The Supreme Court of South Carolina

In the Matter of Darby Lane Smith, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1996, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 18, 2007, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

January 10, 2008

The Supreme Court of South Carolina

In the Matter of Nancy Agnes Garris, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 1, 2005, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 11, 2007, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ James E. Moore J.

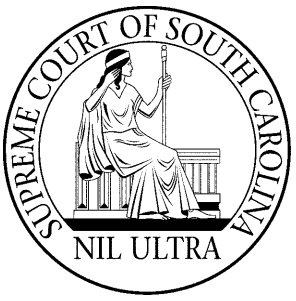
s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

January 10, 2008



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2

January 14, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Katherine Dangerfield, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 26412
Submitted October 18, 2007 – Filed January 14, 2008

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, for Petitioner.

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the post-conviction relief (PCR) court granted partial relief to Katherine Dangerfield ("Respondent")

finding that a magistrates court's imposition of a suspended sentence without a hearing did not afford Respondent due process of law. This Court granted certiorari to review the PCR court's grant of relief, and we affirm.

FACTUAL/PROCEDURAL BACKGROUND

In July 2001, Respondent pled guilty to passing 110 fraudulent checks. Pursuant to a plea agreement between Respondent and the State, a magistrate sentenced Respondent to thirty days imprisonment to be served consecutively (a total of nine years) on each fraudulent check, but suspended the sentence conditioned upon the payment of restitution plus court costs. Respondent did not appeal her conviction and proceeded to begin making restitution payments.

The record reveals that Respondent ceased making restitution payments after November 2001. Thereafter, in February 2002, the magistrates court sent Respondent's trial counsel a copy of the order reflecting the terms of the plea agreement along with a memorandum advising counsel to contact the court or the attorney for the State "if you have any questions before bench warrants are issued." Counsel had not been in contact with Respondent since her trial the previous July, and counsel's apparent attempts to contact Respondent regarding this matter were unsuccessful. In May 2003, the magistrate had bench warrants served on Respondent. Following Respondent's arrest, the magistrate imposed the suspended sentence without a hearing.

Respondent filed a PCR application alleging ineffective assistance of counsel for negotiating an unreasonable plea deal, failing to notify Respondent of the bench warrants, and failing to request a hearing. Respondent requested relief in the form of a revised payment plan reflecting credit for time served and credit for the checks on which she had already made restitution payments. The PCR court found that counsel's conduct in negotiating a plea deal was not objectively unreasonable; however, the court found that counsel's failure to notify Respondent of the bench warrants and to request a hearing amounted to ineffective assistance of counsel because it deprived Respondent of her due process rights. The PCR court did not vacate

Respondent's guilty plea, but ruled that Respondent was entitled to a hearing to determine whether she willfully stopped making restitution payments.

This Court granted certiorari to review the PCR court's decision, and the State raises the following issue for review:

> Does the imposition of a suspended sentence without a hearing violate a defendant's due process rights?

STANDARD OF REVIEW

This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

LAW/ANALYSIS

The State argues that the PCR court erred in finding that the magistrate's imposition of a suspended sentence without a hearing violated Respondent's due process rights. We disagree.

Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions. *See* U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review. *See State v. Hill*, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006).

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the United States Supreme Court confronted procedural due process considerations as they pertained to the revocation of an inmate's grant of parole. Noting that parole does not arise until after the imposition of a sentence, the Court found that

"[r]evocation [of parole] deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.* at 480. The Court held that minimum due process requirements afford a parolee the right to "an informal hearing structured to assure the finding of a parole violation will be based on verified facts and that the exercise of [the court's] discretion will be informed by an accurate knowledge of the parolee's behavior." *Id.* at 484. Relying almost exclusively on the "conditional liberty" interest described in *Morrissey*, the Supreme Court soon thereafter held that due process also requires that a probationer be given a hearing before his probation is revoked for a probation violation. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The State argues that the PCR court improperly analogized the imposition of a suspended sentence to the revocation of probation in the *Morrissey/Gagnon* line of cases because a magistrate may not place a person on probation. *See* S.C. Code Ann. § 22-3-800 (2007) ("Nothing in this section may be construed to give a magistrate the right to place a person on probation."). The State further contends that because the statutory provisions governing Respondent's check fraud do not expressly contain a notice and hearing requirement upon a defendant's alleged failure to pay restitution, *see* S.C. Code Ann. § 22-3-800 *and* S.C. Code Ann. § 34-11-90(c) (Supp. 2006), Respondent is not entitled to notice and a hearing before a magistrate imposes a suspended sentence. Though perhaps correct as a matter of statute, the State's arguments completely bypass the constitutional issues driving the federal courts' due process jurisprudence.

This Court has interpreted § 22-3-800 to prohibit a magistrates court from enforcing substantive conditions as part of a suspended sentence where enforcement of the conditions has the effect of placing the defendant on probation. *See Talley v. State*, 371 S.C. 535, 545, 640 S.E.2d 878, 883 (2007) (vacating a magistrate's immediate suspension of the defendant's sentence on the condition of six months' good behavior because the condition in effect placed the defendant on probation). In our view, the PCR court's finding that the imposition of a suspended sentence has the same *constitutional* effect as the revocation of probation is clearly distinguishable

from this Court's finding that a magistrate's conditional sentence has the same *substantive* effect as the placement of a defendant on probation. *See also Gagnon*, 411 U.S. at 782 n.3 ("Despite the undoubted minor differences between probation and parole, the . . . revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole."). Therefore, we find that regardless of the statutory limitations on a magistrate's authority in probation matters, the PCR court did not err in drawing an analogy to the due process implications inherent in probation revocation.

Furthermore, we find that the PCR court correctly determined that the imposition of a suspended sentence in this case is constitutionally equivalent to the revocation of parole or probation. The imposition of a suspended sentence, like probation and parole revocation, arises after the court has sentenced a defendant in a criminal prosecution. Therefore, although the imposition of the sentence does not deprive Respondent of the absolute liberty guaranteed a free citizen, the imposition of the sentence does, in fact, deprive Respondent of the conditional liberty dependent on her compliance with the restitution payment plan in her plea agreement.

Like that of parolees and probationers, the extent of Respondent's conditional liberty interest encompasses many of the core values of absolute liberty. Respondent may spend unlimited time with family and friends, take on gainful employment, and participate in other hobbies and activities available to unincarcerated members of society. Although the State's governance of Respondent's financial affairs in accordance with the strict terms of the restitution plan is not a component of the absolute liberty afforded citizens who have never been convicted of a crime, the condition that Respondent pay restitution is a far cry from serving nine years in prison. *See Morrissey*, 408 U.S. at 482 (discussing the liberty interest of a parolee). Accordingly, we hold that the PCR court properly determined that the imposition of a suspended sentence implicated Respondent's due process rights.

In recognizing that parole and probation revocation proceedings must comply with minimum due process requirements, this Court has held that

probation may not be revoked solely for failure to make required payments of fines or restitution. *Nichols v. State*, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992). Specifically, in cases involving the failure to pay fines or restitution, we have held that due process requires the court to first make a determination on the record that the probationer willfully violated these terms of probation. *Id.* Because we find no constitutional distinction between the payment of restitution as a condition of suspended sentencing and the payment of restitution as a condition of probation, the PCR court correctly determined that an issue to be explored during Respondent's hearing is whether Respondent's failure to continue paying restitution was a willful violation of her conditional sentence.

Accordingly, we hold that the PCR court properly concluded that due process requires that Respondent be afforded notice and a hearing on the willfulness of her alleged failure to pay restitution before the imposition of a suspended sentence.

CONCLUSION

For the foregoing reasons, we affirm the decision of the PCR court.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Debrezio Mendez Campbell, Appellant.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 26413
Heard December 6, 2007 – Filed January 14, 2008

REVERSED

Appellate Defender M. Celia Robinson, of the South Carolina Commission on Indigent Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; and Kevin Scott Brackett, of York, for respondent.

JUSTICE MOORE: Pursuant to a plea agreement, appellant pled guilty to murder, conspiracy to commit murder, possession of a firearm during the commission of a violent crime, and unlawful carrying of a weapon. He was sentenced to thirty years imprisonment for murder, concurrent sentences of five years on the conspiracy and possession charges, and a concurrent sentence of one year on the carrying charge.

After appellant declined to testify at his co-defendant's trial, the State moved to vacate appellant's sentence based on his failure to honor the plea agreement. The plea judge vacated appellant's sentence and sentenced him to life without parole for murder, and retained the other sentences. We certified this appeal from the Court of Appeals pursuant to Rule 204(b), SCACR.

FACTS

Appellant was indicted with his brother, Desmond, and Christopher Woody for various charges stemming from the shooting death of the victim. Appellant signed a plea agreement, in which he would receive thirty years in prison in exchange for his cooperation with police and prosecutors, including giving testimony at Woody's trial.

> The plea agreement stated, in pertinent part:
>
> > . . . The Defendant agrees to provide complete and thorough cooperation to the . . . solicitor's office and all involved law enforcement agencies, including giving true and honest testimony at any appropriate judicial proceeding. The Defendant further agrees that his written statement dated June 27th, 2004, in which he confessed to the murder . . . is true and accurate.
> >
> > . . . In the event that the Defendant does not comply with the conditions of this plea agreement, the State shall move to have his negotiated sentence

> vacated. The Defendant's guilty plea would remain in effect, and he would be subject to the full penalty of each charge in the discretion of the Court. . . .

In March 2005, appellant pled guilty. The State placed the plea on the record and noted the requirement that appellant had agreed to testify and cooperate fully. Appellant informed the plea judge that he understood these requirements. The State noted on the record from the written plea agreement that if appellant withdrew his cooperation, his pleas would remain and there would be a re-sentencing. Appellant stated he agreed with and understood that portion of the agreement. The plea judge then sentenced appellant consistently with the agreement.

Woody's case went to trial in May 2005. A few days before the trial began, appellant changed his story regarding how and why the crime had occurred. The story was inconsistent with the previous statement he gave police. Appellant's attorney stated that he advised appellant that if he did not testify and comply with the plea agreement, he could be re-sentenced. Appellant did not testify in Woody's trial and previous statements made by appellant were not admitted at the trial. At the conclusion of the trial, Woody received a sentence of life imprisonment without parole.

The plea judge presided over appellant's plea and Woody's trial. In August 2005, a hearing was held in front of the plea judge on the State's motion to vacate appellant's sentence due to noncompliance with the plea agreement. Appellant stated he did not refute the State's position regarding noncompliance; however, he argued the plea judge did not have subject matter jurisdiction to re-sentence him. Appellant contended that, pursuant to Rule 29, SCRCrimP, the State should have filed a formal motion at the time of sentencing or within ten days after the completion of Woody's trial. The State countered that no motion was required because appellant was on notice that if he did not comply with the agreement, then his sentence could be vacated.

The plea judge stated appellant's sentence was a conditional sentence that was subject to change. The judge found the State was entitled to the

benefit of its bargain and that the plea agreement should be enforced. Appellant was re-sentenced to life imprisonment without parole on the murder charge and the other sentences remained the same.

ISSUE

Did the plea judge lack jurisdiction to grant the State's motion to re-sentence appellant five months after his guilty plea and sentencing?

DISCUSSION

It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires. State v. Hinson, 303 S.C. 92, 399 S.E.2d 422 (1990). *See also* State v. Best, 257 S.C. 361, 186 S.E.2d 272 (1972) (trial judge is without authority to pursue a case after the term of court has adjourned). Each week of court is a separate term. State v. Mixon, 275 S.C. 575, 274 S.E.2d 406 (1981). The rule has two exceptions: a timely post-trial motion and a motion for a new trial based on after-discovered evidence. Rule 29, SCRCrimP. Rule 29 states that, except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten days after the imposition of the sentence.[1] Rule 29 further states that the court's jurisdiction to hear the motion will not expire with the term of court if the party has filed a timely motion. However, if the motion is not made within

[1]The State argues that its motion to vacate appellant's sentence is akin to a motion based on after-discovered evidence which is not bound by the ten-day time limit. However, this situation is not what is intended by the rule on after-discovered evidence. *See* State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) (to prevail on a motion for a new trial based on after-discovered evidence, a defendant must show (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching).

ten days of sentencing, the court will be without jurisdiction to entertain the motion.

Appellant's issue frames the term of court rule as a rule of subject matter jurisdiction; however, this rule does not involve subject matter jurisdiction. We have stated that a trial court lacks jurisdiction over a matter once the term of court has ended. While we have used the "jurisdiction" language, we have not stated that the trial court lacks subject matter jurisdiction when the term of court ends. *See, e.g.*, State v. Hinson, *supra*; State v. Walker, 269 S.C. 349, 237 S.E.2d 583 (1976); State v. Best, *supra*. When we used the "lack of jurisdiction" language, we meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended. At least three Court of Appeals' cases have discussed or mentioned the term of court rule as being a rule of subject matter jurisdiction. *See* State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007); Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006); State v. Rhinehart, 312 S.C. 36, 430 S.E.2d 536 (Ct. App. 1993). However, framing the rule as a subject matter jurisdiction rule is incorrect.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), we emphasized that subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. A circuit court judge's power to hear criminal cases is not eliminated once a term of court ends; the power is lost only as to the particular criminal case that the judge heard within a particular term of court. Given Gentry, the term of court rule is not a rule of subject matter jurisdiction.

Pursuant to our case law and Rule 29, the plea judge lacked authority to re-sentence appellant because the State did not file a timely Rule 29 motion after appellant's sentencing. We note the typical procedure in this situation is that a defendant pleads guilty pursuant to a plea agreement and then the defendant's sentencing is held in abeyance until after the defendant has cooperated at the co-defendant's trial. Had the typical procedure occurred, the plea judge would have had the authority to sentence appellant outside of his plea agreement after he failed to testify at his co-defendant's trial.

CONCLUSION

We hold the term of court rule does not involve subject matter jurisdiction and is simply a rule involving the authority of the court to hear a matter it heard in a previous term. We find the judge should not have entertained the State's motion to vacate appellant's sentence given the State did not file a Rule 29 motion. Accordingly, the ruling of the plea judge is **REVERSED.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert K. and Sharon G. Kurschner, Appellants,

v.

City of Camden Planning Commission, Respondent.

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

Opinion No. 26414
Heard October 30, 2007 – Filed January 14, 2008

AFFIRMED

William S. Tetterton, of Camden, and Holly Palmer Beeson, of Baker Ravenel & Bender, of Columbia, for Appellants.

Charles V.B. Cushman, III, of Camden, Weston Adams, III, Jillian M. Benson, and Walter Ralph Frye, III, all of McAngus Goudelock & Courie, LLC, of Columbia, for Respondent.

Robert J. Sheheen, of Savage, Royall & Sheheen, of Camden, for Amicus Curiae Adjoining Landowners and the Trustees of the Legacy of Mary Boykin Chestnut.

CHIEF JUSTICE TOAL: This is an appeal from Respondent City of Camden Planning Commission's ("the Commission") denial of Appellants Robert and Sharon Kurschner's ("the Kurschners") application to subdivide their property. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1989, the Kurschners purchased a 5.49 acre tract of land in the City of Camden known as Sarsfield, the former residence of Mary Boykin Chestnut.[1] In 2004, the Kurschners filed an application with the Commission seeking approval to subdivide the property into eight lots. Prior to the hearing, the Kurschners requested that a member of the Commission who had recently been elected to the South Carolina Legislature in a special election recuse herself from the proceeding, but the member refused the Kurschner's request. Following the hearing, the seven-member Commission voted unanimously to disapprove the Kurschner's application. The trial court affirmed the Commission's decision.

The Kurschners filed this appeal pursuant to Rule 203(d)(1)(A), SCACR,[2] and present the following issues for review:

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[1] Chestnut is the author of *A Diary from Dixie*, which she wrote while living at Sarsfield.

[2] Pursuant to Rule 203(d)(1)(A)(ii), SCACR, a party may file a direct appeal in this Court from "[a]ny final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance."

I. Should the Commission member have recused herself from participating in the Commission's decision, and if so, is the decision therefore void?

II. Were the Kurschners denied their procedural due process rights?

III. Is the Commission's decision affected by an error of law?

LAW/ANALYSIS

I. Failure to Recuse

The Kurschners argue that the Commission member was required to recuse herself pursuant to constitutional and statutory provisions prohibiting dual office holding and that the decision should therefore be reversed. We disagree.

The South Carolina Code provides that "[n]o member of a planning commission may hold an elected public office in the municipality or county from which appointed." S.C. Code Ann. § 6-29-350(B) (2004). Additionally, the South Carolina Constitution prohibits dual office holding. *See* S.C. Const. art. III, § 24 and art. VI, § 3.

Commission member Laura Funderburk was elected to the House of Representatives in a special election. At the time of the hearing regarding the Kurschner's application, Funderburk had not yet taken the oath of office. Pursuant to Funderburk's inquiry, the House Legislative Ethics Committee ("ethics committee") issued an advisory letter opining that because there were no statutory or constitutional provisions providing when the winner of a special election begins her term of office, Funderburk's term would not begin until she took the oath of office. The ethics committee thus concluded that she was free to exercise all of her duties as a member of the Commission.

The circuit court adopted the ethics committee's position and rejected the Kurschner's argument that the case should be remanded as a result of Funderburk's failure to recuse herself.

We hold that Funderburk was not required to recuse herself from participating in the Commission's decision. There are no constitutional or statutory provisions providing when the winner of a special election begins the term. Thus, in the absence of such authority, the most logical point at which a representative could begin the term of office is upon taking the oath of office. *See* S.C. Const. art. III, § 26 (providing that members of the legislature must take an oath of office before exercising their duties of office). However, even assuming Funderburk was holding office, the Kurschners point to no authority indicating that the decision is automatically void and cannot show that Funderburk's participation violated their due process rights. Specifically, the Kurschners cannot demonstrate that they were prejudiced by Funderburk's participation because even without Funderburk's vote, there remained six votes opposing the application, as the Commission unanimously voted against approval. *See Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1988) (holding that a demonstration of substantial prejudice is required to establish a due process claim).

For these reasons, we hold that the Commission's decision should not be reversed as a result of Funderburk's participation.

II. Procedural Due Process

The Kurschners present a two-pronged due process argument. First, the Kurschners argue that they were effectively deprived of due process at the hearing before the Commission because the Commission did not inform them of the opposing evidence prior to trial, considered hearsay evidence, deprived them of the opportunity to cross-examine adverse witnesses, and failed to allow them to conduct *voir dire* questioning of the members of the Commission. Second, the Kurschners argue that they were deprived of due

process on appeal because the trial court's application of the any evidence standard of review amounted to no judicial review. We disagree as to both arguments.

Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. Const. art. 1, § 22; *Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. *First Fed. Sav. & Loan Ass'n of Walterboro v. Bd. of Bank Control*, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974) (quoting *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894 (1961)). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. *S.C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002).

In our view, due process does not require the full gamut of rules and procedures to which the Kurschners claim they were entitled. While due process may require a trial-type hearing in fact-specific, adjudicatory decisions of an administrative body, the power exercised by the Commission and the individual interests at stake in this case are very different. *See In re Vora*, 354 S.C. 590, 582 S.E.2d 413 (2003) (involving the procedures required in revocation of a doctor's clinical privileges after allegations of deficient performance); *Wilson*, 352 S.C. at 456, 574 S.E.2d at 735 (requiring additional procedural safeguards in a proceeding regarding child abuse allegations); *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 391 S.E.2d 866 (1990) (addressing the procedures required in a proceeding concerning the revocation of a teacher's license). Specifically, the decision to deny the Kurcshner's application to subdivide their land was an exercise of discretionary authority, as opposed to adjudicatory power. The legislature expressly granted this discretionary authority in the area of local planning to the Commission. *See* S.C. Code Ann. § 6-29-340 (2005) (conferring

municipal planning commissions with the power to implement and to oversee the administration of regulations for the growth and development of land).

Regarding the requested procedural safeguards in this case, the Kurschners point to no authority for excluding hearsay evidence in planning commission decisions, nor do they provide any authority holding that individuals are entitled to conduct *voir dire* in land-use planning hearings. In our view, the additional procedures that the Kurschners request would not aid the Commission in making its decision, but would greatly hinder its ability to make an informed and reasoned decision, as well as intrude upon a municipality's statutorily-granted legislative authority. Accordingly, we hold that due process does not require the Commission to employ these rules and procedural safeguards in making these types of discretionary decisions. *See Matthews*, 424 U.S. at 335 (holding that in determining the process which is due, a court will consider the private interest affected by the proceeding, the risk of error created by the chosen procedure, and the countervailing governmental interest supporting challenged procedure).

Furthermore, review of the procedures in this case reveals that the Kurschners were afforded a meaningful opportunity to be heard. Specifically, the Commission held a public hearing where the Kurschners submitted twenty-six exhibits to support their application including tax information, three letters of support, title history, and information regarding prior subdivisions of Sarsfield. Additionally, the Commission did not preclude the Kurschners from accessing the evidence in opposition to their application, which mostly consisted of public information regarding the historical significance of Sarsfield. *See Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 642 S.E.2d 565 (2007) (finding no procedural due process violation where the zoning board provided an applicant a meaningful opportunity to be heard regarding whether the applicant was entitled to a permit to replace a billboard).

Additionally, we believe that the Kurschner's argument regarding judicial review is wholly mistaken. The Kurschner's argue that the trial court should have considered the substance of the evidence, and failing to do so deprived them of a meaningful review of the decision. In our view, the

Kurschners are essentially urging this Court to reject the any evidence standard of appellate review that is consistently-utilized in these types of cases and asking us to adopt an appellate review somewhere between a substantial evidence and de novo in examining decisions of a planning commission. We decline to do so.

By statute, the trial court must uphold the Commission's decision unless there is no evidence to support it. *See* S.C. Code Ann. § 6-29-840 (2005) ("The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury"); *Townes Assoc's, Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976) (holding that factual findings of the jury will not be disturbed unless there is no evidence which reasonably supports the jury's findings). We refuse to apply a standard of review different from the any evidence standard in this case, for any other standard of review would be contrary to the legislature's intent in granting a planning commission broad discretion in this area. Furthermore, this standard of review does not violate the Kurschner's due process rights. *Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach*, 294 S.C. 475, 480, 366 S.E.2d 15, 18 (Ct. App. 1988) (holding the any evidence standard of review in zoning decisions does not violate procedural due process). [3]

For the foregoing reasons, we hold that the Commission's decision did not violate the Kurschner's procedural due process rights.

III. Whether the Commission's Decision is Affected by an Error of Law

Finally, the Kurschners argue that the Commission's decision is unsupported by the evidence, controlled by an error of law, and resulted in a taking without just compensation. We disagree.

[3] The Kurschners filed a motion to argue against precedent and urge this Court to revisit *Fairfield Ocean Ridge* and hold that the any evidence standard of review violates procedural due process. The Kurschners have failed to present a compelling argument to overturn that case and we therefore decline to do so.

A decision of a zoning board will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion. *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997).

In denying the Kurschner's application to subdivide their property the Commission relied on § 156.41(B)(2)(e) of the City of Camden's Land Development Regulations, which provides that historic sites "shall be preserved to the extent consistent with the reasonable utilization of the site." The Kurschners contend that this regulation requires that the Commission perform a balancing test to determine whether the proposed subdivision is an unreasonable use of the land and is inconsistent with its preservation. The Kurschners argue that because the Commission failed to apply this balancing standard, the decision was controlled by an error of law.

In our view, the Kurschners misinterpret this regulation. The regulation merely directs the Commission to determine whether subdividing the property will negatively impact the historic value of the site. The regulation does not mandate that the Commission apply a balancing test. *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992) (holding that the words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation). The Commission found that subdividing Sarsfield would negatively impact the historical value of the property, and evidence in the record supports this finding. Furthermore, in addition to § 156.41(B)(2)(e), the Commission based its decision on several other regulations, as well as the City of Camden's Comprehensive Plan. Thus, the Kurschner's argument with respect to § 156.41(B)(2)(e) addresses only part of the Commission's decision and cannot independently require reversal.

Finally, any issues regarding whether this decision constituted a taking without just compensation may not be considered at this time. This is a direct appeal from a decision regarding whether to uphold the Commission's decision denying the Kurschner's application to subdivide their property. Any resulting issues raised by the operation of that decision would be not be

ripe for judicial review at this stage, and those issues should be litigated in a separate action. *Waters v. S.C. Land Resources Conservation Com'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996) (holding that a justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute).

Therefore, we uphold the Commission's decision because it is not controlled by an error of law and it is supported by evidence in the record. *See* § 6-29-840 ("In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.").

CONCLUSION

For the foregoing reasons, we affirm the Commission's decision in denying the Kurschner's application to subdivide their property.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jasper County
Magistrate Donna D. Lynah, Respondent.

Opinion No. 26415
Submitted October 30, 2007 – Filed January 14, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and James G. Bogle, Jr., Senior Assistant Attorney General, both of Columbia, for Office of Disciplinary Counsel.

Donna D. Lynah, of Ridgeland, pro se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a ninety (90) day suspension. The facts as set forth in the agreement are as follows.

FACTS

In 1999, 2006, and 2007, the Chief Justice of the Supreme Court of South Carolina issued detailed orders setting forth specific requirements for financial accounting in all magistrate courts in this state. Respondent attended training concerning the requirements of those orders, but knowingly did not comply with them in at least one or more of the following particulars: 1) she failed to insure that deposits were made as required by the orders and 2) she failed to insure that the bank accounts were reconciled monthly as required by the orders.

On June 13, 2007, the Chief Magistrate for Jasper County held a quarterly meeting with the magistrates, including respondent. Prior to the meeting, the Chief Magistrate had requested all magistrates bring certain bank reconciliation paperwork to the meeting. Respondent informed the Chief Magistrate that she did not have the reconciliations because her office assistant, Paula Willis, needed additional time to sort out some discrepancies with the deposits to the civil and criminal magistrate court accounts.

Thereafter, the Chief Magistrate asked another magistrate court employee, Nancy Grullon, to meet with respondent and Ms. Willis to review the bank accounts and assist them with the reconciliations. When respondent informed Ms. Willis of the meeting to review the bank accounts, Ms. Willis became irate, left for lunch, and never returned to the office.

Respondent then personally reviewed the court checking accounts and immediately realized that all deposits were not being made into the accounts. Respondent and Ms. Grullon discovered a bank bag in Ms. Willis' desk drawer that contained cash in the amount of $1,322.00 and non-deposited checks in the amount of $4,410.00. In addition, respondent and Ms. Grullon found a $25.00 money order in an unopened envelope and one check dated November 14, 2006 in the amount of $65.00 which had not been deposited. There was no identifying information to tie the cash to individual defendants or cases.

An examination by county staff of respondent's magistrate court bank records revealed an approximate shortage of $15,741.82 as of July 2007. An investigation into the exact amount of the shortage is ongoing.

On or about June 23, 2007, Ms. Willis gave a written statement to investigators in which she stated she had been employed by the county for six or eight years and with the magistrate's office for the last three years. She further stated that, within the previous six to eight months, she had become behind on her personal bills and, at some point, stopped making deposits of cash money in the magistrate court accounts and began taking sums from the court accounts to pay her bills. Ms. Willis took full responsibility for the missing money stating respondent had "nothing to do with this."

From approximately August 2006 until June 2007, respondent had relied solely on Ms. Willis to handle court money and reconcile bank statements. Respondent admitted to investigators that had she been reconciling the bank statements, this problem would have been discovered sooner. Further, respondent admitted that she had received training but had not performed her duties as required. Finally, respondent admitted she did not properly supervise Ms. Willis and did not supervise or conduct reconciliations of her official accounts.

LAW

By her misconduct, respondent has violated the following Canons of the Code of Judicial Conduct: Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3 (judge shall perform the duties of judicial office diligently); Canon 3(C)(1) (judge shall diligently discharge her administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration and should cooperate with other judges and court officials in the

administration of court business); and Canon 3(C)(2) (judge shall require staff to observe the standards of fidelity and diligence that apply to the judge).

By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. In addition, she violated Rule 7(a)(7), RJDE, by willfully violating a valid court order issued by a court of this state.

CONCLUSION

We find respondent's misconduct warrants a suspension from judicial duties. We therefore accept the Agreement for Discipline by Consent and suspend respondent for ninety (90) days. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Judicial Conduct.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John W. Swan, Respondent.

Opinion No. 26416

Submitted November 27, 2007 - Filed January 14, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John W. Swan, of North Charleston, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent wrote a letter to a Workers' Compensation Commissioner venting outrage over a ruling by the Commission that was adverse to respondent's client. Respondent admits the tone of and descriptive

speech contained in the letter were abusive and brought disrepute and disrespect to a tribunal engaged in the administration of justice, and the letter could be described as disruptive to the tribunal.

In another matter, respondent admits he violated Rule 417, SCACR, by making a check out to "Cash" instead of to the client. Respondent also admits that his failure to adequately safeguard client funds in violation of Rule 1.15 of the Rules of Professional Conduct, Rule 407, SCACR, caused a check to be reported against his trust account for insufficient funds. Respondent admits he failed to verify that the funds were available in his trust account prior to the issuance of the check that was returned for insufficient funds.

Law

Respondent admits that he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(a) (lawyer shall safeguard client funds and comply with Rule 417, SCACR); Rule 3.5(d)(lawyer shall not engage in conduct intended to disrupt a tribunal); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits he has violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). Finally, respondent admits he violated Rule 417, SCACR.

Conclusion

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Tynika Adams Claxton, Respondent.

Opinion No. 26417
Submitted November 27, 2007 - Filed January 14, 2008

DEFINITE SUSPENSION

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

Jason B. Buffkin, of Cayce, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a range of sanctions from a confidential admonition to a sixty day suspension pursuant to Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and suspend respondent from the practice of law in this state for sixty days. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent conducted a closing of a mortgage without the presence of a third party witness. Subsequent to the closing, respondent

requested and allowed her husband to sign as a witness to the mortgage when he was not present at the execution of the mortgage and did not witness the execution of the mortgage. Respondent, in her capacity as Notary Public for the State of South Carolina, took the oath of her husband regarding his witnessing the mortgagees' signatures on the mortgage when respondent knew the testimony to be false. This occurred on eight other occasions.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: 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(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent also admits that she has violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, by violating the Rules of Professional Conduct.

Conclusion

We find a sixty day suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for sixty days. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Earle E. Morris, Jr., Appellant.

Appeal from Greenville County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26418
Heard October 16, 2007 – Filed January 14, 2008

AFFIRMED

Joel W. Collins, Jr., and Christian Stegmaier, both of Collins & Lacy, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief State Grand Jury Jennifer D. Evans, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This is a direct appeal in a criminal case. A jury convicted Appellant Earle E. Morris, Jr., of one count of engaging in a scheme to commit securities fraud and twenty-two counts of securities fraud. On appeal, Morris questions the trial court's rulings as to his motion to dismiss the indictment, the introduction of several pieces of testimony and

evidence, and the law on securities fraud charged to the jury. Finding no error in the trial court's decisions on these issues, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case involves criminal charges arising out of the collapse of Carolina Investors, Inc., an investment company headquartered in Pickens County, South Carolina. Appellant Earle E. Morris, Jr., ("Appellant"), joined Carolina Investors in 1972 as a member of the company's board of directors, and eventually became chairman of the board. Both prior to and during this time period, Appellant maintained an active political life.[1] Upon his retirement from state government in 1999, Appellant entered into an employment relationship with Carolina Investors.

Although the business operations of Carolina Investors changed dramatically from the company's creation until it closed, the company raised capital for its operations in roughly the same manner throughout its existence. Carolina Investors operated much like an uninsured savings and loan association, raising capital through the public sale of debentures and other debt instruments. Carolina Investors initially used the funds generated from these sales to finance individual sales of cemetery plots. The company's services eventually expanded to include a variety of other lending, primarily in the sub-prime market.

Since the company's creation, a hallmark of Carolina Investors was a feature known as "the fifteen minute rule." This rule operated to allow investors to redeem their debentures at any time prior to maturity, but provided for a reduced rate of interest upon such redemption. According to the company, an investor could redeem a debenture at any time and have their money "in fifteen minutes."

[1] Appellant served in the South Carolina House of Representatives from 1951-1955, in the South Carolina Senate from 1955-1970, as the Lieutenant Governor of South Carolina from 1971-1975, and as Comptroller General from 1976-1999.

In 1991, Carolina Investors became a wholly owned subsidiary of National Railway Utilization Corporation, which eventually became the company HomeGold, Inc. Roughly four years later, Carolina Investors ceased its external lending activities. Although the company continued to raise funds by selling debentures, Carolina Investors simply transferred these funds directly to HomeGold or its other subsidiaries. HomeGold and its subsidiaries primarily used these funds to expand their business operations and pay operating expenses. Although the companies were profitable at one time, HomeGold began to experience substantial operating losses in 1998. These losses continued to mount, and when HomeGold failed to transfer funds sufficient to cover investors' requests to withdraw the balance of their debentures from Carolina Investors, the businesses closed.

The criminal charges that form the basis of the instant case arose primarily out of Appellant's conduct in the year immediately preceding the collapse of Carolina Investors and HomeGold. Specifically, the State alleged that in the waning time period of Carolina Investors' operation, Appellant had a great deal of information regarding the dire financial condition of HomeGold and the growing probability that HomeGold would never be able to repay its debt to Carolina Investors. Rumors of the companies' continued viability began to surface with increasing regularity, and the State alleged that as individual customers contacted Carolina Investors with concerns, either in person or over the phone, Carolina Investors employees systematically referred these investors to Appellant, who then misled the investors with false assurances of current and future profitability. The State also alleged that in some circumstances, customers were able to redeem debentures without having first spoken with Appellant, and that Appellant would thereafter personally contact these individuals and attempt to persuade them to re-invest with Carolina Investors. According to the State, Appellant's misrepresentations caused investors to leave funds on deposit that they would otherwise have withdrawn and persuaded investors to deposit additional funds or re-invest withdrawn funds with the company. The State alleged that Appellant's actions were in furtherance of a scheme to keep a steady stream of money flowing to HomeGold.

At trial, Appellant asserted that his projections to investors were not intentional misrepresentations, but were instead genuinely held sentiments based upon projections received from executives at HomeGold or their professional consultants. Appellant further argued that his position as chairman of Carolina Investors' board of directors was merely an illusory position, and that he was kept in the dark as to the company's bleak financial situation. The jury ultimately convicted Appellant of one count of engaging in a scheme to commit securities fraud and twenty-two individual counts of securities fraud. The trial court sentenced Appellant to forty-four months imprisonment, and this appeal followed.

This Court certified the case from the court of appeals pursuant to Rule 204(b), SCACR, and Appellant presents multiple issues for this Court's review:

I. Should Appellant have been granted immunity as a result of his pre-trial statement to representatives of the South Carolina securities commissioner?

II. Did the trial court err in charging the jury that criminal securities fraud could include conduct exhibiting "extreme recklessness," "severe recklessness," and "extreme indifference?"

III. Did the trial court err in allowing certain testimony from the State's corporations and securities law expert?

IV. Did the trial court err in disallowing testimony from Appellant's legal ethics expert?

V. Did the trial court err in excluding the report prepared by the bankruptcy court's examiner?

VI. Did the trial court err in denying Appellant's motion to dismiss the indictment?

VII. Did the trial court err in denying Appellant's request for a continuance?

LAW/ANALYSIS

I. Immunity from Prosecution

Appellant argues that the trial court should have granted him immunity as a result of his pre-trial statement to representatives of the South Carolina securities commissioner. We disagree.

In *State v. Thrift*, we held that the South Carolina Constitution requires that a person compelled to provide the government with self-incriminating testimony be granted immunity from any prosecution for a transaction or offense to which the person's testimony relates. 312 S.C. 282, 301, 440 S.E.2d 341, 351 (1994) (interpreting S.C. Const. art. I, § 12 to require transactional immunity for compelled testimony). In *Thrift*, we addressed the question of immunity in the context of compelled testimony before the State Grand Jury. *Id*. at 296, 440 S.E.2d at 349. Although this Court affirmed the trial court's decision dismissing the indictments against several defendants on a number of alternative grounds, we nevertheless held that the then-applicable immunity statute providing simply for use immunity failed to comport with the Constitution's demands. *Id*. at 301, 440 S.E.2d at 351.

Appellant asserts *Thrift* requires that he be granted immunity from prosecution in this case. Specifically, Appellant argues that the Attorney General used his statutory authority as securities commissioner to compel Appellant to offer self-incriminating testimony.[2] Though intriguing at first blush, this argument is not supported by the facts of the instant case.

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[2] S.C. Code Ann. § 35-1-20(1) (Supp. 2004) provides that the Attorney General of South Carolina serves as the ex officio securities commissioner.

In 2005, the Legislature comprehensively amended South Carolina's securities laws. S*ee* Act No. 110, 2005 S.C. Acts 681 ("the South Carolina Uniform Securities Act of 2005"). In doing so, the Legislature reorganized a

Thrift's compulsion requirement supplies the first hurdle that Appellant's argument cannot negotiate. More specifically, Appellant was not compelled to appear before the securities commissioner, nor was Appellant compelled to answer any questions before the commissioner's representatives. The record instead reflects that very shortly after the collapse of Carolina Investors and HomeGold, the securities commissioner issued a subpoena *duces tecum* requesting that Carolina Investors, the president of the company, and the chairman of the board supply documents and records relating to the business. We find it instructive that this subpoena was not directed to any individuals, nor did it request any personal appearances.

Although Appellant argued in testimony to the trial court that he was "compelled" to attend the meeting with the representatives of the securities commissioner, Appellant later testified that he advised a member of the securities commissioner's staff that he desired to personally meet and discuss the situation, as he and other representatives of the company had often done in the past. Appellant no doubt felt a strong desire to appear before the securities commissioner to provide information and be of assistance, but we think that a strong desire to provide assistance cannot be the equivalent of compulsion. *See Thrift*, 312 S.C. at 297, 440 S.E.2d at 349 (speaking of compelled testimony as testimony wrung from a person by force). Because there is no evidence that the securities commissioner compelled Appellant's testimony, Appellant's argument based on *Thrift* is inapposite.

To achieve his desired result through an alternate route, Appellant makes the novel argument that in order to avoid *Thrift*'s rule regarding immunity, the securities commissioner was required to inform Appellant of his constitutional right against self-incrimination and obtain a valid waiver of that right prior to questioning Appellant. Again, we disagree.

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great deal of the statutes at issue here. Though the definitional statute now appears in a different code section, *see* S.C. Code Ann. § 35-1-102(28) (Supp. 2006), this reorganization does not appear to have substantially altered the relevant statutory language.

Appellant's argument here presumes too much. Essentially, Appellant argues that the securities commissioner may not place a person under oath without advising the person of his constitutional rights, and that the failure to do so should require a de facto finding of compulsion. Though the most prudent practice in any investigative scenario would always be for law enforcement to advise any person from whom information is sought of the individual's constitutional rights, the Constitution does not require such prudence. The law instead requires only that the government apprise a person of the constitutional privilege against self-incrimination when the person is subjected to interrogation while in the custody of law enforcement. *See e.g. State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409-410 (2003) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). Accordingly, we focus our inquiry, as did the trial court, on whether Appellant was in custody when he gave his statement to the securities commissioner's representatives.

In our view, Appellant was not in custody when he gave his statement to representatives of the securities commissioner. The evidence illustrates that Appellant was not ordered to appear at the meeting, there is no evidence that Appellant was a suspect of any crime at this point, and there is no evidence that Appellant was prohibited from leaving at any point. Although the evidence illustrates that the interview occurred at the securities division in the Attorney General's office, there is no evidence as to who requested that the meeting occur there, nor is there evidence that the purpose of this meeting was to elicit incriminating statements from Appellant. Because Appellant cannot point to any factors demonstrating that he gave his statement while in the government's custody, the securities commissioner was under no obligation to advise Appellant of his constitutional rights.

As a final immunity-based argument, Appellant argues that the State impermissibly pursued criminal charges against him under the guise of the securities commissioner's administrative investigation into the collapse of Carolina Investors. We disagree.

Appellant draws on both this Court's precedent and federal precedent in support of his argument. In *State v. Quattlebaum*, 338 S.C. 441, 527

S.E.2d 105 (2000), the trial court refused to disqualify a circuit solicitor's office from prosecuting a defendant where several sheriff's officers and a deputy solicitor monitored and recorded a privileged communication between the defendant and his attorney. This Court reversed, and in doing so, the Court held that deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. *Id*. at 449, 527 S.E.2d at 109. The Court noted that "[t]he participation at trial of a prosecutor who has eavesdropped on the accused and his attorney tarnishes us all." *Id*.

Similarly, in *United States v. Kordel*, 397 U.S. 1, 12-13 (1970), the United States Supreme Court rejected the argument that a government's inquiry directed against a corporate defendant ought to per se immunize a corporation's directors from subsequent criminal prosecution. Speaking where the issue was parallel investigations of a food company by the Food and Drug Administration and the United States Attorney's office, the court noted that while it is clear that the government may not "use evidence against a defendant in a criminal case which has been coerced from him," the occurrence of parallel civil and criminal investigations does not, absent extraordinary circumstance, violate a defendant's rights to due process. *Id*.

We hold that both *Quattlebaum* and *Kordel* are totally inapplicable to the instant case. There has been absolutely no showing of any prosecutorial misconduct in this matter, and Appellant has not demonstrated that his prosecution is unconstitutional, improper, or that the government pursued a civil action or investigation solely to obtain evidence for a criminal prosecution. Although it is likely that information conveyed in the statement to the securities commissioner's representatives ultimately assisted in the State's criminal investigation, there is no evidence that the State contemplated a criminal investigation of Appellant at the time of the meeting.[3] It is not impossible for us to envision circumstances that might raise concerns when combined with the fact that the South Carolina official vested with the power to institute civil investigations in securities matters also serves as the State's chief criminal prosecuting officer. But in this case,

[3] The meeting occurred roughly two weeks after Carolina Investors closed, and the State Grand Jury indicted Appellant approximately nine months later.

there is simply no support for any analogy or purported similarity between the instant case and *Quattlebaum* or *Kordel*.

For these reasons, we hold that the trial court did not err in determining that Appellant is not entitled to immunity from prosecution.

II. Jury Charges

Appellant argues that the trial court erred in charging the jury that criminal securities fraud can include conduct exhibiting "extreme recklessness," "severe recklessness," and "extreme indifference." More specifically, Appellant argues that a conviction for criminal securities fraud requires a finding of scienter, and that the trial court's charges did not instruct the jury accordingly. We disagree.

As a primary matter, Appellant is mistaken in his characterization of the trial court's charges. In addition to charging the jury that it could find that Appellant violated the securities laws if it found that Appellant knowingly committed misconduct, the court charged the jury that it could convict Appellant if it found that he engaged in conduct "which presents a danger of misleading buyers or sellers that is either known to [Appellant] or is so obvious that [Appellant] must have been aware of it."[4] Stated differently, the court charged that in order to support a conviction, the jury needed to find that Appellant intentionally misled investors, or that Appellant knew that there was a danger that his conduct would mislead investors.

The trial court's charges accurately characterized the mental state required for a criminal conviction for securities fraud in South Carolina. Where a statute does not specify that criminal liability is to be imposed based upon graduated levels of intent, we are extremely reluctant to draw such distinctions. Furthermore, we believe that predicating criminal liability on a stricter standard than this would unnecessarily frustrate the purpose of the

[4] This latter portion of the charge represents the trial court's definition of the term recklessness.

securities fraud statutes. In S.C. Code Ann. §§ 35-1-1210 and 35-1-1590 (Supp. 2004), the Legislature saw fit to criminalize the making of untrue or misleading statements in connection with the offer, sale, or purchase of securities, and we can discern no reasonable basis for weakening this prohibition by not imposing criminal liability in the situation where a person makes statements that he or she knows presents a danger of misleading individual investors. Prevention of this type of conduct strikes at the heart of the intended purpose of the securities laws.[5]

A review of the evidence presented at trial is instructive. The record reflects that HomeGold lost over $300 million from 1998 until the companies closed. During this same time, the record reflects that HomeGold's inter-company debt to Carolina Investors grew from about $304,000 to over $275 million. At trial, the State introduced evidence that Appellant attended board meetings where officers discussed HomeGold's enormous losses and the tremendously increasing inter-company debt. The State introduced evidence that Appellant attended meetings where auditors hired by the company discussed the grave circumstances caused by the lack of positive cash flow to HomeGold and the accompanying likelihood that HomeGold would never repay its debt to Carolina Investors. The State introduced evidence that Appellant discussed these circumstances with his fellow board members, and that Appellant attended meetings where the parties explored the issues of bankruptcy or a convervatorship. Finally, the State introduced evidence that despite being fully aware of the dire situation of the company, Appellant used his reputation to aggressively attract and retain customers for Carolina

[5] In fact, the statutory scheme expressly forecloses Appellant's argument. *See* S.C. Code Ann. § 35-1-501 cmt. 6 (Supp. 2006) (providing that the culpability required to be pled and proven is addressed in the enforcement statute); *see also* S.C. Code Ann. § 35-1-508 cmts. 2, 6 (Supp. 2006) (providing that both the current and former versions of the Code impose criminal liability for securities fraud when a person acts intentionally in the sense that the person is aware of what he or she is doing and that "[p]roof of evil motive or intent to violate the law or knowledge that the law was violated is not required").

Investors, and that Appellant was financially rewarded based upon his effectiveness in preventing massive requests to redeem debentures.

Witness at trial testified that when confronted with specific questions regarding individual investments and the financial situation of the company, Appellant responded "I see the numbers and your money is safe," that there was no way that anyone was going to lose any money, and that there was a lawsuit against another company for putting out false information about Carolina Investors. Additional witnesses testified that Appellant told customers that Carolina Investors had been "sold to a company in California," that Carolina Investors was "as solid as the floor we're standing on," that the company was "as solid as the rock of Gibraltar," and that "money here is as good as if it were gold." This case was not, as Appellant suggests, an example of looking backwards at his conduct through the often distorting lens of hindsight. Instead, the theory of the State's case revolved around evidence showing what Appellant said to twenty-two specific investors versus what Appellant knew to be the financial reality. If the inclusion of the term recklessness, despite the trial court's detailed definition of the term, could have introduced any ambiguity into the jury's understanding of the law, it had no effect on this case. The instant case did not deal with reckless conduct.

Accordingly, we hold that the trial court did not err in charging the jury as to the mental state required for a criminal conviction of securities fraud.

III. The State's Expert

At trial, the State offered Gregory B. Adams as an expert in corporate and securities laws. Appellant argues that Adams was not qualified to opine on issues of corporate and securities laws in South Carolina because Adams is not licensed to practice law in South Carolina. We disagree.

The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion. *State v. Myers*, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990). Generally, defects in the amount and quality of an expert's education or

experience go to the weight to be accorded the expert's testimony and not to its admissibility. *Id*. In South Carolina, expert testimony is admissible where the testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. Rule 702, SCRE.

Despite Appellant's argument to the contrary, the status of Adams' law license is completely irrelevant to his qualification as an expert. The evidentiary rule governing the qualifications of experts says nothing about professional licensing requirements, and a licensing requirement seems wholly incompatible with Rule 702's operational framework. At the time of trial, Adams had been a law professor at the University of South Carolina for more than twenty-five years, with experience teaching corporate and securities law classes. Furthermore, the record reflects that Adams served as one of the authors of the 1988 South Carolina Business Corporations Act, and that Adams serves as one of the co-authors of the primary practice manual on corporate law used in this state. In light of this evidence, the trial court clearly did not abuse its discretion in qualifying Adams as an expert on corporate and securities laws.[6]

Appellant next contends that Adams' testimony was contrary to the law of South Carolina and should have been excluded. We disagree.

Adams testified that in certain contexts, statements that are often associated with unactionable puffery can constitute fraudulent misstatements in violation of the securities laws. Although Appellant may be correct that, in general, "projections of future performance not worded as guarantees are not

[6] Appellant relies in part on S.C. Code Ann. § 40-22-20 (22) (Supp. 2006) to support his policy-based argument that an expert on South Carolina law should be required to be licensed to practice law in this state. Although Appellant correctly points out that § 40-22-20(22) defines the practice of engineering to include offering expert testimony, Appellant overlooks this Court's decision in *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 374-75, 635 S.E.2d 97, 103-04 (2006), where this Court declined to interpret the practice of engineering statute to preclude the offering of expert testimony by a person not licensed as a professional engineer in South Carolina.

actionable under securities laws," Adams did not testify to the contrary. Instead, Adams testified that commercial puffery, by definition, excludes statements that are material to investors, and that the atmosphere in which a statement is made bears on its materiality. Because Appellant does not accurately describe Adams' testimony, Appellant's argument is unpersuasive.

As a final point on this issue, Appellant argues that the trial court improperly allowed Adams to opine on the ultimate issue in this case, which is whether Appellant engaged in fraudulent conduct. Again, we disagree.

This Court's rules provide that "[t]estimony in the form of an opinion . . . otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. In this case, the State concluded its examination of Adams by presenting a series of hypothetical situations and asking whether certain actions in those hypotheticals would be illegal. Although this testimony arguably involved the ultimate issue in the instant case, this case required the jury to analyze facts and circumstances as they existed in a complex business environment, and the trial court determined that expert testimony would assist the jury in making its determinations. For this reason, this case differs substantially from the expert testimony cases upon which Appellant relies.[7]

For the foregoing reasons, we affirm the trial court's decision regarding the qualification of the State's corporate and securities law expert and the admission of the expert's testimony.

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[7] In *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), this Court held that the trial court properly refused to consider an expert affidavit filed in response to a summary judgment motion where the affidavit largely contained only legal opinions, conclusions, and no factual support. Similarly, in *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 249 S.E.2d 734 (1978), the trial court refused to permit an expert to opine on whether an offer of commercial services would constitute the offering of investment contracts under federal law. Affirming the trial court's decision, this Court held that the testimony was offered to establish a conclusion of law within the exclusive province of the court, and thus was properly excluded. *Id*. at 107, 249 S.E.2d at 740.

IV. Exclusion of Appellant's Ethics Expert

Appellant argues that the trial court improperly excluded the testimony of his expert in legal ethics and conflicts of interest. We disagree.

The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support. *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

At trial, Appellant offered attorney Desa Ballard as an expert in legal ethics and conflicts of interest. Through Ballard, Appellant sought to offer testimony as to the conflict of interest HomeGold's officers and corporate attorneys experienced by simultaneously representing Carolina Investors in various capacities.[8] Although the trial court qualified Ballard as an expert, the court held that her testimony as to conflicts of interest was irrelevant, and alternatively, that the testimony would confuse the issues in the case.

The trial court did not abuse its discretion in excluding Ballard's testimony. This Court is concerned by the apparent conflict of interest created by the fact that a single law firm attempted to provide legal services to two companies whose relationship, given the financial characteristics of the situation, was anything but symbiotic; and additionally by the fact that a principal of the law firm served as an officer on the board of the parent corporation. But assuming, without deciding, that a conflict existed here, Appellant cannot demonstrate how any attorney's action or inaction caused him to believe that it was advisable to mislead investors. Similarly, Appellant points to no evidence indicating that any attorney was

[8] The law firm Wyche, Burgess, Freeman, and Parham served as HomeGold's corporate counsel and also prepared Carolina Investors' annual prospectus for approval by the securities commissioner. Attorney C. Thomas Wyche served as an officer on HomeGold's board of directors.

knowledgeable of his conduct, particularly as to Appellant's statements to individual investors. Accordingly, the trial court did not abuse its discretion in concluding that issue of a law firm's conflict of interest was irrelevant and confusing with respect to the issues presented in this case.

For these reasons, we hold that the trial court did not err in excluding the testimony of Appellant's expert in legal ethics and conflicts of interest.

V. Exclusion of the Bankruptcy Examiner's Report

Appellant argues that the trial court incorrectly excluded the report prepared by the bankruptcy examiner in the federal bankruptcy litigation involving Carolina Investors and HomeGold from evidence. Specifically, Appellant argues that the bankruptcy examiner's report was admissible under the public records and reports exception to this Court's general rule excluding hearsay evidence. *See* Rules 802 & 803(8), SCRE. We disagree.

Appellant's argument regarding the public records or reports exception to the hearsay rule is, in our view, misguided. Rule 803(8), SCRE, specifically provides that "investigative notes involving opinions, judgments, or conclusions are not admissible." An examination of the bankruptcy examiner's report reveals that the report contains a great deal of investigative opinions, legal analysis, and potential conclusions.[9] For these reasons, we hold that the trial court correctly concluded that the bankruptcy examiner's report was outside the scope of the public records and reports exception.

[9] By way of example, the report provides that "[m]anagement and its advisors knew that their investor customers would equate [Carolina Investors] with a bank," and "it is clear that the game plan was to knowingly gamble the money of unsophisticated creditors." The report also offers numerous conclusions beginning with the preface "there is sufficient evidence for a finder of fact to conclude." Additionally, the examiner opines on the applicability of several potential legal defenses, and opines specifically that the business judgment rule would not protect the officers and directors of Carolina Investors.

Appellant makes a second argument that the "rule of completeness," *see* Rule 106, SCRE, required the trial court to admit the examiner's report into evidence, but we believe this argument is similarly flawed. As the trial court made clear, it did not admit the examiner's report or any part of the examiner's report into evidence. Furthermore, the State did not offer any testimony, expert or otherwise, that drew from the examiner's report or any part thereof. Because the trial court never admitted any portion of the examiner's report, Appellant's rule of completeness argument is inapposite.

Accordingly, we hold that the trial court did not err in excluding the bankruptcy examiner's report.

VI. Dismissal of the Indictment as Defective

Appellant argues that the trial court incorrectly denied his motion to dismiss the indictment as defective. Specifically, Appellant argues that the conduct set forth in the indictment does not fall within the purview of the criminal statutes the State charged him with violating because all alleged misstatements regarding Carolina Investors' financial health and business operations were to pre-existing customers and not prospective customers. We disagree.

Appellant takes far too narrow a view of the statute's application. Specifically, Appellant's argument overlooks S.C. Code Ann. §§ 35-1-20(13)(a) and (b) (Supp. 2004), providing that "sale" means every contract for the sale of, contract to sell, or contract for the disposition of a security or interest in a security for value; and that an "offer" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. Because Carolina Investors customers had the option of disposing of their debentures prior to maturity, there is no reasonable way to view Appellant's conversations with customers as not relating to offers to dispose of securities. In fact, the only arguable purpose of Appellant's statements to customers was to prevent the disposition of securities.

For the foregoing reasons, we hold that the trial court did not err in denying Appellant's motion to dismiss the indictment as defective.

VII. Appellant's Request for a Continuance

Appellant argues that the trial court incorrectly denied his request for a continuance. We disagree.

The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion. *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). In support of his argument that the trial court abused its discretion in denying his request, Appellant argues that his trial was premature and that had the court granted a continuance, Appellant would have been able to demonstrate that he was a victim of an intentional campaign of deception by HomeGold executives. Appellant asserts that he did not call several potential witnesses who would have corroborated his theory of the case because these witnesses had criminal trials pending and would have asserted their Fifth Amendment rights.

Appellant cannot demonstrate that he suffered any prejudice as a result of being forced to proceed to trial rather than being granted a continuance.[10] At trial, Appellant presented a great deal of evidence, including his personal testimony, regarding what he alleged to be evidence of HomeGold's scheme to hide financial data from Carolina Investors officials. Furthermore, Appellant presented the testimony of several co-workers to corroborate his "kept in the dark" defense. Importantly, Appellant cannot demonstrate that the grant of a continuance would have in any way affected the Fifth Amendment considerations he raises in support of his argument. In our view, the grant of a continuance would have generated no such effect.

As a housekeeping matter on this issue, it is instructive to note that this Court's evidentiary rules speak to the subject of continuances in the context of unavailable witnesses. Rule 7(b), SCRCrimP, provides:

[10] The State Grand Jury indicted Appellant in January 2004, and Appellant's trial occurred during November 2004.

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

At trial, Appellant did not demonstrate any of the above-described hardships in support of his request for a continuance. Furthermore, in light of the evidence introduced at trial, any testimony from unavailable witnesses or other unavailable evidence would likely have been cumulative. Accordingly, there is no indication that Appellant would have been able to make a successful argument for a continuance based upon Rule 7(b).

Accordingly, we hold that the trial court did not abuse its discretion in denying Appellant's request for a continuance.

CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction and sentence.[11]

MOORE, WALLER and BEATTY, JJ., concur. PLEICONES, J., concurring in a separate opinion.

[11] As an eighth issue on appeal, Appellant argues that the trial court erred in denying his motion for a directed verdict. We affirm the trial court's decision on this issue pursuant to Rule 220(b)(1), SCACR, and the following authority: *State v. Weston*, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006) (providing that a trial court examines a request for a directed verdict based on the existence or nonexistence of evidence, and that if there is any direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt, the case must be submitted to the jury).

JUSTICE PLEICONES: I concur in the majority's decision to affirm appellant's convictions and sentences, but write separately because I view several of the issues differently than does the majority. I have addressed the issues in the same order.

I agree that appellant was not entitled to immunity because he was not compelled to provide the State with self-incriminating information. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). I do not join that part of the majority opinion which advises investigators to impart Miranda warnings where they are not otherwise required

I agree that the jury instruction given in this case did not misstate the scienter requirement in a securities fraud prosecution. See State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549 (1975)(knowingly means actual knowledge, but one can not avoid "knowing" by shutting one's eyes to what would otherwise be obvious). Unlike the majority, I would not find that a review of the evidence is in order. As I view appellant's complaint, it is not that the charge was not warranted by the evidence, but rather that it misstated the scienter requirement. Finally, I would not engage in the harmless error analysis undertaken at the conclusion of section II of the opinion, as I would find no error in the charge given.[12]

As to the testimony of the State's expert, I agree with the majority that we should affirm the trial court's ruling that the expert was qualified. See Smith v. Haynesworth, 322 S.C. 433, 472 S.E.2d 612 (1996).

As to appellant's contention that the trial court erred in not permitting his expert to testify to a law firm's alleged conflict of interest, I would affirm as the proffered testimony was simply not relevant. Rule 402, SCRE.

I agree that the Bankruptcy Examiner's Report was properly excluded from evidence.

[12]This is not to suggest that I would endorse the instruction as a model charge.

I agree that the trial judge did not err in refusing to dismiss the indictment, which is couched in the language of the statute. E.g., State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006) *qualified on other grounds* Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007). In my view, appellant's contention that the evidence did not show a statutory violation is one to be addressed at trial at the directed verdict stage, not a defect apparent on the face of the indictment warranting the indictment's dismissal.

Finally, I agree with the majority's decision to affirm the denial of appellant's continuance request, and to affirm the denial of his directed verdict motion.[13]

For the reasons given above, I concur in the majority's decision affirming appellant's convictions and sentences.

[13] I note that the directed verdict is contested not on the basis that the State failed to prove in some counts that there was a "sale" of securities as defined by the statute, but on the ground that the State failed to prove appellant possessed the requisite intent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nitus Joanne Linog, Appellant,

v.

Mark Yampolsky, D.D.S., and
Eloise Bradham, M.D., Respondents.

Appeal from Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 26419
Heard October 17, 2007 – Filed January 14, 2008

AFFIRMED

Brooks Roberts Fudenberg, of Charleston, and Geoffrey H. Waggoner, of Mt. Pleasant, for Appellant.

Andrew Steven Halio, of Halio & Halio, of Charleston, for Respondent Mark Yampolsky.

Todd W. Smyth and Neil D. Thomson, both of Haynsworth Sinkler Boyd, of Charleston, for Respondent Eloise Bradham.

Marvin D. Infinger and Lydia B. Applegate, both of Haynsworth Sinkler Boyd, of Charleston, for Amicus Curiae South Carolina Medical Association.

CHIEF JUSTICE TOAL: This is an appeal from a grant of summary judgment in favor of Respondents Dr. Mark Yampolsky and Dr. Eloise Bradham as to Appellant Nitus Linog's ("Appellant") claim for medical battery. Appellant based her claim on her purported revocation of consent to a dental procedure during the surgery and while under anesthesia. The trial court found no South Carolina precedent recognizing medical battery based on withdrawal of consent, but ruled that even if South Carolina law permitted such a cause of action, Appellant failed to provide any expert testimony. Because we hold that no cause of action exists for medical battery in South Carolina, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

After several consultations, Dr. Yampolsky, a periodontist, recommended that Appellant receive osseous gum surgery, a highly invasive dental procedure. The procedure was scheduled to last approximately four hours and include all four quadrants of Appellant's mouth. Due to her extraordinary fear of dentists, Appellant elected to undergo the procedure with intravenous sedation. Dr. Bradham, an anesthesiologist, administered a combination of four anesthetic agents prior to and during the procedure. However, Dr. Bradham's attempt to sedate Appellant was not entirely successful, and the record reveals that Appellant would turn her head and mumble throughout surgery. As a result, Dr. Yampolsky decided to terminate the procedure after three and a half hours and with only one quadrant completed.

Appellant filed a medical malpractice action against Drs. Yampolsky and Bradham, alleging that she suffered a herniated disc during the procedure. Discovery in the action proceeded, and in depositions, both

doctors testified that during the procedure, Appellant continued to intermittently move her head and otherwise disrupt the procedure, thereby making the surgery more difficult to complete. Appellant then amended her complaint to include a cause of action for medical battery, contending that the doctors' deposition testimonies showed that she withdrew her consent during the procedure.

Subsequently, Respondents filed a motion for summary judgment as to both causes of action. The trial court granted the motion as to the medical malpractice claim based solely on the fact that Appellant failed to identify an expert witness who would testify to support her claim. Additionally, the trial court granted summary judgment as to the medical battery claim. Specifically, the trial court found no legal precedent in South Carolina allowing a claim for medical battery based on a patient's withdrawal of consent. The court alternatively held that even if South Carolina recognized such a claim, Appellant failed to provide expert testimony establishing the relevant standard of care and showing that Appellant withdrew her consent.

We certified this case pursuant to Rule 204(b), SCACR, and Appellant raises the following issue for review:

> Did the trial court err in granting summary judgment regarding Appellant's medical battery claim?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). The mere fact that a case involves a novel issue does not render summary judgment inappropriate. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005).

LAW/ANALYSIS

Appellant argues that South Carolina should recognize a medical battery claim based on revocation of consent and that expert testimony should not necessarily be required in proving such claim. We disagree.

South Carolina courts have specifically addressed issues involving informed consent in the context of medical care. In *Hook v. Rothstein*, the court of appeals explicitly held that lack of informed consent cases fall under the medical malpractice framework. 281 S.C. 541, 553, 316 S.E.2d 690, 698 (Ct. App. 1984) (holding a patient must show that, based on expert testimony of the standard of care, the physician provided insufficient information to enable the patient to make an intelligent and informed decision). Additionally, in *Harvey v. Strickland*, 350 S.C. 303, 312, 566 S.E.2d 529, 534 (2002), we held that South Carolina recognizes a medical malpractice claim stemming from lack of informed consent.

On the other hand, although not entirely foreign to South Carolina jurisprudence, our courts have not explored medical battery as thoroughly. In *Hook*, the court of appeals mentioned medical battery and explained "the battery theory is applicable either where the physician performs a procedure to which the patient has not consented or where the patient gives permission to perform one type of procedure and the physician performs another." *Hook*, 281 S.C. at 558, 316 S.E.2d at 700-01. Similarly, in both *Harvey v. Strickland* and *Banks v. Medical University of South Carolina*, we reversed the trial court's grant of summary judgment as to the patients' medical battery claims and noted that "we have recognized that there may be a viable cause of action for medical battery as the result of failing to obtain proper consent." *Harvey*, 350 S.C. at 312, 566 S.E.2d at 534 (citing *Banks*, 314 S.C. 376, 444 S.E.2d 519 (1994),).

Turning to the instant case, we must determine whether South Carolina should recognize a separate and independent cause of action for medical battery, or whether such theories of liability are more properly analyzed under alternative and well-established causes of action.

Under our jurisprudence, an injured patient may bring a medical malpractice claim against a physician where the physician's negligence in rendering medical care proximately causes the patient's injury. *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). A patient alleging medical malpractice must provide evidence, through expert testimony, showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the physician's field of medicine under the same or similar circumstances, and (2) that the physician departed from the recognized and generally accepted standards. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). Alternatively, it is possible that a patient might sustain an injury as a result of a physician's intentional acts that are unrelated to medical care. In these cases, a patient may bring a civil battery claim against a physician where the physician commits an offensive touching outside of the medical scope. *Honea v. Prior*, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988) (upholding a jury verdict for assault and battery against a physician who sexually assaulted his patient).

In light of the availability of a medical malpractice claim or a civil battery claim to any patient that is injured by a physician, we believe medical battery would constitute an unnecessary and superfluous cause of action. We see little need to recognize an additional cause of action related to tortious injuries arising out of interactions with medical providers when the tort of medical malpractice fully covers all acts performed in relation to medical services and when the remaining area of private tort law applies to acts not related to medical services. Accordingly, we limit the holdings of *Hook*, *Harvey*, and *Banks* to the extent that they indicate that our State recognizes medical battery and hold that no independent cause of action for medical battery exists in South Carolina. We further hold that in order for a patient to pursue a claim stemming from a situation involving lack of or revocation of consent, a physical touching within the medical context, and a resulting injury, the patient must bring this claim under the medical malpractice

framework.[1] That is, a patient must show through expert testimony that the physician deviated from the relevant standard of care in failing to obtain proper consent, unless the subject matter lies within common knowledge. *See David*, 367 S.C. at 248, 626 S.E.2d at 4 (holding that a plaintiff bringing a medical malpractice suit must provide expert testimony unless the subject matter lies within the ambit of common knowledge). It is important to note that our holding in no way implies that a patient must produce expert testimony in a civil battery claim where the touching occurs outside of the medical context. We believe courts are certainly able to distinguish between a physician's professional services and acts that fall outside the medical scope. *See South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry*, 291 S.C. 460, 463, 354 S.E.2d 378, 380 (1987) (holding that the scope of professional services does not include all forms of a physician's conduct simply because he is a physician).

In this case, Appellant clearly sustained her alleged injuries while receiving treatment within the medical context, and therefore, the trial court properly analyzed Appellant's claim as a claim for medical malpractice. Accordingly, because Appellant failed to produce any expert testimony that Drs. Yampolsky and Bradham deviated from the standard of care, we hold that the trial court properly granted Respondents' motion for summary judgment.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

[1] We express serious doubts as to whether a patient could ever revoke consent to a medical procedure while under anesthesia or some other method of significant sedation. For this reason expert testimony as to the standard of care ought to be critically important in cases of this type.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby R. Walton, Appellant,

v.

Mazda of Rock Hill, Mazda USA, Lee Faile, Ken McManus, Eric Sigmon, and C.A.R.S., Defendants,

of whom:

Ken McManus and Eric Sigmon are the Respondents.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 4306
Filed October 19, 2007
Withdrawn, Substituted, and Refiled January 10, 2008

AFFIRMED

Mitchell K. Byrd, Sr., of Hilton Head Island, for Appellant.

Lucy London McDow, of Rock Hill, for Respondent.

PER CURIAM: Bobby Walton filed this action alleging, inter alia, breach of contract arising from his purchase of an automobile. The magistrate granted summary judgment to two of the defendants, Ken McManus and Eric Sigmon. On appeal, the circuit court affirmed and we affirm.[1]

FACTS

On August 31, 2002, Walton purchased a vehicle, and a warranty contract issued by C.A.R.S., from Mazda of Rock Hill, a.k.a. Faile Enterprises, Inc. On December 19, 2002, Faile Enterprises entered into an asset purchase agreement with McManus and Sigmon. In January 2003, Walton brought the vehicle to the dealership for repairs. At that time, Walton was informed of the sale, and McManus and Sigmon refused to honor Walton's contract or warranty. Walton contacted C.A.R.S. expecting it to honor the warranty contract. C.A.R.S. notified Walton it never received the paperwork or payment from Mazda of Rock Hill.

The sale and transfer of the dealership assets closed on March 27, 2003. On March 28, 2003, McManus and Sigmon assigned the asset purchase agreement to McManus-Sigmon, Inc., a.k.a. Team Mazda.

By complaint dated April 2, 2003, Walton sued Mazda of Rock Hill, Mazda USA, Lee Faile, McManus, Sigmon, and C.A.R.S., alleging breach of contract, unfair trade practices, and willful and malicious conduct. The magistrate granted McManus' and Sigmon's motion for summary judgment.

STANDARD OF REVIEW

When reviewing the grant of summary judgment, the appellate court applies the same standard governing the trial court under Rule 56(c), SCRCP. Summary judgment is proper when there is no genuine issue as to any

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

material fact and the moving party is entitled to judgment as a matter of law. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Id.

LAW/ANALYSIS

I. Summary Judgment

Walton first argues a magistrate does not have the authority to rule on a motion for summary judgment. We disagree.

Rule 81, SCRCP, provides:

> These rules [SCRCP], or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable. They shall apply insofar as practicable in magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts.

See Rule 1, SCRCP (defining the scope of the South Carolina Rules of Civil Procedure) and Rule 56, SCRCP (providing the authority to grant summary judgment).

Additionally, Rule 2, SCRMC, provides:

> (a) If no procedure is provided by these rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in like situations but not inconsistent with these rules.

> (b) Each magistrate may promulgate rules for the conduct of proceedings in his court which are not inconsistent with these rules and the South Carolina Code of Laws.

Although there is no law within the South Carolina Rules of Magistrate Court specifically addressing summary judgment, the South Carolina Bench Book for Magistrates and Municipal Court Judges discusses summary judgment, explaining:

> After the filing of a civil case and prior to the actual trial, you may occasionally receive a motion for summary judgment . . . . Rule 56, SCRCP, which is made applicable to magistrate's court by Rule 81, SCRCP, allows the plaintiff **or** defendant . . . [to] move with or without supporting affidavits for a summary judgment . . . . Summary judgment is proper when, after reviewing the motion, supporting affidavits, and the pleadings, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. . . . If, after a hearing, the court determines the summary judgment is appropriate, an order to that effect ending the case should be issued.

South Carolina Bench Book for Magistrates and Municipal Court Judges, II-19 to II-20 (2d ed. 1984), available at http://www.sccourts.org/trial/magistrate/benchbook/HTML/CivilC.htm#C15 (emphasis in original).

Therefore, we find Rule 56, SCRCP, applies to magistrates as members of the South Carolina court system. The circuit court did not err in affirming the magistrate's grant of summary judgment because the grant of summary judgment does not exceed the magistrate's authority.

II. Successor Liability

Walton next contends genuine issues of material fact exist as to successor liability and therefore the magistrate erred in granting summary judgment. We disagree.

In the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully denying creditor claims. Simmons v. Mark Lift Indus., 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) (citing Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924)).

(a) Agreement to Assume Obligations Exception

Walton alleges an issue of material fact is present regarding whether McManus and Sigmon agreed to assume Mazda of Rock Hill's debts or obligations. We disagree.

"When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense." S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct. App. 2003).

The Asset Purchase Agreement states that McManus and Sigmon purchased the assets "free and clear of any liens, encumbrances, restrictions, charges, and equities of any kind whatsoever." Further, the Asset Purchase Agreement states: "Purchaser is not assuming any liabilities of Seller." Walton focuses on language in the Asset Purchase Agreement that obliges McManus and Sigmon to purchase, at cost, all repair work in progress. Under this provision, McManus and Sigmon were to finish customer repair work, and the proceeds were to be divided equally between the parties. We agree with the magistrate and circuit court that this provision, in light of the

other provisions in the contract, does not convert the agreement from solely an asset sale to a sale of assets and liabilities. Therefore, Walton's reliance on this provision is misplaced and the magistrate did not err in finding no genuine issues of material fact exist regarding this exception.

(b) Consolidation Exception

Walton argues there is a material issue of fact whether the sale between Mazda of Rock Hill and McManus and Sigmon was simply a consolidation. We disagree.

As the circuit court properly determined, there is no evidence in the record indicating the transaction between Mazda of Rock Hill and McManus and Sigmon amounted to a consolidation. Both McManus and Sigmon signed affidavits swearing they have never had any interest in Mazda of Rock Hill. The asset purchase agreement clearly establishes a sale between Faile Enterprises and McManus and Sigmon. The agreement was also subject to a consultant and non-compete agreement, in which Faile promised not to associate with any Mazda dealership within twenty miles of the sold dealership and to work as a consultant for McManus and Sigmon for almost two years. Accordingly, no factual issue prevents summary judgment based on this exception.

(c) Mere Continuation Exception

Walton asserts a material issue of fact exists as to whether McManus and Sigmon merely continued Mazda of Rock Hill. We disagree.

In Simmons v. Mark Lift Industries, Inc., the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser. 366 S.C. 308, 312 n.1, 622 S.E.2d 213, 215 n.1 (2005). As discussed, McManus and Sigmon did not have any relationship with Mazda of Rock Hill except for the purchase of the assets of the dealership. Additionally, Faile only served McManus' and Sigmon's new organization, Team Mazda, as a consultant for a limited time period. Therefore, we find

evidence to support the circuit court's finding that there was no material issue of fact supporting Walton's claim of a mere continuation.

(d) Fraud Exception

Finally, Walton contends there is an issue of material fact regarding whether the asset sale was fraudulent. To meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer. Richard L. Cupp, Jr., Redesigning Successor Liability, 1999 U.Ill.L.Rev. 845, 875-76 (1999). Proving such knowledge is difficult, and a few courts have advocated expanding the fraud exception to include reviewing the successor's actual or constructive knowledge. Id. at 888-89 (generally discussing the fraud exception in product liability actions alleging successor liability). Under either interpretation of the fraud exception to successor liability, we find no genuine issue of material fact. Walton provides no theory supporting a claim of fraud. For instance, there is no evidence of inadequate consideration and no indication that McManus and Sigmon were not bona fide purchasers for value. A party opposing summary judgment must do more than rely on mere allegations. Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). We find no error by the trial court in affirming the magistrate's grant of summary judgment on the fraud exception.

Based on the foregoing, we find no error in the circuit court's order affirming the master's grant of summary judgment in favor of McManus and Sigmon.

AFFIRMED.

WILLIAMS, J., and CURETON and GOOLSBY, A.J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Isiah James, Jr., Appellant,

v.

South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS), Respondent.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4329
Submitted November 1, 2007 – Filed January 10, 2008

AFFIRMED

Isiah James, Jr., pro se Appellant.

Daniel R. Settana, Jr. and J. Eric Kaufmann, both of Columbia, for Respondent.

KITTREDGE, J.: Isiah James, Jr., brought this action against the South Carolina Department of Probation, Parole and Pardon Services (the

Department) alleging he was improperly denied parole and that the Department's decision to allow him a parole review every two years rather than each year constituted an ex post facto violation. The circuit court granted summary judgment to the Department, finding James had stated no viable claim for relief and that the Department's review procedure did not constitute an ex post facto violation. James appeals. We affirm.[1]

I.

James was convicted in 1979 of two counts of voluntary manslaughter and one count of armed robbery. The offenses were committed in 1978. He received consecutive sentences of thirty years in prison for each manslaughter charge and a consecutive sentence of twenty-five years for the robbery charge. James brought this current action against the Department alleging he was improperly denied parole after a hearing in 2005. The Department moved for summary judgment, asserting, among other things, that James presented no claim for relief.

The circuit court found no merit to James's claim regarding the Department's decision not to grant him parole and affirmed the Department's decision that James was not entitled to a parole hearing every year rather than every two years. In granting summary judgment to the Department, the court found James failed to state a cause of action and had not established the Department committed an ex post facto violation in its decision to conduct parole hearings every two years. In addition, the court found James's claims were barred by the doctrine of res judicata and several provisions of the South Carolina Tort Claims Act. James appeals, arguing the circuit court erred in granting summary judgment to the Department.

II.

Under the South Carolina Rules of Civil Procedure, the trial court may determine summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

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

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

III.

On appeal, James asserts the circuit court erred in granting summary judgment to the Department on the grounds that he did not have an absolute right to parole and he had shown no ex post facto violation.[2] We disagree.

The circuit court determined James failed to state a cause of action for relief because inmates have no protected right to parole, only the right to a parole hearing, citing Furtick v. South Carolina Department of Probation, Parole, and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003). The circuit court stated a claim regarding the failure to grant parole, as opposed to a claim that an inmate has been declared permanently *ineligible* for parole, is not reviewable. The court additionally found that, even if this were a situation involving a determination that James was permanently ineligible for parole, the proper procedure under Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) would have been to submit this action to the Administrative Law Court (ALC), not the circuit court. We agree.

In Furtick, our supreme court held the ALC[3] had jurisdiction to hear a defendant's appeal from the Department's decision finding him ineligible for

[2] James also challenges the circuit court's rulings regarding the application of the doctrine of res judicata and the South Carolina Tort Claims Act.

[3] The name was changed from the Administrative Law Judge Division to the Administrative Law Court by Act No. 202, effective April 26, 2004. See Civil Action No.: 2001-CP-32-0711 Carolina Water Serv., Inc. v. Lexington County Joint Mun. Water & Sewer Comm'n, 367 S.C. 141, 625 S.E.2d 227 (Ct. App. 2006), *overruled on other grounds by* Edwards v. SunCom, 369

parole. 352 S.C. at 597-98, 576 S.E.2d at 148-49. The court concluded that an inmate has a liberty interest in gaining *access* to the parole board, although there is no protected right to parole. The court explained, "In our opinion, the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process." Id. at 598, 576 S.E.2d at 149. The court observed section 24-21-620 of the South Carolina Code[4] generally provides for review for parole, but noted as follows: "Although this provision creates a liberty interest in parole eligibility, it does not create a liberty interest in parole." Id. at 598 n.4, 576 S.E.2d at 149 n.4; see also Sullivan v. South Carolina Dep't of Corrections, 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 127 n.4 (2003) (noting parole is a privilege, not a right).

In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), an inmate brought a post-conviction relief action contesting a decision by the Department of Corrections to take away his good-time credits. Id. at 361, 527 S.E.2d at 745. Our supreme court held that the proper procedure an inmate should follow is to seek review of the agency's decision by the ALC, following the terms of the Administrative Procedures Act (APA).[5] Id. at 369, 527 S.E.2d at 750. Further, in Sullivan, the court stated that an inmate has a right of review by the ALC that he is ineligible for parole. 355 S.C. 437, 443 & n.4, 586 S.E.2d 124, 127 & n.4.

Thus, we hold the circuit court correctly found James did not present a viable claim regarding the Department's decision to deny him parole as the denial of parole is not a cognizable claim. In addition, James should have followed the procedures outlined in Al-Shabazz for review of his claims.

S.C. 91, 631 S.E.2d 529 (2006) *and rev'd on other grounds by* Carolina Water Serv., Inc. v. Lexington County Joint Mun. Water & Sewer Comm'n, 373 S.C. 96, 644 S.E.2d 681 (2007).

[4] See S.C. Code Ann. § 24-21-620 (2007) (providing for parole review every twelve months for nonviolent offenders).

[5] The APA is found at S.C. Code Ann. §§ 1-23-10 to -660 (2005 & Supp. 2006).

Likewise, we similarly reject James's contention that the circuit court erred in finding he failed to establish the Department committed an ex post facto violation by denying him annual parole reviews.

In Steele v. Benjamin, 362 S.C. 66, 606 S.E.2d 499 (Ct. App. 2004), an action involving a request for a writ of mandamus, we held, as an additional sustaining ground to support the circuit court's dismissal of Steele's claim, that an administrative law judge should have reviewed Steele's claim. We stated, "Steele's complaint that the Department's application of biannual parole review to him constituted an ex post facto violation, potentially lengthening the period of his incarceration by one year, implicated a liberty interest." Id. at 73, 606 S.E.2d at 503. We observed that the ALC has jurisdiction to review matters that implicate a liberty interest, and that a non-collateral matter such as an ex post facto claim should be subject to administrative review under the terms of the APA. Id. at 72, 606 S.E.2d at 502-03. Accordingly, we hold James's ex post facto claim should have been brought before the ALC.

We further agree with the circuit court that James did not establish an ex post facto violation, in any event. "An ex post facto violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a crime." Jernigan v. State, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). In Jernigan, our supreme court held that the retroactive application of a state statute (section 24-21-645 of the South Carolina Code) changing reviews for parole eligibility for violent offenders from annual to biannual constitutes an ex post facto violation. Id. at 264-66, 531 S.E.2d at 511-12. The court noted, "The law existing at the time of the offense determines whether an increase of punishment constitutes an ex post facto violation." Id. at 261 n.3, 531 S.E.2d at 509 n.3.

In finding there was no ex post facto violation, the circuit court rejected James's contention that the Department was retroactively applying section 24-21-645 of the South Carolina Code[6] to allow him parole reviews only

[6] S.C. Code Ann. § 24-21-645 (2007) ("[U]pon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-

every two years instead of each year. The circuit court noted section 24-21-645, which changed parole hearings for violent offenders from annual to biannual reviews, was enacted in 1986. The court stated that at the time James's crimes were committed in 1978, there was no statute governing the frequency of parole hearings. Rather, the frequency of parole hearings was a matter determined by the Department's own policy. At the time of James's crimes, the Department's policy called for reviews every two years for prisoners serving sentences of thirty years of more. The court noted it was not until 1981, several years after James's crimes, that another statute, section 24-21-620, was amended to provide for annual parole reviews. This provision is now limited to nonviolent offenders.

We agree with the circuit court that, because James remains subject to biannual parole reviews, as was the law in 1978, there is no ex post facto violation in this case. The Department is simply applying the law in effect at the time James committed his crimes, not retroactively applying section 24-21-645. See Elmore v. State, 305 S.C. 456, 409 S.E.2d 397 (1991) (stating the law existing at the time of the offense, not at the time of sentencing, determines whether an ex post facto violation has occurred), *overruled on other grounds by* Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

1-60 must have their cases reviewed every two years for the purpose of a determination of parole . . . .").

IV.

We hold summary judgment in favor of the Department is appropriate because James has not presented a cognizable claim for relief and he has not shown the Department committed an ex post facto violation by providing him a parole hearing every two years rather than each year. In addition, James failed to follow the proper review procedures set forth in Al-Shabazz.[7]

AFFIRMED.

HEARN, C.J., and THOMAS, J., concur.

[7] Based on our ruling affirming summary judgment in favor of the Department on these grounds, we need not address James's remaining issues. See, e.g., Wilson v. Moseley, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997) (holding where an appellate court affirms the circuit court's grant of summary judgment on a dispositive ground, the appellate court need not address the remaining grounds); Fuller-Ahrens P'ship v. South Carolina Dep't of Highways and Pub. Transp., 311 S.C. 177, 182, 427 S.E.2d 920, 923 (Ct. App. 1993) (declining to discuss the circuit court's grant of summary judgment on additional grounds, including res judicata, where summary judgment was being affirmed for other reasons and on different grounds).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby S. Foggie, Sr.,
Employee, Appellant,

v.

General Electric Co.,
Employer, and Electric
Insurance Co., Carrier, Respondents.

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

Opinion No. 4330
Submitted December 1, 2007 – Filed January 10, 2008

DISMISSED

Kathryn Williams, of Greenville, for Appellant.

David Hill Keller, of Greenville, for Respondents.

HUFF, J.: In this workers' compensation action, Bobby S. Foggie, Sr. appeals the circuit court's order affirming in part the order of the South Carolina Workers' Compensation Commission, but also remanding two matters to the Commission. We find the interlocutory order of the circuit court is not immediately appealable, and therefore dismiss this appeal.[1]

FACTUAL/PROCEDURAL BACKGROUND

Foggie began working for General Electric around 1967. On June 19, 2000, while working as a machine operator, he was injured when a wrench he was using to tighten a bolt slipped, causing him to fall. Foggie sought benefits for injuries to his back, neck, right shoulder, right upper extremity, and psyche as a result of the accident, and claimed he was permanently and totally disabled. General Electric admitted Foggie suffered an injury by accident to his right shoulder, but denied related injury to any other body part or system and denied Foggie was permanently and totally disabled.

By order dated November 23, 2004, the Single Commissioner found Foggie sustained a compensable injury to his back, right upper extremity, and psyche, and that he was permanently and totally disabled "as a result of his injury by accident; the combination of his related physical and psychological injuries, restrictions, and limitations; and his inability to return to any work and complete loss of earning capacity." In reaching this determination, the Commissioner found it was the opinion of Dr. Tollison that claimant was permanently and totally disabled as a result of the combination of the physical and psychological injuries caused by the injury by accident. The Commissioner also noted Foggie had received a prior workers' compensation award with General Electric involving an injury to another part of his body, but found there was no evidence concerning the amount of the disability and therefore General Electric was not entitled to any credit for previous permanent partial disability benefits paid for that claim. While the Commissioner found Foggie suffered from preexisting post-traumatic stress

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

disorder resulting from his service with the military in Vietnam, no finding was made as to General Electric's entitlement to any credit for Foggie's previous disability assessment by the Veteran's Administration.

General Electric appealed to the Appellate Panel contending, among other things, the Single Commissioner erred in finding Foggie suffered an injury to his psyche, finding Foggie was totally and permanently disabled, failing to award General Electric credit for a prior 10% award in a previous workers' compensation claim, and failing to give General Electric credit for a 30% award Foggie previously received from the Veterans Administration. The Appellate Panel found Foggie sustained a compensable injury to his psyche and that he was permanently and totally disabled, but determined General Electric was entitled to credit for a previous 10% workers' compensation award involving Foggie's leg. While the Appellate Panel found Foggie suffered from preexisting post-traumatic stress disorder as a result of his military service, it made no finding regarding whether General Electric was entitled to any credit for this previous disability. The Appellate Panel, like the Single Commissioner, found Dr. Tollison opined that Foggie was permanently and totally disabled as a result of the combination of the physical and psychological injuries caused by the injury by accident.

General Electric appealed to the circuit court, asserting the Commission erred in (1) finding Foggie sustained an injury to his psyche, (2) finding Foggie was entitled to permanent total disability benefits as a result of his injuries, and (3) failing to grant General Electric a credit for a 30% disability assessed by the Veterans Administration. Foggie also appealed, contending the Commission erred in granting General Electric credit for 10% loss of use of Foggie's lower extremity as a result of a previous accident. The circuit court affirmed the Commission's findings that Foggie sustained injury to his psyche and that General Electric was entitled to a 10% credit for the prior workers' compensation award for Foggie's leg. However, it remanded on the issue of permanent total disability, as well as that of credit for the 30% psychological disability. The court found the Commission, in making its determination on permanent total disability, considered a statement from Dr. Tollison which was to have been excluded from the record. The court thus remanded the case to the Commission with instructions to review the record

without considering the excluded material and to determine whether its findings and conclusions should be altered in any way. The circuit court remanded the issue of the 30% disability assessed by the Veterans Administration for Foggie's combat-related post-traumatic stress disorder, finding the Commission made "absolutely no ruling and no findings of any kind" on the issue, and instructed the Commission to review the record and applicable law and make specific findings concerning General Electric's entitlement to the claimed credit. This appeal followed.

LAW/ANALYSIS

Foggie asserts the circuit court erred in (1) failing to find substantial evidence supports the Commission's finding that he is entitled to permanent total disability compensation benefits, (2) affirming the Commission's finding that General Electric is entitled to credit for an unrelated award of 10% permanent partial disability to Foggie's leg, and (3) failing to reject General Electric's claimed credit for Foggie's alleged service-related disability. General Electric contends, however, the order of the circuit court is interlocutory and therefore not directly appealable. We agree with General Electric, and thus dismiss this appeal.

Appellate review of workers' compensation decisions is governed by the Administrative Procedures Act. Geathers v. 3V, Inc., 371 S.C. 570, 576, 641 S.E.2d 29, 32 (2007). Pursuant to section 1-23-390 of the South Carolina Code, "An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." S.C. Code Ann. § 1-23-390 (Supp. 2006) (emphasis added). Thus, our courts, "have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994). See also Davis v. La-Z-Boy Chair Co., 287 S.C. 121, 122, 337 S.E.2d 238, 239 (Ct. App. 1985) (holding an appeal from a circuit court order remanding a workers' compensation case for the purpose of making specific findings of fact is

interlocutory and not reviewable by the court of appeals); Owens v. Canal Wood Corp., 281 S.C. 491, 491-92, 316 S.E.2d 385, 385 (1984) (holding the order of the circuit court did not involve the merits of the action and was therefore interlocutory and not reviewable by the supreme court for lack of finality); Hunt v. Whitt, 279 S.C. 343, 343, 306 S.E.2d 621, 622 (1983) (holding interlocutory order of the circuit court remanding the workers' compensation matter for taking additional medical evidence did not involve the merits of the action and therefore was not reviewable by the court for lack of finality).

Our courts have recognized that, in some situations, remand orders from the circuit court to the Commission may be immediately appealable. In Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), cert. denied (Jan. 31, 2007), this court found the circuit court's order finally determined the issue on the merits - - that the employee's smoking contributed to his disability - - and that the remand by the circuit court determined with finality whether there would be a reduction in compensation, only leaving the determination of the percentage of apportionment for the Commission. Id. at 387-88, 622 S.E.2d at 551. Accordingly, where the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision, the order is immediately appealable.

Turning to the case at hand, we find the circuit court order remanding the two issues to the Commission is not a final decision on the merits and the order therefore is not immediately appealable. The circuit court did not make a final determination regarding whether or not Foggie was totally and permanently disabled, but remanded the matter for reconsideration by the Commission without reliance on the evidence that had been excluded from the record. The court likewise did not make a final determination of whether General Electric was entitled to a credit for a previous Veterans Administration disability award to Foggie, but remanded the matter to the Commission to review the record and applicable law and make specific findings as to any entitlement to credit General Electric might have.

We do not find persuasive Foggie's argument that the order is immediately appealable because the remand was unnecessary inasmuch as there is substantial evidence supporting the permanent total disability issue and General Electric is not entitled to a credit for the Veterans Administration disability as a matter of law. Both of these issues are clearly matters within the purview of the Commission, not the circuit court or this court sitting in an appellate capacity. For in workers' compensation cases, the Appellate Panel is the ultimate finder of fact, and final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Because these issues have not been properly considered by the Commission, the Commission having included admittedly excluded evidence on one and having failed to make any findings whatsoever on the other, the circuit court was correct in remanding the matters to the Commission. See Baldwin v. James River Corp., 304 S.C. 485, 487, 405 S.E.2d 421, 422-23 (Ct. App. 1991) (wherein the court of appeals remanded the case to the workers' compensation commission because the commission made insufficient findings of fact so as to permit appellate review of the commission's decision denying an award); Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 124, 127 S.E.2d 288, 292-93 (1962), overruled on other grounds, Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983) (holding remand proper on circuit court's own motion in a workers' compensation case where the commission failed to make essential findings of fact because "[t]o hold otherwise would in such cases make the determination of the rights of the parties turn upon the neglect of the Commission to make essential findings of fact, or require the appellate court to make the omitted findings of fact which our statute forbids").

For the foregoing reasons, the appeal in this matter is

DISMISSED.[2]

[2] We take no position on the remaining issues in the circuit court's order. As previously noted, our courts have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable. Montjoy, 316 S.C. at 52, 446 S.E.2d at 618

CURETON, AJ., concurs.

PIEPER, J., dissents in a separate opinion.

PIEPER, J., dissenting:

Respectfully, I dissent. I would hold that the circuit court's order is subject to appellate review.

In the case sub judice, the circuit court finally determined an issue on the merits by affirming the Appellate Panel's conclusion that General Electric was entitled to a 10% credit for a previous workers' compensation award involving Foggie's leg. Thus, the circuit court did not merely remand for further proceedings, but finally determined the defense of set-off or credit that ultimately will be binding on the parties and the Commission on remand.

In Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2007), this court determined that the claimant's smoking contributed to his disability. The circuit court remanded to make findings as to the apportionment percentage with a corresponding reduction in the claimant's disability award. Although the circuit court left the percentage of apportionment up to the Commission on remand, this court nonetheless indicated that the panel would have no choice but to allocate some part of the disability to a noncompensable cause and thus held that the circuit court's order constituted a final decision on the issue of apportionment and was appealable. Ultimately, the court reversed the order of the circuit court on the apportionment issue.

Here the question of the 10% credit or the amount thereof is no longer subject to review on remand although potentially affected by the proceedings

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(1994). Additionally, piecemeal appeals are not favored by the court and should be avoided. Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005); Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 140, 262 S.E.2d 45, 47 (1980). The parties may challenge these issues when a final order is before this court.

on remand. While the majority opinion correctly notes that the credit for the Veterans Administration matter is not final, the majority does not address the final decision on the credit issue as to Foggie's leg, which credit is unrelated to the Veterans Administration matter. I greatly respect the concerns of the majority for judicial economy. However, even if judicial economy is considered, I would respectfully note that if the defense of set-off or credit is reviewed after remand, then it is just as likely that the matter would be sent back again to the Commission if that defense is ultimately overturned or modified which weighs against those notions of judicial economy. Accordingly, I would hold that determination by the circuit court regarding the 10% credit constitutes a final decision on the defense of set-off or credit and is immediately appealable.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James A. Bell, Jr., Respondent,

v.

Patsy G. Knight, as Treasurer of Dorchester County, Suzanna H. Davis, as Delinquent Tax Collector of Dorchester County, and Adolph Fraser, Defendants,

Of Whom Adolph Fraser is the Appellant.

Appeal From Dorchester County
Patrick R. Watts, Master-In-Equity

Opinion No. 4331
Heard December 11, 2007 – Filed January 10, 2008

REVERSED

Arthur C. McFarland, of Charleston, for Appellant.

James B. Richardson, Jr., of Columbia, for Respondent.

KITTREDGE, J.: This is an appeal from an order setting aside a tax sale concerning a tract of land in Dorchester County, South Carolina. The master found the Dorchester County Delinquent Tax Collector failed to comply with statutory notice requirements for a tax sale by failing to notify the property owner's children. We reverse and reinstate the tax sale on the basis that the property owner's children had no interest in the property and were not entitled to notice.

I.

Charles Hart (Husband) and Una Hart (Wife) once owned the property in question as tenants in common. Husband died intestate in 1985, survived by Wife and three children (Children). In 1986, it was agreed that title to the property would vest solely in Wife pursuant to a sale in aid of assets. As a result, the probate court issued an order divesting the Children of any interest in the property, leaving Wife as the sole owner. The 1986 order called for the issuance of a deed to Wife. This deed was not issued until 2005, after the tax sale (which is the subject of this action) had been completed.

Wife paid the property taxes each year. Wife, however, failed to pay the property taxes beginning in 2001. The deed of record in the land records office at the time continued to show Wife and Husband as the property owners. The tax collector provided notice to Wife and Husband of the delinquency at the address of record. The taxes remained unpaid and the tax collector filed suit for a tax sale for delinquent taxes, providing proper notice to Wife and Husband.

Adolph Fraser was the successful bidder at the tax sale. The tax collector issued a deed for the property to Fraser in April 2005, which

was promptly recorded. Thereafter, the deed contemplated by the 1986 probate order was issued and recorded in August 2005. Wife then issued a quit claim deed to James Bell in September 2005. Bell brought an action for quiet title against Fraser. Bell claimed the tax sale was invalid due to lack of notice on the Children. The master agreed that the Children retained an interest in the property as a result of Husband's death intestate. The master set aside the tax sale for failure of the tax collector to provide notice to the Children. The master declared Bell's title good. Fraser appeals.

II.

The disposition of this appeal turns on the effect of the 1986 probate court order divesting the Children of their interest in the property. Fraser contends the probate court order divested the Children's interest, notwithstanding the failure in 1986 to issue and record the anticipated deed granting Wife title to the property. The question, then, is whether the issuance and recording of a deed was necessary to give effect to the probate court order. We find the probate court order was, by itself, sufficient to bind the Children and extinguish their interest in the property. A probate court order is "binding on all parties in interest who are notified of the proceeding." 80 Am. Jur. 2d Wills § 907 (2002).

The South Carolina Supreme Court has described the effect of a probate court order on multiple occasions. "It has been decided that the judgment of the probate court as to the necessity of a sale of the realty, and a sale pursuant thereto, is binding upon all parties to the record." Dyson v. Jones, 65 S.C. 308, 318, 43 S.E. 667, 671 (1903); see also Culler v. Crim, 52 S.C. 574, 579, 30 S.E. 635, 636 (1898) ("The order of the probate court to sell the land in aid of assets was binding upon all who were made parties to that proceeding," and the necessary effect of the order destroys the right of the parties to that proceeding from claiming interests in the land.); 96 C.J.S. Wills § 804 (2001) ("With exceptions as to persons not notified and brought in as parties, probate, until duly revoked or set aside, is generally considered as binding on, or

conclusive against, all the world, or on all parties, heirs, or interested persons.").

Because the Children were parties to the probate court proceedings in 1986, the 1986 probate court order divested Children of any interest in the property. This is so despite the approximate nineteen year lapse between the order and the issuance of the deed.

Accordingly, when the tax collector was required to notify the property owners of the delinquent tax, Wife was the only owner. The tax collector sent proper notice to Wife. The tax collector properly complied with the strict notice requirements of South Carolina law. See S.C. Code Ann. § 12-51-40 (Supp. 2006) (requiring notice of delinquent property taxes be sent to "the defaulting taxpayer and to a grantee of record"); Rives v. Bulsa, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996) ("Failure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void."). Here, the tax collector complied with section 12-51-40 by notifying Wife, a fact which is undisputed.

Finally, notice was not improper because the tax collector attempted to notify deceased Husband. The tax collector was not required to send notice to Husband, and we will not find notice inadequate because a tax collector *exceeded* the statutory notice requirements. See S.C. Fed. Sav. Bank v. Atl. Land Title Co., 314 S.C. 292, 296, 442 S.E.2d 630, 632 (Ct. App. 1994) (holding "that where, as here, notice of a tax sale exceeds the statutory notice requirements, the tax deed may not be set aside on the basis of insufficient notice"). Thus, the tax sale was proper, and Fraser has superior title to the property.

III.

Fraser is the owner of the real property pursuant to a valid tax sale. The judgment of the master is

REVERSED.

HEARN, C.J., and THOMAS, J., concur.