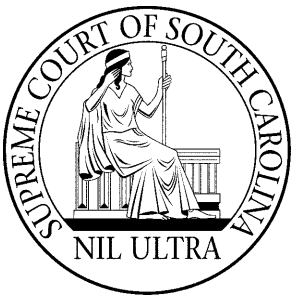

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16

April 28, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anonymous Taxpayer, Appellant

v.

South Carolina Department of Revenue, Respondent.

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

Opinion No. 26473
Heard January 10, 2008 – Filed April 28, 2008

AFFIRMED

A. Camden Lewis, Ariail E. King, of Lewis & Babcock, and John M.S. Hoefer, of Willoughby & Hoefer, all of Columbia, for Appellant.

Ronald W. Urban, of SC Department of Revenue, Vance J. Bettis and Shahin Vafai, both of Gignilliat, Savitz & Bettis, all of Columbia, for Respondent.

JUSTICE BEATTY: In this revisited challenge to the change in state tax exemptions for retired state employees, Appellant Anonymous Taxpayer appeals the circuit court's decision to affirm the administrative law court's (ALC's) order denying class certification and dismissing his claims. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Prior to 1989, state and local government retirement benefits were exempt from state taxes while only the first $3,000 of federal retirement benefits was exempt. S.C. Code Ann. § 9-1-1680 (1986). In 1989, the United States Supreme Court held the doctrine of intergovernmental immunity and 4 U.S.C. § 111 (1997), prohibited the states from taxing federal government retirees at a greater rate than state and local government retirees. Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 818 (1989). The Court informed states they could cure the problem "either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the tax exemption for retired state and local government employees." Id. In response to Davis, our Legislature sought to standardize state taxation on both federal and state retirees by deleting the full tax exemption to state and local government retirees, increasing state retirement benefits by 7%, and allowing a comprehensive exemption for only the first $3,000 of all government retirement benefits. Act No. 189, Part II, § 39, 1989 S.C. Acts 1436 (Act 189).[1]

Anonymous Taxpayer (Appellant) retired in 1997 and filed an action on behalf of himself and all other similarly situated state retirees in 1998 against the State, the different State Retirement Systems, the Department of Revenue, and the Budget and Control Board. Appellant alleged breach of contract and challenged the constitutionality of Act 189. The trial court denied the State's motion to dismiss for failure to exhaust the administrative remedies. Finding retirees had no contractual or property right in a tax

[1] This $3,000 exemption increases to $10,000 in the year the retiree reaches the age of 65. S.C. Code Ann. § 12-6-1170 (2000 & Supp. 2006).

exemption, the court granted the State's motion to dismiss for failure of the complaint to state a cause of action.

This Court reversed, finding: (1) the trial court should have dismissed the matter without prejudice because the retirees failed to first exhaust their administrative remedies; and (2) the trial court erred in granting a motion to dismiss on the novel issue of whether the retirees had constitutional causes of action for impairment of contract and taking without just compensation. Evans v. State, 344 S.C. 60, 67-69, 543 S.E.2d 547, 551 (2001). The Court found pursuing administrative remedies would not deprive retirees of their constitutional right to a jury trial on their breach of contract cause of action. The Court noted that, assuming there was a valid contract between retirees and the Retirement Systems, the Retirement Systems could not be held liable for any alleged breach once Act 189 became effective because performance would have been rendered impossible by the enactment of law, and thus, retirees did not have a valid breach of contract action. Evans, 344 S.C. at 67, 543 S.E.2d at 551 ("Since State Retirees do not have a viable breach of contract action, pursuing their action through the administrative process does not violate their right to a jury trial."). The case was remanded to the trial court, dismissed without prejudice, and pursued through administrative channels.[2]

On August 31, 2001, the Department of Revenue issued a final order denying Appellant's request for a refund of the amount of tax paid after the enactment of Act 189. The Department found: Appellant's claims were barred by the statute of limitations; there was no contractual right to the tax exemption; even assuming there was a contract, there was no substantial impairment of the contract; if there was a substantial impairment, repeal of the tax exemption was reasonable and necessary to carry out the legitimate government purpose; and repeal of the exemption did not amount to a taking. The Department also found that Appellant could not file a claim for a refund on behalf of a class.

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[2] At some point after remand, the case title was changed to "Anonymous Taxpayer v. South Carolina Department of Revenue."

Appellant requested a contested case hearing before the Administrative Law Court (ALC) on behalf of himself and all similarly situated state retirees, restating his impairment of contract, taking without just compensation, and denial of due process claims. The ALC issued an order on June 14, 2002, initially granting Appellant partial summary judgment by concluding the retirement code gave rise to a contract between the State and retirees. However, the ALC vacated this order upon reconsideration. The matter was submitted upon stipulations, depositions, and briefs.

On February 20, 2003, the ALC denied Appellant's motion for class certification, finding: (1) there was no language in the Revenue Procedures Act that provided for class actions; (2) the Act required the Department to issue refunds to any other taxpayer who had also applied for refunds once a taxpayer prevails on his claim that a tax was imposed wrongfully; and (3) the Act stated that there was no "other remedy than those provided" in the Act, such that a class action suit would be barred. On April 29, 2004, the ALC issued its final order on the merits, finding: (1) the statute of limitations barred Appellant's claims; (2) the contract cause of action failed on the merits because Appellant could not prove there was a contract, there was a substantial impairment of the contract, or that Act 189 was not reasonable or necessary; and (3) Appellant failed to prove Act 189 constituted a taking of private property without just compensation or that it was a deprivation of property without due process of law. The ALC dismissed Appellant's claims and denied all relief. The circuit court affirmed the ALC's findings on appeal. This appeal followed.

DISCUSSION

I. Impairment of Contract

Appellant argues the enactment of Act 189 impaired his retirement contract, thus violating the Contract Clause of the United States Constitution. In discussing the Contract Clause, the Supreme Court said, "Although the Contract Clause appears literally to proscribe 'any' impairment, . . . 'the prohibition is not an absolute one and is not to be read with literal exactness

like a mathematical formula.'" United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 21 (1977) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934)). "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." United States Trust Co., 431 U.S. at 25. To establish a contract clause violation, Appellant must show To establish a contract clause violation, Appellant must show: (1) the existence of a contract; (2) the law changed actually impaired the contract and the impairment was substantial; and (3) the law was not reasonable and necessary to carry out a legitimate government purpose. Hodges v. Rainey, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000).

A. Existence of Contract

The major question in this case is whether the pre-Act 189 tax exemption amounted to a contract. Appellant argues a contract existed based on the contractually-significant language used in the Retirement Code.

"Generally, statutes do not create contractual rights." Layman v. State, 368 S.C. 631, 637, 630 S.E.2d 265, 268 (2006). However, a contract created by statute may be found to exist in this state only where contractual rights are expressly found in the language of the statute. Id. at 638, 630 S.E.2d at 268. Specifically, the Court looks for contractually-significant language within the statute in determining whether a contract was intended to be created by the Legislature. Id. at 641, 630 S.E.2d at 270. In Layman, the contractually-significant language included words to the effect that a "member who is *eligible*," "*complies* with the requirements of this article," and "*shall agree*." Id. at 639, 630 S.E.2d at 269.

Former section 9-1-1680 contained the following language:

> The right of a person to an annuity or retirement allowance or to the return of contributions, an annuity or retirement allowance itself, any optional benefit or

> any other right accrued or accruing to any person under the provisions of this chapter, and the moneys of the System created hereunder, are hereby exempted from any State or municipal tax and exempted from levy and sale, garnishment, attachment or any other process whatsoever and shall be unassignable except as herein specifically otherwise provided.

S.C. Code Ann. § 9-1-1680 (1986).

In reviewing this statute, the circuit court held there was no contractually-significant language that would evidence the Legislature's intent for the tax exemption to be contractually binding. Appellant argues, however, that language from other sections of the entire Retirement Code renders all the subsections in the Code, including the tax exemption, a contract with state retirees. This argument is unavailing in light of our opinion in Layman where the language of the statute sections were evaluated individually for contractually-significant language. See Layman, 368 S.C. at 643, 630 S.E.2d at 271 (evaluating separately the TERI statute and the working retirees statute, both found within the Retirement Code, to determine that the former TERI statute amounted to a contract and the former working retiree statute did not). Appellant cannot pick separate language from separate sections within the entire Code to render the prior tax exemption a contract.

Further, despite the fact that section 9-1-1680 is found in the Retirement Code and it deals with issues other than just taxation, the portion of the statute at issue here is a tax law subject to modification.[3] See Ward v. State, 356 S.C. 449, 453, 590 S.E.2d 30, 32 (2003) (evaluating whether Act 189 was constitutional in light of the fact that it increased the retirement benefits given to State retirees while taxing federal retirees at the previous

[3] Appellant further argues that a tax statute may also create a contract. There is no indication in section 9-1-1680 that the Legislature intended it to create a contract.

level; the Court noted that the General Assembly amended South Carolina's tax statute in enacting Act 189 to comply with Davis); Rivers v. State, 327 S.C. 271, 274, 490 S.E.2d 261, 263 (1997) (noting that taxpayers have no vested interest in tax laws remaining unchanged); Lloyd v. Lloyd, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988) (noting that although section 9-1-1680 stated that retirement income could not be garnished, section 20-7-1315 was a more recent and more specific statute and it allowed garnishment of state retirement income to pay a family court support obligation in a proper case; thus, the statute was not irrevocable).

Accordingly, section 9-1-1680 did not create a contract because it did not contain contractually-significant language, it was a tax law, and it was subject to modification. Thus, Appellant has failed to prove the first element of his impairment of contract claim.

B. Actual and Substantial Impairment of the Contract

Even assuming there was a contract, Appellant must prove the second element in an impairment of contract claim regarding whether there was a substantial impairment to the contract. Appellant argues that the ALC and the circuit court erred in finding the 7% retirement benefits increase "fairly offset" the loss of the tax exemption because, assuming retirement benefits of $100 and the 7% increase of $7, he would be taxed on $107 at a rate of 7%, which would be $7.49 in taxes. Thus, he argues, he will always be $0.49 worse off under Act 189 than he would be under prior section 9-1-1680. We find this calculation unpersuasive because it fails to consider the tax exemption given to Appellant as a state employee.[4]

[4] Assuming Appellant had an income of $10,000, pre-Act 189, he would not have any state taxes on the income and would net $10,000. After the enactment of Act 189, Appellant would receive a 7% raise in income to $10,700. Applying the same presumed 7% state tax from Appellant's example to the $7,700 in taxable income after the $3,000 exemption, Appellant would be taxed $539. Thus, his post-Act 189 net, after state taxes, would be $10,161.

A statute is viewed as substantially impairing a contract, for Contract Clause analysis, where it alters the reasonable expectations of the contracting parties. Hodges, 341 S.C. at 94, 533 S.E.2d at 585-86. In discussing the impairment of contract claim in Evans, this Court noted that testimony "may have revealed Act 189's 7% increase in retirement benefits fairly offset any financial loss to State Retirees resulting from Act 189's deletion of the full tax exemption for state retirement benefits." Evans, 344 S.C. at 68, 543 S.E.2d at 551.

Taking the cue from the Evans decision, the ALC accepted a deposition and affidavit from the Department's expert, R. Kent Porth, analyzing the impact of Act 189 on Appellant. Reviewing Appellant's income tax returns from the years 1997 through 2001, Porth opined that the 7% increase in retirement benefits more than offset the increased tax burden resulting from the enactment of Act 189 in nearly every taxable year. Although Appellant disagreed with Porth's calculation method, Porth was the only expert presented below for the ALC's consideration. The ALC found, and the circuit court affirmed the finding, that the 7% retirement benefits increase fairly offset the loss of the tax exemption such that there was no substantial impairment of the contract.

The ALC's finding that there was no substantial impairment of the contract because the loss of the tax exemption was fairly offset by the 7% increase in benefits is supported by the substantial evidence in the record. See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 73, 610 S.E.2d 482, 485 (2005) (noting there is a substantial evidence standard of review from the decision of the ALC). While Appellant's generalized calculation would appear to indicate Act 189 was detrimental, his calculation does not take into consideration the specific deductions and exemptions from Appellant's retirement income like a review of his tax returns would.

C. Reasonable and Necessary

The final element to an impairment of contract claim is whether the impairment was reasonable and necessary to carry out a legitimate state

purpose. Appellant argues that although Davis mandated that the states impose state taxes on state and federal retirees equally, it did not mandate that the states remedy the situation by impairing contracts.

Both the ALC and the circuit court found that enacting Act 189 was reasonable and necessary to accomplish the legitimate state purpose of complying with Davis. This Court has noted that Act 189 was specifically enacted to follow the dictate of Davis. Ward, 356 S.C. at 453, 590 S.E.2d at 32. Complying with the mandates of Davis is a legitimate government purpose and Act 189 reasonably and necessarily accomplished that goal by taxing state and federal retirees equally. Because Act 189 was a reasonable response to Davis, it did not amount to an impairment of contract. Ken Moorhead Oil Co. v. Federated Mut. Ins. Co., 323 S.C. 532, 547, 476 S.E.2d 481, 489 (1996) (noting that where a legislative enactment is reasonable, the Court defers to the legislature and rejects any impairment of contract claim).

II. Takings/Due Process Claims

Appellant argues the circuit court erred in finding Act 189 did not amount to a taking of property without just compensation or deprive Appellant of due process of law because: (1) Appellant's vested tax exemption benefit arises under a contract, and, like thirty-year, tax-exempt bonds, the State could not change the tax status in violation of the contract; (2) there was evidence that Appellant had expectations that he would receive the tax exemption; and (3) retirement benefits, including the tax exemption, are property rights.

Because both a Takings Clause cause of action and substantive due process cause of action focus on a party's ability to protect their property from capricious state action, parties claiming both of these violations must first show that they had a legitimate property interest. The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. Rick's Amusement, Inc. v. State, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001). In determining whether a governmental action violates the Takings Clause, the courts consider: (1) the

economic impact of the state action; (2) its interference with distinct investment-backed expectations; and (3) the character of the state action. Id.

Substantive due process provides that one may not be deprived of property for arbitrary reasons. Worsley Co. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."). To support a substantive due process violation, a party must show "he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Id.

Having found that section 9-1-1680 did not create a contract entitling Appellant to tax exemptions, we conclude that there are no property rights infringed upon by Act 189. Even though taxes amount to taking money from taxpayers or business, those kinds of assessments are not treated as per se takings under the Fifth Amendment. Rivers, 327 S.C. at 275, 490 S.E.2d at 263. Moreover, in order for Act 189 to have effected a taking in the present case, Appellant would have to have had a vested right to the tax exemption. Appellant has failed to show he had any reasonable investment-backed expectations in the tax exemption, and there is no contracted obligation. Because there is not a vested interest in tax laws remaining unchanged, Appellant failed to prove a Takings Claim.

There is no cognizable property interest that requires due process. Appellant relies on Rivers in support of his due process claim. His reliance is misplaced. Rivers involved a due process claim as a result of excessive retroactive application of tax legislation. In the instant case, there is no retroactive application of tax legislation.

III. Statute of Limitations

In addition to failing to prove he was entitled to the tax exemption, Appellant's case was untimely. Appellant argues the ALC and the circuit court erred in finding his claims were barred by the statute of limitations because: (1) the Department did not pursue that defense in Evans; (2) he made his claim for a refund within three years of retirement; and (3) it was a

contract providing for continuing performance, thus the limitations period began anew each year.

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). The statute of limitations for actions pursuant to contract or statute is three years. S.C. Code Ann. § 15-3-530 (1), (2) (2005) (stating the statute of limitations for actions based upon contract or upon liability created by statute is three years). The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist. RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007) (noting that under the discovery rule, a cause of action for breach of contract accrues on the date the injured party discovered or should have discovered the breach); Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) ("Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct.").

In Harvey v. South Carolina Department of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000), the Court of Appeals reviewed a statute of limitations defense in a 1993 action filed by current or recently retired employees of the Department of Corrections complaining that their retirement benefits were only prospectively transferred from the South Carolina Retirement System to the Police Officers Retirement System. The court noted that the cause of action for the transfer of prior years of service accrued in 1983, when the employees were prospectively transferred to the PORS, because it was "undisputed that Employees knew of their claim at that point." Harvey, 338 S.C. at 508, 527 S.E.2d at 769-70.

We find Appellant knew, or through the exercise of due diligence should have known, that his retirement benefits would no longer be exempt from state income tax when the statute was changed in 1989. Although Appellant did not begin receiving retirement income until 1997, he had a vested interest in his retirement plan prior to Act 189. Similar to Harvey,

Appellant's action accrued at the time of the 1989 change, not when he later retired and attempted to claim the prior tax exemption.[5] Thus, the limitations period expired in 1992, not in 1998 when Appellant filed his action. This action is barred by the statute of limitations.

Appellant further argues that the Department waived the statute of limitations defense when it did not raise it as an additional sustaining ground in Evans. A party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense. RWE NUKEM, 373 S.C. at 197, 644 S.E.2d at 734. According to the Appellant's brief, the Department asserted the statute of limitations in the early stages of the Evans case. The Department did not assert the statute of limitations as an alternative sustaining ground in Evans, and it argued that the circuit court erred by not ordering that administrative remedies should have been exhausted.

While the Department did not raise the statute of limitations defense on appeal in Evans court, the result of the Evans decision was that the case was remanded to the circuit court for dismissal without prejudice so that Appellant could exhaust his administrative remedies. The dismissal of the complaint in Evans allows the Department could then assert any available defenses, including a statute of limitations defense, when the action is re-filed.

Finally, Appellant argues the failure to impose the pre-Act 189 tax exemption to his retirement benefits each year amounts to a continuing

[5] Appellant argues that he could not have applied for a tax refund before he retired, and thus, his application for a refund in 1998 was within the three-year statute of limitations for seeking a refund. This argument is unpersuasive. The basis of Appellant's claim is an alleged statutorily-created contract. Assuming that a contract existed, it was breached when the state changed the law eliminating the tax exemption. Thus, accrual date is the time of the change in the law, not nearly ten years later when Appellant sought a refund pursuant to the old law.

breach such that a new limitations period begins each year. The circuit court gave two reasons for denying this argument: (1) because Appellant was alleging an impairment of contract action, not a breach of contract action, the statute of limitations began to run when any alleged contract was impaired by Act 189, not when Appellant was actually denied the exemption each year; and (2) the cause of action accrued when Act 189 was passed because at that point Appellant was put on notice that he had a cause of action. We agree with the circuit court that there is no continuing breach which would start a new limitations period because the cause of action arose with the enactment of Act 189.

CONCLUSION[6]

Appellant failed to prove his impairment of contract claim because section 9-1-1680 did not contain contractually-significant language, it was a tax law, and it was subject to modification. Appellant's takings and due process claims are further without merit because Appellant cannot show that he had a legitimate property interest in the tax law remaining unchanged. Moreover, the substantial evidence showed that any loss of alleged property was more than made up for with the 7% retirement benefits increase. Finally, Appellant's claims are barred by the statute of limitations because he knew or should have known at the time Act 189 was passed that the Act would affect his retirement benefits.

Accordingly, the circuit court's order is

AFFIRMED.

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[6] Appellant also complains about the ALC's denial of class certification. However, Appellant only appeals one of the two reasons the circuit court listed for affirming the ALC. Therefore, the circuit court's alternate sustaining ground is the law of the case. Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (holding that where the ruling of the trial judge is based on more than one ground, the appellate court will affirm unless appellant appeals all the grounds).

MOORE, Acting Chief Justice, WALLER, J., and Acting Justices James W. Johnson, Jr. and Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tracy Lee Whitworth, Respondent,

v.

Window World, Inc., and Insurance Corporation of New York, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 26474
Heard March 6, 2008 – Filed April 28, 2008

REVERSED

Edwin P. Martin, Jr., of Hedrick Eatman Gardner & Kinchloe, of Columbia, for Petitioners.

Stephen B. Samuels, of McWhirter, Bellinger & Associates, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In *Whitworth v. Window World, Inc.*, Op. No. 2005-UP-471 (S.C. Ct. App. filed July 26, 2005), the court of appeals reversed the order of the Workers' Compensation Commission's denying benefits and held that Respondent's accident fell within an exception to the going and coming rule. We granted certiorari to review that decision and now reverse.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Tracy Lee Whitworth was employed by Petitioner Window World, Inc. ("Window World") as a window installer and assigned to a job at a residence. Respondent installed three windows on Saturday, seven windows on Sunday, and planned to finish the job on Monday. The last step to install a window requires installing coil around the window, which involves using a "breaker" to cut the coil. A breaker is a large piece of equipment that must be transported to each jobsite. Because Window World's breaker was unavailable,[1] Respondent used his brother's breaker which was stored in Respondent's garage. Respondent testified that at approximately 7:40 a.m., he loaded the breaker onto his trailer which was attached to his truck and proceeded to the jobsite. After stopping to get a drink on the way to the jobsite, Respondent was involved in an automobile accident.

The single commissioner denied Respondent benefits, finding that the accident occurred on the way to work and that Respondent failed to show the accident fell within an exception to the "going and coming rule" which prohibits employees from recovering from injuries that occur while going to or coming from work. The full commission and the circuit court affirmed.

[1] The parties dispute the reason the breaker was unavailable. Respondent claims that Window World would not let him use their breaker as punishment for misconduct while Window World contends that another crew was using the breaker.

The court of appeals reversed and held that the injuries fell within the "duty or task exception" to the rule because Respondent was charged with the task of transporting the breaker to the jobsite when he was injured.

This Court granted certiorari and Window World[2] presents the following issue for review:

> Did the court of appeals err in holding that Respondent's injuries fell within an exception to the going and coming rule?

STANDARD OF REVIEW

This Court must affirm the findings of fact made by the full commission if they are supported by substantial evidence. *See* S.C. Code Ann. § 1-23-380(A)(5) (2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). This Court may reverse a decision of the full commission that is affected by an error of law. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

LAW/ANALYSIS

Window World first argues that substantial evidence in the record supports the full commission's finding that Respondent was not charged with a duty or task in connection with his employment at the time of his accident, and therefore, the court of appeals exceeded its scope of review in reversing this finding. We disagree.

The relevant facts in this case were not disputed, and thus, whether Respondent's injuries are compensable is a question of law. *See Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) (holding that

[2] We refer to Petitioners collectively as "Window World."

where there are no disputed facts, the question of whether an accident is compensable is a question of law). For this reason, regardless of whether the court of appeals reached the correct conclusion, the court did not exceed its scope of review. *See* S.C. Code Ann. § 1-23-380(A)(5)(d) (2006) (an appellate court may reverse the full commission's decision if affected by an error of law).

Next, Window World argues that the court of appeals erred in reversing the full commission's denial of benefits because Respondent's accident does not fall within an exception to the going and coming rule. We agree.

Under the going and coming rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment. Therefore, an injury sustained by accident at such time is not compensable under the Workers' Compensation Act because it does not arise out of and in the course of his employment. *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 95, 495 S.E.2d 447, 449 (1998). This Court has recognized five exceptions to this rule, one of which is the "duty or task exception." Under this exception, an employee will not be precluded from receiving benefits where the employee, on his way to or from his work, is charged with some duty or task in connection with his employment. *Id.*

Under the facts of this case, Respondent failed to show he was charged with a work-related duty or task as set forth in the exception to the going and coming rule. The primary purpose of Respondent's trip served a personal objective, namely for Respondent to travel to the place where his work was to be performed. Respondent had no work-related duties to perform on the way to work, was not under the control of Window World, and was free to conduct personal business on the way to the jobsite even with the breaker in tow, as evidenced by his personal deviation. The mere transportation of the breaker – a tool of the trade, not owned by Window World, and stored in Respondent's garage – while going to work does not necessarily transform the event into a work-related duty or task. *See Larson's Workers' Compensation Law* § 16.09[4][a] (2007) (noting that "[t]he mere fact that [a] claimant is, while going to work, also carrying some of the paraphernalia of

the employment does not, in itself, convert the trip into a part of the employment"). Accordingly, we hold that under the facts of this case, the going and coming rule precludes compensation.

The court of appeals relied heavily on *Wright v. Wright,* 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991) in reaching their decision. In our view, however, *Wright* is distinguishable. In *Wright*, the claimant, a self-employed contractor, was injured in an automobile accident while traveling from a jobsite in Charlotte to his home in Easley and while taking an employee home. The claimant's accident clearly fell within two exceptions to the going and coming rule since the claimant was driving a company truck and was charged with the specific work-related task of taking the employee home.[3] *Id*. at 333-34, 411 S.E.2d at 830. In the instant case, Respondent was driving his own truck, towing his own tools, and had no work-related tasks to perform on his way to the jobsite.

In the event that we were to find the exceptions to the going and coming rule inapplicable, Respondent urges this Court to adopt the "required vehicle rule." Under this rule, if the employer requires an employee, as part of the employee's job, to bring his own car for use during the workday, the trip to and from work falls within the course of employment.[4] *See* 99 C.J.S *Workers' Compensation* § 442. This rule effectively operates as an additional exception to the going and coming rule.

We decline to adopt or apply the required vehicle rule based on the record presented in this case. Respondent failed to raise this issue to either the single commissioner or to the full commission. Furthermore, although the record indicates Window World required their employees to have their own trucks, the record is not clear on the strictness of this requirement or the

[3] Although the self-employed claimant in *Wright* served in both employer and employee capacities, this fact did not change the analysis or the result.

[4] We disagree with Respondent's claim that the court of appeals implicitly adopted this rule in *Wright*. To the contrary, South Carolina has not yet recognized the required vehicle rule.

extent of traveling Window World demanded from their employees. Thus, we decline to consider the adoption of the required vehicle rule based on the record before this Court.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and hold that Respondent was not charged with a work-related duty or task, and therefore, his injuries are not compensable pursuant to the going and coming rule.

MOORE, WALLER, JJ., and Acting Justices E. C. Burnett, III and Aphrodite K. Konduros, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Salmonsen,
individually and on behalf of
all others similarly situated, Appellants-Respondents,

v.

CGD, Inc., f/k/a Charleston
Gypsum Dealers & Supply Co.,
Inc., Frank Crider, Raymond G.
Wolford, Henry (Hank) Futch,
and Harold (Hal) Futch, Respondents-Appellants,

v.

Parex, Inc., Respondent-Appellants.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge
Roger M. Young, Circuit Court Judge

Opinion No. 26475
Heard October 17, 2007 – Filed April 28, 2008

DISMISSED IN PART, REVERSED IN PART, AND REMANDED

Mary L. Arnold and Justin O'Toole Lucey, both of Mount Pleasant, for Appellants-Respondents.

Joseph E. DaPore, Stephen L. Brown, Russell G. Hines, all of Young, Clement, Rivers, of Charleston; Robert T. Lyles, Jr., of Lyles & Lyles, of Charleston; R. Hawthorne Barrett, Steven W. Ouzts, John E. Cuttino, all of Turner, Padget, Graham & Laney, of Columbia; Steve L. Smith, of Smith, Collins, Newton & Koontz, of Charleston, for Respondents-Appellants.

JUSTICE BEATTY: This is a direct appeal of a class action suit involving damages arising out of the application of allegedly defective synthetic stucco (Exterior Insulation and Finish System, "EIFS") to Charles Salmonsen's residential home and those homeowners similarly situated in the Charleston area. The Court granted Salmonsen's motion for the appeal to be certified from the Court of Appeals to this Court. The appeal and cross-appeals raise multiple substantive and procedural issues regarding the certification of the class. We dismiss in part, reverse in part, and remand.

Factual/Procedural History

On October 19, 2000, Salmonsen filed his original Complaint against Parex, Inc. (the stucco manufacturer), Jeff Thomas d/b/a Thomas Construction (the general contractor for the residence), Mike Tenny d/b/a Synco Enterprise (the subcontractor responsible for applying EIFS), and Charleston Gypsum n/k/a CSR America (the distributor). In his Complaint, Salmonsen claimed his residential home sustained water intrusion damage resulting from allegedly defective construction materials, particularly the Exterior Insulation and Finish System ("EIFS"). Based on these damages, Salmonsen asserted causes of action for breach of implied warranty, breach of express warranty, negligence, and strict liability. Prior to the scheduled trial date of October 14, 2002, Salmonsen settled and entered into a release with the defendants. In the settlement documents, Salmonsen specifically

reserved his claims against CGD, Inc., f/k/a Charleston Gypsum Dealers & Supply Co., Inc.[1]

On October 23, 2002, Salmonsen filed an Amended Complaint on behalf of himself and other similarly situated homeowners, which named CGD, Inc., f/k/a Charleston Gypsum Dealers & Supply Co., Inc. ("CGD"), and each of its former shareholders as defendants. In the Amended Complaint, Salmonsen alleged products liability claims against CGD for breach of implied warranty, negligence, and strict liability. As to the former shareholders, Salmonsen alleged they were personally liable for misconduct associated with the distribution of the corporation's assets.

On February 18, 2003, Salmonsen moved for class certification. In response, CGD filed a memorandum in opposition and a motion to amend its Answer to include third-party defendants who had contributed to the alleged damages of the class of homeowners. After a hearing, Circuit Court Judge Markley Dennis, Jr., issued an order on September 25, 2003, in which he granted Salmonsen's motion to certify the class and denied CGD's motion. In his order, Judge Dennis found that all of the prerequisites for class certification were satisfied pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. In addition to these criteria, Judge Dennis also based his decision to certify the class on the ground that there was a limited fund to satisfy the class claims given the corporation was dissolved and had only a limited amount of insurance coverage available. Judge Dennis certified the following class:

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[1] Charleston Gypsum Dealers and Supply Co., Inc., sold the Parex synthetic stucco that was applied to the exterior of Salmonsen's residence in 1994. On May 15, 1995, Charleston Gypsum sold its business and name to CSR America. Subsequently, Charleston Gypsum changed its name to CGD, Inc. After all known creditors were paid, the sales proceeds were distributed to CGD, Inc.'s shareholders over the next few years. In 1999, the corporation was administratively dissolved.

> All persons and entities that own or have owned structures clad with Parex EIFS sold by the Defendant between January 1, 1991 and May 15, 1995. This class excludes:
>
> a) Employees of the Defendant; and
> b) Those persons who have released the Defendant or are currently in litigation with the Defendant.

Subsequently, CGD and the shareholders jointly filed two motions requesting Judge Dennis to reconsider his orders certifying the class and denying the addition of third-party defendants. By orders dated December 15, 2003, Judge Dennis amended the prior order by ruling that the class would be conditionally certified and permitting CGD additional time to conduct class discovery. Judge Dennis also granted CGD leave to amend its Answer to list Parex as a third-party defendant. Pursuant to this ruling, the defendants filed an Amended Answer and a Third-Party Complaint in which they asserted causes of action for indemnity, negligence, negligent misrepresentation, and breach of implied warranties.

On March 22, 2004, Judge Dennis signed a consent scheduling order in which he granted the defendants until May 1, 2004, to file motions to decertify the class. Additionally, he ordered the parties to: (1) complete discovery on or before July 20, 2004; (2) file all motions by August 20, 2004; and (3) complete mediation on or before August 20, 2004. Judge Dennis also informed the parties that the case was subject to being called for trial on or after September 20, 2004.

After conducting discovery, CGD filed a motion on April 30, 2004, to decertify the conditionally-certified class. In its motion and accompanying memorandum, CGD contended that the requirements of Rule 23, SCRCP, were not met and certification was inappropriate because trying the case would involve numerous separate "mini-trials." CGD reasoned that the homeowners were distinct in their claims and, particularly, their damages.

On October 12, 2004, Judge Dennis held a hearing on the motion to decertify the class. Judge Dennis issued a form order in which he denied the motion and indicated that a formal order would be forthcoming. Prior to the issuance of the formal order, CGD and Parex filed motions to bifurcate the claims of individual class members and, in the alternative, requested a litigation plan for the class action. On January 14, 2005, Circuit Court Judge Roger Young, the Chief Administrative Judge, held a pre-trial conference on these motions. Judge Young removed the case from the trial roster, requested the parties submit proposed trial plans, and assigned the case to himself for all further proceedings.

On February 24, 2005, Judge Dennis issued a formal order explaining his denial of the defendants' motion for decertification. In his order, Judge Dennis reiterated that all of the criteria of Rule 23(a), SCRCP, were met to warrant certification of the class. He also emphasized that "the differences in the claims and damages of these homeowners are not so great that they would weigh against class certification." Additionally, Judge Dennis recognized that "the court faces a continuing duty to ensure that the requirements of Rule 23 remain satisfied. The decision to certify a class is not set in stone; the trial court retains the power to decertify or modify the class at any time prior to final judgment."

On February 25, 2005, Judge Young held a second pre-trial hearing to consider the parties' proposed trial plans and to address the issue of class notification. By order dated May 31, 2005, Judge Young established an "opt-in" notification procedure. In reaching this conclusion, Judge Young found the "opt-in" procedure was "the preferred method of litigating the instant case by serving the interests of the parties and furthering judicial economy." Judge Young further explained that "an opt-in provision is the most pragmatic procedure to facilitate the management of this case. The makeup of this Class should only contain, at most, a narrow group of members, namely the homeowners as identified by sales invoices provided by Defendants." Judge Young declined to establish a trial management plan until after the class had been closed and the class members had been identified.

Significantly, Judge Young specifically reserved the "authority to alter, amend, or modify its orders as changes during the course of this case may warrant."

All parties timely appealed the orders of Judge Dennis and Judge Young. Salmonsen appealed Judge Young's May 31, 2005 order establishing the "opt-in" notification procedure. CGD cross-appealed, challenging Judge Dennis's February 17, 2005 order and Judge Young's May 31, 2005 order denying decertification of the class. Parex also cross-appealed challenging Judge Dennis's three orders converting the case into a class action and Judge Young's order permitting the case to continue as a class action.

Although there are multiple issues raised by the parties, we believe this case essentially presents the following questions: (1) whether these appeals are interlocutory?; (2) whether Judge Dennis erred in conditionally certifying the class?; and (3) whether Judge Young erred in converting the class to an "opt-in" class? Accordingly, in the interest of clarity and brevity, we have consolidated some of the issues raised by the parties. Because the question of appealability is a threshold issue in the case, we have chosen to address it first.

I. Appealability

The substantive differences between the orders at issue necessitates that this Court engage in a bifurcated appealability analysis. Specifically, we must determine whether the class certification orders are immediately appealable and whether the subsequent orders regarding the "opt-in" notification procedure are immediately appealable. For reasons that will be more fully discussed, we dismiss the appeal of the class certification orders and grant the continued review of the "opt-in" orders.

A.

The general rule established by this Court is that class certification orders are not immediately appealable. See Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) ("Orders under Rule 23, SCRCP are interlocutory and thus, immediately appealable only in certain circumstances."); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) ("Usually, an order denying class certification is interlocutory and not immediately appealable."); Schein v. Lamar, 274 S.C. 329, 331, 263 S.E.2d 383, 384 (1980) (finding issue of class certification sought to be raised on appeal was interlocutory and appeal regarding that issue was dismissed); Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) (dismissing class certification order as interlocutory on the grounds that "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment").

This Court, however, has reviewed interlocutory orders involving class certification when they contain other appealable issues. Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; see Eldridge, 308 S.C. at 126-28, 417 S.E.2d at 533-34 (finding order prohibiting a plaintiff from contacting potential members of the plaintiff class was in the nature of an injunction and, thus, directly appealable).

In its brief, CGD concedes that "[u]nder the present law in South Carolina, all appeals in this matter should be dismissed as interlocutory." Despite this concession, CGD requests to argue against precedent and asks this Court accept review of the appeals because the modern trend in state and federal jurisdictions is to allow review of class certification orders under certain circumstances. CGD believes these appeals present the appropriate circumstances for this Court to accept review. In essence, CGD is urging this Court to amend our state rules of civil procedure to permit interlocutory review of class certification orders or issue an opinion holding these orders fall under

the provisions of section 14-3-330(2) of the South Carolina Code,[2] which allows appeal from an interlocutory order when the order affects a "substantial right" and "in effect determines the action and prevents judgment from which an appeal might be taken or discontinues the action."

In analyzing this appealability issue, we have, as urged by CGD, reviewed precedent from other state and federal jurisdictions. Although the decisions from these jurisdictions are instructive, we conclude they are distinguishable and do not warrant a decision to review the certification orders in the instant case.

Unlike our state appellate courts, the federal courts have been specifically authorized by Rule 23(f), which became effective on December 1, 1998,[3] to review class certifications prior to a final judgment. Rule 23(f) provides:

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[2] Section 14-3-330(2) states:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

S.C. Code Ann. § 14-3-330(2) (1977 & Supp. 2007).

[3] This rule was enacted pursuant to the express authority of 28 U.S.C.A. § 1292 (2007), a statute providing for federal courts of appeal to review interlocutory decisions.

> (f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f).[4] The Advisory Committee Note to this rule explains: "The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari . . . Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." However, our Fourth Circuit Court of Appeals seems to emphasize that review of interlocutory class certification decisions would not be routine. Instead, the Court has noted that it would employ a "careful and sparing use of Rule 23(f)" to "promote judicial economy by enabling the correction of certain manifestly flawed class certifications prior to trial and final judgment." Lienhart v. Dryvit Sys. Inc., 255 F.3d 138, 145 (4th Cir. 2001). Therefore, despite the specific authorization, it appears that federal courts, particularly our Fourth Circuit, are reticent to grant review of interlocutory class certifications orders.

Similar to the federal courts, the state jurisdictions which have granted immediate appeal of class certification orders are usually authorized by a state rule of civil procedure or a specific statute. See, e.g., Ala. Code § 6-5-642 (2005) (Alabama); Ark. R. App. P. Civ. 2(a)(9) (Arkansas); Colo. Rev. Stat. § 13-20-901 (2006)(Colorado); Conn. Gen. Stat. Ann. § 42-110h (2007) (Connecticut); Fla. R. App. P. 9.130(a)(3)(vi) (Florida); Ga. Code Ann. § 9-11-23(g) (2005)(Georgia);

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[4] We note there were changes made to the Federal Rules of Civil Procedure effective December 1, 2007. Because these changes are only intended to be stylistic, these amendments do not affect the issues in this appeal. Accordingly, we cite to the version of Rule 23 which was in effect at the time of the initiation of this litigation.

I. C. A. Rule 1.264(3) (Iowa); Kan. Stat. Ann. § 60-223(f) (2005) (Kansas); Mo. Rev. Stat. § 512.020(3) (Supp. 2008) (Missouri); N.M.R.A. Rule 1-023(F) (New Mexico); N.D.R.Civ.P Rule 23(d)(3) (North Dakota); Ohio Rev. Code Ann. § 2505.02(B)(5) (2005)(Ohio); Okla. Stat. Ann. tit. 12, § 993(A)(6) (2005) (Oklahoma); Or. Rev. Stat. § 19.225 (2003) (Oregon); Tex. Civ. Prac. & Rem. Code § 51.014(a)(3) (Supp. 2007) (Texas); see generally Gary D. Spivey, Annotation, Appealability of Order Denying Right to Proceed in Form of Class Action, 54 A.L.R.3d 595 (1973 & Supp. 2008) (discussing state appellate decisions regarding the appealability of orders denying the right to proceed in the form of a class action).

In the absence of a rule or statute, several state appellate courts have granted immediate review. See, e.g., Indiana Bus. Coll. v. Hollowell, 818 N.E.2d 943, 945 (Ind. Ct. App. 2004) (granting review of interlocutory appeal of class certification decision); Dunn v. State, 635 S.E.2d 604, 606 (N.C. Ct. App. 2006)(holding interlocutory appeal of class certification order was directly appealable because it involved "'a matter of law or legal inference that affect[ed] a substantial right of the appellant'"(quoting Frost v. Mazda Motor of Am., Inc., 540 S.E.2d 324, 327 (N.C. 2000))); Mitchem v. Melton, 277 S.E.2d 895, 900-01 (W.Va. 1981) (holding order denying class action standing was immediately appealable); but see Gordon v. Microsoft Corp., 645 N.W.2d 393, 402-03 (Minn. 2002) (adopting "synthesis" of federal jurisprudence regarding immediate appeal of class certification orders and affirming court of appeals decision denying immediate review of class certification order); Basile v. H & R Block, Inc., 926 A.2d 493, 498 (Pa. Super. Ct. 2007) (holding interlocutory orders granting class certification become reviewable on appeal upon the trial court's entry of a final order).

Although the absence of a specific state rule or statute is not dispositive of our decision as to the appealability of class certification orders, it presents a greater obstacle for this Court to grant review of

the appealed orders.[5] Because a decision by this Court to grant immediate appellate review of a class certification order would represent a significant departure from this state's established appealability jurisprudence, we decline to do so. We reiterate that the orders do not prevent a judgment from which an appeal may be taken nor do they discontinue the action.

B.

We reach a different conclusion regarding the appeal of the orders establishing the "opt-in" notification procedure. Although Salmonsen concedes that an order granting or denying class certification is typically treated as an interlocutory appeal by the appellate courts of this state, he contends that his appeal from Judge Young's order establishing the "opt-in" notification procedure is properly before this Court because it affects a substantial right of class members and the mode of trial. Specifically, Salmonsen asserts the ruling of Judge Young "is a death knell for a number of class members' claims because they will no longer be class members due to the inhibitions created by changing the matters to an opt-in class."[6] We agree with Salmonsen that these orders affect a mode of trial and, thus, are immediately appealable. Moreover, this issue presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar.

"Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is

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[5] "Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist." In re Breast Implant Prod. Liab. Litig., 331 S.C. 540, 543 n.2, 503 S.E.2d 445, 447 n.2 (1998).

[6] At oral argument CGD agreed that the "opt-in" procedure affected the mode of trial.

immediately appealable." Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). "These cases not only permit, but indeed require, immediate appeal in the event of the denial of a mode of trial to which one is entitled as a matter of right." Id. This Court's traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case. Id. However, the mode of trial analysis indubitably includes the consideration of the availability of trial. The question of the denial of an actual trial is intrinsic. Here, all parties argue that some of the claims of putative class members are barred or would be barred by the statute of limitations if the "opt-in" procedure is used.

As originally certified by Judge Dennis, the class included "All persons and entities that own or have owned structures clad with Parex EIFS sold by the Defendant between January 1, 1991 and May 15, 1995." By converting this inclusive class to an "opt-in" class, Judge Young's order had the deleterious effect of improperly excluding individuals who should be members of the class. Although the class has not been decertified by the trial judge, the adoption of this notification procedure essentially created a class action anomaly. See Citgo Ref. & Mktg., Inc. v. Garza, 94 S.W.3d 322, 328 (Tex. App. 2002) (stating "an order changing the characterization of a class from opt-out to mandatory fundamentally alters the nature of the class and therefore is immediately appealable").

II. Propriety of "Opt-in" Notification

Having dismissed the appeal from Judge Dennis's class certification orders, we confine our analysis to a review of Judge Young's decision establishing an "opt-in" notice procedure for putative class members.

Salmonsen challenges Judge Young's ruling on procedural as well as substantive grounds. First, Salmonsen contends that Judge

Young's decision effectively overruled Judge Dennis's prior rulings regarding scheduling of the trial and the class certification. Secondly, Salmonsen asserts that an "opt-in" notice requirement is not recognized in this state and, in the alternative, is not appropriate for this class action suit.

Although Salmonsen is correct that one circuit court judge may not overrule another, we find this rule was not violated in the instant case. See Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.").

Rules 23(d)(1) and (2) of the South Carolina Rules of Civil Procedure specifically permit the trial court to maintain continual control over class action proceedings, including the method of class notification. Because Judge Young was the Chief Administrative Judge, who was ultimately assigned to the case, he was authorized to issue orders governing the trial proceedings which included scheduling decisions as well as the method of notification. See Rule 40(e)(2), SCRCP (permitting scheduling orders to be amended by subsequent Chief Administrative Judge). Significantly, Judge Dennis never ruled on the method of class notification nor did he designate the action as an "opt-out" class action. Moreover, class certification may be altered at any time prior to a decision on the merits.[7] Therefore, we find Judge Young properly exercised his discretion and did not overrule any prior decisions of Judge Dennis.

As to the merits of Salmonsen's issue, we believe, for reasons that will be more fully discussed, that the "opt-out" notification procedure is appropriate and should be used in this case and future class action suits.

To analyze this issue, it is instructive to compare Rule 23(d)(2) of the South Carolina Rules of Civil Procedure with its federal

[7] It should be noted that Judge Young's order did not decertify the class; however, it did designate it as an "opt-in" class action.

counterpart, Rule 23(c)(2). In doing so, we are cognizant that our appellate decisions have relied on federal precedent with respect to class action cases, but have also noted the significant differences between the two rules. See Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354, 523 S.E.2d 781, 784 (1999) ("Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart."); McGann v. Mungo, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986) (relying on federal precedent to interpret new Rule 23 of the South Carolina Rules of Civil Procedure).

Rule 23(d)(2) of the South Carolina Rules of Civil Procedure states:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended. It may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class. It may order that notice be given in such manner as it may direct of a proposed settlement, of entry of judgment, or any other proceedings in the action including notice to the absent persons that they may come in and present claims and defenses if they so desire.

Rule 23(d)(2), SCRCP (emphasis added).

In comparison, Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure provides:

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed. R. Civ. Pro. 23(c)(2)(B) (emphasis added).

As evidenced from the emphasized text, our state rule provides a trial court with broader discretion to make decisions regarding class notification procedures than the federal rule. Notably, in defining a trial court's authority our state rule uses the term "may" whereas the federal rule uses the mandatory term "must." Even more significant, the federal rule specifically mandates that class members will only be excluded from the class if the member so requests, i.e., an "opt-out" procedure. Our research has revealed only two types of federal class action cases where the federal courts permit an "opt-in" procedure. See Wagner v. Loew's Theatres, Inc., 76 F.R.D. 23, 24 (M.D. N.C. 1977) (recognizing that class action suits pursuant to the Fair Labor Standards Act and the Age Discrimination in Employment Act provide for statutory "opt-in" class action); Watkins v. Milliken & Co., 613 F. Supp. 408, 418 (W.D. N.C. 1984) (noting that Rule 23(c) of the Federal Rules of Civil Procedure provides for "opt-out" class action whereas the Fair Labor Standards Act allows as class members only those who "opt in").

In contrast, our state rule has no similar provision. Nor has this court specifically spoken on the issue. Therefore, Judge Young had no guidance in determining the appropriate notification method.

As explained by Professor Flanagan:

> Rule 23(d) is not exhaustive. The court has inherent power to manage the class action and may enter any appropriate order. One important issue not covered by the rule is the procedure for determining who is bound by a class action. Federal Rule 23 allows only those who are members of a Rule 23(b)(3) class action in which common questions predominate, the option of electing not to be bound by the class action. Class members must be notified of this right and must affirmatively elect not to be bound. Members of a Rule 23(b)(1) or (b)(2) class actions are not given the option of staying out of the class action.
>
> The South Carolina Rule leaves to the court's discretion the method of determining how class members elect to be bound. In some actions, particularly those involving only injunctive relief, no procedure may be necessary. In other cases, where common questions predominate, the court may use the federal approach of binding the members unless they opt-out, or alternately requiring an affirmative election to be bound.

Flanagan, James F., South Carolina Civil Procedure 192-93 (2d ed. 1996).

Despite the implicit permission in the rule for an "opt-in" notification procedure, our appellate courts have not recognized this method and have clearly expressed a preference for the "opt-out" procedure. For example, this Court has stated:

> Thus, in order to provide minimal due process, absent class plaintiffs:
>
> must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through

> counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, . . . due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.
>
> Id. at 812, 105 S.Ct. 2965 (citations omitted). If the due process requirements of (1) notice; (2) an opportunity to be heard; (3) an opportunity to "opt out;" and (4) adequate representation are met, the foreign court properly asserts personal jurisdiction over the absent class plaintiffs. Accordingly, those plaintiffs who elect not to opt out are bound by the foreign court's judgment.

Hospitality Mgmt. Assocs. v. Shell Oil Co., 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004) (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)) (discussing extent of collateral review of due process safeguards for absent class members to a class action settlement in foreign jurisdiction).[8]

[8] Interestingly, the dissent concurred without opinion in Hospitality Management Associates. As evident from the above-quoted language, the unanimous Court unequivocally approved of the "opt-out" procedure as the preferred procedure and clearly indicated that this procedure comports with the requirements of due process. Thus, we are perplexed by the dissent given it represents a fundamental reversal on this issue.

Furthermore, the dissent's reference to Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003), is unavailing. In Tilley, this

Moreover, this Court has stated, "South Carolina Rule of Civil Procedure 23(d)(2) gives the circuit court the broad power to 'impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended.'" Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (quoting Rule 23(d)(2), SCRCP). "The power to issue an order which the court, in its discretion, believes is necessary to curtail the opportunities for abuse of the judicial system in class actions is not without bounds. Eldridge, 308 S.C. at 127, 417 S.E.2d at 534. "The specific grants of power in Rule 23(d), SCRCP are directed towards notifying the absent parties of the pending litigation." Id. The discretion granted by Rule 23(d)(2) to determine how absent parties are notified of a pending action does not include the discretion to determine if a member of the class will be a party to the action. It is inherent in class-action litigation that every member of the class is a party. The remaining question is whether or not each party will present a claim or a defense.

In our view, the "opt-in" procedure is not contemplated by the notice provision of Rule 23. The "opt-in" procedure is more far reaching than simply notifying putative class members of the pending action. It also determines the class and may even re-define it. Moreover, we believe the elimination of the putative class members effectively denies those individuals a trial by jury.

Furthermore, we believe the implementation of the "opt-in" procedure effectively converts the previously certified class action into an ersatz form of permissive joinder under Rule 20 of the South Carolina Rules of Civil Procedure.[9] To do so eviscerates Rule 23 class

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Court approved of the trial court's delaying the actual mailing of the class notice until after certain issues were resolved on appeal. This decision had absolutely nothing to do with "opt-in" class actions.

[9] Rule 20 provides in relevant part:

actions. Rule 23 specifically requires that the court find, before certifying the class, that the class is so numerous that joinder is impracticable. Thus, Rule 20 joinder and Rule 23 class actions should not co-exist.

The careful reading of Rules 20 and 23 together leads to the conclusion that "opt–in" class actions should not be allowed. This prohibition cannot be avoided by use of an "opt-in" notice procedure. The "opt-in" class action and the "opt-in" notice procedure are a distinction in name only, the practical effect is the same.

After much consideration, we come to the conclusion that an "opt-out" notification procedure is the proper method to be offered to putative class members in the instant case and future class action cases. We further take this opportunity to specifically reject the use of an "opt-in" procedure. Taken to its logical extreme, the "opt-in"

> a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Rule 20(a), SCRCP.

procedure undermines the due process reasoning of Rule 23 and essentially amounts to *de facto* decertification of a class.

Specifically, as the text of Rule 23(d)(2) states, a court in managing a class action suit should issue orders that "fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." By implementing an "opt-in" procedure, we believe a court is making misperceived judicial economy paramount to the interests of putative class members. For example, if, as in the instant case, limited insurance funds are available to cover claims, potential class members who do not participate in the class would not be compensated because the limited funds may be exhausted in the action. Furthermore, potential members of the class may be precluded from bringing their claims due to statute of limitation problems. Because class action litigation is intended to effectively litigate a large number of claims through a representative party, a requirement that parties "opt-in" will undoubtedly limit the size of the class and, therefore, undermines the purpose of a class action suit.[10]

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[10] One commentator has explained the negative effects of an "opt-in" procedure as follows:

> [T]he opt-in procedure is . . . a very effective means of diminishing the size of a class, because an affirmative act by an individual is always less likely than mere inaction and hence presents certain dangers. Requiring class members to insert themselves into the suit will result inevitably in smaller classes, unrelated to the magnitude of the harm done or the merits of the case. In addition to its unfairness, unnecessary reduction of class size negates the perceived benefits of class actions as efficient and economic means of litigation, since those who fail to opt in could bring their own suits, thereby multiplying cases where one would do.

Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1202 n.19 (11th Cir. 1985) (quoting Note, Reforming Federal Class Action Procedure:

Although we recognize that class action suits are complex and laborious for all involved parties, this fact alone is not sufficient to utilize a notification procedure that effectively eviscerates class action status. Accordingly, we hold Judge Young erred in ordering an "opt-in" notification procedure.

CONCLUSION

Based on the foregoing, we dismiss the appeals of Judge Dennis's class certification orders as interlocutory. Because we adopt the "opt-out" class action and notification procedure as the exclusive method of class action litigation in this state, we reverse Judge Young's order and remand for further proceedings consistent with this opinion.

DISMISSED IN PART, REVERSED IN PART, AND REMANDED.

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

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An Analysis of the Justice Department Proposal, 16 Harv.J.Legis. 543, 571-72 (1979)).

JUSTICE PLEICONES: I respectfully dissent. The majority holds that the circuit court's interlocutory order utilizing the "opt-in" class certification procedure is immediately appealable under S.C. Code Ann. § 14-3-330(2) (1976) because it is an order affecting the mode of trial. I disagree: the "mode of trial" exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury. E.g., Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000); Pelfry v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978). I would therefore dismiss both appeals. Knowles v. Standard Savings and Loan Ass'n., 274 S.C. 58, 261 S.E.2d 49 (1979) (dismissing an interlocutory appeal from a class certification order holding such an order "does not involve substantial or essential legal rights which require attention prior to final judgment").

Although the issue is not properly before us, I note my disagreement with the majority's decision on the merits as well as with its procedural ruling. Without question, the circuit court has discretion to create an "opt-in" class under Rule 23(d), SCRCP, and while we have never directly addressed the propriety of the "opt-in" class, we have never disapproved of the procedure. See Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003) (approving timing of notice to persons eligible to join the class). Moreover, I am at a loss to understand the majority's holding that an "opt-in" class somehow runs afoul of Rule 20(a), SCRCP, the permissive joinder provision. The first prerequisite for class certification is a finding that the class is so numerous that joinder is not practicable. Assuming that criterion is satisfied, whether the class proceeds as "opt-in" or "opt-out," each potential class member has the right to determine whether to participate in the law suit, and thus the same "ersatz" joinder problem exists under either scenario.

None of the interlocutory orders sought to be appealed are immediately appealable under § 14-3-330. I would dismiss the cross-appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

USAA Property and Casualty Insurance Company, Appellant/Respondent,

v.

Deborah J. Clegg, as Personal Representative of the Estate of Allison T. Clegg; Elliot M. Lambrecht; and Douglas A. Lambrecht, Defendants

of whom

Douglas A. Lambrecht is Respondent/Appellant.

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

Opinion No. 26476
Heard March 6, 2008 – Filed April 28, 2008

REVERSED

William O. Sweeny, III and William R. Calhoun, Jr., both of Sweeny, Wingate & Barrow, of Columbia, for Appellant-Respondent.

John E. North, Jr. and Pamela K. Black, both of North & Black, of Beaufort, for Respondent-Appellant.

JUSTICE BEATTY: In this declaratory judgment action, USAA Property and Casualty Insurance Company ("USAA"), appeals the circuit court's order granting partial summary judgment in favor of Douglas A. Lambrecht on his claim that USAA had a duty to defend him against a wrongful death and survival action arising out of an accident caused by his non-resident, emancipated son while driving a "non-owned" automobile. Lambrecht, in a cross-appeal, contends this Court is without jurisdiction to review the appeal. We certified the appeal from the Court of Appeals. We reverse.

FACTUAL/PROCEDURAL HISTORY

On January 9, 2002, Lambrecht's nineteen-year-old son, Elliott M. Lambrecht ("Elliott"), while driving with a suspended license, was involved in a single-vehicle accident that resulted in the death of his passenger, Allison T. Clegg. At the time of the accident, Elliott was not a resident of Lambrecht's home and was driving a 1994 Mazda, which was owned by Elliott and not listed as a covered automobile on Lambrecht's insurance policy with USAA.

Subsequently, Deborah J. Clegg, Clegg's mother and personal representative of her estate, filed a wrongful death and survival action which named Elliott and Lambrecht as defendants. Based on her belief that Lambrecht owned the 1994 Mazda, Clegg asserted causes of action for negligent entrustment and negligence on the grounds that Lambrecht knew his son: (1) was driving without a valid South Carolina driver's license; and (2) had a history of numerous traffic violations involving excessive speed. Shortly after the initial filing, Clegg amended her Complaints. In the Amended Complaints, Clegg named three other defendants[1] and characterized Lambrecht as the "de facto" owner of the 1994 Mazda.

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[1] These individuals were Elliott's relatives and friends who also had access to the vehicle involved in the accident.

In response, USAA denied Lambrecht's request to defend him in the underlying lawsuits. USAA then filed a declaratory judgment action seeking a determination by the circuit court that there was no coverage under Lambrecht's policy and, thus, it owed no duty to defend. Specifically, USAA claimed the insurance policy in effect at the time of the accident did not name Elliott as an insured and did not list the 1994 Mazda as a covered vehicle.[2] USAA also relied on the fact that Elliott owned the 1994 Mazda and was not a resident relative at the time of the accident. Based on these allegations, USAA believed it did not have a duty to defend Lambrecht or Elliott given there were no provisions of the policy which would render coverage for the accident.

Lambrecht filed an Answer and Counterclaim in which he alleged that USAA was required to defend him in the underlying action as well as reimburse him for the attorney's fees and costs of defending the lawsuits and USAA's declaratory judgment action. Lambrecht alleged he was a "covered person" under the terms of the policy and that USAA owed him a duty to defend based on the following policy language: "We will pay damages for BI or PD for which any covered person becomes legally liable because of an auto accident."[3] As a result, Lambrecht filed a motion for partial summary judgment.

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[2] The insurance policy that was in effect between September 20, 2001, and March 20, 2002, named Lambrecht as the insured and listed a 1997 BMW Z3 convertible and a 1997 Ford Explorer as covered vehicles. Prior to the renewal of the policy on September 20, 2001, Elliott was deleted as a named insured and the 1994 Mazda was deleted as a covered vehicle.

[3] In his Answer and Counterclaim, Lambrecht admitted that Elliott was neither a resident relative nor a named insured under the USAA policy. He further admitted he did not "use" or "maintain" the 1994 Mazda and it was owned by Elliott and, thus, not listed as a covered automobile under the policy. Additionally, Lambrecht stated that the

After a hearing on Lambrecht's motion, the circuit court issued an order on April 8, 2005, granting partial summary judgment in favor of Lambrecht. The court prefaced its order by noting the parties agreed the facts were undisputed and the motion presented a question of law "with regard to the construction of the policy of insurance issued by USAA to Lambrecht." In the recitation of the facts, the court specifically noted that at the time of the accident: (1) Elliott was nineteen years old and no longer a member of Lambrecht's household; (2) the 1994 Mazda was owned by Elliott; and (3) the 1994 Mazda was not identified as a covered automobile in the Declarations page of the policy.

The court framed the issue before it as follows: "whether [the allegations] even if ultimately proven to be legally and factually baseless, trigger USAA's obligation to defend Lambrecht in the Underlying Actions." Relying on the language of the policy and decisions from other jurisdictions, the court answered this question in the affirmative. With respect to the policy, the court found "[t]he unambiguous language of the Policy provides coverage for Lambrecht if the claims against him arise from any auto accident, not just one in which he was a driver, and was the result of the 'ownership, maintenance, or use' of 'any auto,' not just those automobiles insured under the Policy."

On May 26, 2005, USAA filed a motion for reconsideration of the April 8, 2005 order. USAA explained the filing of its motion was belated because it did not receive notice of entry of the order until May 16, 2005. Lambrecht objected to the motion as untimely. In support of his objection, Lambrecht filed an affidavit from his attorney and an accompanying facsimile transmittal sheet which indicated that Lambrecht's attorney had faxed a letter to USAA's counsel on April 19, 2005, which stated that he had received a copy of the circuit court's order.

1994 Mazda was not owned by, furnished, or available for the regular use of a "family member" as defined in the policy.

After a hearing on the motion,[4] the circuit court issued an order on August 22, 2005, in which it found USAA's motion for reconsideration was timely filed. As to the substantive issues, the Court affirmed its previous order but modified the basis for its decision.[5]

Both parties appealed the circuit court's order to the Court of Appeals. We certified the appeal from the Court of Appeals.

Although the parties in their cross-appeals raise multiple issues, we believe there are essentially two questions before the Court: (1) whether this Court has jurisdiction to review the appeal?; and (2) whether the circuit court erred in finding USAA had a duty to defend Lambrecht in the underlying wrongful death and survival actions?[6]

I. JURISDICTION

In his cross-appeal, Lambrecht contends the circuit court erred in finding USAA's motion for reconsideration was timely given it was filed more than ten days after entry of the April 8, 2005 order. If the motion is found to have been untimely, Lambrecht asserts the circuit court was without jurisdiction to hear the motion. As a result, Lambrecht claims this Court, in turn, is without jurisdiction to review the appeal on the ground the time was not tolled for USAA to file its Notice of Appeal.

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[4] The circuit court conducted the hearing in his chambers without a court reporter present.

[5] A comparison of the two orders reveals that the circuit court deleted two paragraphs from the initial order in which it addressed USAA's allegations that the policy specifically excluded coverage.

[6] Because the jurisdictional question is a threshold issue in the case, we have decided to address it first despite its order in the parties' briefs. In terms of the parties remaining issues, we have consolidated some issues and addressed some out of the "briefed" order in the interest of clarity.

"Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal." Canal Ins. Co. v. Caldwell, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999). "The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

"A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion." Id. at 15, 602 S.E.2d at 775 (citing Rule 203(b)(1), SCACR, Rules 50(e), 52(c), and 59(f), SCRCP). "A motion under Rule 59(e) is timely if it is 'served not later than 10 days after receipt of written notice of the entry of the order.' If a timely motion is made pursuant to Rule 59, the time for appeal runs from the receipt of written notice of entry of the order disposing of the motion." Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 3, 518 S.E.2d 56, 57 (Ct. App. 1999).

Strictly applying the above-outlined rules of civil and appellate procedure, there is evidence to support Lambrecht's assertion. However, for this Court to dismiss the appeal for lack of jurisdiction, it would have to essentially reject the circuit court's implicit credibility determination of USAA's counsel and find that counsel made a false representation to the circuit court regarding notice of entry of the order.

In response to Lambrecht's assertion that USAA's motion to reconsider was untimely, USAA's counsel submitted a letter to the circuit court in which she claimed she did not receive notice of entry of the final order until May 16, 2005, when Lambrecht's counsel contacted her. After receiving this notice, USAA's counsel claimed she filed the motion for reconsideration on May 26, 2005, within the

requisite ten-day time period. Presumably, USAA's counsel was being truthful when she made this representation to the circuit court. See Rule 407(1), SCACR ("A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."); Rule 3.3(a)(1)("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); Rule 4.1(a)("In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."); Rule 8.4(d)("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

Because there is no record of the hearing, this Court is unable to determine whether USAA's counsel's representations to the circuit court were under oath. Furthermore, the circuit court's order is silent regarding the basis for its decision finding that USAA's motion for reconsideration was timely filed. In light of this procedural posture, it was incumbent upon Lambrecht to file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to request that the circuit court provide specific factual findings for its decision. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue); Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) ("When a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal.").

Without explicit findings of fact by the circuit court, our decision can only be based on the implicit credibility determination of the circuit court. Deferring to the circuit court, we find USAA's counsel was credible in explaining her delay in filing the motion for reconsideration. See Reed v. Ozmint, 374 S.C. 19, 24, 647 S.E.2d 209, 211 (2007)

(noting the circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony). Based on the record before us, we decline to reverse the decision of the circuit court.

As a result, we hold USAA's motion to reconsider and Notice of Appeal were timely. In turn, this Court has jurisdiction to review USAA's appeal.

II. DUTY TO DEFEND

Having found this Court has jurisdiction to review USAA's appeal, the question becomes whether the circuit court erred in granting partial summary judgment in favor of Lambrecht and finding that USAA had a duty to defend Lambrecht against the underlying wrongful death and survival actions.

A. Standard of Review

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005); Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995) (citing Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169

(1991)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

B. Insurer's Duty to Defend

In Sloan Construction Company, Inc.. v. Central National Insurance Company of Omaha, this Court explained the theoretical underpinnings of an insurer's duty to defend:

> A liability insurance policy contains two insuring provisions of major significance: one, providing for the payment by the insurer of sums the insured shall become obligated to pay, the other providing, in substance, for the defense of any suit alleging bodily injury or property damage and seeking damages payable under the terms of the policy. The latter clause also provides, as a rule, that such a defense will be furnished even if any of the allegations of the suit are groundless, false or fraudulent.
>
> The duty to defend is separate and distinct from the obligation to pay a judgment rendered against the insured. American Casualty Co. v. Howard, 187 F.2d 322, 327 (4th Cir. 1951). Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the insurer's ultimate liability to the insured.
>
> * * *

> Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services.

Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 186-87, 236 S.E.2d 818, 820 (1977) (citations omitted).

Although an insurer's duty to defend is separate and distinct from its obligation to pay a judgment, the two are in a sense interrelated. If the facts alleged in the complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 291 S.C. 460, 463, 354 S.E.2d 378, 380 (1987). "Accordingly, the allegations of the complaint determine the insurer's duty to defend." Id.; B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) ("It is well settled that an insurer's duty to defend is based on the allegations of the underlying complaint."). "A liability insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy." B.L.G. Enters., Inc, 334 S.C. at 535, 514 S.E.2d at 330. "However, an insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded under the policy." Id.

"Insurance policies are subject to the general rules of contract construction." B.L.G. Enters., Inc, 334 S.C. at 535, 514 S.E.2d at 330. "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." Sloan Constr. Co., 269 S.C. at 185, 236 S.E.2d at 819. "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." B.L.G. Enters., Inc, 334 S.C. at 535, 514 S.E.2d at 330. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995).

Applying the foregoing to the facts of the instant case, we believe for several reasons the circuit court erred in finding USAA had a duty

to defend Lambrecht against the underlying wrongful death and survival suits. Initially, we find the circuit court overlooked an analytical step. In our view, the circuit court should have first determined whether the allegations in Clegg's Complaints brought the claims within policy coverage. Instead, the circuit court omitted this step and considered factual allegations presented to it at the summary judgment stage that were not part of the Complaints. The absence of this analysis is significant because the circuit court ordered USAA to reimburse Lambrecht for attorney's fees and costs in defending the initial filing of the lawsuit as well as defending against USAA's declaratory judgment motion. As will be discussed, we hold USAA did not have a duty to defend from the onset of the litigation.

An analysis of this issue is dependent upon a comparison of the relevant USAA policy provisions with the allegations in Clegg's Complaint.

The policy provisions at issue are as follows:

INSURING AGREEMENT

> **We** will pay damages for **BI** or **PD** for which any **covered person** becomes legally liable because of an auto accident. **We** will settle or defend, as **we** consider appropriate, any claim or suit asking for these damages. Our duty to settle or defend ends when our limit of liability for these coverages has been paid or tendered. **We** have no duty to defend any suit or settle any claim for **BI** or **PD** not covered under this policy.

EXCLUSIONS

> B. **We** do not provide Liability Coverage for the ownership, maintenance, or use of: (2) Any vehicle, other than your **covered auto** that is owned by **you**, or furnished or available for **your** regular use.

DEFINITIONS

A. **You** and **your** refer to the "named insured" shown in the Declarations and spouse if a resident of the same household.

E. **Family member** means a person related to you by blood, marriage, or adoption who is a resident of **your** household. This includes a ward or foster child.

L. **Your covered auto** means:

1. Any vehicle shown in the Declarations.

[A] **covered person** as used [in the Liability Coverage Section] means:

1. **You** or any **family member** for the ownership, maintenance, or use of any auto or **trailer**.

Here, Clegg's initial Complaint and Amended Complaints alleged causes of action against Lambrecht for negligent entrustment and negligence[7] based on Clegg's belief that Lambrecht was the owner or "de facto" owner of the 1994 Mazda. Taking these allegations as true, section B(2) of the USAA policy specifically excluded coverage. That provision explicitly excluded coverage for the "ownership" of a vehicle other than Lambrecht's covered automobiles. Because the 1994 Mazda was not listed in the Declarations section of the policy, it did not constitute a covered automobile. Accordingly, based solely on the allegations in Clegg's Complaints, the USAA policy did not provide coverage. Therefore, although USAA has a continuing

[7] "The theory of negligent entrustment provides: the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment." Am. Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981) (citations omitted).

potential duty to defend based on its contractual relationship with Lambrecht, it was not required to defend Lambrecht against this underlying lawsuit given the duty was limited by the coverage outlined in the insurance policy.

Furthermore, to the extent Lambrecht argues that this issue is controlled entirely by the "Insuring Agreement" provision, we find this assertion to be without merit. In our view, this policy provision cannot be read in isolation. Instead, the allegations in the Complaint must be applied to the policy in its entirety, which necessarily includes the exclusions section. See Falkosky v. Allstate Ins. Co., 311 S.C. 369, 372, 429 S.E.2d 194, 196 (Ct. App.), aff'd as modified, 312 S.C. 210, 439 S.E.2d 836 (1993) (recognizing an insurer has no duty to defend where liability is excluded from coverage); Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 168, 383 S.E.2d 2, 4 (Ct. App. 1989) (finding insurer had no duty to defend where policy expressly excluded coverage for damages alleged in the Complaint).

Although the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a Complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer's duty to defend is not strictly controlled by the allegations in Complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer. See BP Oil Co. v. Federated Mut. Ins. Co., 329 S.C. 631, 638, 496 S.E.2d 35, 39 (Ct. App. 1998) ("Although the determination of an insurer's duty to defend is based upon the allegations in a complaint . . . in some jurisdictions, the duty to defend will be measured by facts outside of the complaint that are known by the insurer."). The instant case provides such a scenario given USAA presented additional facts at the declaratory judgment stage that were not initially known to Clegg at the time she filed her Complaints.

Turning to the actual analysis in the circuit court's order, we find the court erred in ruling that the USAA policy provided coverage for the 1994 Mazda when it was undisputed by the parties that Lambrecht's

emancipated adult son, who was not a resident relative, was the owner of the vehicle.

First, under the terms of the policy, neither Lambrecht nor his son was a "covered person." Because Elliott did not reside in Lambrecht's household, he could not be considered a "covered person" in light of the fact that he was not a "family member." Given Lambrecht admitted that he did not "own," "maintain," or "use" the 1994 Mazda at the time of the accident, he also did not meet the definition of a "covered person."

Secondly, even if Lambrecht could be deemed a "covered person," we disagree with the circuit court's finding that he could be potentially liable for a claim of negligent entrustment arising from the negligent use of a noncovered automobile by someone other than the insured. A review of the cases cited by the circuit court reveals that they do not support the court's holding. In three of the cited cases, parents were found to be liable for damages arising out of their children's negligent driving. See Brown v. Champeau, 537 So. 2d 1120, 1122 (Fla. Dist. Ct. App. 1989)(en banc) (holding insurance policy covered mother, who became statutorily liable for her minor son's driving where she signed for his license application, for damages resulting from her son's negligence while driving his own vehicle); Eason v. Fin. Indem. Co., 721 So. 2d 528, 530 (La. Ct. App. 1998) (finding insurance policy provided coverage for parents who were held vicariously liable by statute for damages resulting from their minor child's negligent driving; noting, under policy, that mother would not have been responsible for "major child" as a "family member"); Scott v. Am. Standard Ins. Co. of Wisconsin, 392 N.W.2d 461, 464 (Wisc. Ct. App. 1986) (ruling insurance policy provided coverage for mother who was statutorily liable for her minor son's driving negligence where she sponsored her minor son in order to allow him to obtain a driver's license). We find these cases are distinguishable given the child at issue was a minor and the parents were statutorily liable for damages caused by their children's negligence. In the instant case, Elliott was an emancipated child at the time of the accident and there is no statutorily-imposed obligation for Lambrecht to be responsible for

damages caused by Elliott's negligence. Finally, the fourth case relied on by the circuit court is inapposite. Hertz Corp. v. Amerisure Ins. Co., 627 So. 2d 22, 23 (Fla. Dist. Ct. App. 1993) (holding insurance policy provided coverage for insured who was legally liable for a friend's negligent driving under the state's dangerous instrumentality doctrine where insured used his credit card to rent a vehicle for his friend). Here, there is no comparable dangerous instrumentality statute in this state. Furthermore, the undisputed facts established that Elliott, not Lambrecht, owned the vehicle involved in the accident. Thus, we do not believe that Lambrecht could be held "legally liable," as required by the terms of the policy, for Elliott's negligence based on these cases.

Additionally, there are cases from other jurisdictions in which the courts have held that the parent of an emancipated adult child driving a non-owned vehicle was not liable for the child's alleged negligent acts. See Tollefson v. Am. Family Ins. Co., 226 N.W.2d 280, 284-85 (Minn. 1974) (recognizing that insurance policy did not provide coverage for accident of emancipated child, who did not reside in insured's household and was driving a non-owned vehicle); see also Safeco Ins. Co. of Am. v. Parks, 19 Cal.Rptr.3d 17, 24-28 (Cal. Ct. App. 2004) (holding insurer had no duty to defend minor child where she was driving a non-owned vehicle and was not a member of insured's household); Crawley v. State Farm Mut. Auto Ins. Co., 979 P.2d 74, 80-83 (Haw. Ct. App. 1999) (finding insurer owed no duty to defend insured for negligent actions of minor child, who was not a resident relative, while driving a non-owned vehicle); Universal Underwriters Ins. Co. v. State Farm Auto. Ins. Co., 470 N.E.2d 1130, 1134 (Ill. App. Ct. 1984) (concluding insurer of minor's parents owed no duty to defend them for suits arising out of minor child's acts while driving a non-owned vehicle given child did not live with the insureds); Nichols v. Atnip, 844 S.W.2d 655, 660-63 (Tenn. Ct. App. 1992) (affirming summary judgment for parents of emancipated child, finding parents did not negligently entrust automobile to child and parents owed no duty to accident victims to supervise child's driving); Coop. Fire Ins. Ass'n of Vermont v. Am. Prot. Ins. Co., 599 A.2d 360, 385 (Vt. 1991) (holding insurer was not required to defend insured against negligent entrustment and supervision causes of action arising from minor child's

use of non-covered automobile); cf. Nat'l Union Fire Ins. v. Carricato, 439 S.W.2d 957, 959 (Ky. Ct. App. 1969) (finding emancipated child was covered under parents' insurance policy where she lived in parents' home and was the beneficial owner of the vehicle); see generally 8A Lee R. Russ, Couch on Insurance 3d §§ 118:21, 39 (Supp. 2007) (discussing liability coverage for the use of non-owned vehicles).

III. USAA's REMAINING ISSUES

In its brief, USAA raises two additional issues. USAA contends the circuit court erred in: (1) imposing a duty to defend when neither a covered auto nor a covered person was involved in the accident because such a ruling expands automobile liability policies beyond what the Legislature and the Supreme Court intended; and (2) granting summary judgment as to whether USAA owed Respondent a defense and an award of costs and fees when there had not been adequate time for discovery in the case.

Because these issues were neither raised to nor ruled upon by the circuit court, we find they were not properly preserved for our review. See B & A Dev., Inc. v. Georgetown County, 372 S.C. 261, 271, 641 S.E.2d 888, 894 (2007) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review). Furthermore, in light of our decision finding USAA did not have a duty to defend, we decline to address USAA's remaining issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when disposition of prior issues is dispositive).

CONCLUSION

Based on the foregoing, we find the circuit court correctly concluded that USAA's motion to reconsider was timely filed. Thus, we have jurisdiction to review USAA's appeal. As to the merits of the

appeal, we reverse the decision of the circuit court finding USAA had a duty to defend and reimburse Lambrecht. Because the USAA policy did not provide coverage to Lambrecht under either the allegations of Clegg's Complaints or the additional facts known to USAA and presented at the declaratory judgment stage, we hold USAA had no duty to defend and reimburse Lambrecht.

REVERSED.

MOORE, Acting Chief Justice, WALLER, J., and Acting Justices E. C. Burnett, III and Aphrodite K. Konduros, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amos Keith Partain, Respondent

v.

Upstate Automotive Group, Appellants.

Appeal from Anderson County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4373
Heard March 5, 2008 – Filed April 23, 2008

REVERSED

Troy A. Tessier and Hannah Rogers Metcalf, of Greenville, for Appellants.

W. N. Epps, Jr., of Anderson, for Respondent.

PIEPER, J.: Upstate Automotive Group appeals the circuit court's refusal to dismiss the legal action and compel arbitration of Amos K. Partain's tort claim. We reverse.

FACTS

On March 30, 2006, Amos Keith Partain (Partain) purchased a vehicle from Upstate Automotive Group (Upstate). Partain contends that he negotiated with Upstate for the purchase of a specific black 2006 Nissan truck. During the negotiations, Partain claims he visited the dealership several times and test-drove the truck he intended to buy.

Upon signing the paperwork for the purchase and after participating in a "vehicle introduction," Partain drove the truck home where he allegedly discovered that the truck in his possession was not the one he had test-driven and had intended to buy.

On April 28, 2006, Partain filed a complaint against Upstate alleging that Upstate violated the Unfair Trade Practices Act by selling Partain a different truck than the one he had negotiated to purchase. On May 8, 2006, Upstate filed a motion to dismiss and to compel arbitration consistent with an arbitration agreement the parties allegedly signed.

After a hearing, the circuit court denied the motion finding[1] that the claim was not arbitrable since the claim was a tort independent of the contract and because the alleged tortious behavior was not reasonably foreseeable. The court only addressed whether the nature of the claim herein was covered by the arbitration clause and presumed the validity of the arbitration clause. This appeal followed.

STANDARD OF REVIEW

Unless the parties agree otherwise, the question of the arbitrability of a claim is for judicial determination. Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007). While arbitrability determinations are subject to de novo review, appellate courts will not reverse a circuit court's factual findings if any evidence reasonably supports the findings. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).

[1] The circuit court made no findings upon the merits of the allegations.

LAW/ANALYSIS

Upstate argues that the circuit court erred in determining that the arbitration agreement did not apply to Partain's claim. We agree.

Both federal and state public policy strongly favor the arbitration of disputes. Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007). A court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "However, arbitration is a matter of contract, and a court cannot require a party to submit to arbitration any dispute, which he has not agreed to submit." Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007).

"To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993). "Any doubts concerning the scope of the arbitration clause should be resolved in favor of arbitration." Id. "A broadly-worded arbitration agreement applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Zabinski, 346 S.C. at 598, 553 S.E.2d at 119; see Long v. Silver, 248 F3d 381 (4th Cir. 2001). However, "[b]ecause even the most broadly worded arbitration agreements still have limits founded in general principles of contract law, [courts] will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." Aiken, 373 S.C. at 151, 644 S.E.2d at 709.

In the case at bar, the pertinent part of the arbitration agreement states:

> Buyer/Lessee acknowledges and agrees that all claims, demands, disputes or controversies of every kind or nature that may arise

> between them concerning any of the negotiations leading to the sale, lease or financing of the vehicle, terms and provisions of the sale, lease or financing shall be settled by binding arbitration conducted pursuant to the provision of 9 U.S.C. section 1 et. Seq. and according to the Commercial Rules of the American Arbitration Association[.] Without limiting the generality of the forgoing, it is the intention of the buyer/lessee and the dealer to resolve by binding arbitration all disputes between them concerning the vehicle[,] its sale, lease or financing and its condition including disputes concerning the terms and condition of the sale, lease or financing, the condition of the vehicle, any damage to the vehicle, the terms and meaning of any of the documents signed or given in connection with the sale, lease or financing, any representations, promises or omissions made in connection with the negotiations for the sale, lease or financing of the vehicle, or any terms, conditions or representations made in connection with the financing, credit life insurance, disability insurance and vehicle extended warranty or service contract purchased or obtained in connection with the vehicle.

We do not construe this arbitration agreement as encompassing all claims that may arise between Partain and Upstate. Rather, we interpret this clause as applying only to disputes arising out of or relating to the underlying agreement. Accordingly, to compel arbitration, a "significant relationship" must exist between Partain's claim and the contract containing the arbitration agreement. Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct. App. 2003).

Generally, regardless of the label Partain assigns to the claim, the arbitration clause will apply if the requisite relationship exists with the underlying agreement. See Great W. Coal (Kentucky), 312 S.C. at 563, 437 S.E.2d at 25. The underlying agreement between Upstate and Partain was for the sale of a vehicle. Partain's claim is that Upstate, in executing the sale of the vehicle to Partain, violated unfair trade practices.[2] The facts alleged by

[2] Partain did not assert a breach of contract claim or any other cause of action.

Partain are that he negotiated the purchase of a particular black 2006 Nissan truck and subsequent to that sale, Upstate switched vehicles and transferred a different vehicle to Partain than the one he had negotiated to purchase. We find that whether Partain received the vehicle he contracted to purchase is central to the agreement between Upstate and Partain. Accordingly, a significant relationship in fact does exist between Partain's unfair trade practice claim and the underlying agreement.

Having found a significant relationship exists between Partain's claim and the underlying agreement, we must next determine whether Upstate's actions constituted "illegal and outrageous acts that [were] unforeseeable to a reasonable consumer in the context of normal business dealings." Chassereau, 373 S.C. at 172, 644 S.E.2d at 720. Recently, our supreme court refused "to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." Aiken, 373 S.C. at 151, 644 S.E.2d at 709. In Chassereau, the court held a provision in an installation agreement requiring any disputes related to an above-ground swimming pool be subject to arbitration did not encompass unforeseen acts of the installer's employee that were historically associated with the tort of outrage. 373 S.C. 168, 644 S.E.2d 718. Similarly, in Aiken, the court held that an arbitration clause in a loan agreement between borrower and finance company did not apply to borrower's tort claims because the theft of the borrower's personal information was outrageous conduct that borrower could not possibly have foreseen. 373 S.C. 144, 644 S.E.2d 705. These cases merely "seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." Id. at 152, 644 S.E.2d at 709.[3]

[3] Moreover, in Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 27, 644 S.E.2d 663, 670, our Supreme Court indicated that contracts between a consumer and automobile retailer may be viewed with "considerable skepticism." Notwithstanding, just as the supreme court indicated that adhesion contracts are not per se unconscionable, the court did not go so far as to indicate that similar consumer/automobile retailer contracts are per se unconscionable. The court reiterated that parties are always free to "contract

In the present case, we find the conduct alleged does not meet the standard established in Chassereau and Aiken.[4] Though the conduct alleged by Partain, if true, is conduct this court would never condone or regard lightly, when the underlying tort claim is significantly related to the contract and the arbitration agreement is not violative of public policy, statutory law or the Constitution, this court will compel arbitration consistent with the strong presumption in its favor under our state's policy.

CONCLUSION

We respectfully conclude the circuit court erred in denying the motion to compel arbitration. Since no other issues were raised as to the validity of the provision or otherwise, the decision is hereby

REVERSED.

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

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away their rights." Id., 373 S.C. at 28, 644 S.E.2d at 670. The freedom to contract does not necessarily preclude an attempt to set aside a contract based on various grounds including, but not limited to, unconscionability. However, unlike the Simpson case, the arbitration provision herein was not attacked on grounds of unconscionability; instead, the provision was presumed to be valid by the court. On appeal, neither party has challenged the validity of the arbitration provision.

[4] The trial court never made a specific finding as to whether the alleged acts were outrageous under Chassereau and Aiken. However, the court did find that the plaintiff could not have foreseen the tortious conduct.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas R. Wieters, M.D., Respondent,

v.

Bon-Secours-St. Francis Xavier Hospital, Inc., Allen P. Carroll, William B. Ellison, Jr., Jeffrey M. Deal, M.D., Sharron C. Kelly, and Esther Lerman Freeman, Psy. D.

of whom:

Bon-Secours-St. Francis Xavier Hospital, Inc., Allen P. Carroll, William B. Ellison, Jr., Jeffrey M. Deal, M.D., and Sharron C. Kelly are Appellants.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4374
Heard April 8, 2008 – Filed April 23, 2008

REVERSED

James J. Hinchey, Jr., of Charleston, for Appellants.

Gregg Meyers, of Charleston, for Respondent.

Ralph W. Barbier and Jeanne M. Born, both of Columbia, for Amicus Curiae South Carolina Hospital Association.

ANDERSON, J.: In this action for defamation and civil conspiracy brought by Dr. Thomas R. Wieters (Wieters) against Bon-Secours-St. Francis Xavier Hospital, Inc. (Hospital), Allen P. Carroll, Dr. William B. Ellison, Jr., Dr. Jeffrey M. Deal (Deal), and Sharron C. Kelly, Hospital and these individuals (collectively Hospital Personnel) appeal an order compelling discovery. Dr. Esther Lerman Freeman (Freeman) is a defendant but not a party to this appeal. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Wieters is a physician licensed to practice in South Carolina. His medical staff privileges were summarily suspended by Hospital. Pursuant to the Hospital's Medical Staff Bylaws, he was granted a hearing by a committee of the medical staff and an appellate hearing before a committee of the Hospital's Board. After each hearing, the respective committee upheld the suspension.

As required by federal law, Hospital reported Wieters' suspension to the National Practitioner Data Bank. Wieters sued Hospital and Hospital Personnel for defamation, alleging the report they transmitted to the National Practioner Data Bank contained false information about him. He maintains Hospital, Hospital Personnel, and Freeman engaged in a conspiracy to injure him.

During discovery, Wieters, through his attorney, deposed Deal and a non-party witness, Dr. Donald Pocock (Pocock). Wieters inquired about the circumstances that led to the summary suspension of other physicians at Hospital, its affiliate Roper Hospital, and other hospitals where the witnesses had worked. Both Deal and Pocock testified how many physicians they recall being suspended during their service on peer review committees, but both deponents were instructed by their counsel or Hospital's counsel to not answer questions concerning what led to the other physicians' suspensions, citing the confidentiality provisions of South Carolina's Peer Review Statute, section 40-71-20 of the South Carolina Code.

Hospital and Hospital Personnel sought a protective order pursuant to Rule 26, SCRCP. Wieters moved to compel the witnesses to answer the deposition queries. The circuit court issued an order compelling Deal and Pocock to answer general questions regarding other summary suspensions without identifying the physicians involved. The relevant section of the order reads:

> Deposition questions not answered. This case is about, in part, the information which related to a summary suspension of the plaintiff doctor. In deposition, witnesses Dr. Deal and Dr. Pocock were asked to provide a general description of the circumstances which prompted other applications of summary suspension. All such information was refused, and the witnesses instructed not to answer, citing privilege. The Hospital defendants filed a motion for a protective order claiming the information was protected peer review citing S.C. Code § 40-71-20 and McGee v. Bruce Hospital, 468 S.E.2d 633 (1996).
>
> The information relates to the claim of the plaintiff and should be provided. The plaintiff has not requested identifying information, only the nature of the circumstances that gave rise to other applications of summary suspension, and no privilege prohibits

> that information being provided. The plaintiff may pose the questions the witnesses were instructed not to answer, and to make any related follow up questions.

Hospital and Hospital Personnel appeal the order compelling Deal and Pocock to answer the deposition questions.[1]

ISSUES

1. Is the circuit court's order compelling discovery appealable?

2. Do the deposition questions unanswered by Deal and Pocock pertain to confidential committee proceedings protected by the Peer Review Statute, South Carolina Code section 40-71-20?

STANDARD OF REVIEW

A circuit court judge's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion. Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734 (1989); Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). The burden is upon the party appealing the order to demonstrate the court abused its discretion. Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997).

An abuse of discretion may be found by this Court where the appellant shows that the conclusion reached by the circuit court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law. Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990); Darden v. Witham, 263

[1] The parties briefed the refusal of Dr. Stephen Shapiro (Shapiro) to answer the same questions at his deposition, which was conducted after the circuit court issued its order regarding Deal and Pocock. Because there is no order from the circuit court regarding Shapiro's deposition, the matter is not properly before this Court.

S.C. 183, 209 S.E.2d 42 (1974), overruled on other grounds, Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

LAW/ANALYSIS

I. Appealability of discovery orders

As a general rule, only final judgments are appealable. Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); Bolding v. Bolding, 283 S.C. 501, 323 S.E.2d 535 (Ct. App. 1984). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005).

An order directing a non-party to submit to discovery is not immediately appealable. Lowndes Products, Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974). Instead, a non-party must be held in contempt before an appeal may be taken challenging the validity of the discovery order. Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986).

An order compelling a party to submit to discovery is interlocutory and not directly appealable. Hamm v. South Carolina Public Service Com'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); Waddell v. Kahdy, 309 S.C. 1, 419 S.E.2d 783 (1992); Wallace v. Interamerican Trust Co., 246 S.C. 563, 144 S.E.2d 813 (1965). "This discovery order is not a final order because it leaves some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined." Ex parte Wilson, 367 S.C. at 13, 625 S.E.2d at 208.

Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within South Carolina Code section 14-3-330. Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004). Section 14-3-330 states:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (1976 & Supp. 2007).

An order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). Such an order must be immediately appealed or any later objection in a subsequent appeal will be

waived. Id. The order to unseal the record of a divorce proceeding is immediately appealable. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006) ("[W]e agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure."). The denial of appellant's motion to proceed anonymously meets the benchmark for appellate review. Doe v. Howe, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) ("The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously.").

Statutes and rules of court should be construed liberally in favor of the right of appeal. Stroup v. Duke Power Co., 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949); Haughton v. Order of United Commercial Travelers of Am., 108 S.C. 73, 74-75, 93 S.E. 393, 394 (1917); O'Rourke v. Atl. Paint Co., 91 S.C. 399, 403, 74 S.E. 930, 931 (1912).

The South Carolina Supreme Court considered the same issue before us in the instant case in McGee v. Bruce Hospital System, 312 S.C. 58, 439 S.E.2d 257 (1993). Although McGee involved a medical malpractice wrongful death claim and this case is an action for defamation and conspiracy, both are actions at law and have the same procedural posture. Id. at 60, 439 S.E.2d at 259 ("This matter is before the Court pursuant to the circuit court order granting the plaintiff's motion to compel and instructing the defendant Bruce Hospital System . . . to produce the credentialing files and clinical privileges for each of the defendant physicians.").

Because the Supreme Court determined it appropriate to review the discovery order compelling a hospital to produce credentialing files, we hold the order issued by the circuit court is immediately appealable.

II. Principles of statutory interpretation

The issue of interpretation of a statute is a question of law for the court. Univ. of S. Cal. v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App.

2005); see also Catawba Indian Tribe of S.C. v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007), cert. denied, 128 S.Ct. 256 (2007); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005), cert. dismissed, 374 S.C. 346, 649 S.E.2d 485 (2007); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582.

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle, 344 S.C. at 122, 542 S.E.2d at 740 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); Worsley Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561, 486 S.E.2d at 495; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 376, 498

S.E.2d 894, 896 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 166, 573 S.E.2d 783, 785 (2002); Adams v. Texfi Indus., 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005), cert. denied, June 2007; see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Liberty Mut. Ins. Co., 363 S.C. at 622, 611 S.E.2d at 302; see also Mid-State Auto Auction v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (stating that in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

III. Legislative/jurisprudential efficacy of peer review

The Peer Review Statute provides:

> (A) All proceedings of and all data and information acquired by the committee referred to in Section 40-71-10 in the exercise of its duties are confidential unless a respondent in the proceeding requests in

> writing that they be made public. These proceedings and documents are not subject to discovery, subpoena, or introduction into evidence in any civil action except upon appeal from the committee action. Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings, nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings or revealing such matters to third persons. . . .

S.C. Code Ann. § 40-71-20 (Supp. 2007).

Deal and Pocock have been ordered by the circuit court to reveal knowledge learned in their service on committees within the scope of South Carolina Code section 40-71-10. The protections of the Peer Review Statute extend to:

> an appointed member of a committee of a medical staff of a licensed hospital, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital . . . for any act or proceeding undertaken or performed within the scope of the functions of the committee . . . .

S.C. Code Ann. § 40-71-10 (Supp. 2007).

The cognoscenti of health care nomology trust and rely upon Peer Review Statutes as the quiddity and hypostasis of the hospital/physician relationship. The quintessence and elixir of the peer review process is confidentiality. In enacting the Peer Review Statute, the General Assembly struck a balance between a litigant's need to know with the public's interest in quality health care through meaningful peer review. The legislature stated

that only in one narrow circumstance does a litigant have access to peer review information, an "appeal from the committee action."

If peer review information is subject to compulsion beyond the narrow boundaries enacted by the legislature, the foundation of the peer review process would be severely compromised. Without the promise of confidentiality of the information, physicians would not fully and completely participate in the process or not participate at all. The lack of candor and openness would hinder and thwart hospitals in their efforts to effectively monitor physicians. This is not an appeal from the committee action, so the exception to the confidentiality of peer review information does not apply.

In McGee v. Bruce Hospital System, the South Carolina Supreme Court expounded upon the reasoning behind the Peer Review Statute, citing cases from West Virginia and Florida:

> The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process.

312 S.C. 58, 61, 439 S.E.2d 257, 259 (1993) (citations omitted). The Court found that the peer review statute protects documents acquired by the committee of the medical staff as part of its decision-making process. Id. at 63, 439 S.E.2d at 260.

The Court distinguished the committee's decision-making process from its consequence:

> [W]e find that the outcome of the decision-making process is not protected. Permitting discovery of the effect of the committee proceedings does not inhibit

> open discussion. In our view, the confidentiality statute was intended to protect the review process, but not restrict the disclosure of the result of the process.

Id. (citations omitted).

The Supreme Court echoed its holding from McGee in Durham v. Vinson, 360 S.C. 639, 602 S.E.2d 760 (2004). The Court analyzed whether the defendant physician's privileging file was protected under the Peer Review Statute and determined the file was not subject to discovery or disclosure. The Court articulated:

> The trial court erred by allowing Durham's counsel to ask Dr. Vinson about his failure to fully disclose his privileging file, a file that he was under no obligation to disclose pursuant to section 40-71-20. If physicians can be questioned before the jury about the refusal to produce this privileged information, the effect is to pressure them toward disclosure of the privileging file. As occurred here, the exercise of the statutory right not to disclose the information would be used against the physician as evidence the physician is hiding something. Allowing this to occur does not serve the policy goals of promoting candor and open discussion among participants in the peer review process.

Id. at 649, 602 S.E.2d at 765.

Deal and Pocock have answered questions about the outcome of committee actions, namely how many physicians have been suspended while each one was serving as a committee member. They have refused to answer questions relating to what led to the suspension of those physicians. The Peer Review Statute is salutary and salubrious. All committee actions are safeguarded and protected by the Peer Review Statute. The reasons considered by a committee to summarily suspend a physician are confidential

just like the documents and testimony reviewed when a physician applies for clinical privileges or appeals a suspension of clinical privileges.

CONCLUSION

The Peer Review Statute serves the important public policy goal of ensuring quality medical care to citizens of South Carolina by protecting confidences revealed to committees evaluating the qualifications of physicians practicing in hospitals. The necessitude and essentiality for this information to remain private is so momentous, portentous, and consequential that appellate courts of this state will address orders jeopardizing this confidentiality despite their interlocutory nature.

We hold the efficaciousness and applicability of the South Carolina Peer Review Statute mandates the revelation by physicians of the outcome of committee actions. We rule that any further questions delving into the committee's proceedings are absolutely protected and safeguarded by the statutory provisions encapsulated in the Peer Review Statute.

Accordingly, the order of the circuit court is

REVERSED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RRR, Inc., Respondent,

v.

Thomas M. Toggas and
Katherine Toggas, Appellants.

Appeal From Beaufort County
John C. Few, Circuit Court Judge

Opinion No. 4375
Submitted February 1, 2008 – Filed April 23, 2008

AFFIRMED

David B. Marvel, and Andrew W. Countryman, both of Charleston, for Appellants.

Otto W. Ferrene, Jr., of Hilton Head Island, for Respondent.

HEARN, C.J.: Thomas M. Toggas and Katherine Toggas (Appellants) appeal the circuit court's order denying their motion to alter, amend or vacate judgment, and instead affirming the findings of the jury. We affirm.[1]

FACTS

Appellants contracted with RRR, Inc., to rent their beachfront condo on Hilton Head, South Carolina to guests. The contract provided for the rental commission, costs of cleaning and maintenance to be deducted from the gross rental funds, and that Appellants would be responsible for any damages arising from bookings made by RRR that were not honored. RRR booked Appellants' condo during the busy weeks of the Family Circle Tennis Tournament and the MCI Heritage Golf Tournament, which were held in consecutive weeks in Hilton Head. Thereafter, Appellants refused to honor the bookings, and RRR was required to find comparable units out of its own pocket for the short-term guests it had previously booked that were then out of a place to stay.

At the time of the double booking, RRR, in the normal course of business, had in its possession rental funds it had received from Appellants' prior rentals. According to the contract, RRR attempted to use these funds as partial payment for the out of pockets expenses incurred in finding the short-term guests additional lodging. Appellants disagreed with this practice, and a dispute arose. Over the course of the next week, Appellants began calling the cell phone of the owner of RRR, as well as its business phone. During these calls and messages that were left, Appellants coupled extreme profanity and lewd name-calling of RRR's female employees, with threats to shut RRR down and ruin its business. According to testimony, Appellants also made calls to the Chamber of Commerce, the Beaufort County Sheriff's Department, the local newspaper, and the South Carolina Real Estate Commission. RRR's business apparently began to suddenly and severely decline, and RRR eventually brought suit against Appellants alleging three causes of action: breach of contract, breach of contract accompanied by a fraudulent act, and unlawful use of a telephone.

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

During the course of this four year dispute, Appellants have been represented by four different attorneys. Attorney T. Wayne Yarborough, attorney number two, represented Appellants before the trial until a fee dispute led to his filing three separate motions to be relieved as counsel. Yarborough's second motion was denied by Master-in-Equity Kemmerlin until the parties could resolve their differences in a fee dispute resolution. Subsequently, Yarborough filed a third motion, and this was granted by Circuit Court Judge Gregory in April, 2003. Yarborough immediately sent a copy of the order relieving him as counsel by certified mail, return receipt requested, along with two voided checks from Appellants totaling three thousand dollars, as well as a check from Yarborough to Appellants for two thousand dollars. Appellant Thomas Toggas signed for this mail, which also notified Appellants they should obtain counsel within thirty days, and that if they did not, they would be listed and contacted as pro se from that point forward.

The case was thereafter called to trial without Appellants present in July, 2003. Testimony presented at the trial indicated the Clerk of Court sent notice of the court roster indicating the case would be called to Appellants; however, Appellants contend they received no such notice. A jury trial and verdict resulted in a finding of $1,550 actual damages to each Thomas and Katherine Toggas on the breach of contract claim. The breach of contract accompanied by a fraudulent act claim resulted in a verdict against Thomas Toggas in the amount of $75,000 in actual damages, and $500,000 in punitive damages. Finally, the jury found damages on the unlawful communication charge against Thomas Toggas in the amount of $4,781, and $60,000 in punitive damages.

The judgment was mailed to Appellants' home of record, and Appellants subsequently filed a motion to alter, amend or vacate the judgment. After a hearing, the motions for a new trial absolute, vacation of the judgment, and new trial nisi remittitur were denied. This appeal followed.

LAW/ANALYSIS

I. Excusable Neglect

Appellants first contend the circuit court erred in refusing to set aside the judgment for excusable neglect under Rule 60, SCRCP, claiming they received no notice of the trial. We disagree.

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). An appellate court's standard of review, therefore, is limited to determining whether there was an abuse of discretion. Id. at 18, 594 S.E.2d at 482. Relief under Rule 60(b)(1), SCRCP, lies within the sound discretion of the circuit court and will not be reversed on appeal absent an abuse of discretion. Paul Davis Sys., Inc. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 225, 607 S.E.2d 358, 360 (Ct. App. 2004).

Rule 60(b)(1), SCRCP provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . .

"Although most often used when relief is sought from a judgment by default, Rule 60(b)(1) applies to any final judgment." Goodson v. Am. Bankers Ins. Co. of Fla., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988). "Relief under this section is within the sound discretion of the circuit court and will not be disturbed absent a clear abuse of that discretion." Id. "Such an abuse arises when the circuit court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." Id. See also Ledford v. Pennsylvania Life Insurance Co., 267 S.C. 671, 230 S.E.2d 900 (1976); Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987). "While these cases deal with the circuit court's

discretion in setting aside default judgments, the principles are equally applicable to motions for relief from any final judgment." Goodson, 295 S.C. at 402, 368 S.E.2d at 689.

Appellants' basis for claiming excusable neglect is that they did not receive actual notice that the trial was imminent. Whether Appellants received notice of the impending trial is not clear from the record; however, the circuit court found specifically that notice was given Appellants by the clerk of court. The foundation of this finding was the testimony of both the Clerk of Court Elizabeth Smith, and Deputy Clerk of Court Joni Fields. Fields testified she had sent Appellants a copy of the July roster to their Washington D.C. address of record because Appellants were listed as pro se. Furthermore, the circuit court found Appellants' testimony that they did not receive notice to not be credible, stating the testimony was "filled with calculated and obvious misstatements and deliberate lies." "Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 338, 557 S.E.2d 468, 474 (Ct. App. 2003). Accordingly, the circuit court did not abuse its discretion in finding one witness's testimony more credible than another's in denying Appellants' motion to set aside the judgment due to excusable neglect.

II. New Trial; New Trial Nisi Remittitur

Appellants next contend the circuit court erred in refusing to grant their motion for a new trial absolute, or a new trial nisi remittitur pursuant to Rule 59, SCRCP. We disagree.

A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). "The jury's determination of damages, however, is entitled to substantial deference." Id. The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion,

caprice, prejudice, partiality, corruption or some other improper motives. Id. at 379-80, 426 S.E.2d at 805.

The grant or denial of new trial motions rests within the discretion of the circuit court and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Umhoefer v. Bollinger, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). See also Boozer v. Boozer, 300 S.C. 282, 387 S.E.2d 674 (Ct. App. 1988) (Court of appeals has no power to review circuit court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law.). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Umhoefer, 298 S.C. at 224, 379 S.E.2d at 297.

Based on the standard described above, the circuit court was left with Appellants' testimony to decide if the jury's determination of fault and resulting damages was unsupported by the evidence or based on errors in law. Appellants testified they only received several checks from Yarborough, representing monies paid by Appellants in advance and due back after Yarborough was relieved as counsel, and at no time were put on notice that Yarborough had been actually been relieved. However, Yarborough testified he sent Appellants a letter explaining he had been relieved as counsel, that Appellants should retain new counsel within thirty days, and that if they did not, they would be listed and contacted as pro se from that point forward. The letter also included as enclosures two voided checks from Appellants, as well as a refund check from Yarborough in the amount of two thousand dollars. The letter and its enclosures were sent via certified mail, and Yarborough produced a return receipt signed by Thomas Toggas proving Appellants' receipt. Furthermore, both Thomas and Katherine Toggas provided affidavits in support of their motion to alter or amend judgment, swearing to receipt of notice that Yarborough had been relieved pursuant to the letter described above. The circuit court found Appellants' credibility to be "absolutely zero." We therefore cannot say the circuit court's decision to deny Appellants' motion for a new trial absolute was an abuse of discretion.

Similarly, the circuit court alone has the power to grant a new trial nisi when it finds the amount of the verdict to be merely inadequate or excessive. McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995).

While the circuit court may not impose its will on a party by substituting its judgment for that of the jury, it may give the party an option in the way of additur or remittitur, or, in the alternative, a new trial. Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 493, 361 S.E.2d 775, 776 (Ct. App. 1987). The circuit court has wide discretionary power to reduce the amount of a verdict which, in its judgment, is excessive. Daniel v. Sharpe Const. Co., 270 S.C. 687, 690, 244 S.E.2d 312, 314 (1978). The decision of the circuit court to reduce the verdict will not be disturbed unless it clearly appears that the exercise of discretion was controlled by a manifest error of law. Id. The circuit court, being cognizant of the evidentiary atmosphere at trial, is in a far better position to review the damages than this court. Id. Accordingly, great deference is given to the circuit court, especially in the area of damages. Id.

In this case, the circuit court did a full analysis of the damages awarded RRR by the jury, including the appropriateness and excessiveness of the punitive damage award. As enumerated by our supreme court in Gamble v. Stevenson, upon a post-trial motion challenging an award of punitive damages, a circuit court may consider the following factors in its review: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) "other factors" deemed appropriate. Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991).

After conducting a full Gamble review, the circuit court determined the award of damages and punitive damages was appropriate given the conduct

of Appellants. We can find no error of law amounting to an abuse of discretion in this determination.

III. No Private Right of Action

Appellants also contend Section 16-17-430 of the South Carolina Code (Supp. 2006) is a criminal statute, and does not otherwise provide a private right of action to a litigant. Appellants maintained in their answers and counterclaims to RRR's complaint, as well as in the memorandum in support of their motion to alter, amend or vacate the judgment, that RRR's cause of action for unlawful use of the telephone was not properly pled or proven. However, Appellants were not present at the trial, and therefore did not timely object to the circuit court's instruction to the jury that 16-17-430 created a private right of action. As a result, this issue is not preserved for our review. Although we question whether or not this statute does, indeed, create a private right, in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the circuit court. It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved. Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Moreover, a party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (issue raised for first time in Rule 59, SCRCP, motion is not preserved for review).

IV. Entry of Default and Notice

Next, Appellants contend they were not provided notice as prescribed under Rule 55, SCRCP. Appellants maintain RRR should have been required to seek a default judgment in this situation, and because Appellants had previously appeared or otherwise defended in the action against them, under Rule 55(b)(2), they were entitled to written notice of the motion or application for judgment at least three days prior to the hearing. Claiming to have never received this notice, Appellants assert the damages award should be vacated. We disagree.

Rule 55(a), SCRCP, states "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend ... the clerk shall enter his default upon the calendar." This case is similar to that of Goodson, where Appellants had not "failed to plead" and no default was entered by the clerk; rather as Appellants themselves point out, they have actively defended the action for four years. Goodson, 295 S.C. 400, 368 S.E.2d 687. Furthermore, Rule 55(b), SCRCP, provides for written notification where there has been an application for judgment by default. Id. at 404, 368 S.E.2d at 690. Here, as in Goodson, there was no application for default, and the case went before a jury and a full trial was held on the matter.

Moreover, Rule 54(c), SCRCP, provides:

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

In addition, "[a]lthough there appears to be authority for the proposition that a failure to appear at trial after answering the complaint should entitle a defendant to default status, the majority view appears to permit the plaintiff to proceed to judgment on the merits. See 11A Words and Phrases "Default" 272-274 (1971); Coulas v. Smith, 96 Ariz. 325, 395 P.2d 527 (1964); Tartaglia v. Del Papa, 48 F.R.D. 292 (E.D.Pa.1969)." Goodson, 295 S.C. at 405-06, 368 S.E.2d at 691. (quoting Cureton, J., concurring and dissenting). As a result, because RRR did not seek or file for a default judgment, instead proceeding to a judgment on the merits, the notice prescribed in Rule 55(b)(2) is inapplicable to the case at hand.

V. Inappropriate Collateral Review

Finally, Appellants contend Judge Gregory's order, granting Yarborough's motion to be relieved as counsel, was an inappropriate collateral review of Judge Kemmerlin's order, and is therefore, void. Appellants did not make this argument in their motion to alter, amend or vacate; therefore it is not preserved for our review. See Pye, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (finding it is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved.).

CONCLUSION

Based on the foregoing, we hold the circuit court did not err in denying Appellants' motion to alter, amend or vacate judgment. The decision of the circuit court is accordingly

AFFIRMED.

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