The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

S.C. Code Ann. § 34-31-20 (B) (Supp. 2009) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2-3, 2010, the first edition after January 1, 2010, listed the prime rate as 3.25%. Therefore, for the period January 15, 2010, through January 14, 2011, the legal rate of interest for judgments and money decrees is 7.25% compounded annually.

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

Columbia, South Carolina
January 4, 2010

The Supreme Court of South Carolina

In the Matter of Kathleen D. Crane, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1981, 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 Supreme Court of South Carolina, dated December 16, 2009, 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 Kathleen Denise Crane 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/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 6, 2010

The Supreme Court of South Carolina

In the Matter of Catherine Isaza, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on April 1, 1991, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 9, 2009, 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 Catherine Isaza 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/ Costa M. Pleicones J.

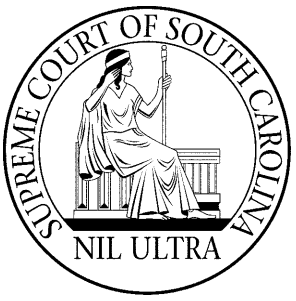
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 6, 2010



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OF

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AND

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

James W. Dickert, Appellant/Respondent,

v.

Carolyn H. Dickert, Respondent/Appellant.

Appeal From Greenville County
Timothy L. Brown, Family Court Judge

Opinion No. 26757
Heard December 1, 2009 – Filed January 11, 2010

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

David A. Wilson, of Horton, Drawdy, Ward & Jenkins, and Kenneth C. Porter, of Porter & Rosenfeld, both of Greenville, for Appellant/Respondent.

Timothy E. Madden and Megan G. Sandefur, both of Nelson Mullins Riley & Scarborough, of Greenville, for Respondent/Appellant.

CHIEF JUSTICE TOAL: This Court certified this case for review pursuant to Rule 204(b), SCACR.

FACTS/PROCEDURAL HISTORY

This is an appeal from a family court order granting Respondent/Appellant Carolyn H. Dickert (Wife) a divorce from Appellant/Respondent James W. Dickert (Husband).[1]

Husband and Wife began dating when Wife was fourteen years old and Husband was sixteen years old. Wife skipped her senior year of high school to join Husband at Clemson University. Upon Husband's graduation from Clemson, the parties moved to Charleston so Husband could attend dental school at the Medical University of South Carolina (MUSC). Husband and Wife were married in 1974 when Husband was twenty-three and a student at MUSC, and wife was twenty-one and working as a teacher.

While Husband was attending dental school, Wife was the sole breadwinner through her job as a teacher. When Husband finished dental school, the parties moved to Greenville where Husband opened a dental practice and worked at the county health department. Wife continued to teach while Husband established his dental practice. Upon moving to Greenville, the parties lived in an apartment. They then moved into a new house, where they lived for three years.

Wife continued to work until the birth of their first child in 1981. After the birth of their first child, Wife became a stay-at-home mother and primary caretaker of the children, and Husband was the primary breadwinner. Wife has not worked outside the home since 1981. Wife's primary roles were to maintain the home, maintain household finances, and support Husband in his dental practice.

[1] Both parties are appealing issues derived from the Amended Final Order filed September 17, 2007.

In 1984, Wife became pregnant with their second child, and the parties purchased a new house in Sugar Creek, an upper-middle-class subdivision in Greenville. The two sons grew up in this approximately 3,000 square foot home. While living in Sugar Creek, Husband's dental practice continued to grow and Wife continued as a stay-at-home mother. Husband was solely responsible for all of the income of the family while the parties shared child-rearing responsibilities. While living at Sugar Creek, Husband paid for a maid to assist Wife with some of the household chores. Wife continued to have a maid throughout the marriage. Throughout the marriage the parties engaged in social activities associated with the children's athletics and with their membership at Thornblade Country Club, including golf, tennis, and swimming.

In 2001, the parties decided to build their dream home in the Thornblade Country Club subdivision. The parties worked together to design a 7,000 square foot home in the Thornblade community. The parties invested approximately $900,000 in the home and moved into the Thornblade residence in May 2002. Within three months of moving into the Thornblade residence, Husband became involved in an adulterous relationship with Sandy Brockman (Brockman). Husband met Brockman on a golf trip to Hilton Head. Husband continued to see Brockman and informed Wife of his adulterous relationship in July of 2003.[2] Husband informed Wife he was unhappy and wanted a divorce so he could pursue a relationship with Brockman. Husband left the marital home in August 2003 and never returned. Husband commenced this marital dissolution action on October 30, 2003.

Husband's income at the time of trial was approximately $360,000 per year. Wife remained unemployed. Instead of seeking employment, Wife spent a significant amount of time playing tennis at the Thornblade Country Club. The marital estate of the parties was valued at approximately $2,000,000. The trial court awarded Wife forty-five percent of the marital

[2] Wife was granted an absolute divorce from Husband on the statutory ground of Husband's adultery.

estate and Husband fifty-five percent. The trial court awarded permanent periodic alimony to Wife in the amount of $8,600 per month. The trial court also ordered Husband to pay $99,000 in attorney's fees and costs.

ISSUES

I. Did the family court err by including the goodwill of Husband's dental practice in calculating the marital estate?

II. Did the family court err in apportioning forty-five percent of the marital estate to Wife?

III. Did the family court err in awarding Wife $8,600 per month in permanent periodic alimony?

IV. Did the family court err in awarding $99,000 to Wife in attorney's fees and litigation expenses?

STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Strickland v. Strickland*, 375 S.C. 76, 82, 650 S.E.2d 465, 469 (2007) (citation omitted). "This broad scope of review does not require the reviewing court to disregard the findings of the family court; appellate courts should be mindful that the family court, who saw and heard the witnesses, sits in a better position to evaluate credibility and assign comparative weight to the testimony." *Id.* (citation omitted).

LAW/ANALYSIS

I. Goodwill Included in Marital Estate

Husband argues the family court erred in determining the value of his dental practice by including goodwill in the amount of $256,519 to arrive at a value of $360,000 subject to equitable distribution. We agree.

This Court has defined "goodwill" in general:

> Goodwill may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

Donahue v. Donahue, 299 S.C. 353, 359, 384 S.E.2d 741, 745 (1989) (quoting *Levy v. Levy*, 164 N.J. Super. 542, 549, 397 A.2d 374, 377 (1978)). This Court has defined "professional goodwill" as having the following attributes:

> It attaches to the person of the professional man or woman as a result of confidence in his or her skill and ability. (cite omitted) It does not possess value or constitute an asset separate and apart from the professional's person, or from his individual ability to practice his profession. It would be extinguished in the event of the professional's death, retirement or disablement. (cite omitted)

Id. (quoting *Rathmell v. Morrison,* 732 S.W.2d 6, 17 (Tex. App. 1987)).

"'The very nature of a professional practice is that it is totally dependent upon the professional.'" *Id.* at 360, 384 S.E.2d at 745 (quoting *Powell v. Powell*, 648 P.2d 218, 223 (Kan. 1982)). "The definitions set forth above indicate the intangible nature of the goodwill asset . . . [and] [i]t is this intangibility which inevitably results in a speculative valuation." *Id.* This Court in *Donahue* held the family court erred in placing a value upon the goodwill of the husband's professional dental practice and attempting to equitably divide it. *Id.*; *see also Casey v. Casey*, 293 S.C. 503, 505, 362 S.E.2d 6, 7 (1987) (holding that goodwill in Husband's fireworks business does not constitute marital property subject to equitable distribution); *Keane v. Lowcountry Pediatrics*, 372 S.C. 136, 146, 641 S.E.2d 53, 59 (Ct. App. 2007) (holding that professional goodwill has no value that exists separate and apart from the professional).

In this case, the family court assigned the value of $360,000 to Husband's dental practice for purposes of equitable apportionment. In arriving at this number the family court included $256,517 in what it termed "enterprise goodwill." Wife wants this Court to follow other jurisdictions that subject "enterprise goodwill" to equitable apportionment. However, because of the intangible nature of the goodwill asset, "enterprise goodwill" is not subject to equitable distribution. Thus, the family court erred in including "enterprise goodwill" in the amount of $256,517 in marital property to be equitably apportioned.

II. Equitable Distribution

The family court awarded fifty-five percent of the marital estate to Husband and forty-five percent of the marital estate to Wife. Because we reverse the family court's decision on "enterprise goodwill," we reverse and remand the family court's decision regarding equitable distribution. This will allow the family court to determine if a change in the marital apportionment should be made in light of the goodwill valuation change. This issue is to be tried on the record as it exists now. No more evidence is to be taken on remand to the family court.

III. Alimony

Husband argues the trial court abused its discretion in awarding $8,600 per month in permanent periodic alimony to Wife. We agree.

"An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." *Allen v. Allen*, 347 S.C. 177, 183-84, 554 S.E.2d 421, 424 (Ct. App. 2001) (citation omitted). Alimony is a substitute for the support that is normally incident to the marital relationship. *Spence v. Spence*, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Allen*, 347 S.C. at 184, 554 S.E.2d at 424 (citation omitted). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." *Id.* (citation omitted). "Alimony should not dissuade a spouse, to the extent possible, from becoming self-supporting." *Rimer v. Rimer*, 361 S.C. 521, 525, 605 S.E.2d 572, 574 (Ct. App. 2004) (citation omitted). Section 20-3-130(C) lists the factors the family court judge must consider in deciding whether to award alimony or separate maintenance and support.[3] *Hatfield v. Hatfield*, 327 S.C. 360, 364,

[3] S.C. Code Ann. § 20-3-130(C) (Supp. 2008) states:

> (C) In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to all of the following factors:
> (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance action between the parties;
> (2) the physical and emotional condition of each spouse;
> (3) the educational background of each spouse, together with need of each spouse for additional training or education in order to achieve that spouse's income potential;
> (4) the employment history and earning potential of each spouse;
> (5) the standard of living established during the marriage;

489 S.E.2d 212, 215 (Ct. App. 1997). No one factor is dispositive. *Allen*, 347 S.C. at 184, 554 S.E.2d at 425 (citation omitted).

Husband concedes the family court considered all of the factors, but contends it abused its discretion in analyzing the factors. Husband's main contention is that the award of $8,600 a month allows wife to enjoy a

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> (6) the current and reasonably anticipated earnings of both spouses;
> (7) the current and reasonably anticipated expenses and needs of both spouses;
> (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action;
> (9) custody of the children, particularly where conditions or circumstances render it appropriate that the custodian not be required to seek employment outside the home, or where the employment must be of a limited nature;
> (10) marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce or separate maintenance decree if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage, except that no evidence of personal conduct which may otherwise be relevant and material for the purpose of this subsection may be considered with regard to this subsection if the conduct took place subsequent to the happening of the earliest of (a) the formal signing of a written property or marital settlement agreement or (b) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
> (11) the tax consequences to each party as a result of the particular form of support awarded;
> (12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and
> (13) such other factors the court considers relevant.

standard of living better than the marital standard. Husband points to several factors to show that during the majority of the marriage the couple did not live an extravagant lifestyle: for approximately twenty years of marriage the couple lived in the Sugar Creek subdivision; they did not move into Thornblade until May 2002; they did not drive luxury automobiles; and the wife even admitted that the standard of living she enjoyed in the Thornblade house was not the standard of living she enjoyed during the course of marriage.

Husband's expert determined that Wife would need $4,669 per month to enjoy the standard of living obtained during the marriage without imputed earnings. The court imputed earnings of $1,167 per month to Wife leaving her alimony need at $3,502 per month according to Husband. Wife contends the family court did not award her enough alimony. She argues she deserves $10,290 per month to maintain the marital standard of living. The family court found Husband's expert to be generally correct in his analysis of Wife's alimony needs. The family court also noted Wife's expert calculated her needs based on her expenditures for only 2002 and 2003. Because the family court found Husband's expert was generally correct concerning Wife's alimony needs and Wife's expert only considered two years in determining alimony, we find an award of $8,600 per month of permanent periodic alimony was an abuse of discretion. Moreover, we hold that an award of $7,000 per month in permanent periodic alimony will place Wife, as nearly as practical, in the same position she enjoyed during the marriage.

IV. Attorney's Fees

Husband argues the family court erred in awarding $99,000 in attorney's fees to Wife. We disagree.

The family court may order one party to pay a reasonable amount to the other party for attorney's fees and costs incurred in maintaining an action for divorce pursuant to S.C. Code Ann. § 20-3-130(H) (Supp. 2008). Whether to award attorney's fees is a matter within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Bakala v.*

Bakala, 352 S.C. 612, 633-34, 576 S.E.2d 156, 167 (2003). In determining whether to award attorney's fees, the following factors should be considered: (1) the party's ability to pay his or her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). When the family court finds an attorney's fee is justified, the amount of the fee should be determined by considering: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court addressed the four factors used to determine whether an award of attorney's fees is appropriate and correctly determined an award of attorney's fees was appropriate. The family court also addressed the six *Glasscock* factors in awarding attorney's fees. We hold that the family court did not abuse its discretion in awarding $99,000 in attorney's fees to Wife in a case presenting complex issues that required a great deal of time and energy to assess.

CONCLUSION

First, the family court erred by including the $256,517 in "enterprise goodwill" in the amount to be equitably apportioned. Second, because we reverse the family court's decision on "enterprise goodwill," we reverse and remand the family court's decision regarding equitable distribution. Third, we reverse the family court's alimony award and find that $7,000 per month in permanent periodic alimony will place Wife, as nearly as practical, in the same position she enjoyed during the marriage. Lastly, we affirm the family court's decision to award Wife $99,000 in attorney's fees.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Teresa Edwards, Appellant

v.

Lexington County Sheriff's Department and County of Lexington, Respondents.

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

Opinion No. 26758
Heard October 7, 2009 – Filed January 11, 2010

REVERSED AND REMANDED

Frederick Arnold Beacham, Jr., of Lexington, and John O'Leary, of O'Leary and Associates, of Columbia, for Appellant.

Patrick J. Frawley, of Nicholson, Davis, Frawley, Anderson & Ayer, of Lexington, for Respondents.

JUSTICE KITTREDGE: Appellant Teresa Edwards, a domestic violence victim, sued the Lexington County Sheriff's Department and the County of Lexington (collectively, Respondents)[1] after she was attacked by her ex-boyfriend, Allen Baker, in a magistrate's court bond revocation hearing where no security was provided. The bond revocation hearing was scheduled at the request of an employee of the Lexington County Sheriff's Department who was aware of Baker's multiple bond violations and his continuing threats against Edwards. The trial court ruled Respondents owed no duty to Edwards and granted Respondents' motion for summary judgment. Because we conclude Respondents owed a common law duty to Edwards, we reverse and remand.

I.

Teresa Edwards and Allen Baker were dating in February 2003 when the Lexington County Sheriff's Department (the sheriff's office) responded to a domestic violence call at Edwards' home.[2] Baker was arrested for criminal domestic violence. Baker was released on a personal recognizance bond and ordered not to contact Edwards.

On April 25, 26, and 27, Edwards called the sheriff's office to report that Baker was threatening her and her children. On April 28, the sheriff's

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[1] Respondents filed a joint answer to the complaint asserting that the Lexington County Sheriff's Department and Lexington County were "one and the same entity." However, under South Carolina law, the sheriff and sheriff's deputies are State, not county, employees. *See Cone v. Nettles*, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992); *Heath v. Aiken County*, 295 S.C. 416, 418, 368 S.E.2d 904, 905 (1988). Although Respondents' assertion is inconsistent with settled law, their position that they are the same entity is the law of the case. We therefore do not address the legally settled distinction between a county government and a sheriff's office for liability purposes.

[2] The facts are taken from the parties' "Stipulation of Facts" presented in the trial court.

office arranged for Edwards and her daughters to stay in a hotel for protection and obtained a warrant to be issued against Baker. On April 29, Edwards returned home. That night, Baker went to Edwards' home and was arrested for violating the no-contact order. As a result of violating his bond, Baker was sentenced to thirty days in jail. Subsequently, Baker posted a $5,000 surety bond and was released.

Nicole Howland is a domestic violence prosecutor employed by the sheriff's office. Howland contacted Edwards in order to begin prosecuting Baker for the February incident. Edwards informed Howland that Baker was continuing to contact and harass her. Howland instructed Edwards to document any further contact as evidence that Baker was still acting in violation of the no-contact order.

Howland then contacted a Lexington County magistrate to request a bond revocation hearing. The magistrate agreed to schedule a hearing and contacted Baker's bondsman on August 4, 2003. The magistrate instructed the bondsman to have Baker appear in court two days later, August 6. Howland informed Edwards of the August 6 hearing and told her to be present and to bring the evidence of Baker's continuing harassment. Edwards told Howland that she feared Baker and was reluctant to attend, but Howland insisted she attend so the evidence could be admitted to prove Baker's violation of the no-contact order.

The August 6 bond revocation hearing was held in the magistrate's office, which was temporarily located in a small two-room building. The magistrate was seated at the head of the room behind a desk. Edwards was seated behind a desk on the left side of the room, facing the magistrate. Howland was seated to the right of Edwards. Baker was seated to the right of Howland, behind another desk. No one from the sheriff's office or the County took any steps to ensure security for the bond revocation hearing, and as a result, no officer was present and no other precautionary or security measures were employed.

After Howland presented evidence that Baker had violated the no-contact order and Baker had responded, the magistrate found Baker in contempt, revoked his bond, and sentenced him to thirty days in jail. As the magistrate was writing the sentence, Baker rose from his chair, struck Howland at least two times, and then pinned Edwards against the wall and struck her on the head at least three times. The bondsman eventually restrained Baker, and the magistrate sprayed Baker with pepper spray. A staff member called 911. Baker was arrested and Edwards was taken to the hospital and treated for her injuries.

Edwards filed a negligence action pursuant to the South Carolina Tort Claims Act alleging Respondents' gross negligence proximately caused her injury. In their answer, Respondents argued they owed no duty specific to Edwards under the public duty rule, contended Edwards' injury was caused by her own negligence, and asserted several exceptions to the waiver of immunity as provided in the Tort Claims Act.

The trial court granted Respondents' motion for summary judgment on the sole basis that Respondents owed no duty to Edwards under statutory law or common law. We certified Edwards' appeal pursuant to Rule 204(b), SCACR.

II.

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). In this case, summary judgment was granted on the basis of the absence of a duty, which is a question of law for the court to determine. *See Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007) (recognizing that whether a duty exists is a question of law for the courts). We are thus presented with a legal question

concerning the presence or absence of a duty under the circumstances presented.

III.

Establishing a Duty

An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. *Doe*, 375 S.C. at 72, 651 S.E.2d at 309. Without a duty, there is no actionable negligence. *Id.* A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law. *Arthurs ex rel. Estate of Munn v. Aiken County*, 346 S.C. 97, 104, 551 S.E.2d 579, 582 (2001). When the duty is created by statute, we refer to this as a "special duty," whereas when the duty is founded on the common law, we refer to this as a legal duty arising from "special circumstances." *See id.* at 109-10, 551 S.E.2d at 585 (explaining that this Court restricts the term special duty to those arising from statutes, whereas a legal duty arising from a "special circumstance" is created under the common law).

There is no general duty to control the conduct of another or to warn a third person or potential victim of danger. *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). However, there are five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant. *Id.*

1. Statutory Duty

Edwards first argues provisions of the Criminal Domestic Violence Act (CDV Act), S.C. Code Ann. § 16-25-10 et seq. (2008), in conjunction with S.C. Code Ann. § 16-3-1525(G) (2008),[3] impose a special duty on Respondents. We disagree.

In *Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940), we adopted the "public duty rule." Under this rule, statutes which create or define the duties of a public office create no duty of care towards individual members of the general public. *Arthurs*, 346 S.C. at 105-06, 551 S.E.2d at 583. South Carolina has followed the public duty rule since 1940, and this rule remains the law of South Carolina today. However, we have carved out a narrow exception to the rule and found a statute imposes a special duty on a governmental entity if the following six-part test is met:

> (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 200, 403

[3] Specifically, Edwards refers to § 16-25-20, which makes it unlawful to injure a household member and § 16-25-80, which provides that this article does not replace other criminal offenses. Section 16-3-1525(G) provides that a law enforcement agency "must provide any measures necessary to protect the victims and witnesses, including . . . physical protection in the courthouse."

S.E.2d 615, 617 (1991). "The public duty rule is a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action for a statute's breach." *Vaughan v. Town of Lyman*, 370 S.C. 436, 442, 635 S.E.2d 631, 634 (2006) (recognizing that the dispositive issue is not whether the statute creates a duty, but rather whether the statute was intended to provide an individual a private right of action).

Edwards cites to provisions of the CDV Act making it unlawful to injure a household member, but she points to no provision of the CDV Act imposing a specific duty on Respondents that they failed to perform. In short, even if the CDV Act could be the source of a special duty imposed upon law enforcement, Edwards has not alleged a breach of duty created by the Act.

Edwards' further reliance on § 16-3-1525(G) in no manner bolsters her position. Section 16-3-1525(G) is merely a general statute that broadly recites the general duty of law enforcement agencies with regard to protecting victims and witnesses and clearly fails the six-part test. *See Arthurs*, 346 S.C. at 108, 551 S.E.2d at 584 (holding a statute requiring the sheriff's department to patrol the county merely broadly recited general duties and did not create a special duty). Moreover, the Legislature has spoken directly to its intent to foreclose a private cause of action under § 16-3-1525(G), for § 16-3-1565 states no provision in this article "creates a cause of action on behalf of a person against a public employee, public agency, the State, or an agency responsible for the enforcement of rights and provision of services set forth in this article."

2. Special Relationship with Edwards

Edwards argues she had a special relationship with Respondents because *she* was in the "functional custody" of the State, and therefore, Respondents owed her a specific duty. There are no allegations and there is

no evidence in the record indicating that Edwards was in custody. Accordingly, we hold Respondents owed no duty of protection to Edwards under her "functional custody" theory.

3. Creating the Risk and Respondents' Relationship with Baker

Edwards' final contention, with which we agree, is that Respondents owed her a common law duty because of the "special circumstances" presented. *Arthurs*, 346 S.C. at 108, 551 S.E.2d at 584 (recognizing that a duty may arise because of "special circumstances"). The special circumstances are Respondents' relationship with Baker and their actions in creating the risk of harm.

Respondents were well aware of Baker's unrelenting violent tendencies toward Edwards. Edwards had called the sheriff's office to report Baker's harassment on numerous occasions, and the sheriff's office arranged for Edwards to stay in a hotel after one of the incidents. The sheriff's office and the County, through its agent Howland,[4] arranged the bond revocation hearing at the magistrate's office with no security present. Despite Respondents' awareness that Edwards feared Baker and was reluctant to attend the bond revocation, Respondents strongly encouraged Edwards' presence.

Respondents cannot claim lack of knowledge of Baker's violent tendencies towards Edwards since the reason they were seeking to revoke Baker's bond was due to his failure to obey the no-contact order, which was issued as a direct result of his violent actions. We hold Respondents created a situation in which it was foreseeable that Baker would harm Edwards. *Compare Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct.

[4] Respondents stipulated that Howland was employed by the sheriff's office. Because of Howland's status as a sheriff's office employee, the sheriff's office is charged with Howland's knowledge and actions (or lack of action), and as a result of Respondents' position that the sheriff's office and Lexington County are the same entity, such knowledge is imputed to Lexington County.

App. 2000) (holding Wal-Mart had no duty to protect a customer from a parking lot attack because Wal-Mart had no notice that the crime would occur).

We hold that Respondents owed Edwards a duty solely as a result of the unique facts of this case, i.e., "special circumstances." Respondents created a situation that they knew or should have known posed a substantial risk of injury to Edwards. Moreover, given Respondents' knowledge of Baker's demonstrated threats against Edwards, Respondents owed her a duty. Respondents' duty is one of due care and whether Respondents acted reasonably, negligently or grossly negligently is not before us. We do note that Respondents were not under a duty to guarantee Edwards' safety with absolute certainty. *See Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006) (rejecting defendants' all or nothing approach with regard to the existence of a duty and noting that this argument "confuses the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case").

IV.

We reverse the trial court's grant of summary judgment and remand to the trial court for further proceedings.[5]

REVERSED.

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

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[5] Respondents argue even if we were to find the existence of a duty, Edwards cannot show the remaining elements of her negligence claim. The trial court granted summary judgment based solely on the absence of a duty. Therefore, under this procedural posture, the record does not permit us to make those fact-driven determinations.

The Supreme Court of South Carolina

Curtis D. Richardson, Petitioner,

v.

Heath Stewart, Esquire and Horizon Addiction Treatment Unit, Respondents.

ORDER

Petitioner has filed a motion for leave to proceed in forma pauperis in this action. The motion is denied. Ex parte Martin, 321 S.C. 533, 471 S.E.2d 134 (1995).

We also take this opportunity to address the repetitive, frivolous and abusive nature of petitioner's filings in the courts of this state. With the exception of a period of time from July 27, 2006, until September 13, 2007, petitioner has been incarcerated in the South Carolina Department of Corrections (SCDC) since January 31, 2000. During his time of incarceration, petitioner has filed approximately twenty-two actions in the United States District Court for the District of South Carolina, twenty-two

actions in the South Carolina Court of Common Pleas, and eleven actions in the Administrative Law Court (ALC).[1] Petitioner has represented himself in

[1] In addition, since 2001, petitioner has filed six pro se petitions in this Court that were disposed of pursuant to Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991). In 2002, petitioner filed a pro se "Johnson Petition for a Writ of Certiorari" in this Court following the issuance of an opinion by the Court of Appeals affirming petitioner's convictions and sentences. The petition was dismissed because it was not served on counsel for the State and because no petition for rehearing was filed in the Court of Appeals. In 2004, counsel for petitioner filed a petition for a writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), following the denial of petitioner's application for post-conviction relief (PCR). Petitioner filed a lengthy, and frivolous, pro se response. In March 2009, petitioner filed a pro se notice of appeal from an order of the circuit court denying his PCR application as successive and untimely. The notice of appeal was dismissed based on petitioner's failure to provide a sufficient explanation pursuant to Rule 243(c), SCACR. In May 2009, petitioner filed a pro se notice of appeal from an order of the Court of Appeals dismissing his appeal in Curtis Richardson v. SCDC; however, the matter was dismissed without prejudice to petitioner's right to seek review if a petition for rehearing or reinstatement was acted upon by the Court of Appeals.

Since 2000, two direct appeals have been filed by counsel on petitioner's behalf in the Court of Appeals. In both cases, counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and the appeals were dismissed. In 2007, petitioner filed a pro se notice of appeal, which was dismissed by the Court of Appeals due to petitioner's failure to timely serve the notice on opposing counsel. Petitioner has filed four pro se notices of appeal in the Court of Appeals in actions against SCDC. Two of the appeals were from orders of the circuit court in one action and the remaining appeals were from orders of the ALC in separate actions. The first appeal was dismissed at petitioner's request based on the fact that he had a Rule 59(e), SCRCP, motion pending in the circuit court. In the second appeal from the circuit court, petitioner was allowed to proceed in forma pauperis. However, on May 5, 2009, the Court of Appeals dismissed the appeal based on petitioner's failure to order the transcript. The remittitur was sent to the lower court on May 21, 2009. Petitioner attempted to file a petition for rehearing and/or reinstatement after the remittitur was sent, but the Court of Appeals refused to act on the petition because it was untimely. Petitioner filed a petition for a writ of certiorari in this Court which, as noted above, was dismissed without prejudice to his right to seek review if the Court of Appeals acted on a petition for rehearing or reinstatement in the matter. In August 2008, petitioner filed a pro se notice of appeal from an order of the circuit court denying his petition for a writ of habeas corpus. The Court of Appeals dismissed the notice of appeal based on petitioner's failure to provide a sufficient explanation pursuant to Rule 203(d)(1)(B)(vi), SCACR. In the third action against SCDC, the Court of Appeals allowed petitioner to proceed in forma pauperis. However, on September 23, 2009, the court granted SCDC's motion to dismiss. Petitioner's petition for reinstatement was denied on December 8, 2009. In July 2009, petitioner

the majority of those actions.

Petitioner has proceeded in forma pauperis in federal court pursuant to the Prison Litigation Reform Act (PLRA) and in state court pursuant to Rule 3(b), SCRCP. However, by order dated December 14, 2006, the federal court prohibited petitioner from filing any further actions pursuant to the PLRA without prepayment of the filing fee. Since that time, petitioner has filed approximately seventeen pro se actions in the court of common pleas in Richland, Horry and Georgetown Counties.

A majority of the matters set forth above are of a repetitive and frivolous nature and, as evidenced by the sheer number of matters referenced, have resulted in a waste of judicial time and resources and have interfered

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filed a pro se notice of appeal in the Court of Appeals from an order of the circuit court in Curtis Richardson v. Scott Joye. Petitioner's request to proceed in forma pauperis was denied. Thereafter, the notice of appeal was dismissed based on petitioner's failure to pay the filing fee. Petitioner's petition for reinstatement was denied. In August 2009, petitioner filed a notice of appeal from an order of the circuit court in Curtis Richardson v. Heath Stewart. Petitioner's request to proceed in forma pauperis was denied and the notice of appeal was eventually dismissed due to petitioner's failure to pay the filing fee, and a request for reinstatement was denied. Petitioner is seeking to proceed in forma pauperis in filing a petition for a writ of certiorari in this Court from the decision of the Court of Appeals. Petitioner currently has an appeal pending before the Court of Appeals from an order of the ALC in Curtis Richardson v. SCDPPPS. The Court of Appeals granted his request to proceed in forma pauperis in that matter. He also has an appeal pending in the Court of Appeals from an order of the circuit court in Curtis Richardson v. James Galmore. The Court of Appeals denied petitioner's request to proceed in forma pauperis by order dated December 30, 2009. Finally, in petitioner's fourth appeal involving SCDC, which remains pending before the Court of Appeals, his request to proceed in forma pauperis was denied on November 24, 2009.

with the fair administration of justice. Accordingly, in order to curb petitioner's abusive filings, we hereby order the Clerks of Court in this state, including clerks of the circuit courts, the appellate courts, and the Administrative Law Court, not to accept any documents from petitioner for filing that require a filing fee unless accompanied by the filing fee and a properly notarized affidavit from petitioner stating that he in good faith believes the document submitted for filing is nonfrivolous and proper for the court to consider. See In re Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996). This order shall not apply to matters in which petitioner has already been granted leave to proceed in forma pauperis. Finally, any attempt by petitioner to file documents in any of the courts of this state in violation of this order may result in him being held in contempt of this Court.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 8, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carl Johnson, Appellant,

v.

Timothy Chad Hunter, Respondent.

Appeal From Horry County
Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 4644
Heard November 17, 2009 – Filed January 11, 2010

AFFIRMED

Ian Maguire, of Myrtle Beach, for Appellant.

G. Michael Smith, of Conway, for Respondent.

KONDUROS, J.: Carl Johnson appeals the trial court's finding he was involved in a single accident instead of two accidents for purposes of the

underinsured motorist (UIM) coverage limits in his insurance policy. We affirm.

PROCEDURAL BACKGROUND/FACTS

Johnson was driving to work on U.S. Highway 701 in Horry County around 5:30 a.m. Timothy Hunter was traveling behind Johnson. A third party, Jose Dominguez, was traveling the opposite direction on Highway 701 when his vehicle crossed the center line into the path of Johnson's pick-up truck. Johnson swerved to the right to avoid Dominguez. However, Dominguez's truck still hit him, turning Johnson's truck sideways in the road. His airbags deployed and he unbuckled his seatbelt to exit the vehicle. Before he could exit, Hunter's vehicle hit Johnson a second time knocking him into the floorboard of his truck and causing him serious injury.

Johnson sued Hunter for negligence seeking to recover under his own underinsured motorist coverage with State Farm Mutual Automobile Insurance Company. The trial court found the events constituted one accident, limiting Johnson's recovery to the maximum allowed for "each accident" under the State Farm policy. This appeal followed.

STANDARD OF REVIEW

In an action at law tried without a jury, the appellate court will not disturb the trial court's factual findings unless they are not reasonably supported by the record. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). An action to determine whether coverage exists under an insurance policy is an action at law. Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006).

LAW/ANALYSIS

Johnson argues the circuit court erred in finding a single accident occurred thereby limiting recovery under his UIM coverage. We disagree.

Johnson's UIM coverage sets limits for "each accident." Therefore, the parties are concerned with what constitutes a single accident in the context of the policy. South Carolina does not appear to have addressed this precise issue but other jurisdictions have. Most courts have concluded the question whether one or more accidents occurred should be evaluated under the causation theory. The trial court employed the causation theory analysis and neither party appeals that ruling. Therefore, it is the law of the case.[1] See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (stating an unappealed ruling is the law of the case and should not be reconsidered by the appellate court).

"Under the cause approach, the insured's single act of negligence is considered the occurrence from which all claims flow." Am. Cas. Co. v. Heary, 432 F. Supp. 995, 997 (E.D. Va. 1977) (finding a single occurrence when insured crashed into a sign and barrier causing telephone pole and wires to fall damaging two other vehicles over a period of approximately one minute and fifteen seconds). "Courts applying the 'cause' theory uniformly find a single accident 'if cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event.'" Ill. Nat'l Ins. Co. v. Szczepkowicz, 542 N.E.2d 90, 92 (Ill. App. Ct. 1989) (citations omitted) (finding two accidents occurred when an automobile struck a tractor trailer, blocking both lanes, and a second automobile did not strike the tractor trailer until five minutes had elapsed and one lane had reopened).

When one negligent act or omission is the sole proximate cause, there is but one accident, even though there are several resultant injuries or losses. Hyer v. Inter-Ins. Exch. of Auto. Club, 246 P. 1055, 1057 (Cal. Ct. App. 1926) (finding a single accident when a negligent driver struck the insured's car breaking off the steering wheel and the insured then collided with a

[1] Because the parties do not dispute analysis under the causation theory is appropriate, we are not called upon to determine whether South Carolina would adopt that analysis in similar cases. However, a review of relevant case law is necessary to understand the causation theory and whether the trial court properly applied it to the facts of this case.

second vehicle). Taken in its usual sense, the word "accident" means a single, sudden, unintentional occurrence and is used to describe the event, no matter how many persons or things are involved. St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689, 691 (5th Cir. 1955) (finding one accident when the insured's truck negligently collided with a freight train, derailing the train and causing damage to sixteen cars and owners). An accident or occurrence in this context should be viewed from the perspective of cause and not effect. Olsen v. Moore, 202 N.W.2d 236, 241 (Wis. 1972) (finding one accident when the insured's vehicle struck two vehicles almost simultaneously, and there was virtually no time or space interval between the two impacts, and the insured never regained control over the vehicle prior to striking the second automobile).

We could find no South Carolina cases directly on point. However, in Sossaman v. Nationwide Mutual Insurance Co., 243 S.C. 552, 135 S.E.2d 87 (1964), the court, in dicta, recognized the majority view regarding whether a single accident has occurred for purposes of insurance coverage.

> A number of cases support the general position that where one proximate, uninterrupted and continuing cause results in injuries to more than one person or damage to more than one item of property there is a single accident or occurrence within the meaning of a liability insurance policy limiting the insurer's liability to a certain amount for each accident or each occurrence.

Id. at 563, 135 S.E.2d at 93.[2]

[2] In Sossaman, the court was not required to determine whether a single accident occurred. In that case, the parties were arguing over the limitation of $5,000 per personal injury when wife was injured in a school bus accident and she and husband made claims for personal and property injury and loss of consortium respectively.

Having considered the rationale behind the causation theory and its application in other cases,[3] we now turn to its application in this case. Johnson contends two distinct accidents occurred in this case because the time between the first and second impacts was "at least one and one-half to two minutes." This is premised upon his conclusion it would have taken at least that long for his airbags to have deployed and for him to remove his seatbelt. He maintains the trial court erred in finding one accident without even making a determination about exactly how much time passed between the two collisions.

Johnson places too much emphasis on the timing of the impacts. Most cases discussing the causation theory do not rely solely on the timing of events in determining whether or not one or two accidents occurred. While timing is frequently a part of the analysis, the courts place the most emphasis on whether or not one source of negligence set all the subsequent events in motion. Szczepkowicz, 542 N.E.2d at 90, heavily relied upon by Johnson, involved collisions occurring five minutes apart. The court recognized timing is only one factor to be considered.

> National argues that the time span between collisions is not a factor this court can consider. This contention is without merit. Certainly one occurrence can result in injuries suffered over a period of time; in such a case, time would be irrelevant to a determination of the number of

[3] Most cases from other jurisdictions discuss accident in the context of a liability policy. However, the rationale behind the causation theory still seems applicable when considering UIM coverage. One case espousing the causation theory maintains the very existence of limits means the parties to the insurance contract contemplated a cap on benefits for their own negligent actions. Under the effect theory, liability could be limitless depending on the number of parties injured. See St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689, 692 (Ga. 1955). Likewise, the parties contemplate a limit to UIM coverage for the negligence of other underinsured motorists whose actions could result in injury to the UIM holder by multiple parties.

> occurrences. The relevance of time between injuries is relevant, however, under other factual scenarios. In the instant case, the issue involves the reasonableness of a driver's actions and his failure to take corrective measures after an accident; the time span between collisions is one factor that must be taken into account.

Id. at 93 n.3 (citations omitted) (emphasis added).

The question of whether a single accident occurred under the causation theory will turn on the particular facts of each case. The court will be required to look at all the circumstances, including timing, in its analysis.

Turning to the record before us, evidence supports finding the collisions resulted from Dominguez's single act of negligence. Johnson testified approximately one and one-half to two minutes passed between impacts. However, he also testified he "couldn't pin it down to two whole minutes, but [he] kn[e]w it was time."

Hunter testified it felt like two or three seconds between the impacts "cause it just happened." He further testified he was traveling one and one-half to two car lengths behind Johnson just prior to the accident, and he applied his breaks and skidded approximately fifteen feet before hitting Johnson. Johnson and Hunter both testified the highway had steady traffic on it at the time of the crash giving rise to an inference another vehicle would have been between Johnson and Hunter if they were actually one and one-half to two minutes apart.

Furthermore, Hunter was able to testify about witnessing the initial impact between Dominguez and Johnson indicating he was close enough behind Johnson to see the accident as it happened, but did not have time to stop. Importantly, Johnson testified he did not believe Hunter could have done anything to avoid hitting him. This statement contradicts Johnson's assertion two accidents occurred and instead supports the finding that

Hunter's hitting the truck did not constitute a second, distinct negligent act but was simply an additional foreseeable consequence of Dominguez's negligence.

CONCLUSION

Under the causation theory,[4] evidence in the record supports finding a minimal amount of time passed between the impacts and the second impact was not due to Hunter's own independent negligence but was a foreseeable consequence of Dominguez's negligent conduct. Consequently, the ruling of the trial court is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

[4] In Hartford Accident & Indemnity Co. v. Wesolowski, the court characterized its approach to this issue as the "event test," providing the test for determining whether there has been one accident within a liability policy is if there has been but a single event of an unfortunate character that took place without one's foresight or expectation. 305 N.E.2d 907, 910 (N.Y. 1973) (finding one occurrence when the insured vehicle struck an oncoming vehicle then ricocheted off and struck a second vehicle more than one hundred feet away a second or two later). Under either the causation test or the event test, the result in this case would be the same.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Blackbaud, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appeal From Administrative Law Court
Marvin F. Kittrell, Administrative Law Judge

Opinion No. 4645
Heard October 6, 2009 – Filed January 11, 2010

AFFIRMED AS MODIFIED

Carol I. McMahan, Ray N. Stevens, Harry T. Cooper, and Nicholas P. Sipe, all of Columbia, for Appellant.

Burnet R. Maybank, III and Joan W. Hartley, both of Columbia, for Respondent.

HEARN, C.J.: In this appeal, the South Carolina Department of Revenue (Department) contends the administrative law court (ALC) erred in

finding Blackbaud was entitled to claim job development tax credits for jobs created after the cut-off date. We affirm as modified.

FACTS

In 1995, the General Assembly enacted the Enterprise Zone Act (Act) to provide tax incentives for businesses to locate or expand in rural counties in South Carolina. The Act created the Advisory Coordinating Council for Economic Development (Council) and allowed qualifying businesses to submit an application to the Council for approval.[1] S.C. Code Ann. §§ 12-10-20(3) to -100(A) (2000 & Supp. 2008). In order to qualify for tax incentives under the Act, businesses were required to meet the eligibility requirements established by section 12-10-50(A)(1)-(4) of the South Carolina Code (Supp. 2008). Of particular importance for purposes of this appeal, section 12-10-50(A)(3) required businesses to enter into a revitalization agreement (RVA) with the Council. The Act gave the Council absolute discretion in deciding whether to enter into an RVA with an otherwise qualifying business. S.C. Code Ann. § 12-10-60(A) (Supp. 2008). Furthermore, the Act allowed the Council and the qualifying business to negotiate the terms of the RVA. Id. Although the terms of each individual RVA varied, every RVA uniformly required each business to create a minimum number of jobs and make a minimum capital investment by a certain date (cut-off date) in order to claim job development credits. Id.; S.C. Code Ann. § 12-10-80(A) (Supp. 2008). Under the Act, as soon as a business met the minimum job requirement and minimum capital investment set forth in the RVA, the business was eligible to claim job development credits. § 12-10-80.

Blackbaud, the largest software developer in the world for non-profit organizations, moved its headquarters from New York to Berkeley County in order to take advantage of the tax incentives provided by the Act. On October 22, 1997, Blackbaud entered into an RVA with the Council. In the RVA, Blackbaud agreed to create three hundred new jobs at its new facility

[1] The Council consists of the heads or board chairs of ten state agencies concerned with economic development.

on Daniel Island and invest a minimum of $29.6 million in the project before the cut-off date on October 22, 2002. In addition, the RVA contained an important provision commonly referred to as the 85/150 rule. At the time Blackbaud entered into the RVA with the Council, the Council had adopted Guidelines to assist it in determining whether a business was eligible to receive job development credits. The 85/150 rule was one of many guidelines adopted by the Council. The 85/150 rule in the RVA provided, "[o]nce it meets the Minimum Job Requirement, the Company may fall below the Minimum Job Requirement by 15 percent or exceed the Minimum Job Requirement by 50 percent and remain eligible to claim Job Development Credits."

Blackbaud met the job and capital investment requirements on September 30, 2001—more than a year before the cut-off date—and began claiming job development credits in October 2001. While Blackbaud only agreed in the RVA to create three hundred new jobs, it took advantage of the 85/150 rule and created more than three hundred jobs, while also claiming job development credits for them, during every quarter leading up to the cut-off date. In the last quarter before the cut-off date, Blackbaud claimed job development credits for 398 new jobs—its highest total to date. After the cut-off date, Blackbaud claimed job development credits in excess of 398 for every quarter from January 1, 2003, through December 31, 2005.[2] Blackbaud reported the number of job development credits it claimed each quarter on reports submitted to the Council. In addition, Blackbaud submitted annual reports to the Council, certifying it had not violated the 85/150 rule. The Council reviewed Blackbaud's quarterly and annual reports and never communicated to Blackbaud that these reports were inaccurate or improperly completed.

[2] Blackbaud never violated the 85/150 rule by claiming job development credits in excess of 450 jobs.

In 2004, the Council adopted new Guidelines amending the 85/150 rule. Although the new rule did not apply to Blackbaud,[3] the amended version of the 85/150 rule provided:[4]

> [T]he Council will allow a company, once it meets the minimum job requirement to fall below the minimum job requirement by 15% and remain eligible to claim [Job Development Credits]. If a company exceeds the minimum job requirement, that company may claim [Job Development Credits] on the excess jobs up to 50% of the minimum job requirement. Jobs created in excess of the "Minimum Job Requirement" shall be deemed to include only such "New Jobs" as are created at the "Project" prior to the "Cut-off Date" as those terms are defined in the final RVA.

The Department audited Blackbaud's tax returns in July 2006. Although this was the second time the Department audited Blackbaud's tax returns, this audit was the first since the cut-off date and the promulgation of the new Guidelines. Unlike the first audit, the Department concluded Blackbaud had calculated job development credits incorrectly. Specifically, the Department determined the text of the initial 85/150 rule prevented Blackbaud from claiming job development credits in excess of those claimed at the time of the cut-off date. Thus, the Department refused to allow Blackbaud to claim job development credits in excess of 398 jobs.

On August 9, 2006, the Department issued a proposed assessment to Blackbaud, seeking to recoup $281,264 in job development credits. Blackbaud filed a timely protest to the proposed assessment. On June 15, 2007, the Department issued its final agency determination, reasserting its claim to the money. Thereafter, Blackbaud requested a hearing before the

[3] The new rule only applies to "applications or RVAs pending as of February 1, 2004."

[4] Underlined portions of the rule indicate changes in the Guidelines.

ALC to review the Department's final determination. The ALC ruled in favor of Blackbaud, finding Blackbaud was eligible to claim job development credits on "newly created jobs in an amount not to exceed 150% of the Minimum Job Requirement (450 in this case), for a five-year-period commencing on the date the RVA received final approval by the Department of Commerce." This appeal followed.

STANDARD OF REVIEW

This court's scope of review is set forth in section 1-23-610(B) of the South Carolina Code (Supp. 2008). That section provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

LAW/ANALYSIS

In this case, Blackbaud claimed a high of 398 job development credits before the cut-off date. After the cut-off date, Blackbaud claimed job development credits in excess of 398 for every quarter from January 1, 2003, through December 31, 2005. The ALC found the 85/150 rule allowed Blackbaud to claim job development credits on newly created jobs "in an amount not to exceed 150% of the minimum job requirement, for a five-year period commencing on the date the RVA received final approval by the Department of Commerce." (emphasis added). On appeal, the Department argues the plain language of the 85/150 rule prevented Blackbaud from claiming job development credits in excess of 398 jobs after the cut-off date. We disagree.

When a contract or agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001). However, when an agreement is ambiguous, the court should determine the parties' intent. Ellie, Inc. v. Miccichi, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004). A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Jordan v. Sec. Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

The RVA defines the minimum job requirement and sets forth the 85/150 rule. It provides:

> Minimum Job Requirement means the minimum number of New Jobs the Company has agreed to

> create, prior to the Cut-Off Date, and maintain before claiming any Job Development Credits. Once it meets the Minimum Job Requirement, the Company may fall below the Minimum Job Requirement by 15 percent or exceed the Minimum Job Requirement by 50 percent and remain eligible to claim Job Development Credits.

We find this language to be clear and unambiguous. Initially, the first sentence defines the minimum number of new jobs Blackbaud must create in order to claim job development credits. This language unequivocally requires Blackbaud to meet the minimum job requirement by the cut-off date. Thus, according to the terms of the RVA, Blackbaud had to create three hundred new jobs before October 22, 2002, in order to claim job development credits. Both parties agree Blackbaud met this requirement. The next sentence sets forth the 85/150 rule. The 85/150 rule allowed Blackbaud, after meeting the minimum job requirement, to continue claiming job development credits if it maintained eighty-five percent of the minimum job requirement. Moreover, this sentence allowed Blackbaud to exceed the minimum job requirement by fifty percent and "remain eligible" to claim job development credits. However, the 85/150 rule contains no timing limitation. Unlike the minimum job requirement that required Blackbaud to create three hundred jobs by the cut-off date in order to claim job development credits, the 85/150 rule does not reference the cut-off date at all. Consequently, the 85/150 rule does not prohibit Blackbaud from claiming job development credits in excess of those created at the cut-off date. As a result, we find Blackbaud is entitled to claim the job development credits in question.

Additionally, the Department contends the plain language of the RVA does not support the ALC's finding that Blackbaud could take advantage of the 85/150 rule "for a five-year period commencing on the date the RVA received final approval by the Department of Commerce." We agree.

As we stated above, the 85/150 rule contains no timing limitation. Thus, pursuant to the terms of the parties' agreement, Blackbaud is eligible to

take advantage of the 85/150 rule, not for a five-year period, but for as long as the RVA remains in effect. Nowhere in the RVA does it state that Blackbaud can only claim the benefit of the 85/150 rule for a five-year period. Because the plain language of the RVA does not support this portion of the ALC's ruling, the decision is modified to remove the five-year limitation.

Accordingly, the decision of the ALC is

AFFIRMED AS MODIFIED.

KONDUROS and LOCKEMY, JJ., concur.