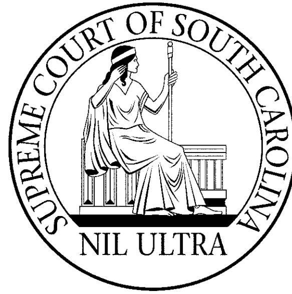

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17

April 24, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

William Larry Childers, Jr., Petitioner/Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Kershaw County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26319
Heard December 6, 2006 – Filed April 23, 2007

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, and Solicitor Warren Blair Giese, all of Columbia, for Respondent/Petitioner.

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner/Respondent.

JUSTICE BURNETT: We granted both parties' petitions for writ of certiorari to review the Court of Appeals' decision in State v. Childers, 358 S.C. 614, 595 S.E.2d 872 (Ct. App. 2004). We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

On October 14, 2002, William Larry Childers visited his former live-in girlfriend (the victim) at her mother's home.[1] According to the victim's sister, Childers became upset during the meeting because the victim would not leave the house to talk to him. Later that night, Childers saw the victim along with her sister and her sister's ex-husband at a turkey shoot and a confrontation ensued.

About 3:00 a.m. on October 15, the victim's brother returned to his mother's home and after hearing footsteps in a wooded area near the home, he determined Childers was prowling around the area. The brother immediately called 911, but the police were unable to locate Childers when they arrived. The brother testified he was awakened approximately thirty minutes later by the sound of gunshots in the front yard and when he went outside, he saw "Childers go across the yard."

According to the victim's sister, she along with her ex-husband and the victim were standing in the victim's mother's yard talking after the turkey shoot when Childers suddenly appeared in the yard and shot the victim twice, at close range, in the head. The victim's sister said she immediately ran toward the house and Childers fired two more shots at her. The victim's former brother-in-law testified he attempted to warn the victim and his ex-wife that Childers was approaching them, but Childers shot the victim in the back of the head before he could do so.

According to Childers, he went to a friend's home, which was close to the victim's mother's home, after the turkey shoot. Childers testified he then

[1] For a more complete recitation of the facts, see State v. Childers, 358 S.C. 614, 595 S.E.2d 872 (Ct. App. 2004).

decided to walk to the victim's mother's home to talk to the victim. He testified he carried a loaded gun with him to protect himself from stray dogs during the walk, and as he approached the group standing in the yard, he had the gun in his coat pocket. Childers stated the victim's former brother-in-law shot at him first. He returned fire, and in doing so, he shot the victim. Childers also testified he did not visit the victim that night with the intention of shooting anyone, but he fired because he was fired upon.

After the jury had been selected, Childers requested the trial judge relieve his defense counsel, but the trial court denied this request. At the end of trial, defense counsel requested a jury charge on voluntary manslaughter. The trial judge refused to charge voluntary manslaughter, but charged murder, involuntary manslaughter, and self-defense. Childers was convicted of murder, assault of a high and aggravated nature,[2] and discharging a firearm into a dwelling. He received a life sentence for murder and concurrent terms of ten years' imprisonment for each of the remaining two convictions.

Childers appealed his convictions. The Court of Appeals upheld the trial judge's refusal to relieve defense counsel. The Court of Appeals reversed and remanded Childers' murder conviction after finding the trial judge erred in failing to give a jury charge on voluntary manslaughter. Childers, 358 S.C. at 614-21, 595 S.E.2d at 872-76.

CHILDERS' ISSUE

Did the Court of Appeals err in finding the trial judge did not abuse his discretion by denying Childers' request to relieve defense counsel?

[2] The Court of Appeals' opinion incorrectly referred to this conviction as assault and battery of a high and aggravated nature. Childers, 358 S.C. at 615, 618, 621, 595 S.E.2d at 873-74, 876.

LAW/ANALYSIS

Childers argues his defense counsel should have been relieved because defense counsel, while employed as an assistant solicitor, had previously prosecuted him on an unrelated charge.[3] We disagree.

A motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005); State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001). The movant bears the burden to show satisfactory cause for removal. Gregory, 364 S.C. at 152, 612 S.E.2d at 450; Graddick, 345 S.C. at 386, 548 S.E.2d at 211.

Childers asked the trial judge to relieve defense counsel based on defense counsel's prior prosecution of him and his perceived lack of defense counsel's trial preparation. Defense counsel told the trial judge he was ready and prepared to go to trial and he had no independent recollection of prosecuting Childers. Childers failed to show his counsel had any divided loyalties or an actual conflict of interest. See Gregory, 364 S.C. at 152, 612 S.E.2d at 450 ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's."); see also People v. Abar, 736 N.Y.S.2d 155 (N.Y. App. Div. 2002) (finding there was no conflict of interest where defendant's public defender had previously prosecuted him on unrelated charges when she was employed as an assistant district attorney); State v. Cobbs, 584 N.W.2d 709 (Wis. Ct. App. 1998) (concluding there was no actual or serious potential conflict where defendant's counsel had previously prosecuted defendant while working in the district attorney's office). The Court of Appeals correctly found the trial

[3] Childers also argues the trial judge erred in denying his request to relieve counsel because counsel had previously represented the victim's brother. This issue is not preserved for review because it was not raised at trial. See State v. Hicks, 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (to be preserved for appeal, an issue must be raised to and ruled upon by the trial judge).

judge did not abuse his discretion by denying Childers' request to relieve counsel.

THE STATE'S ISSUE

> Did the Court of Appeals err in finding the trial judge improperly denied Childers' request for a voluntary manslaughter charge?

LAW/ANALYSIS

The State argues Childers was not entitled to a voluntary manslaughter charge given the facts of this case. We agree.

Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon a sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 285-86, 350 S.E.2d 180, 184 (1986). "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (internal quotations omitted). Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter. State v. Hughey, 339 S.C. 439, 451, 529 S.E.2d 721, 727 (2000).

The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). In determining whether the evidence requires a charge on voluntary manslaughter, this Court must view the facts in the light most favorable to the defendant. *Id.* at 101, 525 S.E.2d at 512-13. To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *Id.*

The Court of Appeals determined the evidence showed that Childers only fired his gun after being fired upon by the victim's former brother-in-law. The Court of Appeals found, although the victim did not provoke Childers, the provocation by her ex-brother-in-law could be transferred to the victim under the doctrine of transferred intent. Based on this analysis, the Court of Appeals concluded Childers was entitled to a voluntary manslaughter charge. Childers, 358 S.C. at 621, 595 S.E.2d at 876.

Viewing the evidence in the light most favorable to Childers, this factual scenario is completely void of any evidence supporting a charge of voluntary manslaughter. Childers testified he was provoked by the victim's former brother-in-law and he fired his gun in response to being first shot at by the ex-brother-in-law. Childers' testimony does not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation by the victim because, contrary to the Court of Appeals' decision, the overt act that produces the sudden heat of passion must be made by the victim. See State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) ("[W]hen death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault-by some overt, threatening act-which could have produced the heat of passion."); State v. Locklair, 341 S.C. 352, 363, 535 S.E.2d 420, 425 (the defendant was not entitled to a voluntary manslaughter charge because the "overt act was made by a third party, not the deceased, and South Carolina has not recognized sufficient legal provocation from a third party that can be transferred to the victim."); State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) ("The provocation must come from some act of or related to the victim in order to constitute sufficient legal provocation."). Because there is no evidence whatsoever tending to reduce the crime from murder to voluntary manslaughter, the Court of Appeals erred in finding the trial judge erroneously failed to give a voluntary manslaughter charge.

CONCLUSION

For the foregoing reasons, we uphold Childers' convictions.

AFFIRMED IN PART; REVERSED IN PART.

WALLER, J., concurs. TOAL, C.J., concurring in result only in a separate opinion. PLEICONES, J., dissenting in a separate opinion in which MOORE, J., concurs.

CHIEF JUSTICE TOAL: I concur in the result reached by the majority, but I write separately because I would resolve the case on different grounds. Like the majority, I believe the court of appeals incorrectly determined that the evidence presented at trial entitled the defendant to a voluntary manslaughter charge. In my view, however, the concept of transferred intent has little relevance to the outcome of the instant case.

As this Court's precedent provides, voluntary manslaughter is the unlawful killing of a human being in a sudden heat of passion upon sufficient legal provocation. *State v. Walker*, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996). Voluntary manslaughter mitigates an otherwise felonious killing to manslaughter, and while the elements of passion and provocation need not be of such a degree so as to dethrone reason entirely, or shut out knowledge and volition, they must "be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *Id.* (*citing State v. Byrd,* 323 S.C. 319, 474 S.E.2d 430 (1996)). When determining whether a defendant is entitled to a voluntary manslaughter charge, the court must view the facts in the defendant's favor. *Byrd*, 323 S.C. at 321, 474 S.E.2d at 431.

The defendant's own narrative is instructive. According to the defendant, the events leading up to the fatal shooting began with a minor altercation early in the evening between the defendant, his live-in girlfriend (from whom he was separated seven days earlier), and his girlfriend's ex-brother-in-law. The defendant testified that he left the scene of the altercation, visited several other destinations, and eventually decided to attempt to reconcile with his girlfriend at her mother's house at approximately 3:30 in the morning. The defendant believed it prudent to leave his car nearly two miles away from the house and approach the house from the rear, and as he approached the house, the defendant testified that he observed his girlfriend, his girlfriend's sister, and the sister's ex-husband outside the home. The defendant alleges that as he approached the trio, the sister's ex-husband fired a weapon at him. According to the defendant, he used his own gun to return fire, and then retreated from the property while firing multiple times over his shoulder.

This factual scenario is completely void of any evidence remotely supporting a charge of voluntary manslaughter. Voluntary manslaughter, by definition, requires a criminal intent to do harm to another. But according to the defendant's story, he had no criminal intent whatsoever.

If, as he suggests, the defendant returned fire in a panic for his life, surely the defense of self-defense would be appropriate. Notably, this was charged by the trial court. Similarly, the trial court charged the jury on the law of involuntary manslaughter; perhaps because it was possible for the jury to believe that the defendant's initial returning of fire was justified, but ultimately find that the defendant was criminally reckless in firing multiple times over his shoulder as he retreated. Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury.[4]

In support of their holding that the defendant was entitled to a voluntary manslaughter charge, the court of appeals relied on this Court's holding in *State v. Penland*, 275 S.C. 537, 540, 273 S.E.2d 765, 766 (1981). As the court of appeals noted, that case arguably stands for the proposition that a jury issue on the voluntary manslaughter element of heat of passion can be created in a case similar to the instant case.

Penland cannot be so broad. Read literally, the opinion seems to impermissibly blend the concept of voluntary manslaughter with the defense of self-defense. The opinion provides no substantial factual background for the case, and no description of the events leading up to the apparently fatal incident. To the extent *Penland* stands for the proposition that a person who

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[4] Tellingly, the fatal shots consisted of two gunshot wounds to the victim's head. At trial, the State's medical expert testified that powder marks around both wounds suggested that the shots were administered at a close range. Though the implications of this evidence contradict the defendant's account of the events, we must believe the defendant when determining jury charges.

simply defends himself while in fear for his life is entitled to a voluntary manslaughter charge, the case should be overruled.

For the foregoing reasons, I would reverse the court of appeals' decision and reinstate the defendant's murder conviction.

JUSTICE PLEICONES: I agree that there was no abuse of discretion in the trial court's denial of Childers' motion to relieve his trial counsel, and therefore join that part of the majority's opinion. I respectfully dissent, however, from that part of the decision which reverses the Court of Appeals' holding that the trial judge committed reversible error in denying Childers' request for a voluntary manslaughter charge.

The majority reverses the voluntary manslaughter holding, finding the Court of Appeals misapplied the doctrine of transferred intent. Aside from the fact that this issue is not before the Court,[5] as explained below, this case represents a classic claim of transferred intent.

"Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and an] evil doing hand.'" United States v. Bailey, 444 U.S. 394, 402 (1980). Thus, in a homicide case, the law is concerned with the killer's state of mind, not with the identity of the victim. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). As the Fennell court explained, "[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another." Id. at 272, 531 S.E.2d at 515.

Thus, the critical question was Childers' mental state at the time he shot. If there is evidence that he fired in the sudden heat of passion upon sufficient legal provocation, it matters not that his aim was poor. State v. Fennell, *supra*. Here, Childers testified that his sudden heat of passion was aroused when the victim's former brother-in-law shot at him, and that in returning the fire, he mistakenly shot the victim. The majority misapplies the doctrine in order to find no voluntary manslaughter charge was

[5] The State did not challenge the Court of Appeals transferred intent holding on rehearing and consequently could not, and did not, seek certiorari to review that ruling. An unchallenged ruling by the Court of Appeals, even if erroneous, is the law of the case on certiorari. E.g., State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997).

warranted. See also e.g. State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) *overruled on other grounds* Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984). [6]

The sole issue before the Court on the State's certiorari is

> Whether the Court of Appeals erred by finding the trial judge incorrectly denied Childers' request for a voluntary manslaughter charge when the record shows there is no evidence of heat of passion?[7]

The State's argument rests on its contention that Childers did not present evidence that he was "inflamed by passion" when he returned the brother-in-law's fire. I disagree, and would hold that the jury could have found the "heat of passion" in Childers' testimony that he fired back because he was scared and feared he would be shot at again.

For these reasons, I would affirm the decision of the Court of Appeals.

MOORE, J., concurs.

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[6] The majority relies on a case where the legal provocation of "A" was used by the defendant to justify his intentional shooting of "B," State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000), and one where there was simply no legal provocation. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). In contrast, here the State has conceded legal provocation.

[7] "State's Brief of Petitioner" at page 2.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy Mark Hopper,	Employee/Claimant,

v.

Terry Hunt Construction, Employer, Uninsured, South Carolina Uninsured Employers' Fund, Kajima USA, Inc., Statutory Employer, and Zurich American Insurance Company, Carrier,	Defendants,
of whom Kajima USA, Inc., Statutory Employer, and Zurich American Insurance Company, Carrier are	Respondents,
and South Carolina Employers' Fund is	Appellant.

Appeal From Greenwood County
Howard P. King, Circuit Court Judge

Opinion No. 4238
Submitted February 1, 2007 – Filed April 23, 2007

REVERSED

Latonya Dilligard Edwards, of Columbia and Terry M. Mauldin, of Lexington, for Appellant.

Steven M. Rudisill, of Charlotte, for Respondents.

WILLIAMS, J.: The South Carolina Uninsured Employers' Fund (the Fund) appeals the circuit court's reversal of the Appellate Panel of the Workers' Compensation Commission (the Commission). The circuit court found Kajima USA, Inc. (Kajima) and its workers' compensation carrier, Zurich American Insurance Company (Zurich), were entitled to transfer liability to the Fund pursuant to Section 42-1-415 of the South Carolina Code (Supp. 2006). The Fund argues the circuit court erred by: (1) concluding Kajima satisfied the requirements of section 42-1-415 to transfer liability; (2) concluding no substantial evidence existed to support the Commission's finding that the certificate of insurance presented to Kajima showed coverage only in Georgia; and (3) relying on our decision in South Carolina Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). We reverse.

FACTS

Timothy Hopper suffered an injury while working for Hunt Construction Company (Hunt) in Greenwood, South Carolina. Hopper sought workers' compensation benefits from Hunt and Kajima. In response, Kajima and Zurich sought to transfer liability to the Fund pursuant to section 42-1-415.

At the time of the accident, Hunt was performing work as a subcontractor for the general contractor Kajima. Both companies are based in Georgia, and at the time of the accident, Hunt did not have workers'

compensation insurance coverage in South Carolina. However, prior to Hopper's injury, Hunt presented a certificate of workers' compensation insurance to Kajima.

The single commissioner found Kajima was not entitled to transfer liability to the Fund pursuant to section 42-1-415 and ordered Kajima and Zurich to pay benefits to Hopper. The commissioner reached this conclusion by stating Hunt lacked workers' compensation insurance coverage in South Carolina at the time of the accident and the certificate of insurance Hunt provided to Kajima showed coverage in Georgia but no coverage in South Carolina. Kajima and Zurich appealed this decision to the Commission, which affirmed the single commissioner. Thereafter, Zurich and Kajima appealed to the circuit court.

The circuit court ruled no substantial evidence existed to support the Commission's finding that the certificate of insurance showed coverage only in Georgia. The circuit court determined the Commission erred in its application of section 42-1-415 and concluded Kajima and Zurich were entitled to transfer liability to the Fund pursuant to section 42-1-415. The Fund now appeals the circuit court's rulings.

STANDARD OF REVIEW

The Administrative Procedures Act applies to appeals from decisions of the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the Commission, neither this Court nor the circuit court may substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

"Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). "Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." Id. at

515, 544 S.E.2d at 844. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Lee v. Harborside Café, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002) (internal quotations and citations omitted).

As noted above, an appellate court may reverse the Commission when the Commission's decision is based on an error of law. Corbin, 351 S.C. at 617, 571 S.E.2d at 95. Certain situations involve a mixed question of law and fact. Statutory interpretation is a question of law. House, 360 S.C. at 470, 602 S.E.2d at 82. But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard. Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006) (The meaning of a statutory term is a question of law, but whether a gas and electric company's activities met this definition is a question of fact.).

Therefore, the determination of the requirements to transfer liability under section 42-1-415 is a question of law. However, whether Kajima and Zurich met those requirements is a question of fact.

LAW/ANALYSIS

The Fund initially argues the circuit court erred by concluding Kajima satisfied the requirements of section 42-1-415 to transfer liability to the Fund. In other words, the Fund contends the circuit court erred because substantial evidence existed to support the Commission's conclusion that Kajima did not satisfy the requirements under section 42-1-415. However, before we determine the issue of whether Kajima met the requirements of section 42-1-415, we must ascertain what those requirements are.

A. Requirements of section 42-1-415

Section 42-1-415 in pertinent part provides:

(A) [U]pon the submission of documentation to the commission that a . . . subcontractor has represented himself to a higher tier . . . contractor . . . as having workers' compensation insurance at the time the . . . subcontractor was engaged to perform work, the high tier . . . contractor . . . must be relieved of any and all liability. . . . In the event that [the subcontractor] is uninsured . . . the higher tier . . . contractor . . . shall . . . pay all benefits due. . . . The higher tier . . . contractor . . . may petition the commission to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund. The Uninsured Employers' Fund shall assume responsibility for claims within thirty days of a determination of responsibility made by the commission.

(B) To qualify for reimbursement . . . the higher tier . . . contractor . . . must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the . . . subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

If the language in the statute is plain and unambiguous, there is no need to resort to the rules of statutory interpretation. City of Columbia v. Am. Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 387, 475 S.E.2d 2d 747, 749 (1996). If the terms of the statute are clear, the court must apply those terms according to their literal meaning. Id. Therefore, we must first determine if the language used in section 42-1-415 is ambiguous.

The dispute between Kajima and the Fund arises in their interpretation of the type of documentation required to transfer responsibility for compensation. Kajima ultimately argues as long as a subcontractor provides a general contractor with proof of workers' compensation insurance in any state, the general contractor is relieved of its duty, irrespective of whether the subcontractor has coverage in South Carolina. The Fund argues there must be coverage in South Carolina for section 42-1-415 to apply.

Section 42-1-415 provides the means for a general contractor to shift liability for workers' compensation benefits. To gain this benefit, the subcontractor has to provide the general contractor with "documentation" that shows the former has workers' compensation insurance. § 42-1-415.

"Documentation" is not a defined term in section 42-1-415. However, Regulation 67-415 of the South Carolina Code (Supp. 2006) sets out an acceptable way to demonstrate insurance coverage. This regulation provides:

> For purposes of Section 42-1-415, the ACORD Form 25-S, Certificate of Insurance, as published by the ACORD Corporation and as issued by the insurance carrier for the insured, shall serve as documentation of insurance. The Certificate of Insurance must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.

On the surface, it would appear Regulation 67-415 sets out the definition of "documentation." However, our recent decision in Barton v. Higgs, Op. No. 4197, --- S.C. ----, ---S.E.2d ----, 2007 WL 102986 (Ct. App. 2007), is illustrative on this point. In that case, we held Regulation 67-415 describes documentation that is always acceptable. Id. But the Regulation does not set out the only acceptable means to prove coverage. Id.

Because the term is susceptible to at least two different meanings, it is ambiguous. Consequently, we must resort to the rules of statutory construction to ascertain its meaning.

The cardinal rule of statutory construction is to determine and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Following Kajima's interpretation of the statute would lead to a conclusion that the legislature did not intend.

Kajima's argument stands for the proposition that although a subcontractor does not have workers' compensation insurance in South Carolina, if a subcontractor shows a general contractor proof of coverage in another state, a general contractor is relieved of liability. In other words, if Hunt, the subcontractor, had coverage only in Alaska and showed proof of this coverage to Kajima, Kajima would be relieved of liability.

Following this interpretation would allow a general contractor to escape liability by turning a blind eye towards the obvious. Moreover, such an interpretation would place a general contractor's liability upon the shoulders of South Carolina, by deducting from the State treasury money owed by a general contractor. Surely, the legislature did not intend such a result when it enacted section 42-1-415. See Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992) (Workers' compensation statutes are to be liberally construed in favor of coverage.); see also Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001) (Statutes that impose liability on the State must be liberally construed in favor of limiting liability to the State.); Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) ("The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason.").

Nonetheless, Kajima argues the language of section 42-1-415 is unambiguous. However, no matter how "clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature." Hamm v. South Carolina Pub. Serv. Comm'n, 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985). Even if we were to assume the language of section 42-1-415 is clear, such a reading would lead to the absurd result described above.[1] Having determined that section 42-1-

[1] Our ruling today does not put an extra duty upon the general contractor to inquire into the validity of the subcontractor's coverage. However, a general contractor cannot expect to turn a blind eye to the subcontractor's obvious lack of coverage in South Carolina and have the State shoulder that burden.

415 does not reward a general contractor for turning a blind eye to the obvious, we must now determine whether Kajima complied with this section.

B. Kajima noncompliance with section 42-1-415

The Fund argues the circuit court erred by concluding Kajima satisfied the requirements of section 42-1-415 to transfer liability. In other words, the Fund contends there was substantial evidence that the certificate of insurance presented to Kajima showed coverage only in Georgia and not in South Carolina. We agree.

As described above, whether an agency correctly applied the facts of a case to a statute is a question of fact, subject to the substantial evidence standard. Bursey, 369 S.C. at 184-85, 631 S.E.2d at 904. Thus, our review of whether the Commission correctly concluded Kajima met the requirements of section 42-1-415 is subject to the well-known substantial evidence standard.

The certificate of insurance provided by Hunt to Kajima, dated September 4, 2003, lists the insured as "Terry Hunt Construction Company . . . Valdosta, [Georgia] 31602." The certificate holder is listed as "Kajima Construction Services, Inc. . . . Atlanta, [Georgia] 30305-1503." The coverage producer is listed as "BB&T Insurance Services, Inc. . . . Macon, [Georgia] 31210." The block labeled "Description of Operations/Locations" is blank. There is no indication on the certificate of insurance in which state, if any, Hunt had workers' compensation coverage. Based on this, there is substantial evidence to support the Commission's finding that Kajima did not satisfy section 42-1-415. Thus, the circuit court erred by concluding Kajima satisfied the requirements of section 42-1-415 to transfer liability.

A determination of what type of conduct constitutes an obvious lack of coverage in South Carolina will have to be settled on a case-by-case basis.

C. The House case

The Fund argues the circuit court erred by relying on our decision in South Carolina Uninsured Employers' Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). Conversely, Kajima asserts House is factually similar to this case; therefore, Kajima should be able to pass liability to the Fund. We agree with the Fund.

In House, a general contractor employed a subcontractor for framing work. Id. at 469, 602 S.E.2d at 81. During the course of employment, an employee of the subcontractor was injured. Id. Prior to the accident, the subcontractor presented to the general contractor a certificate indicating workers' compensation coverage. Id. However, by the time of the accident, the subcontractor's coverage had lapsed. Id. at 469-70, 602 S.E.2d at 81-82.

The Commission concluded the subcontractor committed fraud by failing to notify the general contractor of the lapse. Id. The Commission transferred the general contractor's liability to the Fund pursuant to section 42-1-415. Id. The circuit court reversed and concluded the general contractor had notice of the subcontractor's lapse in coverage. Id. The general contractor appealed to this Court, and we reversed the circuit court. Id. Kajima argues this factual similarity requires us to affirm the circuit court. However, House is distinguishable from this case.

The central issue in House was whether a general contractor had a continuous duty to collect proof of insurance coverage. Id. We noted section 42-1-415 does not "require a [general] contractor to *continue* to collect proof of insurance coverage from its subcontractor after originally collecting documentation at the time of the hire." Id. at 471, 602 S.E.2d at 82 (emphasis added).

In House, the subcontractor initially provided the general contractor with proper documentation. Id. We did not address the issue of what happens if the documentation originally submitted to the general contractor did not provide coverage in South Carolina. House does not stand for the

proposition that a general contractor may escape liability simply by collecting documentation that shows a lack of workers' compensation coverage in South Carolina. Thus, the circuit court erred in relying on House.

CONCLUSION

Accordingly, the circuit court's decision is

REVERSED. [2]

HUFF and BEATTY, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Appellant,
v.	
Jeremiah Dicapua,	Respondent.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4239
Heard March 6, 2007 – Filed April 23, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Appellant.

Appellate Defender Eleanor Duffy Cleary, of Columbia, for Respondent.

GOOLSBY, J.: The State appeals the trial court's *sua sponte* grant of a new trial to the respondent Jeremiah Dicapua following his convictions for distribution of crack cocaine and possession with intent to distribute crack cocaine. We reverse and reinstate Dicapua's sentence.

FACTS

On October 16, 2003, the Horry County Police Department and Myrtle Beach Police Department organized a sting operation in Myrtle Beach. They rented connecting rooms at a Red Roof Inn in Myrtle Beach. One room was to be used as a transaction room and the other as a control room where the officers, using surveillance equipment consisting of a hidden camera and a microphone, would monitor what occurred in the transaction room.

The police issued a female informant $180 in "marked police buy money" with which to buy drugs from Dicapua, a person from whom the informant claimed to have purchased drugs on a prior occasion. The police had arrested the informant and another woman whom the record describes as a "cooperating witness" earlier that day, charging them with prostitution. Before Dicapua ever entered the transaction room, the police conducted a search of the room and of the informant and the other woman. Once the officers had everything in place for the sting operation, the informant left the room.

Detective Kent Donald of the Narcotics and Vice Division of the Horry County Police Department saw Dicapua and the informant enter the transaction room as he watched from the control room next door using the hidden camera. Once inside the transaction room, the informant gave Dicapua money and Dicapua tossed "something" onto the bed. Either the informant picked up whatever Dicapua dropped onto the bed or Dicapua handed the "something" to her. Regardless, the informant placed what Dicapua dropped or handed to her inside her pocket. The officers entered the room and arrested Dicapua as he prepared to leave.

The police immediately searched Dicapua and found 0.8 grams of crack cocaine and $160 in marked bills on his person. The informant turned over two bags of crack cocaine. All total, the police recovered 2.4 grams of crack cocaine.

Before the start of trial, Dicapua sought to suppress the videotape because it did not have any audio. The audio surveillance system had failed to record what was said in the transaction room because of a machine malfunction. The trial court, however, refused to suppress the videotape.

Once the trial began, the State introduced the videotape through its first witness, Detective Donald. When the trial court asked what the defense's position was regarding the introduction of the videotape, Dicapua's counsel specifically stated, "We have *no objection*, Your Honor." (Emphasis added.) Whereupon, the trial court entered the videotape into evidence "[w]ithout objection."

After the jury found Dicapua guilty on both charges, he "renew[ed] all of [his] prior Motions . . . made during the course of the trial, as well, as at the end of the State's case." Dicapua also moved for a new trial "on the basis of what else was set out before the Court, the objections and request going back to the CI, the chain, and all those things." The trial court denied Dicapua's motions, ruling that the jury's verdict was supported by the evidence. The trial court sentenced Dicapua to two concurrent sentences of thirty months in prison and fined him $25,000 on each offense.

The trial court vacated Dicapua's convictions and sentences the next day, acting *sua sponte*. The trial court focused upon the videotape, finding its introduction "inappropriate for multiple reasons."[1]

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[1] The trial court also suppressed the introduction of the videotape in any subsequent trial of Dicapua on the charges, an issue we need not address in view of our decision to reverse the grant of the new trial.

LAW/ANALYSIS

The State argues the trial court abused its discretion when it granted Dicapua a new trial. We agree.

It is well settled that the grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion.[2] Where there is no evidence to support a conviction, an order granting a new trial should be upheld.[3] "The State may appeal the grant of a new trial when it appears it is based 'wholly upon an error of law.'"[4]

As the record reflects, Dicapua's sole objection to the videotape came in the form of a motion *in limine* to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had "no objection." We find this amounted to a waiver of any issue Dicapua had with the videotape.

In Martelly v. State, a case similar to the one here, the defendant's counsel not only failed to object to the introduction of evidence that he had previously moved to suppress through a pretrial motion, but affirmatively stated that he had no objection to its introduction.[5] The Court of Appeals of Maryland, in finding the defendant waived his objection, held:

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[2] State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993).

[3] State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993).

[4] State v. Johnson, 363 S.C. 184, 189, 610 S.E.2d 305, 307 (Ct. App. 2005) (emphasis in original) (quoting State v. Dasher, 278 S.C. 395, 400, 297 S.E.2d 414, 417 (1982)).

[5] Martelly v. State, 187 A.2d 105, 107 (Md. 1963).

> [A]ppellant's express waiver of objection to the admission of the evidence now in question was tantamount to a withdrawal of his previous motion to suppress, and . . . consequently the issue of admissibility is not now before us. To hold otherwise would be to say that a defendant could not change his mind and affirmatively consent to the admission of the evidence at trial. It is settled law that when an accused is present in court and represented by competent counsel, he is bound by the actions and concessions of counsel, and that even constitutional rights may be waived in the course of a trial.[6]

REVERSED.

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[6] Id. at 108. See Southern Ry. Co. v. Coltex, Inc., 285 S.C. 213, 215-16, 329 S.E.2d 736, 737-38 (1985) (reversing a trial court's grant of a new trial *ex mero motu* on the ground that the party's waiver of the issue upon which the trial court granted a new trial meant the issue "was not properly before the trial court, the Court of Appeals, or this Court" and holding that the grant of a new trial on a waived issue constitutes an error of law requiring reversal); see also State v. Patino, 12 S.W.3d 733, 740 (Mo. Ct. App. 1999) (ruling that the defendant, by announcing he had no objection to the introduction of evidence he previously attempted to suppress in a pretrial motion, affirmatively waived his objection); State v. Scott, 858 S.W.2d 282, 285 (Mo. Ct. App. 1993) (holding that counsel, by affirmatively stating he had no objection to the admission of evidence, as compared to merely failing to object, waived his prior objection); Dean v. State, 749 S.W.2d 80, 83 (Tex. Crim. App. 1988) (ruling an issue was not preserved for appellate review where defense counsel, after losing at the suppression hearing, expressly stated that defense had no objection to the admission of fingerprint evidence when the evidence was later offered at trial); cf. State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994) ("When . . . a party abandons the ground asserted when the objection was made and asserts completely different grounds in the motion for a new trial . . . the party waives the issue.")

CURETON, A.J., concurs.

STILWELL, J., concurring in result only in a separate opinion.

STILWELL, J., (concurring in result): I concur with the majority in its decision to reverse the grant of a new trial, but write separately to explain why I would reverse on a different ground.

Dicapua raises the issue of the ability of the State to appeal the grant of a new trial. This is a threshold issue not addressed in the majority opinion. The State's ability to appeal the grant of a new trial is closely circumscribed by precedent. If the grant of a new trial by the trial court is based on the insufficiency of the evidence, the State has no right to appeal. State v. Lynn, 120 S.C. 258, 261, 113 S.E. 74, 75 (1922). On the other hand, the State may appeal the grant of a new trial when it appears it is based wholly upon an error of law. State v. DesChamps, 126 S.C. 416, 418, 120 S.E. 491, 492 (1923).

Although the grant or refusal of a new trial motion lies within the discretion of the trial court, "[a]n abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." State v. Walker, 366 S.C. 643, 656, 623 S.E.2d 122, 129 (Ct. App. 2005).

In this instance, I agree the State may appeal because the ruling of the trial court that the videotape is not admissible is, in my view, an error of law. The flaws in the videotape go to the weight of the evidence and not to its admissibility. The trial court's grant of a new trial was premised solely on the finding that the videotape was inadmissible. I believe that ruling to be an error of law that allows the appeal, and its prejudicial nature compels the reversal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bage, LLC **Respondent,**

v.

Southeastern Roofing Co. of Spartanburg, Inc., a/k/a Southeastern Roofing Company n/k/a Orvis, Inc.

Appellant

Appeal From Richland County
Casey Manning, Circuit Court Judge
Joseph M. Strickland, Master-In-Equity

Opinion No. 4240
Submitted April 2, 2007 – Filed April 23, 2007

AFFIRMED

Robert T. King, of Florence, for Appellant.

Thomas B. Jackson, III, of Columbia, for Respondent.

ANDERSON, J.: Southeastern Roofing appeals the circuit court's order finding the company was properly served by service of process on its employee, Debbie Green, and determining that it failed to show good cause to allow relief from an entry of default under Rule 55(c), SCRCP. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

In August 2003, BAGE, L.L.C. ("BAGE") entered into a written contract with Southeastern Roofing Company of Spartanburg, Inc. ("Southeastern Roofing"). Under the agreement, Southeastern Roofing was to perform re-roofing work on a commercial office building BAGE owned. More specifically, the company was to remove the outer layers of the existing roof system and install of a new, modified bitumen roof on the structure. Southeastern Roofing was to immediately commence the project after the contract was signed and to complete the job within approximately six weeks. Work on the roof, however, did not begin until the end of October 2003 and continued only sporadically through the winter and into the spring of 2004.

From almost the moment Southeastern Roofing started operations on BAGE's building, significant leaks in the roof began to occur. These leaks resulted in interior water infiltration, manifested by falling ceiling tiles, water gushing down interior walls, light fixtures filling with water, and the growth of mold and mildew. BAGE repeatedly contacted Southeastern Roofing, demanding the leaks be stopped. Despite BAGE's requests, the necessary repairs were never made and water continued to infiltrate and further damage the building. BAGE ultimately filed suit, claiming breach of contract, breach of express and implied warranties, and negligence.

At the fledgling stages of the litigation, BAGE's counsel spoke with Southeastern Roofing's general manager, Jamie Cubitt, who initially agreed to accept service of process by mail. When Cubitt failed to return the summons and complaint, BAGE sought to serve the company through its

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

registered agent. After discovering that the agent listed with the Secretary of State was no longer affiliated with Southeastern Roofing, BAGE pursued service via a private process server.

On July 9, 2004, the process server arrived at Southeastern Roofing's office with the intendment of serving Cubitt with BAGE's summons and complaint. Cubitt was not in the office at that time, and the server was instead met by Debbie Green, another Southeastern Roofing employee. Green was able to reach Cubitt by telephone. After being informed someone was in the office with papers to serve, Cubitt instructed Green to accept the documents. This communication with Cubitt was relayed to the process server. Green signed for the service of process. An affidavit of service was filed on July 13, 2004.

Upon returning to the office, Cubitt instructed another employee, Cheri Barnette, to send a copy of the summons and complaint to Southeastern Roofing's insurance agency. These documents were faxed to the insurance company on July 13, 2004. No cover letter was included in this facsimile nor was any follow-up with its insurance carrier ever taken by Southeastern Roofing.

Southeastern Roofing never responded to the complaint. BAGE filed an affidavit of default and motion for an entry of default on September 7, 2004. That same day, an entry of default was dated and filed with the court. By a motion filed on September 20, 2004, Southeastern Roofing moved to set aside the order granting the entry of default.

A hearing on the motion to set aside the entry of default was held before the circuit court on December 8, 2004. Southeastern Roofing argued (1) the service of process had been improper and thus deprived the court of personal jurisdiction and (2) "good cause" existed to set aside the entry of default under SCRCP Rule 55(c).

By an order dated April 28, 2005, the judge denied Southeastern Roofing's motion to set aside the entry of default. In regard to service of process, the order specifically found (1) Green was an office manager at Southeastern Roofing for the purposes relevant to service of process and (2)

Green had Cubitt's specific authorization to accept service of process. With respect to the Rule 55(c) motion, the judge found Southeastern Roofing had failed to show good cause as to allow relief from the entry of default. Southeastern Roofing timely moved for reconsideration of the order denying its motion to set aside default. This motion was denied.

On April 27, 2006, following a damages hearing before the Richland County master-in-equity, BAGE obtained a default judgment against Southeastern Roofing in the amount of $1,151,888.84. This judgment was properly filed with the court on May 3, 2006.

STANDARD OF REVIEW

"Questions of fact arising on a motion to quash service of process for lack of jurisdiction over the defendant are to be determined by the court." Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001); accord Lawson v. Jeter, 243 S.C. 103, 106, 132 S.E.2d 276, 277 (1963); Moore v. Simpson, 322 S.C. 518, 524, 473 S.E.2d 64, 67 (Ct. App. 1996). The findings of the circuit court on such issues are binding on this court, unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law. Id.

"The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court." Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (citing Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)); accord In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). "This court cannot substitute its judgment for that of the trial judge and will not disturb the trial court's decision absent a clear showing of abuse of discretion." Ricks, 293 S.C. at 374, 360 S.E.2d at 536; Ammons v. Hood, 288 S.C. 278, 279, 341 S.E.2d 816, 818 (Ct. App. 1986). In reviewing a trial judge's exercise of discretion, the issue before an appellate court is not whether it believes good cause existed to set aside the entry of default, but whether the trial judge's determination is supported by the evidence and not controlled by an error of law. Pilgrim v. Miller, 350 S.C. 637, 640-41, 567 S.E.2d 527, 528 (Ct. App. 2002).

LAW/ANALYSIS

I. Service of Process

Southeastern Roofing argues the delivery of process to Green was insufficient as a matter of law. We disagree.

Rule 4(d), SCRCP addresses service of process and states:

> **Summons: Personal Service.** The summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Voluntary appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective upon mailing, or may be served as provided in this rule. Service shall be made as follows:
> . . .
> (3) *Corporations and Partnerships*. . . .

The rule provides service of the summons and complaint may be made upon a corporation by "delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . ." Rule 4(d)(3), SCRCP. Service on a managing or general agent is sufficient even though the corporation has a registered agent. Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981).

> The rule permits service on two types of agents: an agent authorized by appointment and an agent authorized by law. Evidence of an actual appointment by the defendant for the specific purpose of receiving service is normally required to show the

> authority of the agent. The courts look at the circumstances to find express or implied authority to accept the service. Agency for accepting process is not necessarily established by the act of accepting the process, statements by the person served, or the existence of another agency relationship.

James F. Flanagan, South Carolina Civil Procedure 20 (2nd ed. 1996).

Our supreme court has enunciated:

> Service on a corporation may be made by hand delivering a copy of the summons and complaint to an officer of the corporation or to an authorized agent of the corporation. Rule 4(d)(3), SCRCP. The rule "presupposes that an officer of the corporation will know what to do with the papers served and will see that the corporation takes steps to defend the action." 62B Am. Jur. 2d, Process § 268 (1990). Once papers have been served on an officer of the corporation, the corporation then has actual notice of the action. Pioneer Util. Corp. v. Scott-Newcomb, Inc., 26 F. Supp. 616 (E.D.N.Y.1939).

Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 210, 456 S.E.2d 897, 899-900 (1995). "Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." Roche, 318 S.C. at 209, 456 S.E.2d at 899; Moore, 322 S.C. at 523, 473 S.E.2d at 66.

"The plaintiff has the burden to establish that the court has personal jurisdiction over the defendant." Moore, 322 S.C. at 523, 473 S.E.2d at 66 (citing Jensen v. Doe, 292 S.C. 592, 358 S.E.2d 148 (Ct. App. 1987)). However, exacting compliance with the rules is not required to effect service of process. Roche, 318 S.C. 209-10, 456 S.E.2d at 899 (citing Foster v. Crawford, 57 S.C. 551, 36 S.E. 5 (1900) (when officer's return defective as to time and place of service, it can be amended to state facts); Saunders v. Bobo,

2 Bailey 492 (1831) (sheriff's incomplete return that was not sworn to may be amended); Miller v. Hall, 28 S.C.L. 1, 1 Speers 1 (1842)); Moore, 322 S.C. at 66, 473 S.E.2d at 523. Rather, inquiry must only be made as to whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction over the defendant and the defendant has notice of the proceedings. Moore, 322 S.C. at 523, 473 S.E.2d at 66; Roche, 318 S.C. at 210, 456 S.E.2d at 899. "When the civil rules on service are followed, there is a presumption of proper service." Roche, 318 S.C. at 211, 456 S.E.2d at 900 (citing 62B Am. Jur. 2d Process § 111 (1990)). The defendant, not the plaintiff, bears the burden of proving that the service of process was signed by an unauthorized person. See Roche, 318 S.C. at 211, 456 S.E.2d at 900 (stating that when service of process is accomplished by certified mail under Rule 4(d)(8), "the defendant, not the plaintiff, must prove the receipt was signed by an unauthorized person.").

Not every employee of a corporation is an "agent" of the corporation for the purposes of service of process. Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 583-84, 560 S.E.2d 624, 631-32 (Ct. App. 2001). If the employee in question is not a managing or general agent, the question is whether the individual possessed "specific authorization to receive process." Id. This court has inculcated:

> Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process. The courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority.

Moore, 322 S.C. at 523, 473 S.E.2d at 67 (internal citations omitted); accord Hamilton v. Davis, 300 S.C. 411, 414, 389 S.E.2d 297, 299 (Ct. App. 1990).

This court addressed a factually similar issue in Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d 736 (Ct. App. 1996). In Schenk, the plaintiff attempted to serve process on the defendant's registered agent by means of a private process server. When the server took the summons and complaint to the address recorded with the secretary of state, an individual different from the one on file, Carol Grant, informed him the listed agent was no longer there and had retired from the company. Grant signed for the papers, assuring the server that she was duly authorized to accept service as the office manager. She assured him that she would pass the documents along to the company's corporate headquarters. The defendant never answered the complaint and an entry of default ensued. A motion to set aside default for improper service was denied by the circuit court. On appeal, this court found service of process had been effective and affirmed the circuit court. Noting Grant was the defendant's office manager and that she assured the process server of her authorization to accept service of process, we concluded she was a managing agent for the defendant under Rule 4(d)(3), SCRCP. Id. 322 S.C. at 319-20, 471 S.E.2d 738.

Although, "[w]ithout specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary," Brown, 348 S.C. at 584, 560 S.E.2d at 632 (citing Moore, 322 S.C. at 523-24, 473 S.E.2d at 67), Green indubitably served in a much greater capacity at Southeastern Roofing than simply that of a secretary. The testimony given by Green during her deposition clearly refutes the contents of her prior affidavit submitted by Southeastern Roofing and its assertion that she was only a "secretary/receptionist." During Green's deposition, the following colloquy took place:

> Q. If Joanie Burnett is not there and you're there, then accordingly wouldn't you then be in charge of the office?
> A. Yes, Sir.
> Q. And on this particular day, you were there and you were in charge of the office?

A. Correct.

Additionally, Green indicates it was common practice for her to sign for the receipt of documents:

> Q. Was it normal for you to sign for mail for Southeastern?
> A. Normally it is. I mean as far as, you know, signing for certified mail. Yeah, we usually sign for certified mail.

The deposition demonstrates Green's specific authorization to accept the service of process:

> Q. . . . Did you tell Mr. Cubitt that the person that was there had a summons and complaint for Mr. Cubitt?
> A. Yes, Sir. I just told him that he had some -- the server had some papers from him for some -- for him to sign for.
>
> . . . .
>
> Q. Did Mr. Cubitt indicate to you it was ok if you --
> A. Yeah.
> Q. --- Accepted the papers?
> A. Mm-Hmm (Affirmative Response).

In his order denying the motion to set aside the entry of default, the circuit judge found:

> 1. As indicated in Ms. Green's deposition, the office management responsibilities pertaining to Defendant's office are shared by the administrative personnel in the office and Ms. Green manages the office and is in charge if no one else is there. On July 9, 2004, Ms. Green was in charge of managing the office of Defendant when the subject process server

arrived for the purpose of serving the Summons and Complaint in this case.

2. According to Ms. Green, and while the process server was at the office, she either called Mr. Jamie Cubitt or Mr. Cubitt called her and, after informing Mr. Cubitt that someone was there with papers to be served, she was authorized by Mr. Cubitt to accept the subject documents, such being told to the process server as acknowledged by Ms. Green in her deposition and also referenced in the process server's Affidavit of Service which has been filed in this case.

3. After examination by counsel for Plaintiff in her deposition, and on further examination by counsel for Defendant, Ms. Green reconfirmed her conversation with Mr. Jamie Cubitt about being "okayed" to "receive whatever it was that the server was there to give you."

Although there is no case in South Carolina specifically defining "managing agent" or "agent authorized by appointment" under Rule 4(d)(3), SCRCP, Schenk confirms that an office manager of the corporate defendant involved can be deemed a "managing agent" under the rule. Additionally, the facts of the case prove that Green had Cubitt's authorization to sign for the summons and complaint. Although Southeastern Roofing argues contrarily, the evidence inexplicably supports the circuit judge's finding that service on Southeastern Roofing was proper under Rule 4(d)(3), SCRCP.

Furthermore, we would note the efficacy and rationale behind the requirement for service of process--that the defendant has notice of the proceedings--has luculently been met in this case. See Roche, 318 S.C. at 210, 456 S.E.2d at 899 ("Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action."); Moore, 322 S.C. at 523, 473 S.E.2d at 66 ("Rather, inquiry must only be made as to whether the plaintiff has sufficiently complied with the rules such that the court has personal

jurisdiction of the defendant and the defendant has notice of the proceedings."). The history and dealings between the parties through July 9, 2004 reveal that BAGE's counsel spoke with Cubitt in regard to this suit and that BAGE attempted to serve process through the postal service. Accordingly, it seems disingenuous for Southeastern Roofing to claim Cubitt, in his conversation with Green, was unaware the papers being served by the process server were the summons and complaint at issue. Moreover, Southeastern Roofing's manager readily admits to having knowledge of the summons and complaint long before the deadline to answer passed. In his affidavit, Cubitt states: "[O]n or about July 10, 2004, I was notified that a Summons and Complaint concerning this case was left at SE Roofing's place of business the prior day."

II. Entry of Default

Southeastern Roofing argues the court erred in not setting aside the entry of default as provided under Rule 55(c), SCRCP. We disagree.

South Carolina Rules of Civil Procedure provide: "For good cause shown the court may set aside an entry of default . . . ." Rule 55(c), SCRCP. Thus, under the rule, the standard for granting relief from an entry of default is "good cause," Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989), and is more lenient than the standard for granting relief from a default judgment under Rule 60(b) SCRCP. Ricks v. Weinrauch, 293 S.C. 372, 274, 360 S.E.2d 535, 536 (Ct. App. 1987) (citing H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 82 (2nd Ed. 1985)).

Public policy favors the disposition of cases "on their merits rather than on technicalities." Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (citing Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986). Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits." Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995); Ricks, 293 S.C. at 374-75, 360 S.E.2d at 536; see also Mann v. Walker, 285 S.C. 194, 328 S.E.2d 659 (Ct. App. 1985) (holding

under the earlier statutory provisions for default judgment pursuant to section 15-27-130 of the 1976 Code of Laws of South Carolina, the rules dealing with default are liberally construed to see that justice is promoted and to strive for the disposition of cases on their merits).

The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court. Wham, 298 S.C. at 465, 381 S.E.2d at 501. An abuse of discretion in setting aside an entry of default arises when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997); Boland v. S.C. Public Service Authority, 281 S.C. 293, 315 S.E.2d 143 (Ct. App. 1984). An order based on this discretion will not be set aside absent an error of law or lack of evidentiary support. Wham, 298 S.C. at 465, 381 S.E.2d at 501; Stanton v. Town of Pawley's Island, 309 S.C. 126, 420 S.E.2d 502 (1992) (stating the appellate court will not disturb a discretionary ruling unless the ruling is without evidentiary support or is controlled by an error of law); Ricks, 293 S.C. 372 S.E.2d 535 (Ct. App. 1987) (holding abuse of discretion in setting aside an entry of default occurs when order was controlled by some error of law or, based upon factual-as distinguished from legal conclusions-was without evidentiary support). Williams v. Vanvolkenburg makes clear the appellate court reviews an evidentiary record under the "good cause" standard by determining whether the trial judge's determination is supportable by the evidence and not controlled by an error of law. 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994).

The seminal case articulating the application of "good cause" under Rule 55(c) to a factual scenario is Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). Wham provides:

> Under S.C.R.Civ.P. 55(c), as under F.R.CIV.P. 55(c), the standard for granting relief from an entry of default is "good cause." The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court. An order based on an exercise of that discretion,

> however, will be set aside if it is controlled by some error of law or lacks evidentiary support.
>
> . . .
>
> In deciding the question of whether to grant the motion by [the defendant] for relief from the entry of default, the master did not employ the "good cause" standard. Instead, the master erroneously applied the more rigorous standard of "excusable neglect," a standard used under Rule 60(b). He did this even though he recognized the "good cause" standard was applicable.

Id. at 465, 381 S.E.2d at 501 (citations omitted).

A "good cause" analysis under Rule 55(c) ordinarily is made by the trial judge. In deciding whether to set aside an entry of default, the factors the judge should consider are: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Wham, 298 S.C. at 465, 381 S.E.2d at 501-02; Weeks, 329 S.C. at 259, 495 S.E.2d at 459. However, it is not necessary for the trial judge to make specific findings in regard to the factors enumerated in Wham. This court has held, "[t]he trial judge will not be reversed for failing to make specific findings of fact on the record for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause." Dixon, 320 S.C. at 179, 463 S.E.2d at 639.

In this case, over two months elapsed between the time Southeastern Roofing was served with the summons and complaint and when it moved for relief. Although the summons and complaint were allegedly sent to Southeastern Roofing's insurance agent, any negligence by the insurance agent in handling these documents is imputable to Southeastern Roofing. Pilgrim v. Miller, 350 SC. 367, 567 S.E.2d 527 (Ct. App. 2002). Pursuant to the findings of the circuit court, Southeastern Roofing mishandled the service of process of this lawsuit:

> It is apparent from the Affidavits filed on behalf of the Defendant that Defendant simply failed to give this matter the proper attention which needed to be given when an entity is served with a Summons and Complaint. There is no indication that there was even a cover letter or other follow up by any representatives of Defendant with its insurance agent after the Summons and Complaint were allegedly faxed to such agent. . . . Defendant's failure to properly respond to the Summons and Complaint in this case resulted from its failure to take proper action in order to assure that a response was timely filed in regard to Plaintiff's Summons and Complaint.

Based on the alleged defective workmanship of Southeastern Roofing, the circuit court did not believe Southeastern Roofing had a meritorious defense. The circuit judge stated:

> [T]he Defendant does not otherwise have a meritorious defense to the Complaint based on the alleged poor roofing workmanship of Defendant which has apparently caused Plaintiff to sustain continuing damage to the building involved in this case due to water infiltration . . .

In support of its motion to set aside the order of default, Southeastern Roofing filed several affidavits. The court specifically addressed two of these affidavits in its order:

> As to the Affidavit of Cheri Barnette submitted on behalf of Defendant, Ms. Barnette clearly confirms that Mr. James Cubitt did timely receive the Summons and Complaint which was served in this case and that instructed Ms. Barnette to send the Summons and Complaint to Defendant's insurance agent, all of which was apparently without any transmittal or follow up by Defendant.

> As to the Affidavit of James Cubitt submitted on behalf of Defendant, Mr. Cubitt confirms (1) that he did receive the Summons and Complaint in a timely fashion, and (2) that he did instruct Cheri Barnette to fax a copy of the Summons and Complaint to Defendant's insurance agent (i.e. all of which was apparently done according to Ms. Barnette in her Affidavit) and that it was Mr. James Cubitt's understanding that the insurance agent would contact Defendant concerning the Summons and Complaint. Apparently, there was no follow up by Defendant.

The circuit court found the evidence did not show the existence of good cause as to allow Southeastern Roofing relief from the entry of default. In making this determination, the circuit judge relied upon Stark Truss Co. v. Superior Construction Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004). In Stark, the circuit court refused to relieve the defendants from an entry of default, finding they had failed to present sufficient proof of good cause under Rule 55(c), SCRCP. The Court of Appeals affirmed. Noting the defendant's only explanation for not filing an answer within thirty days was that the company's president was "struggling with some depression and had a lot things slip through his fingers" and gave no reason why its attorney failed to file an answer, this court found "there was evidence to support the circuit court's refusal to set aside the entry of default." Id., 360 S.C. at 510, 602 S.E.2d at 103.

As determined by the circuit judge, Southeastern Roofing's failure to properly respond to the summons and complaint resulted from its failure to take proper actions in order to assure a response was timely filed. The company offers no good or valid explanation as to why it failed to respond. There is no indication that there was any follow-up by the employees of Southeastern Roofing with its insurance agent after the summons and complaint were allegedly faxed to the agent. It is axiomatic that Southeastern Roofing simply did not give this matter the proper attention it required.

CONCLUSION

We come to the ineluctable conclusion Green qualifies as both a managing and authorized agent of the appellant. Concomitantly, the appellant was properly served when the summons and complaint were delivered to Green as an agent of the appellant. There is copious evidence in the record to support the circuit judge's finding that appellant did not prove the existence of good cause to allow the court to set aside the entry of default. We hold there was no abuse of discretion by the trial judge in refusing to grant the appellant relief under SCRCP, Rule 55(c).

Accordingly, the decision of the circuit court is

AFFIRMED.

KITTREDGE and SHORT, JJ., concur.