parties and witnesses, and the third paragraph, which is applicable here, is limited to "a witness attending any deposition." (emphasis added) By its plain language, the paragraph of the subsection concerning witness fees and mileage applies only to witnesses. The Perry case relied on by Murphy is inapposite because it pre-dates the adoption of the South Carolina Rules of Civil Procedure. See Sunamerica Fin'l Corp. v. Equi-Data, Inc., 299 S.C. 175, 177, 383 S.E.2d 8, 9 (1989) (holding that cases decided prior to the adoption of the South Carolina Rules of Civil Procedure are inapplicable when deciding an issue involving construction of a rule).

AFFIRMED.
HEARN, C.J., CURETON and GOOLSBY, JJ., concur.