OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22

June 12, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dale A. Hardy, Lawrence J. Kukulski, Patricia A. Kukulski, and Grace G. Stegall, Respondents,

v.

Millicent O. Aiken, William R. Aiken, Virginia N. Baillie, Mary R. Ballenger, Richard C. Ballenger, Deane Fant Camak, Joseph Boyd Camak, Nancy L. Hearn, Rozlyn S. Hood, William C. Hood, Yvonne R. Jeffcoat, Rajeev Malik, Mary Alice N. Terry, and Ellen L. Ware, Defendants,

Of whom Yvonne R. Jeffcoat is the, Appellant.

Appeal From Anderson County
Charles B. Simmons, Jr., Special Referee

Opinion No. 26130
Heard February 14, 2006 – Filed June 12, 2006

AFFIRMED

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia; and Samuel F. Albergotti, of Jones, Spitz, Moorhead, Baird & Albergotti, P.A., of Anderson, for Appellant.

Harold P. Threlkeld, of Anderson, for Respondents.

ACTING JUSTICE HAYES: The special referee found the duration of the restrictive covenants on the parties' property could not be extended by amendment and expired January 14, 2005. This case was certified for review pursuant to Rule 204(b), SCACR, and we now affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1971, J. Donald King, Sr. subdivided a tract of land adjacent to Highway 81 into ten separate parcels – referred to as Lots 1-8 and Tracts A and B. On September 13, 1979, restrictive covenants applying to Lots 1-7 and Tracts A and B were recorded.[1] On January 14, 1980, these restrictive covenants were re-recorded.

Among other things, the restrictive covenants prohibited the commercial use of the land. The restrictive covenants were to "run with the land and [] be binding on all parties and all persons claiming under them for a period of 25 years from the date these Covenants are recorded." Thus, the restrictive covenants were to expire January 14, 2005.

One provision in the covenants provided for amendments to the restrictive covenants as follows:

> Change of Restrictions. Any change or amendment of these restrictions shall be made only by an

[1]For some undisclosed reason, Lot 8 was not subjected to these restrictive covenants.

> instrument in writing signed by a majority of the heads of household owning lots in said subdivision.

In 1987, King subdivided Tract A into lots A-F and designated them as the Marcdon Place subdivision. On May 20, 1987, a separate set of restrictive covenants was filed for Marcdon Place. Among other things, these restrictive covenants prohibited the commercial use of the land until May 20, 2012.

In the 1970s, Highway 81 was a two-lane road. Later, it was enlarged to four lanes to connect downtown Anderson to I-85. In recent years, there has been significant commercial development along Highway 81.

Part of Lot 1 and Lots 5 and 7 have houses on them, and Lots 2, 3, 4, and 6 remain undeveloped.[2] Five of the Marcdon Place lots have houses on them. At the hearing, the current homes were described as high end homes with an average value of $500,000. The respondents, the seven owners of lots 1-6,[3] have proposed developing their property for commercial use. The defendants, the eight owners of lots A-F in Marcdon Place (previously Tract A), Tract B, and Lot 7, oppose any commercial development.[4]

On December 20, 2002, the respondents filed a document purporting to cancel the restrictive covenants. The document recited the amendment provision and stated the majority of the heads of household wanted to cancel the restrictive covenants. Four months later, on April 25, 2003, the defendants filed a document amending the restrictive covenants by extending the covenants' expiration date to September 13, 2029.[5]

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[2]Lot 1 was subdivided into two lots in 1986.

[3]There were seven owners because Lot 1 was subdivided into two lots.

[4]We note not all of the defendants are participating in this appeal.

[5]Of the defendants, only Yvonne Jeffcoat appeals.

The respondents sought a declaratory judgment stating the restrictive covenants expired September 13, 2004, and thus are now unenforceable.[6] Defendant/Appellant Yvonne Jeffcoat filed a cross-claim and a counterclaim requesting a declaratory judgment stating the amendment extended the restrictive covenants until September 13, 2029.

The special referee found the amendment provision in the restrictive covenants ambiguous. He specifically held the amendment provision in the covenants did not expressly allow the amendment of the duration of the covenants. Strictly construing the amendment provision, the special referee held the restrictive covenants expired January 14, 2005, and could not be extended by agreement of less than 100% of the owners. Jeffcoat appeals.

ISSUE

Did the special referee err in finding the restrictive covenants could not be amended?

LAW/ANALYSIS

Standard of Review

The appellant contends the standard of review is de novo. The respondents, however, argue the standard of review is "any evidence." We find the proper standard of review is de novo.

Both sides agree "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The

[6]Plaintiffs Lawrence and Patricia Kukulski originally were the only plaintiffs. The special referee realigned the parties. Afterwards, in addition to the Kukulskis, the plaintiffs included Dale Hardy and Grace Stegall. The defendants were Millicent and William Aiken, Virginia Baillie, Mary and Richard Ballenger, Nancy Hearn, Rozlyn and William Hood, Yvonne Jeffcoat, Deanne and Joseph Camak, Rajeev Malik, Mary Alice Terry, and Ellen Ware.

respondents contend this action's underlying issue is an action to construe a contract. However, the appellant argues the underlying issue is one to enforce restrictive covenants which is in equity.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). However, the determination of the scope of the easement is a question in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). While this action potentially may require the Court to construe a contract, the underlying action is a declaratory action to declare whether the restrictive covenants are enforceable after January 14, 2005. Accordingly, we hold the proper scope of review is de novo.

Discussion

The special referee held the general amendment provision is ambiguous as to whether it includes the power to amend the duration of the restrictive covenants. He then strictly construed the amendment provision in favor of free use of the property and held the duration could not be extended. The appellant contends the special referee erred in finding the provision ambiguous and in holding it includes the amending of the duration of the restrictive covenants. We disagree.

A restrictive covenant is ambiguous when its terms are reasonably susceptible of more than one interpretation. *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001). On one hand, the amendment provision states "any change or amendment" can be made. (Emphasis added). On the other hand, the restrictive covenants clearly state they expire in twenty-five years and there is no express provision allowing for an amendment to extend the duration of the restrictive covenants. We find the amendment provision ambiguous as to whether "any

change or amendment" includes an extension of the duration of the restrictive covenants.[7]

The appellant then contends if the provision is deemed ambiguous, it should be interpreted to allow an amendment of the duration of the restrictive covenants. We disagree.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *See Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. *Taylor*, 32 S.C. at 4, 498 S.E.2d at 864.

Here, the restrictive covenants had a clear expiration date, and there was no express provision for their extension. Further, strictly construing the general amendment provision and resolving any doubts in favor of the free use of the property, we hold the amendment provision does not allow extending the duration of the restrictive covenants. Accordingly, the

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[7]We note that amendment provisions similar to the one here have been interpreted differently in different jurisdictions. *See, e.g., Allen v. Sea Gate Ass'n*, 460 S.E.2d 197 (N.C. Ct. App. 1995)(holding the duration of restrictive covenants cannot be extended, unless the restrictive covenants clearly authorize it); and *Venetian Isles Homeowners Ass'n, Inc., v. Albrecht*, 823 So.2d 813 (Fla. Dist. Ct. App. 2002)(holding the general power to modify restrictive covenants includes the power to extend the duration).

purported amendment is invalid and the restrictive covenants expired January 14, 2005.

CONCLUSION

For the foregoing reasons, we affirm the special referee's order.

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

The Supreme Court of South Carolina

Debra Edwards, individually
and as class representative for
all those similarly situated, Appellant,

v.

SunCom, a member of the
AT&T wireless network, d/b/a
Triton PCS Operating
Company, LLC, Respondent.

ORDER

The petition for rehearing is granted, and the attached opinion is substituted for the opinion previously filed in this matter.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

Pleicones, J., not participating

Columbia, South Carolina

June 12, 2006

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Debra Edwards, individually and as class representative for all those similarly situated, Appellant,

v.

SunCom, a member of the AT&T wireless network, d/b/a Triton PCS Operating Company, LLC, Respondent.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 26148
Heard March 21, 2006 – Refiled June 12, 2006

DISMISSED

Natale Fata, of Surfside Beach, for Appellant.

Charles S. Altman, of Charleston, and Michael D. Hays, of Washington, for Respondent.

JUSTICE WALLER: This is an appeal from an order of the circuit court granting SunCom's motion to stay the action. The circuit court simultaneously ordered SunCom to seek a ruling from the Federal Communications Commission (FCC) as to whether an "early termination fee"

constituted a "rate charged."[1] Edwards appeals. We dismiss the appeal as interlocutory.

FACTS

In March 2000, Edwards signed a service agreement to become a SunCom cellular telephone customer. She cancelled the agreement after the initial 12 month service period, and was charged a $200.00 early cancellation fee. She filed this action in the circuit court alleging the cancellation fee was charged in breach of the terms of the agreement.[2] SunCom moved for judgment on the pleadings or alternatively to dismiss or stay the action. The trial court issued an order staying the matter and, further, requiring SunCom to petition the FCC to seek a declaratory ruling as to whether the early termination fee was a "rate charged." The matter was stayed pending the FCC's ruling. Edwards appeals.

ISSUE

The sole issue we need address is whether an order granting a stay is immediately appealable. We hold that it is not.

Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C. Code Ann. § 14-3-330. Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004). Pursuant to S.C. Code Ann. § 14-3-330, the following types of orders are appealable:

> 1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common

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[1] A state is preempted from regulating the entry of or the rates charged by any commercial mobile telephone service by 42 USC § 332 (c)(3)(a) of the Federal Communications Act.

[2] The contract initialed by Edwards states, "My service plan has a 12 month service contract and if terminated prior to the end of that term I will be charged a cancellation fee of $200.00 to my account. I also understand that my contract automatically renews for one year past 3/24/01. I understand if I do not wish for my contract to automatically renew, cancellation requires 30 days written notification prior to automatic renewal date."

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

We find the present order does not fall into any of these categories. It does not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken.

An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Id. at 335 n. 4, 426 S.E.2d at 780 n. 4.

The order here does not discontinue the proceeding. It merely temporarily stays the matter pending a ruling by the FCC. Accordingly, we find an order granting a stay is not immediately appealable.

Edwards cited Hiott v. Contracting Services, 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981), as supporting her claim that an order granting a stay is directly appealable. However, Hiott adopted this rule, without discussion, citing Dill v. Moon, 14 S.C. 338 (1880). Dill dealt with the refusal to stay an action and, further, is based upon broad language which this Court no longer follows. The Dill court noted that the 1873 code allowed appeals from orders "involving the merits." It went on to cite an 1878 case holding that an order denying a motion to transfer a case to the county of the defendant's residence, after the law upon that subject had been changed, was immediately appealable. The Dill court stated, "[t]he word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case. . . . It may be concluded that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court." Under § 14-3-330, however, an order must affect a substantial right **and** prevent a judgment from which an appeal may later be taken in order to be immediately appealed. Accordingly, we find Hiott and Dill are no longer good law such that they are overruled.[3]

APPEAL DISMISSED.[4]

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

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[3] To the extent it is inconsistent with our holding today, we likewise overrule the Court of Appeals' recent opinion in Carolina Water Svc. v. Lexington County Joint Municipal Water and Sewer Comm'n, Op. No. 4047, S.C. Ct. Appeals filed Jan. 20 2006 (Shearouse Adv. Sh. No. 5 at 65).

[4] We note that, although we find no abuse of discretion in the grant of a stay in this case, Edwards is free to move the circuit court for a lift of the stay, or such other relief as may be necessary, if the matter pending before the FCC is unduly delayed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Carter D. Harrington, Respondent.

Opinion No. 26162
Submitted May 15, 2006 – Filed June 12, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Carter D. Harrington, of Gainesville, Florida, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) 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 an admonition, public reprimand, or sixty (60) day suspension from the practice of law. See Rule 7(b), RLDE, Rule 413, SCACR. Respondent further agrees that, if suspended from the practice of law, he must appear before the Committee on Character and Fitness as a condition of reinstatement. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a sixty (60) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Around January 2004, respondent was retained to represent a client on a pending driving under the influence (DUI) charge. Respondent informed the client that his fee would be $5,000. Due to the client's financial situation, respondent allowed the client to make regular payments towards the retainer.

Between January 3 and June 8, 2004, the client made payments totaling $2,270, including a payment of $200 on April 19, 2004, and a payment of $170 on June 8, 2004. Respondent's license to practice law in this state was suspended by order of the Court dated April 9, 2004 for failure to pay his 2004 license fees. Respondent admits his acceptance of fees while under suspension constituted the unauthorized practice of law.

In or about August 2004, respondent's wife informed the client that respondent was relocating his practice. The client was not provided with a current address or telephone number and had no way to contact respondent.

By letter dated January 13, 2005, ODC notified respondent of the complaint in this matter. The letter requested a response within fifteen (15) days. Respondent failed to respond or otherwise communicate with ODC in response to the January 13, 2005 letter. On March 29, 2005, ODC sent an additional letter to respondent pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting a response from respondent. Respondent failed to respond.

Respondent represents that, during the time period addressed by the Agreement, he suffered significant medical problems, including a stroke and resulting partial paralysis. Respondent required constant medical attention resulting in frequent in-patient and out-patient care. Financial hardships contributed to his inability to provide effective legal representation to his clients.

As a result of his health and subsequent relocation outside South Carolina to seek medical rehabilitation, respondent arranged to have his client files delivered to the office of another attorney.[1] Respondent failed to notify his clients of the transfer of their files. Respondent now understands it was not permissible to release client files to another attorney without the client's prior knowledge and consent.

Respondent acknowledges that his medical condition is not so severe as to render him unable to assist in his own defense in this matter or make an informed decision as to whether to enter into the Agreement, but agrees that his condition currently renders him unfit to practice law. Respondent has expressed remorse for his conduct and represents he will strive to ensure that this situation does not recur.

ODC agrees respondent has been forthright and cooperative throughout its investigation.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter); Rule 8.1 (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); and Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct). Respondent further admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

[1] Respondent represents his trust account is in good order and that no client funds have been compromised.

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR. As a condition of seeking reinstatement under Rule 32, RLDE, respondent must appear before the Committee on Character and Fitness for the purpose of determining whether his health is such that he is capable of resuming the practice of law.[2]

DEFINITE SUSPENSION.

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

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[2] The request to appoint an attorney to protect respondent's clients' interests is denied.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Transportation, Condemnor, Respondent,

v.

First Carolina Corporation of South Carolina, Landowner, and Edisto Farm Credit, ACA, Mortgagee, Other Condemnees, /of whom First Carolina Corporation of South Carolina is Appellant.

Appeal from Jasper County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 26163
Heard April 6, 2006 – Filed June 12, 2006

REVERSED

Daniel E. Henderson, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Ridgeland, and Thomas A. Holloway, of Harvey & Battey, of Beaufort, for Appellant

B. Michael Brackett, of Moses, Koon & Brackett, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This case arises out of a condemnation action by South Carolina Department of Transportation (SCDOT). First Carolina Corporation of South Carolina (First Carolina) initiated a suit to determine the value of the condemned property. After the jury returned a verdict, SCDOT moved to deposit the judgment with the court pursuant to Rule 67, SCRCP, in order to stop the accrual of post-judgment interest during SCDOT's appeal. The trial judge granted the motion. First Carolina appealed, and we reverse.

FACTUAL / PROCEDURAL BACKGROUND

SCDOT condemned approximately eight (8) acres of land belonging to First Carolina. The condemned property was part of a four hundred (400) acre planned unit development. First Carolina initiated an action to determine the amount of compensation owed by SCDOT for the condemnation of First Carolina's property. The jury returned a verdict of $1,990,975.00; of which $640,300.00 was for the land acquired and $1,350,675.00 for the damage to the remainder.

The trial court denied SCDOT's post trial motions, and SCDOT appealed. Pursuant to Rule 67, SCRCP, SCDOT also sought to deposit with the court the judgment amount plus accrued statutory interest, less the draw down amount.[1] First Carolina objected. However, the court granted SCDOT's motion, allowing it to deposit the funds and stop the accrual of

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[1] "Draw down" refers to the condemnees' right to a portion of funds on deposit with clerk of court after the condemnor has taken possession. "Upon written application, in form satisfactory to the clerk of court, by all named condemnees at any time after which the condemnor has taken possession, when the right to take is not contested, the clerk of court shall pay to them the amount applied for up to fifty percent of the funds deposited with the clerk of court by the condemnor in that action." S.C. Code Ann. § 28-2-480 (2005).

post judgment interest. First Carolina appealed raising the following issue for review:

> Did the trial court err by allowing SCDOT to deposit the judgment amount pursuant to Rule 67, SCRCP, in order to stop the accrual of post-judgment interest?

STANDARD OF REVIEW

The granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Cajun Elec. Power Co-op., Inc. v. Riley Stoker Corp.,* 901 F.2d 441, 445 (5th Cir. 1990). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Conner v. City of Forest Acres,* 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005).

LAW / ANALYSIS

First Carolina argues that the trial court erred in allowing SCDOT to deposit the condemnation judgment funds pursuant to Rule 67, SCRCP in order to stop the accrual of post-judgment interest during the appeals process. We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted). All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). Whenever possible, legislative intent should be found in the plain language of the statute itself. *Whitner v. State*, 328 S.C 1, 6, 492 S.E.2d 777, 779 (1997). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

The Eminent Domain Procedure Act (the Act) provides:

> [a] condemnor shall pay interest at the rate of eight percent a year upon sums found to be just compensation by the appraisal panel or judgment of a court to the condemnee. This interest shall accrue from the date of filing of the Condemnation Notice through the date of verdict or judgment by the court. Interest accruing on funds on deposit with the clerk of court must be offset against the interest computed pursuant to this section. Interest shall not accrue during the twenty-day period commencing upon the date of verdict or order of judgment. *If the judgment is not paid within the twenty-day period, interest at the rate provided by law for interest on judgments must be added to the judgment. Thereafter, the entire judgment shall earn interest at the rate provided by law for interest on judgments.*

S.C. Code Ann. § 28-2-420(A) (2005) (emphasis added). The Act also provides that "[i]n the event of conflict between this act and the South Carolina Rules of Civil Procedure, this act shall prevail." S.C. Code Ann. § 28-2-120 (2005).

Rule 67, SCRCP, allows a judgment debtor to avoid further accrual of post-judgment interest pending the resolution of an appeal from the judgment by depositing the judgment with the court. *Russo v. Sutton*, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995). The rule provides:

> [i]n an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. Money paid into the court under this rule shall be deposited as directed by the court in any bank or institution authorized to receive public funds, and shall be withdrawn only upon the check of the clerk of court in favor of the party to whom the order of the court directs.

Rule 67, SCRCP.

The Act clearly requires post judgment interest to be added to any judgment which is not paid within the twenty day period. Any deposit under Rule 67, SCRCP, would be in direct contravention of the Act's requirement that post-judgment interest be added to the condemnation judgment. To resolve the inherent conflict between these provisions, we need look no further than the clear and unambiguous language of the statute. Section 28-2-120 mandates that in the event of conflict, the Act prevails over the rules of civil procedure. Accordingly, the trial court erred in allowing SCDOT to deposit the judgment funds in order to stop the accrual of post-judgment interest.

SCDOT relies on *South Carolina Dept. of Trans. v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999) to support its position that a deposit pursuant to Rule 67, SCRCP, does not conflict with the Act, and that the deposit should be allowed to stop the accrual of post-judgment interest. This reliance is misplaced.

First, *Faulkenberry* is primarily a case involving pre-judgment interest. In *Faulkenberry*, the landowner was paid $863,574 as just compensation upon SCDOT's filing of a condemnation action. After trial, the jury awarded the landowner $2,396,100. The landowner claimed that he was due prejudgment interest on the full jury verdict under § 28-2-420 from the date of condemnation through the date of the verdict. SCDOT contended that the landowner was entitled to interest only on the difference between the jury verdict and the initial payment. The court of appeals held that the landowner was entitled to interest only on the condemnation award in excess of the amount he was originally paid. *Faulkenberry*, 337 S.C. at 156, 522 S.E.2d at 830.

Additionally, *Faulkenberry* does not address deposits with the court pursuant to Rule 67, SCRCP.[2] The only reference to deposits in

[2] *Faulkenberry* cites *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995), for the proposition that compliance with Rule 67, SCRCP, would prevent the accrual of interest on a judgment debtor's deposit of funds with the court.

Faulkenberry relates to deposits made pursuant to § 28-2-90(3). The fundamental difference between these two types of deposits is that the landowner has the right to withdraw the funds deposited under § 28-2-90(3), whereas that same right does not apply under Rule 67, SCRCP. Accordingly, *Faulkenberry* does not address the present issue, and can not be relied upon to show that there is no conflict between Rule 67, SCRCP, and § 28-2-420.

Accordingly, the clear and unambiguous language of § 28-2-420(A) and § 28-2-120 require post-judgment interest to accrue on any judgment not paid within twenty days of the entry of the order of the judgment. Therefore, we find that the trial court abused its discretion by allowing SCDOT to deposit the judgment funds and stop the accrual of post-judgment interest.

CONCLUSION

Based on the foregoing, we reverse the trial court's order granting SCDOT's motion to deposit judgment funds.

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

However, it is important to note the *Russo* is not a condemnation action; *Russo* is an action concerning criminal conversation and alienation of affection.

Additionally, both *Faulkenberry* and *Russo* cite *Horry County v. Woodward*, 291, S.C. 1, 351 S.E.2d 877 (1986), for the proposition that "[p]ayment of a judgment into court is deemed to be a payment of money for the use of the person entitled thereto and stops the running of judgment interest." *Woodward,* 291 S.C. at 3, 351 S.E.2d at 878. While this statement may be applicable to Rule 67, SCRCP, in general, it is no longer applicable in relation to the Eminent Domain Procedure Act. *Woodward* relied on S.C. Code Ann § 28-5-320 (1976), *repealed by* 1987 Act No. 173.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The South Carolina Public Interest Foundation, and James M. Herring, Individually and on Behalf of All Others Similarly Situated, Appellants/Respondents,

v.

The Judicial Merit Selection Commission, Senator James H. Ritchie, Jr., Respresentative F.G. Delleney, Jr., Senator Robert Ford, Representative Doug Smith, Senator Ray Cleary, Representative Fletcher N. Smith, Jr., John P. Freeman, Judge Curtis G. Shaw, Ms. Amy Johnson McLester, and Richard S. "Nick" Fisher, Respondents/Appellants.

Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26164
Heard June 7, 2006 - Filed June 8, 2006

AFFIRMED

James G. Carpenter, of Greenville, for Appellant-Respondents.

Michael Robert Hitchcock and Mikell C. Harper, both of Columbia, for Respondent-Appellants.

CHIEF JUSTICE TOAL: The trial court found that the issue of whether the Judicial Merit Selection Commission (Commission) properly evaluated a candidate seeking election to a circuit court seat was a nonjusticiable political question. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

The South Carolina Public Interest Foundation (Foundation) and James Herring (Herring) brought the present action against the Commission and its members in their official capacities on February 16, 2006. In this lawsuit, the Foundation and Herring challenge the Commission's determination that Carmen Tevis Mullen (Mullen) was qualified to seek election for the fourteenth judicial circuit, seat 2. In particular, the Foundation and Herring allege that the Commission was unreasonable in finding that Mullen was a resident of the fourteenth judicial circuit.

The record indicates that the Lowcountry Screening Committee raised concerns related to Mullen's residency to the Commission and the Commission considered those concerns in determining if Mullen was qualified to seek election for the fourteenth judicial circuit. The Foundation and Herring seek to have the Commission's finding that Mullen was qualified overturned because they contend Mullen is not a resident of the fourteenth circuit. Accordingly, the Foundation and Herring seek to have the election reopened for fourteenth judicial circuit, seat 2.

As a result, the Foundation sought a declaratory judgment by the trial court that the Commission did not adequately investigate whether Mullen met residency requirements for fourteenth judicial circuit, seat 2. Mullen was found qualified by the Commission and was subsequently elected by the South Carolina General Assembly. Mullen is not a party to this action.

The Commission moved to dismiss the claim pursuant to Rule 12(b)(6), SCRCP. The trial court found the Foundation failed to state facts sufficient to support a justiciable claim because the claim was moot and not proper for judicial review. The Foundation appealed and this Court certified the case pursuant to Rule 204(b), SCACR. As a result, the following issues are presented to the Court:

I. Did the trial court err in determining that the issue is nonjusticiable?

II. Did the trial court err in granting the Commission's motion to dismiss pursuant to Rule 12(b)(6), SCRCP?

LAW / ANALYSIS

I. Justiciability

The Foundation and Herring argue that the trial court erred in determing that the issue was nonjusticiable.[1] We disagree.

The nonjusticiability of a political question is primarily a function of the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Id*. at 211; *See Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (stating the political question doctrine, which derives from the separation of powers doctrine, excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch).

[1] In addition to the separate of powers analysis, the circuit found the issue presented in the present case to be moot. In our view, the political question doctrine, as opposed to mootness dictates the decision in this case.

The fundamental characteristic of a nonjusticiable "political question" is that its adjudication would place a court in conflict with a coequal branch of government. *U.S. v. Munoz-Flores*, 495 U.S. 385, 393-94 (1990). Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial. *Chicago & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Brd.*, 333 U.S. 103, 111 (1948).

In addition to the authority cited above, this Court has declined to opine on issues where the Constitution delegates authority to the General Assembly. *See Stone v. Leatherman*, 343 S.C. 484, 484-85, 541 S.E.2d 241 (2001) (holding that the South Carolina Constitution provides the Senate with the authority to judge the election returns and qualifications of its own members). Likewise, other state courts have declined to answer political questions when Constitutional provisions grant the power to another branch of government. *See Ex. Rel. Turner v. Scott*, 296 N.W.2d 828, 830-31 (Iowa 1978) (holding that the determination of whether a senator was qualified to hold office because of questions regarding residency was the prerogative of the Senate pursuant to the Iowa State Constitution).

In the present case, the power to determine if a person is qualified to hold judicial office is vested with the General Assembly by the State Constitution. The South Carolina Constitution requires the General Assembly to establish a commission charged with the duty of determining if a person is qualified to be elected as a judge. S.C. Const. art. V, § 27. In addition, the Constitution proscribes that the General Assembly is to establish criteria for the Commission to consider when making the determination if a judicial candidate is qualified. *Id*; *See also* S.C. Code Ann. § 2-19-35 (2005) (establishing the criteria for the Commission to consider when determining if a candidate is qualified to be elected to a judicial seat); and S.C. Code Ann. § 2-19-20(D) (2005) (providing that the Commission can conduct the investigation into a judicial candidate's background in any manner the Commission deems appropriate).

As the above cited statute indicates, the State Constitution, in unequivocal terms, vests the power to determine the qualifications for judicial candidates in the General Assembly. Were we to review this case, this Court

would be delving into the decision making process of the very body that determines whether the members of this Court are qualified to seek election to the bench. We decline to put the judiciary in a position that would interfere with the selection of its very own members. Accordingly, we hold that the issue of whether Mullen was properly qualified is a nonjusticiable political question.

The issue presented in the present case is distinguishable from other areas in which the Court reviews the actions of another coequal branch of government. For example, the South Carolina Code specifically gives this Court the power to review the decisions of administrative agencies that are under the umbrella of the executive branch. *See* S.C. Code Ann. § 1-2-380(A) (2005) (outlining the procedures for appealing a final decision of an administrative agency). In addition, this Court can review the actions of the General Assembly when the actions are unconstitutional. *See Hanvey v. Oconee Mem. Hosp.*, 308 S.C. 1, 4, 416 S.E.2d 623, 625 (1992) (stating that the Court can overturn an act of the General Assembly when the enactment is unconstitutional).

Under the present facts, the Foundation and Herring had other avenues to seek relief. Specifically, the complaining parties could properly challenge the residency of Mullen as provided for in the Code:

> [o]nce a person is registered, challenges of the qualifications of any elector, except for challenges issued at the polls pursuant to §§ 7-13-810, 7-13-820, and 7-15-420 must be made in writing to the board of registration in the county of registration. The board must, within ten days following the challenge and after first giving notice to the elector and the challenger, hold a hearing, accept evidence, and rule upon whether the elector meets or fails to meet the qualifications set forth in § 7-5-120.
>
> When a challenge is made regarding the residence of an elector, the board may consider the following proof to establish residence including, but not limited to, income tax returns; real estate interests; mailing address; address on driver's license; official papers and documents requiring the statement of

> residence address; automobile registration; checking and savings accounts; past voting record; membership in clubs and organizations; location of personal property; and the elector's statements as to his intent.

S.C. Code Ann. § 7-5-230 (Supp. 2005).

Accordingly, we hold that the issue presented in this case constitutes a political question not proper for judicial review.

II. Summary Judgment

The Foundation and Herring argue the trial court erred in granting the Commission's motion to dismiss pursuant to Rule 12(b)(6), SCRCP. Because we hold that the case is not justiciable we do not reach the merits of the claims.[2]

CONCLUSION

Based on the authority cited above, we hold that the question of whether the Commission properly determined the residence of Mullen or gave proper weight to the concerns of the Lowcountry Screening Committee presents a nonjusticiable political question that this Court should decline to answer. Accordingly, we affirm the trial court's decision.

MOORE, WALLER and BURNETT, JJ., and Acting Justice Roger M. Young, concur.

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[2] While we do not delve into the decision making process of the Judicial Merit Selection Committee, we do note that Mullen was a qualified elector from the Fourteenth Judicial Circuit at the time of her election as evidence in the Appellants' complaint. Further, the legislative history of S.C. Code Ann. § 14-5-610 (Supp. 2005) does not reflect that the word "from" has any other meaning outside requiring that a person seeking a seat as a resident judge in a judicial circuit be a qualified elector of that circuit on the date of his or her election.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Randolph Frails, Respondent.

Opinion No. 26165
Heard May 2, 2006 – Filed June 12, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard and Jason B. Buffkin, both of West Columbia, for Respondent.

PER CURIAM: In this attorney-discipline matter, Respondent concedes that he violated the following Rules of Professional Conduct: Rules 1.1 (requiring competence), 1.3 (requiring diligence), and 5.5 (prohibiting the unauthorized practice of law).[1] Because Respondent violated Rule 5.5 while he was suspended by order of this Court, the Office of Disciplinary Counsel (ODC) recommends that we hold Respondent in contempt. We do not hold Respondent in contempt, and as recommended by the Panel of the Commission on Lawyer Conduct (the Panel), we find that a sixty-day definite suspension, credited against Respondent's previously served six-month interim suspension,

[1] Rule 407, SCACR.

in addition to payment of the costs of the proceeding, is an appropriate sanction.

FACTS

Respondent is a member of the South Carolina Bar and of the Georgia Bar. His office is in Augusta, Georgia, and almost all of his practice is in Georgia. A small percentage of his practice has been conducting closings on South Carolina realty from his office in Georgia.

Although he had completed the requisite hours, Respondent failed to file a Continuing Legal Education (CLE) report for 2001. In addition, he failed to pay his 2002 South Carolina Bar dues.

A certified letter from this Court that was sent to Respondent's Augusta address informed him that he had been administratively suspended from the practice of law in South Carolina. An employee signed for this letter, but Respondent was never made aware of it.

Soon thereafter, Respondent conducted a closing in Georgia for Mr. and Mrs. Samuel Williams (the Williamses) on South Carolina realty. The deed was to be recorded by Respondent in Aiken County.

Shortly after the closing, we issued an order suspending Respondent and other members of the Bar for failing to file 2001 CLE reports. The order was not served on Respondent, but it was published in the advance sheets. Respondent did not subscribe to the advance sheets, so he did not become aware of the order.

A few months later, Respondent realized that he was no longer receiving mailings from the South Carolina Bar, and he concluded that his South Carolina license had lapsed. He made no inquiry to confirm his conclusion, nor any effort to revive his license. He did not submit his already late CLE report for 2001, or pay his overdue bar dues for 2002. Further, he later failed to submit a CLE report for 2002, and failed to pay his 2003 dues.

Respondent continued to conduct closings on South Carolina property from his office in Georgia. In connection with those closings, he continued to record deeds in South Carolina courthouses.

In August 2003, ODC contacted Respondent about a complaint filed by the Williamses regarding the closing Respondent had conducted for them. In the complaint it was alleged that Respondent had not recorded the deed until nine months after the closing and that Respondent's South Carolina license was not active at the time of the closing. Respondent informed ODC that he believed his license was active when he conducted the closing for the Williamses. Around this time, Respondent ceased conducting closings on South Carolina realty and recording documents in South Carolina courthouses.

In November 2003, ODC filed a Petition for Interim Suspension and Rule to Show Cause why Respondent should not be held in contempt for violating our suspension order by continuing to conduct closings. We placed Respondent on interim suspension and issued a Rule to Show Cause. After Respondent appeared before us, we decided to hold the contempt matter in abeyance until resolution of the Williams matter.

In June 2004, we granted Respondent's petition to be reinstated. He had submitted all of his late CLE reports and paid all bar dues. Our decision did not affect the Williams complaint or the contempt matter, which were still pending.

After a hearing on the Williams matter, the Panel found that Respondent had failed to competently and diligently handle the Williams closing, in violation of Rules 1.1 and 1.3 of the Rules of Professional Conduct. The Panel therefore found that Respondent was subject to discipline pursuant to Rule 7(a)(1), RLDE, Rule 413, SCACR.

The Panel also found that Respondent had violated Rule 5.5, RPC, Rule 407, SCACR, by conducting real-estate closings while his license was suspended. Not only did Respondent violate the rule, but

also he violated an order of this Court. This all stemmed from his failure to pay bar dues as required by Rule 410, SCACR, which led to his administrative suspension pursuant to Rule 419, SCACR.

Based on these findings, the Panel recommends that Respondent receive a definite suspension of sixty days. The Panel further recommends that Respondent be credited for his time under interim suspension – more than six months – meaning the Panel recommends "that no further period of suspension be imposed." The Panel also recommends that Respondent be ordered to pay the costs of the proceedings, five hundred forty-four dollars and fourteen cents.

FINDINGS AND SANCTION

Noting Respondent's agreement, we adopt the findings of the Panel concerning the violations of the Rules of Professional Conduct. We do not hold Respondent in contempt for violating our suspension order, because we find that Respondent did not do so willfully. See In re Brown, 333 S.C. 414, 420-21, 511 S.E.2d 351, 354 (1998) (noting that contempt requires willfull conduct) (citations omitted). Respondent should have made some effort to determine whether he was engaging in the unauthorized practice of law, but we find he genuinely believed that he was not.

We also adopt the Panel's proposed sanction. Respondent is definitely suspended for sixty days, but this suspension is credited against his more-than-six-month interim suspension. Respondent shall pay the costs of the proceeding below, five hundred forty-four dollars and fourteen cents, within thirty days.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

Nancy S. Layman, David M. Fitzgerald, Vicki K. Zelenko, Wyman M. Looney and Nancy Ahrens, on behalf of themselves and all others similarly situated, Petitioners,

v.

The State of South Carolina and The South Carolina Retirement System, Respondents.

AMENDED ORDER

On May 4, 2006, this Court issued an opinion holding that respondents breached their contract with TERI participants who joined the TERI program, originally enacted in 2001, prior to July 1, 2005 (old TERI participants), by forcing them to make retirement system contributions. Layman v. State of South Carolina, Op. No. 26146 (S.C. Sup. Ct. filed May 4, 2006). We further ordered that all retirement system contributions withheld from those TERI participants be returned to them with interest and that no further contributions from them shall be required. Id. Finally, we remanded the issue of breach of contract as it relates to working retirees to

the trial court because the record before us does not allow us to make the factual or legal inquiry necessary to determine if a binding contract existed between the State and the working retirees regarding the making of further retirement system contributions. Id.

The parties have now filed several motions. We will address respondents' petition for rehearing first. We deny the petition with regard to Arguments I and II.

We also deny the petition as to Argument III, but will analyze the arguments made therein. Respondents contend this Court impugned the integrity of counsel by labeling as a complete misrepresentation the assertion that the growing number of TERI participants was part of the reason for requiring contributions from previously enrolled TERI participants. At page 26 of their brief respondents state, "Act 153 was adopted in the face of increasing liabilities in the Retirement System." The sentence is accompanied by a reference to pages 754 and 755 of the record. Those pages in the record contain a portion of the Milliman study describing the increase in the number of participants corresponding to the increase in the liabilities of the retirement system. The numbers are reflected in chart form, depicting the

liabilities increasing significantly, almost off the charts. We did not intend to impugn the character of counsel, but we did find fault in the analysis used with respect to the entire Milliman report. Respondent's reliance on the report was inaccurate because by the time respondents prepared the briefs for presentation before this Court, we had previously certified the plaintiff class to include *only* those retirees enrolled *prior* to July 1, 2005. The Milliman report included both current and future TERI participants.

Further, this Court pointed to flawed analysis by stating that 100 percent of eligible retirees were used in arriving at the figures in the report. This sentence, when taken out of context, is incorrect. To clarify, the Milliman report did assume that only 80 percent of *all* eligible retirees (as opposed to 100 percent of eligible retirees) would participate in TERI.[1]

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[1] Respondents contend in their Introduction, that "[t]his case represents a dramatic departure from ordinary procedural and substantive standards" and that [i]t is doubtful that there is another case in the history of South Carolina jurisprudence with such a procedural history." Many cases this Court has elected to entertain in its original jurisdiction, which by their very nature involve issues of public interest or special emergency, see Rule 229(a), SCACR, have taken the same efficient and expeditious path as the case at hand, and have not included an opportunity for the parties to engage in discovery. See e.g. South Carolina State Ports Authority v. Jasper County, Op. No. 26132 (S.C. Sup. Ct. filed April 3, 2006)(order accepting matter in Court's original jurisdiction filed March 2, 2005; opinion issued April 3, 2006); Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005)(order accepting matter in Court's original jurisdiction filed May 14, 2004; opinion issued January 28, 2005); Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004)(order accepting matter in Court's original jurisdiction filed May 30, 2003; opinion issued February 9, 2004). The case at hand was certified to this Court by order dated August 4, 2005. The opinion was issued on May 4, 2006, nine months later. Accordingly, this case does not

In Arguments IVA and IVB, respondents maintain the Court should amend the class definition to exclude working retirees or, in the alternative, decertify the entire class. Respondents state that class treatment is not necessary because "if the Court lets its decision stand, respondents will comply with the law as declared and provide appropriate relief to all persons entitled to it." Respondents also point out that if the class is not decertified, class notice will be required.[2] We are persuaded by this argument. Accordingly, we grant respondents' request to decertify the classes in this matter. Thus, petitioners' Motion for Approval of Notice to Class is denied as moot.

In Argument IVC, respondents maintain the Court failed to prescribe the procedures for making refunds pursuant to the opinion, specifically, how or when such refunds will be made.[3] Respondents state,

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mark a dramatic departure from procedures and time periods in other similar cases before this Court.

[2] By order dated November 3, 2005, this Court deferred the issue of class notice until after a decision was rendered in the case.

[3] Respondents take issue with this Court's statements in its opinion that the amounts contributed by old TERI participants have been escrowed in a separate interest-bearing account. By order dated August 31, 2005, this Court granted respondents' request for the escrowed funds to be held within the Retirement Trust Fund, but subject to separate accounting for individual contributions, and also ordered that the escrowed funds bear interest at the current rate established by the State Budget and Control Board pursuant to S.C. Code Ann. § 9-1-280 (1986). Further, we note that

"This is one of the reasons that the class definition must be amended to prevent confusion regarding who is entitled to relief, should the Court maintain the same result in this case." Finally, respondents maintain, as they have in the past, that there is a delay in collecting the contributions and in allocating them to specific persons who are members of the class.

We find there should be no confusion as to who is entitled to relief in this matter – all TERI participants who joined the TERI program, originally enacted in 2001, prior to July 1, 2005, from whom retirement system contributions have been collected since the effective date of Act 153. As to when such refunds are to be made, we hereby order that all retirement system contributions withheld from the old TERI participants shall be returned to them, with interest at the rate of 4%, within thirty (30) days of the date of this order. Specifically how this refund will be effectuated is to be decided by respondents, not this Court. The post judgment interest on the amounts to be returned shall begin to accrue at the rate of 11.25%, set forth by order of this Court dated January 4, 2006, for post-judgment interest, if not returned within this thirty (30) day period.

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the description of the interest bearing escrow account was borrowed in large part from pages 2-3 of respondents' brief.

In Argument IVD, respondents maintain the Court must clarify its ruling as to the working retirees and provide for appropriate procedures on remand to deal with whatever claims are permitted. Our opinion orders that the issue of breach of contract as it relates to the working retirees is remanded to the trial court. Because we have now decertified the class, only petitioner Ahrens' case is remanded to the circuit court, specifically, to the Honorable John L. Breeden. Judge Breeden shall have full authority to decide whether to certify a class or deal with the cases individually. Judge Breeden has the authority to fully explore the issue of whether the working retirees entered into a binding contract and all other issues involved in the working retiree action(s).

Finally, respondents assert in Argument IVE that this Court must prescribe procedures for determining petitioners' request for fees and costs. We consider petitioners' Petition for Costs to Include S.C. Code § 15-77-300 Attorney's Fees and Motion for Attorney's Fees (Common Fund Doctrine) in conjunction with Argument IVE of respondents' petition for rehearing. We deny petitioners' Motion for Attorney's Fees (Common Fund Doctrine), as we find attorney's fees in this matter should not come from the retirement

contributions made by the old TERI participants, or the interest accumulated thereon. However, we remand petitioners' request for costs, to include attorneys' fees pursuant to section 15-77-300, to Judge Breeden to determine if petitioners are entitled to recover reasonable attorneys' fees to be taxed as court costs against the State of South Carolina and the South Carolina Retirement System, and if so, the amount of attorneys' fees they are entitled to based on the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/Perry M. Buckner A.J.

s/Deadra L. Jefferson A.J.

Columbia, South Carolina
June 1, 2006

[Note: By order dated June 6, 2006, the Supreme Court of South Carolina amended this order to substitute the phrase "interest at the rate of 4%" for the phrase "interest at the rate of 6%" in the seventh paragraph of the order. This order reflects the language as amended.]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane & John Doe, Respondents,

v.

Richard Roe; Mary M.; John Roe (Whose true identity is unknown); and Baby Boy Jay, A Minor Under the Age Seven (7) Years, Defendants,

Of Whom Richard Roe is the Appellant.

Appeal From Spartanburg County
James F. Fraley, Jr., Family Court Judge

Opinion No. 4119
Heard May 9, 2006 – Filed June 5, 2006

AFFIRMED

William G. Rhoden, of Gaffney, for Appellant.

James Fletcher Thompson, of Spartanburg, for Respondents.

Susan A. Fretwell, of Spartanburg, Guardian Ad Litem.

ANDERSON, J.: Richard Roe, the biological father of Baby Boy Jay, appeals (1) the family court's ruling that Roe's consent for adoption was not required under section 20-7-1690 of the South Carolina Code, and (2) the court's termination of Roe's parental rights. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Melanie gave birth to Jay on January 19, 2005, and executed a consent for adoption form on January 20, 2005. Jane and John Doe initiated this action by filing for adoption of Jay on January 24, 2005. The Does have had custody of Jay since January 21, 2005.

Roe timely filed an answer and counter-claim seeking custody of Jay. DNA testing confirmed that Roe is Jay's biological father. The case was tried on May 9 and 11, 2005 and resulted in a ruling that Roe's consent was not required under South Carolina Code Annotated section 20-7-1690. In addition, the court terminated his parental rights.

Roe, who has been married to Martha Roe since April of 2000, separated from his wife in March of 2004 and moved in with Melanie. Within a few weeks, Roe returned to live with his wife. Shortly thereafter, Melanie discovered she was pregnant and informed Roe. On June 16, 2004, Melanie entered a drug rehabilitation center where she stayed until September 2, 2004. While she was in rehabilitation, Roe visited her and called her on the phone. The parties disagreed on the number of visits—Melanie estimated six visits, Roe recalled twelve or thirteen. By early August, the calls and visits suddenly stopped. Melanie averred:

A. In the beginning, he called a lot, but he just quit calling and quit coming, and I didn't know what happened to him.

Q. Before you got out, recognizing you got out September 2nd, '04, how much before the time that you got out—how many days or weeks or months did he stop coming to visit or stop calling?

A. About a month.

Q. Had y'all had this falling out or something?

A. No. He showed up with a card and a pack of cigarettes. And, the lady there told me—he didn't even see me, it was Wednesday; it was not visit day; Thursday was visit day. And, when I came back—I think I was in class or something, but when I came back to where we lived, she gave me the card and the cigarettes.

Q. That was it?

A. I never heard from him again until December.

During the time that Roe did visit, he gave Melanie some money, brought her cigarettes, and took her out for food on several occasions.

Q. . . . Was there anything that Roe ever brought you that helped you while you were in there. . . ?

A. He got me some food.

Q. Y'all went out to eat? You could check out a couple of times?

A. On Thursday, he could go eat with me, if I remember.

Q. And, I think you estimated on how many occasions during the time he came?

A. We went to Subway twice and, on a Sunday, he brought me KFC once.

Q. Subway twice; KFC once—twice; is that right?

A. Yes.

Q. And, Twenty Bucks?

A. Yes.

Q. Could it have been Thirty Bucks?

A. It could have been Thirty Bucks.

Q. Could it have been Fifty Bucks?
A. No, it wasn't.
Q. That was just one time, and it was in cash.
A. Yes—well, no, he mainly gave me Ten and Twenty on different occasions, but it was not more than Fifty Dollars altogether.

Roe confessed, "I gave her very little money while she was in there," but estimated he gave her between fifty and one hundred dollars. He averred he brought her cigarettes and soda "just about every week."

Melanie left the rehabilitation center on September 2. After staying one night with a friend, and several nights with her brother, she returned to her mother's home in Gaffney, South Carolina. On September 7, Melanie obtained phone service in her name at her mother's residence. Melanie tried unsuccessfully to reach Roe by phone on several occasions, calling Roe's mother and wife to no avail. For approximately two weeks in October, Melanie moved out from her mother's house and stayed with her brother Adam and his girlfriend Carla. She returned to her mother's in Gaffney and stayed there until December 3, 2004, when she moved back in with Adam and Carla.

Although Melanie avoided DSS, she declared she never attempted to evade Roe.

Q. Have you ever failed to answer the door for Roe?
A. Roe never knocked on the door. We knew who was at the door all the time.
Q. Did you ever hide from Roe?
A. No, I did not.

Melanie's brother, Adam, and Adam's girlfriend, Carla, confirmed that Melanie never hid from Roe, but rather attempted to contact him. Adam testified as follows at trial:

Q. At any time when you were staying with your mom and with Melanie at Kendrick Street, were you aware of any steps that were made to try to hide Melanie from Roe?
A. No, sir.
Q. Are you aware of any steps that were taken from Melanie to find Roe?
A. A few.
Q. What were you aware of that was done?
A. I was aware of her few phone calls that were made.
Q. Did you ever make any phone calls?
A. One or two.

Carla provided a similar account:

Q. Were you aware of any veil of secrecy or any kind of concerted effort that was made to hide the pregnancy from Roe?
A. No.
Q. Are you aware of any steps that were taken actually to locate Roe during this period of time?
A. Yes.
Q. What were you aware of?
A. Melanie had used the phone a couple of times trying to call. She couldn't get through. Adam had called a couple of times and couldn't get through. They just couldn't find him.

However, the evidence does suggest that Roe hid from Melanie. Adam recounted a time in December when he had a chance encounter with Roe.

Q. What happened that day?
A. Roe drove up the street. I was outside. He stopped to talk to me.
Q. What did Roe say?
A. He asked me if I knew where my sister was.
Q. What did you say to him?

A. I asked him where he was—where he had been, I'm sorry.
Q. What was his response to that?
A. He said he was trying to hide out.

Carla described an occasion when Roe stopped at the service station where Adam and Carla worked. She averred: ". . . I had asked at one point '[W]hat happened to you, Roe; you just disappeared?' And, he kind of looked down and said: 'That was my plan.'"

From December 3 until Jay was born Melanie stayed with her brother. Roe spoke with Melanie's brother and left a card and a pillow for her sometime in December. The card read, "21 More Day[s]," a statement apparently intended to mislead Melanie into believing Roe was soon to be divorced from his wife.

On January 3, 2005, Roe stopped by Adam's trailer to install a car battery. Melanie was there, and Roe stayed for approximately fifteen minutes. According to Roe, "she showed me a picture of the ultrasound and I told her I didn't really have time; I just wanted to make sure she was O. K." Melanie testified:

Q. At that time, did he stay a long time? Did he talk to you about the baby and your plans together? Did y'all sit down and –what happened?
A. I was sitting on the couch; I showed him the ultrasound; he helped me with the battery in the car.
Q. Did he leave you any money?
A. No.
Q. Did he come back after that January 3rd visit again before the baby was born?
A. No, he did not.
Q. Had you left the Evans Trailer Park?
A. No, he told me that he would be back, and he never came back.

Melanie did not see Roe again until after she gave birth. On February 12, 2005, after learning of the suit for adoption by the Does, Roe purchased several items including blankets, pacifiers, and a diaper bag from Target.

The family court ruled that Roe was aware that Melanie was pregnant, knew of her location, and was informed that she was considering the option of adoption. According to the court, Roe "abdicated his responsibility to Melanie and to the unborn child." Therefore, the court found his consent to the adoption was not required and terminated his parental rights.

STANDARD OF REVIEW

In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. Dearybury v. Dearybury, 351 S.C. 278, 569 S.E.2d 367 (2002); Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005); Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 612 S.E.2d 707 (Ct. App. 2005); Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (citing Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992)). However, this broad scope of review does not require us to disregard the family court's findings. Holler v. Holler, 364 S.C. 256, 261, 612 S.E.2d 469, 472 (Ct. App. 2005). Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lacke v. Lacke, 362 S.C. 302, 608 S.E.2d 147 (Ct. App. 2005); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (noting that because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the family court's findings where matters of credibility are involved).

LAW/ANALYSIS

I. An Unwed Father's Consent for Adoption

A. Section 20-7-1690

South Carolina Code Ann. section 20-7-1690 (Supp. 2005), provides, in pertinent part:

> (A) Consent or relinquishment for the purpose of adoption is required of the following persons:
>
> . . . .
>
> (5) the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth, but only if:
>
> > (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
> >
> > **(b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.**

S.C. Code Ann. § 20-7-1690 (Supp. 2005) (emphasis added). Roe did not provide a reasonable sum for the support of the child or for expenses incurred

in connection with Melanie's pregnancy as outlined in the statute. However, under certain limited circumstances, our courts will excuse an unwed father for failure to meet the requirements of the statute.

B. Abernathy and Its Progeny

The seminal case of Abernathy v. Baby Boy, 313 S.C. 27, 437 S.E.2d 25 (1993), held that even though an unwed father fails to meet the literal requirements of section 20-7-1690, he may nonetheless be afforded constitutional protection when he undertakes sufficient prompt and good faith efforts to assume parental responsibility and to comply with the statute. The biological mother and father in Abernathy began a "casual sexual relationship" while both were on active duty in the Navy. 313 S.C. at 29, 437 S.E.2d at 27. Soon after Julie and Mitchell discovered Julie was pregnant, Mitchell was forced to leave for sea duty. He gave Julie use of his car and access to his bank account, and offered to send her to college while he stayed home to care for the child. Julie, however, decided she did not want to be involved with Mitchell. She put the car in storage and used the bank account only to store the car and to pay a speeding ticket fine for Mitchell. Upon Mitchell's return from sea Julie "rebuffed his advances and rejected his offer of marriage. . . . Julie thereafter avoided contact with Mitchell, refused his telephone calls, and 'was kind of hiding away from him.'" Id. Mitchell received notice that Julie had given birth and that the Abernathys had commenced an action to adopt the child. Mitchell contested the adoption. The trial court determined he possessed the right to refuse consent to the adoption. Our supreme court affirmed.

First, the appellants maintained "an unwed father's consent to adoption is not required unless he complies with the literal requirements of section 20-7-1690(A)(5)(b), which mandates that a father provide for the support of his child before the State is compelled to seek his consent to the adoption of the child." 313 S.C. at 31, 437 S.E.2d at 28. The court did not agree:

> The United States Supreme Court has recognized that an unwed father may possess a relationship with his child that is entitled to constitutional protection. Stanley v. Illinois, 405 U.S.

645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). However, "parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Lehr v. Robertson, 463 U.S. 248, 260, 103 S.Ct. 2985, 2992, 77 L.Ed.2d 614, 626 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979)). Thus, an unwed father must demonstrate a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child before his interest in personal contact with his child acquires substantial constitutional protection. Id., 463 U.S. at 261, 103 S.Ct. at 2993, 77 L.Ed.2d at 626. The mere existence of a biological link does not merit equivalent constitutional protection. Id.

When a child is first born, an unwed father possesses an "opportunity no other male possesses to develop a relationship with his offspring." Id. at 262, 103 S.Ct. at 2993, 77 L.Ed.2d at 627. However, this opportunity interest is constitutionally protected only to the extent that the biological father who claims protection wants to make the commitments and perform the responsibilities that give rise to a developed relationship, because it is only the combination of biology and custodial responsibility that the Constitution ultimately protects. E. Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson, 45 Ohio State L.J. 313, 368 (1984) (hereinafter Unwed Fathers). The specific acts undertaken by the unwed father to preserve his inchoate relationship with his child, as well as the nature of the relationship he wishes to foster with the child, are of considerable importance in determining whether the unwed father has evinced a commitment to his child deserving of protection. See id. at 352; cf. Lehr, 463 U.S. at 262, 103 S.Ct. at 2994, 77 L.Ed.2d at 627 (appellant never had any significant custodial, personal, or financial relationship with child, and did not seek to establish a legal tie until after the child was two years old). Moreover, the opportunity interest is of limited duration as a constitutionally significant interest because of the child's need

for early permanence and stability in parental relationships. Unwed Fathers at 365.

Against this background, we must ascertain the interaction between the requirements of section 20-7-1690(A)(5)(b) and the unusual facts before us. As always, our primary function in interpreting a statute is to ascertain the intent of the Legislature. Spartanburg Cty. Dep't of Social Svcs. v. Little, 309 S.C. 122, 420 S.E.2d 499 (1992). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Id. We find that by enacting section 20-7-1690(A)(5)(b), the Legislature contemplated establishing general minimum standards by which an unwed father timely may demonstrate his commitment to the child, and his desire to "grasp [the] opportunity," Lehr, 463 U.S. at 262, 103 S.Ct. at 2993, 77 L.Ed.2d at 627, to assume full responsibility for his child. However, as shown by the events leading to this appeal, an unwed father's ability to cultivate his opportunity interest in his child can be thwarted by the refusal of the mother to accept the father's expressions of interest in and commitment to the child. Accordingly, we conclude that an unwed father is entitled to constitutional protection not only when he meets the literal requirements of section 20-7-1690(A)(5)(b), but also when he undertakes sufficient prompt and good faith efforts to assume parental responsibility and to comply with the statute. See In re Chandini, 166 A.D.2d 599, 560 N.Y.S.2d 886 (1990); In re Adoption of Baby Girl S., 141 Misc.2d 905, 535 N.Y.S.2d 676 (N.Y.Surr.1988); In re Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1987); In re Riggs, 612 S.W.2d 461 (Tenn.Ct.App.1980), cert. denied, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981). To mandate strict compliance with section 20-7-1690(A)(5)(b) would make an unwed father's right to withhold his consent to adoption dependent upon the whim of the unwed mother. See In re Adoption of Baby Girl S., 141 Misc.2d 905, 535 N.Y.S.2d 676 (N.Y.Surr.1988).

313 S.C. at 31-33, 437 S.E.2d at 28-29.

The court concluded Mitchell's efforts were sufficient to require his consent to the adoption.

> It is undisputed that Mitchell attempted to provide monetary support to Julie during her pregnancy, but his offers were rejected by her. In addition, Mitchell endeavored to keep apprised of Julie's progress during the pregnancy, but she shielded herself from contact with him, even to the point of complaining to her superiors that Mitchell was harassing her by his numerous telephone calls. Mitchell appeared at the hospital after learning that the child had been born and offered to pay medical expenses related to the birth, but was told there were no expenses because he and Julie were in the Navy. Although Mitchell sought no legal advice regarding the means available for him to protect his parental interest in the child, his lack of action was engendered by Julie's assurance to him that she would not place the child for adoption. Further, Mitchell immediately manifested his willingness to assume sole custody of the child once he discovered that adoption proceedings had commenced.
>
> Time and circumstances may limit the protectibility of an unwed father's interest in his child. The values that underlie protection require that the father take advantage of his opportunity to develop a relationship with his child early and completely. Unwed Fathers at 364-67, 381-82. Here, Mitchell timely demonstrated a willingness to develop a full custodial relationship with his child. Accordingly, we find that the trial judge did not err in ruling that Mitchell's consent to the adoption was required, and that the adoption failed as the result of Mitchell's withholding of his consent.

313 S.C. at 33, 437 S.E.2d at 29.

In Ex parte Black, 330 S.C. 431, 499 S.E.2d 229 (Ct. App. 1998), Contius Black and Martha Jane Dubose were both high school students when they began a sexual relationship. Black transferred to a nearby school and the two eventually ended their relationship. Dubose discovered she was pregnant and attempted to contact Black. She called his parents' house and was told that he no longer lived there, although this information was apparently false. Dubose gave birth on June 20, 1995, and gave the child over for adoption two days later.

Black learned that Dubose might be pregnant in October or November of 1995. In December 1995 he had a "chance meeting" with Dubose and learned she had delivered the child, given her up for adoption, and that he was the biological father. Black and his new wife contacted the adoption agency and Black was eventually added as a party to the adoption action. The family court determined "Black's consent for the adoption of the child was not necessary because of his 'failure to timely demonstrate a willingness to develop a custodial relationship with this child.'" 330 S.C. at 433-34, 499 S.E.2d at 231. We affirmed:

> We find no merit to Black's argument that the family court erred in finding he failed to timely demonstrate a willingness to develop a full custodial relationship with his daughter.
>
> If the biological father of a child was not married to the child's mother at the time the child was born and the child was placed with prospective adoptive parents six months or less after the child's birth, the father's consent or relinquishment for the purpose of adoption is necessary if the father paid a fair and reasonable sum, based on his financial ability, toward either the child's support or expenses incurred in connection with the mother's pregnancy or with the birth of the child. S.C. Code Ann. § 20-7-1690(A)(5)(b) (Supp. 1997). An unwed father, however, is entitled to a relationship with his child not only when he meets the literal requirements of this section, "but also when he undertakes sufficient prompt and good-faith efforts to assume parental responsibility and to comply with the statute."

> Abernathy v. Baby Boy, 313 S.C. 27, 32, 437 S.E.2d 25, 29 (1993) (emphasis added).
>
> Because section 20-7-1690(A)(5)(b) explicitly conditions the necessity of a father's acquiescence in an adoption on his payment of support or financial assistance to the birth mother, any steps Black may have taken to assert his parental rights are insufficient to protect his relationship with his child unless accompanied by a prompt, good-faith effort to assume responsibility for either a financial contribution to the child's welfare or assistance in paying for the birth mother's pregnancy or childbirth expenses. Here, the record contains no evidence that Black attempted at any time to help Dubose or Bethany Christian Services with pregnancy or childbirth expenses. Moreover, even assuming Black is correct that he took prompt measures to determine paternity and assert his parental rights after Dubose told him about the child, he admitted he never offered to support the child, even after receiving the results of the paternity test, which were available about five months before the final hearing. Although the family court relied primarily on Black's lack of diligence in making inquiries about Dubose's pregnancy, the record evidence of his failure to offer support for the child as of the date of the final hearing warrants our affirmance of the family court order. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.").

Black, 330 S.C. at 434-35, 499 S.E.2d at 231-32 (footnote omitted).

Teenagers Christine Lovin and Samuel Dunlap were involved in a sexual relationship in Parag v. Baby Boy Lovin, 333 S.C. 221, 508 S.E.2d 590 (Ct. App. 1998). Dunlap bought her a pregnancy test when she informed him she might be pregnant, but Lovin did not give him the results. The two terminated their relationship in December 1994 or January 1995. Dunlap continued to inquire whether Lovin was pregnant, but Lovin would neither admit nor deny the pregnancy. She gave birth on July 8, 1995, and gave the

baby up for adoption. Lovin did not tell Dunlap about the birth until October 1995. The Paragus, in connection with their action to adopt Baby Boy Lovin, hired investigator Oehler to locate the child's father. Oehler contacted Dunlap in January of 1996. Initially, Dunlap indicated "he was planning to attend college on a football scholarship and the birth of the child interfered with his life. He stated he was not interested in having the child, but was interested in releasing the child for adoption[.]" 333 S.C. at 224, 508 S.E.2d at 592. A few days later, he changed his mind; "after talking with his grandmother and father, he thought he wanted to have the child for them to rear." Id.

The Parags commenced an action seeking adoption and the termination of Dunlap's parental rights. The family court concluded Dunlap had shown sufficient good faith efforts to assume parental responsibility and was entitled to protection under section 20-7-1690 and Abernathy. Adoption was accordingly denied. We disagreed and reversed, noting both the pre- and post-birth shortfalls of Dunlap.

> It is incumbent . . . upon the unwed father to demonstrate a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of the child before he may acquire substantial constitutional protection, and the mere existence of a biological link does not merit equivalent constitutional protection. While the unwed father possesses an opportunity to develop a relationship with his offspring, this opportunity is of limited duration as a constitutionally significant interest because of the child's need for early permanence and stability in parental relationships. As stated by the court in Abernathy, "Time and circumstances may limit the protectibility of an unwed father's interest in his child. The values that underlie protection require that the father take advantage of his opportunity to develop a relationship with his child early and completely." 313 S.C. at 33, 437 S.E.2d at 29 (emphasis added). Thus, the unwed father must timely "demonstrate his commitment to the child, and his desire to grasp the opportunity." 313 S.C. at 32, 437 S.E.2d at 29.

Turning to the facts at hand, we find Dunlap has failed to demonstrate sufficient prompt and good faith efforts to assume parental responsibility and comply with the statute. Dunlap was aware that Lovin might be pregnant in November of 1994. While Dunlap claims he was thwarted in his efforts to assist Lovin with the pregnancy by her avoidance of him, the record clearly shows that in October 1995, Lovin informed Dunlap of the pregnancy and the birth of his child. He was further aware at that time that the child was placed for adoption and he correctly assumed the child was in the area where Lovin had given birth. From October of 1995, Dunlap had information with which he could have sought the exact location of his child and made efforts to cultivate a relationship with the child and assume parental responsibility. However, he failed to take any action until he was contacted by the adoption investigator, three months later. Even then, the record evinces the extent of his efforts to be only submission to paternity testing and participation in the adoption action. There is absolutely no evidence that Dunlap was thwarted in any way from demonstrating his commitment to the child once he learned of the child's birth. It is uncontested Dunlap never offered any financial support or assistance to Lovin in connection with the expenses of the pregnancy and birth after learning of the child's birth. Further, the record shows Dunlap never offered any financial support for the child after learning of the child's birth. See Ex parte Black, 330 S.C. 431, 499 S.E.2d 229 (Ct. App. 1998) (assuming unwed father took prompt measures to determine paternity and assert parental rights after biological mother informed father of child's existence, where father failed to offer to support child or assist in medical expenses, his consent to adoption was not required under § 20-7-1690(A)(5)(b)). We therefore conclude Dunlap has failed to timely demonstrate his commitment to the child and has failed to show sufficient efforts to assume parental responsibility and comply with the statute as required under Abernathy. Accordingly, Dunlap's consent was not required under § 20-7-1690(A)(5)(b), and the order below denying the adoption on this basis is reversed.

Parag, 333 S.C. at 227-29, 508 S.E.2d at 593-94 (footnote omitted).

In Doe v. Brown, 331 S.C. 491, 489 S.E.2d 917 (1997), Baby Girl Ashlie was conceived as the result of Brown's statutory rape of the twelve-year-old mother. The mother relinquished her parental rights and consented to adoption. Brown, joined by his parents, intervened and opposed the adoption. The family court terminated Brown's parental rights, and that ruling was affirmed by the supreme court.

> In sharp contrast to Abernathy, the family court judge in this case found Father "young, immature, and irresponsible." He found Father failed to meet the statutory requirements, and that his conduct upon learning of the pregnancy and during the next several months did not rise to the level necessary to meet the Abernathy standard. Although this Court is free to find the facts differently from the family court, we find the record overwhelmingly supports these findings. Epperly v. Epperly, 312 S.C. 411, 440 S.E.2d 884 (1994).

Brown, 331 S.C. at 497-98, 489 S.E.2d at 921.

The supreme court, in Doe v. Queen, 347 S.C. 4, 552 S.E.2d 761 (2001), held that the unwed father's efforts to assume parental responsibility were sufficient to require his consent to adoption. The biological mother informed Queen that she was pregnant and wanted an abortion. Queen attempted to convince the mother to keep the child. The two ended their relationship, and the mother informed Queen she had aborted the child. The mother and her new boyfriend signed a criminal warrant against Queen for assault with a deadly weapon, and as a condition of his bond, Queen was ordered to have no contact with the mother for one year. The child was born on September 21, 1998. When Queen was notified of the birth in November 1998 he obtained an attorney. He began saving money, prepared a nursery, and arranged for medical insurance for the child. The family court ordered that Queen's consent to adoption was required under section 20-7-1690 and Abernathy. The supreme court agreed with the family court:

Initially, we find Queen should not be penalized for his actions, or lack thereof, prior to Tanner's birth. Mother left their apartment when she was approximately 8-10 weeks pregnant, telling Queen she intended to have an abortion. She thereafter lied, telling him she had, in fact, had an abortion in Atlanta. She then made every attempt to conceal from Queen the fact that she had not had an abortion, effectively isolating herself from him and, through court orders, ensuring that Queen could have no contact with her until well after the baby's birth.

As we noted in Abernathy, "an unwed father's ability to cultivate his opportunity interest in his child can be thwarted by the refusal of the mother to accept the father's expressions of interest in and commitment to the child. . . . To mandate strict compliance with section 20-7-1690(A)(5)(b) would make an unwed father's right to withhold his consent to adoption dependent upon the whim of the unwed mother." 313 S.C. at 32-33, 437 S.E.2d at 29. This is clearly such a case. Given Mother's representations that she had obtained an abortion, coupled with her extraordinary efforts to conceal her pregnancy from Queen, we find the preponderance of the evidence amply demonstrates that Queen's failure to support during the pregnancy was through no fault of his own and, accordingly, we decline to require literal compliance with the statute.

Moreover, we find Queen's actions subsequent to learning of Tanner's birth demonstrate "sufficient prompt and good faith efforts to assume parental responsibility."

The family court found Queen had made sufficient efforts in that he had "established a nursery, arranged for health insurance and began a savings account for the child." We agree. While Queen conceded he had not paid support during the ten-month period prior to the hearing, he testified he was willing to do so, and would reimburse the adoptive parents for their expenses. Further, due to a February 1999 order preventing the

> disclosure of the identity of the adoptive parents, Queen was unaware of the name or identity of the Does, and/or their location. Under these circumstances, we simply cannot say that Queen's failure to support or visit Tanner defeats his constitutional interest in establishing a relationship with his son. When approached by the Doe's attorney, at which time Queen learned of Tanner's existence, Queen declined to sign a consent to adoption, instead indicating he needed to contact his attorney. For reasons unknown to this Court, his attorney sought and obtained an unlimited extension in which to file responsive pleadings such that an answer to the Doe's complaint was not filed until the day of the hearing. Although Queen testified he was willing and able to support the child, and had money in savings for Tanner, his mother testified that Queen's attorney never advised him to send any money to the Does. Given the circumstances of this case, and the fact that the Does were unwilling to reveal their identity or whereabouts, we find Queen took the only reasonably available alternative measures, to wit, establishing a nursery, putting money in a bank account, and taking steps to provide for Tanner when he received custody. In our view, under the very limited facts of this case, we find Queen demonstrated sufficient prompt and good faith efforts to assume parental responsibility pursuant to <u>Abernathy</u> such that his literal compliance with section 20-7-1690(A)(5)(b) is excused. Accordingly, we concur with the family court that the adoption was properly denied and custody of Tanner should be transferred to Queen.

<u>Queen</u>, 347 S.C. at 8-10, 552 S.E.2d at 763-64 (footnote omitted).

<u>Arscott v. Bacon</u>, 351 S.C. 44, 567 S.E.2d 898 (Ct. App. 2002), is our most recent decision regarding consent for adoption by an unwed father. Edgar Bacon and Mary Ford began a sexual relationship in May 1999. Ford discovered she was pregnant in October 1999. Approximately two weeks later, she told Bacon she had had an abortion. In November, Bacon ended the relationship. Mary Ford was arrested for robbing Bacon's home and was

incarcerated. Unconvinced that she had been pregnant or had gone through with an abortion, Bacon inquired at the local jail whether Ford was pregnant, and jail authorities indicated that she claimed to be pregnant. Upon her release, Ford stayed at a women's shelter. Bacon drove by the shelter many times in an effort to catch a glimpse of her. Ford delivered the child in May 2000 and gave it up for adoption. On July 17, 2000, Ford appeared in criminal court on the burglary charge and informed Bacon that she had given birth, although Bacon still was not convinced she had ever been pregnant. Finally, Bacon was served with notice of the adoption action in August. He opposed the adoption, claiming Ford had concealed the pregnancy.

After analyzing Abernathy, Queen, Parag, and Black, we concluded Bacon had not satisfied the requirements of the statute and precedent.

> This is not a "thwarted birth father" case. In his answer, Bacon alleged Ford concealed the pregnancy from him and the first notice he had of the parental relationship was service of the complaint. The facts indicate otherwise. Ford told Bacon in October 1999 that she was pregnant. Although she told him she was going to have an abortion, Bacon stated he did not believe her, and she never produced the written proof which Bacon requested. Bacon asked authorities if Ford was pregnant and was advised she had completed a jail form indicating she was. Bacon continually asked people if Ford appeared pregnant. He drove past a local health care facility to see if he could observe her entering or leaving. He knew Ford was living in the community and staying at a local women's shelter. Although she could not contact him due to the conditions of her criminal bond, Bacon was not legally prohibited from contacting her or having someone else contact her. Most importantly, from July 17 to August 16, Bacon did nothing, despite knowing that Ford had a child and he could be the father.
>
> The critical question is not whether Bacon believed Ford was pregnant but whether he was on notice of sufficient facts to pursue his legal rights and whether he was thwarted by the birth

mother from doing so. Generally, courts rely on parties to be proactive in protecting their own rights. Bacon was on notice of sufficient facts to create an affirmative duty to investigate whether Ford was carrying or had delivered his child if he wished to claim constitutional protection. Under the provisions of the statute relating to unmarried fathers, paternity may frequently be in doubt. However, doubt as to paternity does not totally absolve a putative father of his responsibility to take steps to protect his rights. Most cases focus on pre-placement conduct except where there is no evidence the natural father knew of the birth. In light of the information Bacon had, and particularly given his personal distrust of Ford's credibility, his lack of initiative calls into question his concern about protecting his rights as a father. His actions fall short of the sufficient prompt and good faith efforts necessary for constitutional protection to attach. Thus, we conclude Bacon's consent to the adoption was not necessary.

Moreover, in the ultimate analysis, this court's lodestar is always the best interests of the child. See, e.g. Patel v. Patel, 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001) ("In a custody case, the best interest of the child is the controlling factor."); S.C. Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 298, 547 S.E.2d 506, 511 (Ct. App. 2001) ("The best interests of the child are paramount when adjudicating a TPR case."). Our supreme court recently overruled a long line of cases holding that the termination of parental rights statute should be strictly construed and determined that it should be liberally construed consistent with the purpose of facilitating prompt adoption and the best interests of the child. See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000). Likewise, we consider the child's best interests as a factor here. In Abernathy, the supreme court stated that the father's constitutional window is a limited one, balanced against the child's interest in stability. Abernathy at 32, 437 S.E.2d at 28. The record is clear that both the natural father and the adoptive parents would be fit parents and provide loving homes. However, the evaluating psychologist's testimony is also

> clear that taking the child out of the home he has known from birth until two years old would result in significant long-term trauma and possibly severe attachment issues. Thus, the best interests of Infant Baby Boy warrant reversal of the family court in this instance.
>
> Due to its finding that Bacon's consent was required, the family court held the adoption by the Arscotts could not proceed. Given that Ford gave her consent to the adoption specifically to the Arscotts, the family court held that Ford could possibly initiate an action seeking to withdraw her consent for adoption. The court therefore declined to terminate her parental rights. No specific issue was raised by the appellants to the court's ruling regarding Ford. However, due to the role of the courts in protecting minors, this court may raise ex mero motu issues not raised by the parties. See Joiner at 107, 536 S.E.2d at 374. As in Parag, because Ford consented to the adoption and defaulted below, the family court erred in not terminating her parental rights. Parag at 229, 508 S.E.2d at 594. The record discloses no indication that Ford's consent to adoption of the child by the Arscotts was involuntary. Since we conclude Bacon's consent is not required, there is no reason to vitiate Ford's consent. Rather, it is in the best interests of the minor child to resolve this matter as expeditiously as possible. Therefore, we reverse the family court's decision not to terminate Ford's parental rights. Ford's parental rights are terminated, and the adoption may proceed without Bacon's consent.

Arscott, 351 S.C. at 54-56, 567 S.E.2d at 903-04.

C. Roe's Conduct

Initially, it is important to note that section 20-7-1690 is the benchmark for determining whether an unwed father's consent is required before an adoption takes place. This statutory starting point requires that a father pay a "fair and reasonable sum, based on the father's financial ability, for the

support of the child or for the expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses." S.C. Code Ann. § 20-7-1690 (Supp. 2005). Abernathy held that under certain circumstances, total compliance with the literal requirement of the statute might be excused. In Abernathy, the court declared:

> an unwed father's ability to cultivate his opportunity interest in his child **can be thwarted** by the refusal of the mother to accept the father's expressions of interest in and commitment to the child. **Accordingly**, we conclude that an unwed father is entitled to constitutional protection not only when he meets the literal requirements of section 20-7-1690(A)(5)(b), but also when he undertakes sufficient prompt and good faith efforts to assume parental responsibility and to comply with the statute.

Abernathy, 313 S.C. at 32, 437 S.E.2d at 29 (emphasis added). Thus, Abernathy's sufficient prompt and good faith efforts test does not replace the statute, but rather extends the spirit of the statute to an unwed father who is prevented from meeting the statutory requirements, especially when impeded from compliance by the birth mother.

The instant case is readily distinguishable from Abernathy and Queen—the two cases in which our supreme court has found a father's consent to adoption necessary. Consent cases involve a fact-intensive analysis, and the decisions in both Abernathy and Queen were predicated upon unusual facts. Arscott, 351 S.C. at 48, 567 S.E.2d at 900 ("The importance of analyzing the facts of each specific case cannot be overstated."); Abernathy, 313 S.C. at 31, 437 S.E.2d at 29 ("[W]e must ascertain the interaction between the requirements of section 20-7-1690(A)(5)(b) and the unusual facts before us."); Queen, 347 S.C. at 10, 552 S.E.2d at 764 ("In our view, under the very limited facts of this case, we find Queen demonstrated sufficient prompt and good faith efforts[.]").

The father in Abernathy was faced with military deployment which forced his separation from the mother. He nevertheless sought to provide

during the pregnancy by giving the mother full use of his car and bank account. Once the father returned, the mother "rebuffed his advances and rejected his offer of marriage." Contrastively, Roe's contributions to Melanie were too insubstantial to be of consequence. During the last half of Melanie's pregnancy Roe saw her for only fifteen minutes and contributed nothing to her except a pillow. Melanie never rebuffed his advances or otherwise demonstrated a disinterest in having Roe involved and supportive during the pregnancy. Whereas the father in Abernathy "timely demonstrated a willingness to develop a full custodial relationship with his child," 313 S.C. at 33, 437 S.E.2d at 29, Roe failed to evince a commitment to the child deserving of protection, see id. at 31, 437 S.E.2d at 28 ("The specific acts undertaken by the unwed father to preserve his inchoate relationship with his child, as well as the nature of the relationship he wishes to foster with the child, are of considerable importance in determining whether the unwed father has evinced a commitment to his child deserving of protection.").

Queen was a thwarted birth father case. The mother misled the father into believing she had had an abortion and obtained a warrant whereby Queen was ordered to have no contact with her. After learning about the baby, Queen put away money for the child, arranged for the child's medical insurance, and prepared a nursery. Here, Roe maintained contact with Melanie for only the first half of her pregnancy. It was Roe—not Melanie—who ended the contact. Melanie never refused Roe's help, but rather requested it, informing him, "I can't do it by myself." Further, Melanie attempted to reach Roe on several occasions, but he was apparently avoiding her in a surreptitious attempt to mislead her into believing he was divorcing his wife. His contributions to her were de minimis. In Queen, the court noted that "Queen's failure to support during the pregnancy was through no fault of his own[.]" In contrast, the blame for Roe's failure to support Melanie during her pregnancy falls squarely on his shoulders.

Prior to August 4, Roe's contributions to Melanie were negligible, consisting of approximately $50, cigarettes, and a few trips to fast food restaurants. After August 4 he gave her nothing but a card and a pillow. Roe's contributions to Melanie were insubstantial and inconsistent. As the Arscott court observed, "Most cases focus on pre-placement conduct except

where there is no evidence the natural father knew of the birth." 351 S.C. at 54, 567 S.E.2d at 903. Roe simply failed to meet the "general minimum standards by which an unwed father timely may demonstrate his commitment to the child, and his desire to grasp the opportunity to assume full responsibility for his child." Abernathy 313 S.C. at 32, 437 S.E.2d at 29 (internal quotation marks and citation omitted).

II. Best-Interests Analysis

Roe contends the judge erred by going beyond the scope of the hearing and engaging in a best-interests analysis. The parties stipulated prior to trial that the Does were seeking only adoption and did not have an alternative pleading for custody. Therefore, had Roe's consent been required, Roe would have been granted custody. Given the stipulation, Roe contends the court should not have addressed the child's best interests. We disagree.

The family court's decision was based on Roe's failure to comply with the statute and case law, independent of considerations of the child's best interests. The family court's order stated: "It is clear, and this Court holds, that Mr. Roe failed both the literal language of the statute and failed to exercise his responsibilities pursuant to the Common Law Precedent." The court's legal conclusion stands on its own. Although the best-interests finding was not required, the court did not err in separately considering the child's best interests. As we stated in Arscott, "[I]n the ultimate analysis, this court's lodestar is always the best interests of the child." Arscott, 351 S.C. at 55, 567 S.E.2d at 903. Therefore, the court's best-interests analysis does not constitute reversible error.

III. Termination of Roe's Parental Rights

Roe argues that even if section 20-7-1690 and Abernathy did not require his consent to the adoption, his parental rights should not have been terminated. He maintains that because his parental rights should not have been terminated, the notice provision of section 20-7-1374 allows him to "fully participate in the adoption proceedings and assert his independent causes of action for custody."

A. Preservation

This argument was not raised in Roe's Rule 59(e) motion, and does not appear to be preserved. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004); see also Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) (noting it is axiomatic than an issue cannot be raised for the first time on appeal). An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment. Hawkins v. Mullins, 359 S.C. 497, 597 S.E.2d 897 (Ct. App. 2004).

Roe filed a Rule 59(e) motion raising several issues, but the motion did not mention the court's termination of his parental rights. Moreover, at the Rule 59(e) hearing, Roe's counsel acknowledged the court's termination of his parental rights in passing and did not assert that the termination was in error. In asking the court to grant Roe supervised visitation counsel stated: "I know this is getting into a whole new issue here **and the court certainly has ruled that his rights are to be terminated under this order.** But I would ask the court and in reviewing this to address that issue as to whether or not Mr. Roe should be afforded any visitation." (Emphasis added.) Roe never complained to the family court of the termination of his parental rights. Because Roe did not raise this issue in his Rule 59(e) motion, he may not raise it for the first time on appeal.

B. Merits of the Termination

Even were this issue preserved, the family court properly denied Roe's parental rights. The United States Supreme Court case, Lehr v. Robinson, 463 U.S. 248 (1983), elucidated that a biological father has a limited window in which to secure for himself Constitutional protection of the father-child relationship:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," Caban, 441 U.S., at 392, 99 S.Ct., at 1768, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." Id., at 389, n. 7, 99 S.Ct., at 1766, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. . . .
>
> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Lehr, 463 U.S. at 261-62 (footnotes omitted).

In the case sub judice, the family court extended Roe his procedural and substantive due process rights and determined he had failed to demonstrate the level of commitment to the responsibilities of parenthood that would trigger constitutional protection. Roe correctly asserts that, pursuant to S.C. Code Ann. section 20-7-1770 (Supp. 2005), biological parents lose their rights over the adoptee after a final decree of adoption is entered. However, nothing in the statute prevents this process from being completed in a bifurcated fashion as the court did here.

The family court adjudicated Roe's claim that his consent was required for adoption. By requesting remand to determine whether adoption by the Does would be in Jay's best interest, Roe is essentially seeking an impermissible second attempt at preventing the adoption. The family court did not err in terminating Roe's parental rights. Further, because his rights

were properly terminated, Roe is not entitled to notice of the final adoption proceeding pursuant to S.C. Code Ann. section 20-7-1734(A) (Supp. 2005). See id. ("Notice of any proceeding initiated pursuant to this Subarticle 7 of Article 11 of Chapter 7 of Title 20 must be given to the persons or agencies specified in subsection (B) of this section, unless the person has given consent or relinquishment **or parental rights have been terminated**.") (emphasis added).

CONCLUSION

The order of the family court is

AFFIRMED.

HEARN, C.J., and GOOLSBY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Betty J. Hancock, Appellant,

v.

Mid-South Management, Co., Inc., Respondent.

Appeal From Newberry County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4120
Submitted June 1, 2006 – Filed June 12, 2006

AFFIRMED

Samuel M. Price, Jr., of Newberry, for Appellant.

Elizabeth M. Damzell, of Columbia, for Respondent.

WILLIAMS, J.: Betty Jo Hancock brought this negligence action against Mid-South Management Co., Inc. for injuries she received while walking across a parking lot owned by Mid-South. Hancock appeals the circuit court's order granting summary judgment to Mid-South. We affirm.

FACTS

On November 5, 2001, Hancock and her daughter-in-law, Susan Hancock (Daughter), drove to the offices of The Newberry Observer, a local news agency, to pick up a newspaper. After Daughter parked in the Observer's parking lot, Hancock walked toward the Observer's office building and tripped. As a result of her fall, Hancock allegedly suffered physical, emotional, and financial injuries. In April 2004, Hancock brought suit against Mid-South, the owner of the Observer, alleging Mid-South was negligent in maintaining the parking lot of the Observer.

Mid-South filed a Motion for Summary Judgment, which was heard on May 5, 2005. At the hearing, the parties submitted deposition testimony from Hancock and Daughter, and photographs of the parking lot in support of their respective positions. Hancock's deposition testimony provides she tripped on something that was raised. Hancock testified she tripped on something that "felt like a rock or something to that affect," and that "[i]t was the broken asphalt that I tripped on." However, Hancock also testified she could not remember exactly where she fell.

Daughter, using a photograph of the Observer's parking lot, testified Hancock fell "[r]ight there where things changed" from asphalt to cement. The photographs presented show the Observer's parking lot and an abutting cement walkway. The photographs show a change in elevation at the point the asphalt meets the walkway. The photographs also show that, several feet away from the walkway, portions of the Observer's parking lot are littered with rocks or broken asphalt and cracks.

Also in evidence was an affidavit of Ernestine B. LeCoate, a former employee of the Newberry Publishing Company, the publisher of the Observer. LeCoate's affidavit provides "it was a well known fact to all employees, including deponent, that the parking lot was in a deteriorated condition with potholes . . ." and management was aware of the parking lot's condition.

At the hearing, Mid-South argued summary judgment was required because the only evidence presented establishes Hancock tripped on a change in elevation, where the pavement changes into cement. Hancock argued the evidence indicates Hancock's injuries were caused by broken asphalt.

The circuit court granted Mid-South's summary judgment motion. Hancock filed a Motion for Reconsideration, which was denied. This appeal followed.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). Summary judgment is proper when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. In ruling on a motion for summary judgment, "the evidence and inferences that can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." Tremont Constr. Co., Inc. v. Dunlap, 310 S.C. 180, 181, 425 S.E.2d 792, 793 (Ct. App. 1992). "If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. However, if the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court." Ward v. Zelinski, 260 S.C. 229, 232, 195 S.E.2d 385, 387 (1973).

LAW/ANALYSIS

Hancock contends the trial court erred in granting Mid-South's summary judgment motion because the evidence presented demonstrates Mid-South should be liable for Hancock's injuries. Specifically, Hancock argues the trial court erred in finding the Observer's parking lot did not constitute a defective or dangerous condition and Hancock's fall was not caused by an elevation change. We disagree.[1]

[1] We note Hancock separately addresses these issues in her brief; however, because we find the issues interrelated, we discuss them accordingly.

"A merchant is not an insurer of the safety of his customers but rather owes them the duty to exercise ordinary care to keep the premises in a reasonably safe condition." Denton v. Winn-Dixie Greenville, Inc., 312 S.C. 119, 120, 439 S.E.2d 292, 293 (Ct. App. 1993). '"The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge."' Larimore v. Carolina Power & Light, 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000) (quoting Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991)). "To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it." Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001).

"The mere fact that there is a difference between the levels in the different parts of the premises does not, in itself, indicate negligence unless, owing to the character, location and surrounding condition of the change of level, a reasonably careful person would not be likely to expect or see it." Bruno v. Pendleton Realty Co., 240 S.C. 46, 51, 124 S.E.2d 580, 582 (1962). Similarly, '"[a] step-up or step-down in a parking lot does not, in and of itself, constitute negligence."' Denton, 312 S.C. at 121, 439 S.E.2d at 294 (quoting Bruno v. Pendleton Realty Co., 240 S.C. 46, 51, 124 S.E.2d 580, 582 (1962)).

In Denton, this court analyzed whether a grocery store was negligent in failing to warn a customer about a cart corral in the store's parking lot. In finding the trial court should have entered judgment notwithstanding the verdict for the grocery store, the court held:

> The corral was not materially different from speed bumps, curbing, or concrete dividers at the head of parking spaces--all of which are commonly found in or along public streets and places to park. Accidents may happen around these structures as they do on steps, escalators, and other raised structures. This

> does not mean they are unreasonably dangerous or that a person exercising due care would not have them on the premises. They are, in fact, common structures that a person taking reasonable care for his own safety would likely expect and see while on the premises.

312 S.C. at 121, 439 S.E.2d at 294. Thus, the key question in cases involving the determination of whether a raise in elevation in or around a parking lot may be considered a dangerous or defective condition is whether the change in elevation is something "a person taking reasonable care for [his or her] own safety would likely expect and see while on the premises." Id.

In this case, the only testimony presented indicates Hancock fell at the point where the pavement and the cement meet. Daughter testified to that effect, and Hancock could not recall the location of her fall. The photographs of the Observer's parking lot clearly show a change in elevation at the point the pavement and cement meet. In addition, the record provides the change in elevation was clearly visible at the time of Hancock's fall; Hancock's deposition testimony provides no debris obstructed her view of the change in elevation. Based on the facts of this case, we find a person taking reasonable care should anticipate a possible change in elevation where asphalt meets an adjacent walkway. Accordingly, we hold the trial court did not err in finding Hancock failed to demonstrate a dangerous or defective condition caused her fall because the evidence demonstrates Hancock fell on a clear change in elevation that a person taking reasonable care would expect to see.

Moreover, even if the change in elevation amounts to a dangerous or defective condition, Hancock still failed to prove Mid-South could be liable because the elevation change is an open and obvious condition. "A landowner generally does not owe a duty to warn others of open and obvious conditions on the property." Larimore, 340 S.C. at 445, 531 S.E.2d at 539. However, a landowner may still be liable for injuries suffered from an open and obvious defect if the landowner should have anticipated the harm. Callander v. Charleston Doughnut Corp., 305 S.C. 123, 125-26, 406 S.E.2d 361, 362-63 (1991). A landowner may expect harm to the visitor from known or obvious dangers when the owner has reason to expect the invitee's

attention may be distracted. See Larimore, 340 S.C. at 446 n.15, 531 S.E.2d at 539 n.15 (citing Restatement (Second) of Torts § 343A (1965)). We find the elevation where the asphalt meets the walkway is an open and obvious condition, and therefore, Mid-South had no duty to warn visitors of the elevation. We also find Mid-South had no reason to anticipate harm to Hancock in this case because the record provides Hancock was not distracted at the time of her fall.

Based on the above, we find the trial court did not err in granting summary judgment to Mid-South. Accordingly, the trial court's decision is

AFFIRMED. [2]

KITTREDGE and SHORT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dana Lockamy, Appellant.

Appeal From Marlboro County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4121
Submitted June 1, 2006 – Filed June 12, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Jay E. Hodge, Jr., of Cheraw, for Respondent.

WILLIAMS, J.: A Marlboro County jury convicted Dana Lockamy of murder in the death of his brother, James E. Lockamy, and the trial court sentenced him to thirty years in prison. On appeal, Lockamy argues the trial court erred in failing to instruct the jury on the law of self-defense given the events surrounding the shooting. We affirm.

FACTS

The Lockamys own a thirty-acre parcel of land in Marlboro County. Both Dana and his brother, James, lived on this property. Dana resided in a home with his father, Andrew Lockamy, and James lived in another home located approximately a quarter of a mile away. Andrew Lockamy owns and operates a trucking business that utilizes tractor-trailer trucks to haul commodities from state to state. The brothers both worked for their father driving the trucks.

On May 25, 2002, Dana and his father returned home after hauling a load of produce to Florida. Shortly after their arrival, James called and asked Dana if he could borrow a set of hand tools to work on a lawnmower. Dana said that he could and drove the short distance to his brother's house with the tool set.[1]

When Dana arrived at his brother's house he found James standing outside near a workbench working on the lawnmower. James walked over to the truck and Dana handed him the tool set through the passenger side window. As the tool set was handed over, Dana asked that James be careful and not lose any of the tools. At this point, according to Dana, James became enraged, began cursing at him, and threatened to "beat [his] brains out and leave [him] lying in a pool of blood."

After throwing the tool set back into the truck, James strode around to the driver's side window and began beating Dana in the head with a stick.

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[1] Although accounts of what happened next vary according to the different witnesses, for purposes of this opinion, we construe the facts as related by Dana's trial testimony.

Dana grabbed the stick and threw it out of the passenger window, after which James continued to hit Dana with his fists. In an attempt to stop the beating, Dana began to drive off, but James grabbed Dana's arm and continued to strike him. Unable to drive away, Dana stopped the truck and attempted to get out of the vehicle. As he attempted to exit, James slammed the car door on him pinning Dana between the door and the body of the truck.

Having freed himself from the car door, Dana leaned against the bed of the truck to recover. James then walked a short distance away and retrieved a large iron pipe which he used to beat Dana in the arms, hips, and ribs. Dana testified that when he retrieved the pipe, James was holding it "marching back and forth like a Roman soldier" and shouting "I've got the power, I've got the power."[2] After sustaining several blows with the pipe, Dana, being the larger of the two brothers, was able to wrest the pipe away from James. Having been disarmed, James again began striking Dana in the head and body with his fists. According to Dana, the repeated assaults lasted approximately ten minutes.

When the attack subsided, Dana testified that James walked a short distance away and began laughing and joking about the beating he gave Dana. James also stated that next time he would finish beating Dana's brains out and then go to their father's home and do the same to him. Dana got back in the truck and drove out of James' yard and down the street when he noticed in the rear-view mirror that his face was covered in blood. He also noticed his sunglasses were missing and that his glass eye was not in place. At that point, Dana assumed the glass eye was knocked out during the altercation, but it was learned after the incident that he took the glass eye out before he drove to James' house.

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[2] Dana testified that he believed James was in a "drug-induced rage" and that his peculiar behavior resulted from being under the influence of some type of drug. In fact, he testified that at one point during the beating he asked James what he "got ahold of" and James responded that he got some really good drugs from North Carolina.

Having noticed his injuries, Dana drove the short distance to the house he shared with his father and retrieved a shotgun. Dana testified that he thought mistakenly "surely . . . he would not attack me if I had a weapon when I returned." Dana stated that he wanted to return to his brother's house to retrieve his glass eye, which, as noted previously, he mistakenly thought was knocked out by the assault.

When Dana arrived back at James' he left the gun in the truck, got out, and noticed one of James' friends handing him a packet of drugs. James started to brag about beating Dana with his fists and then asked Dana if he could still borrow the tool set. Dana responded that he could not borrow the tools and this again enraged James. Having been denied the use of his brother's tools, James picked up a socket wrench and approached Dana with it raised above his head, poised to strike. As he approached, he threatened to knock Dana's good eye out of his head.

Dana backed up towards the truck, reached through the window and retrieved the gun. Dana stated that his intention was to fire a shot into the ground. Meanwhile James continued to threaten Dana and his father. Even after seeing the gun, James advanced towards Dana and attempted to strike him with the ratchet. Dana got down on his knees and attempted to cover his head with one of his arms while James was standing above him with the gun sticking out between James' legs.

When James went to strike Dana with the wrench, Dana was able to locate and disengage the safety on the gun and pump a shell into the chamber. At this point, James dropped the wrench and started to run away. Dana then stood up and walked a short distance holding the gun down by his side. As James ran away, Dana said "don't ever beat me in my head and face like that again, and don't ever come to our father's home and harm him in any way or there will be no warning shot fired the next time."

James ran around a large tree and across a small garden[3] before Dana, still holding the gun at his side, fired one shot through the tree in the direction James was running. Dana testified that at the time he fired the shot, he could not see James. After approximately one minute, James walked back into view towards Dana. Dana stated that he noticed a small amount of blood on James' arm, but otherwise did not think James was seriously injured. Dana got back in his truck, drove home to his father's house, and began to wash blood off his face. In fact, he was so occupied when the police arrived to arrest him a short time later.

When paramedics arrived at the scene of the shooting, they found James deceased, lying in a field beside his home. The coroner determined he died from a single gunshot wound to the back.

LAW/ANALYSIS

On appeal, Dana argues that given the particular facts surrounding the incident, the trial court erred in refusing to charge the jury on the law of self-defense.

"'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "the trial court's refusal to give a requested jury instruction must be both erroneous and prejudicial to warrant reversal." State v. Light, 363 S.C. 325, 330, 610 S.E.2d 504, 506 (Ct. App. 2005). However, if there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445.

Dana argued at trial that he shot his brother in self-defense. In South Carolina, four elements must exist for a defendant to be entitled to a self-defense charge:

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[3] Dana stated that he believed James was approximately 50 feet away when the shot was fired.

> (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2002) (citing State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999)).

Before making its ruling in the current case, the trial court carefully and thoughtfully considered the propriety of charging the jury on self-defense. The court was particularly concerned about the fourth element of the defense – that Dana had no other probable means of avoiding the danger. As the court noted, if James had been shot while he was still standing over Dana attempting to strike him, it would be clear that Dana would be entitled to the instruction. However, Dana was no longer in danger when he fired the shot. His own testimony belies his position. Dana stated that James ran and that he was fifty feet away when the fatal shot was fired.

Accordingly, we agree with the trial court that the fourth element of self-defense was not proven and therefore, find the trial court did not err by refusing the instruction.

AFFIRMED. [4]

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

KITTREDGE and SHORT, JJ., concur.