The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF T. ANDREW JOHNSON, PETITIONER

T. Andrew Johnson, who was definitely suspended from the practice of law for a period of one (1) year, retroactive to October 4, 2006, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, July 11, 2008, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 29, 2008

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

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N O T I C E

IN THE MATTER OF WILLIAM F. PARTRIDGE, III, PETITIONER

William F. Partridge, III, who was definitely suspended from the practice of law for a period of one (1) year, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, July 11, 2008, beginning at 10:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 29, 2008

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N O T I C E

IN THE MATTER OF W. JAMES HOFFMEYER, PETITIONER

W. James Hoffmeyer, who was definitely suspended from the practice of law for a period of nine (9) months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, July 11, 2008, beginning at 11:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
May 29, 2008

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N O T I C E

IN THE MATTER OF DAVID P. COLE, PETITIONER

David P. Cole, who was disbarred from the practice of law, retroactive to March 26, 1992, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, July 11, 2008, beginning at 1:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
May 29, 2008

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF DONALD LOREN SMITH, PETITIONER

Donald Loren Smith, who was indefinitely suspended from the practice of law, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, July 11, 2008, beginning at 2:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

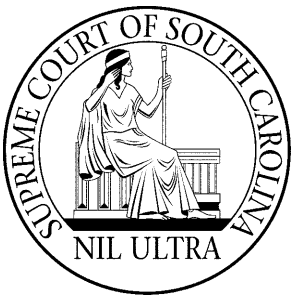
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 29, 2008

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22

June 2, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Berry Scott Bolin, Respondent.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26494
Heard March 5, 2008 – Filed May 19, 2008

AFFIRMED

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, of Columbia; and Kevin Scott Brackett, Solicitor, of York, for appellant.

Leland B. Greeley, of Rock Hill, for respondent.

JUSTICE MOORE: Respondent was indicted for murder, assault and battery with intent to kill, possession of a firearm during

commission of a violent offense, assault with intent to kill, discharging a firearm into an occupied vehicle, and possession of a pistol by a person under 21 years of age pursuant to S.C. Code Ann. § 16-23-30 (2003 & Supp. 2007).

Respondent argued that the possession of a pistol indictment should be quashed because § 16-23-30(B) under which he was charged is unconstitutional. The motion to quash was granted by the trial court. The State appeals and we affirm.

ISSUE

> Did the trial court err by quashing the indictment for possession of a handgun while under the age of 21 on the ground that the criminal statute making such possession illegal is unconstitutional?

DISCUSSION

When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution. State v. White, 348 S.C. 532, 560 S.E.2d 420, *cert. denied*, 537 U.S. 825 (2002).

Section 16-23-30(A) provides:

> [i]t is unlawful for a person to knowingly sell, offer to sell, deliver, lease, rent, barter, exchange, or transport for sale into this State any handgun to: (3) a person under the age of twenty-one, but this shall not apply to the issue of handguns to members of the [military or other like organizations or to those receiving instruction on handgun use under the

> immediate supervision of a parent or adult instructor].

Subsection (B) states that "[i]t is unlawful for a person enumerated in subsection (A) to possess or acquire handguns within this State."[1]

Respondent argues that because he was old enough to be *sui juris* and the state constitution granted him the right to bear arms, then he could not be charged with a crime for handgun possession. *See* S.C. Const. Art. I, § 20 (a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed).

The portions of § 16-23-30 regarding persons under the age of 21 do not violate the constitutional right of a person under the age of 21 to keep and bear arms. While a person under the age of 21 is prohibited from possessing a handgun, except in certain circumstances, this does not prevent a person under the age of 21 from possessing other types of guns. Our constitution simply requires that a person's right to keep and bear "arms" not be infringed upon. The legislature's regulation of who may have access to handguns does not infringe upon that right because persons under the age of 21 have access to other types of guns. *Cf.* State v. Johnson, 76 S.C. 39, 56 S.E. 544 (1907) (city ordinance prohibiting firing of guns within city limits is not unconstitutional as infringing on right to bear arms); State v. Johnson, 16 S.C. 187 (1881) (purpose of act was to prohibit, as far as consistent with a citizen's right to bear arms, the carrying of deadly weapons, with a view to prevent acts of violence).[2] Accordingly, § 16-23-30 does not violate S.C. Const. Art. I, § 20, regarding a person's right to keep and bear arms.

---

[1]The General Assembly recently passed and the Governor signed a bill amending § 16-23-30. The amendment makes it unlawful for a person under the age of eighteen to possess a handgun. Therefore, the 18-to 20-year-old age group may now legally possess a handgun. However, this amendment does not apply to the instant case because the General Assembly provided that this amendment does not affect pending actions.

[2]*See also* Robertson v. City and County of Denver, 874 P.2d 325 (Colo. 1994) (ban of assault weapons was a reasonable exercise of police power

Respondent further argues that § 16-23-30 violates the state constitution because the age group of 18- to 20-year-olds is being treated differently than adults aged 21 and above. South Carolina Const. Art. XVII, § 14, provides:

> Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed *sui juris* and endowed with full legal rights and responsibilities, *provided,* that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

Article XVII, § 14, specifically makes reference to the fact the General Assembly can restrict the sale of alcoholic beverages to persons until age 21. By expressly allowing the regulation of the sale of alcoholic beverages to the 18- to 20-year-old age group and not stating any other situation in which the General Assembly may restrict the rights of this age group, the state constitution precludes the General Assembly from prohibiting this age group's possession of handguns. *See* Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (the canon of construction "*expressio unius est exclusio alterius*" or " *inclusio unius est exclusio alterius*" holds that "to express or include one thing implies the exclusion of another, or of the alternative"); *see also* Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007) (when interpreting a statute, the words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation).

---

despite the right to bear arms); Benjamin v. Bailey, 662 A.2d 1226 (Conn. 1995) (ban on sale and possession of assault weapons did not infringe on right to bear arms because access to a wide array of weapons was still permitted); Mosby v. Devine, 851 A.2d 1031 (R.I. 2004) (right to possess a handgun, whether fundamental or not, is not absolute and is subject to reasonable regulation; statute was not a total ban on the right to bear arms).

We find the General Assembly's prohibition on hand gun possession by the 18-to 20-year old age group does not infringe upon the right to bear arms; however, § 16-23-30 violates the plain language of Article XVII, § 14, of our state constitution. Accordingly, the decision of the trial court is

AFFIRMED.

TOAL, C.J., WALLER, BEATTY, JJ., and Acting Justice E. C. Burnett, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jeremy Tisdale, Petitioner,

v.

State of South Carolina, Respondent.

Appeal from Berkeley County
Roger M. Young, Sr., Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 26495
Submitted April 16, 2008 – Filed May 27, 2008

REVERSED

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney

General Matthew J. Friedman, all of Columbia,
for respondent.

JUSTICE MOORE: Petitioner was convicted of murder and sentenced to life without parole. His direct appeal was dismissed after an Anders review.[1] Petitioner then filed this application for post-conviction relief (PCR) claiming counsel were ineffective for failing to request a charge on accident or involuntary manslaughter. PCR was denied. We reverse.

FACTS

The victim in this case was Lavelle Anderson (Victim). His decomposing nude body was found in a ditch in Berkeley County on October 2, 2000. He had been shot twice in the head.

Petitioner and his co-defendant, Anthony Dawson, were charged with murdering Victim on September 27 and disposing of the body. The State's theory of the case was that Victim's murder was revenge for the killing of petitioner's brother in a drive-by shooting a few days earlier.

At trial, Dawson testified for the State. He stated that after the wake for petitioner's brother, he and petitioner picked up Victim in a borrowed car. Dawson was reclined in the backseat because he had a headache, so Victim got in the front seat. As they drove down the interstate, Dawson heard petitioner and Victim talking but could not hear their words until their voices became raised. Victim began yelling and called petitioner a "bitch." Victim then punched petitioner in the face. Petitioner pinned Victim against the passenger side of the car and was pulling the car onto the shoulder of the road when Victim pulled a gun and shot at petitioner. Petitioner and Victim fought over the gun and one or two shots were fired. Dawson stated he did not know who had the gun when the shots were fired, but he saw the gun in

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[1] Anders v. California, 386 U.S. 738 (1967).

petitioner's hand after the shooting. Petitioner and Dawson put Victim's body in the trunk of the car and drove to a friend's house for help disposing of the body.

Petitioner testified he picked up Victim because Victim had called him asking for a favor. After Victim was in the car and stated where he wanted to go, petitioner did not want to do it. Victim then began yelling and punched petitioner in the face. When petitioner saw Victim pull a gun, they struggled over the weapon. The gun went off while it was still in Victim's hand and then Victim was still. On cross-examination, the solicitor asked: "Your testimony is that that gun was never in your hand?" Petitioner answered: "It was never in my hand until he was just motionless."

During closing, the solicitor argued:

> [T]hey want you to believe that this was an accident. It is not self-defense. It is not voluntary manslaughter. And it is not involuntary manslaughter. They want you to believe that it was an accident and it is not murder. No evidence supports that it was anything other than an intentional act.

The trial judge charged voluntary manslaughter as a lesser offense and self-defense. On PCR, petitioner claimed counsel were ineffective for failing to request charges on accident and involuntary manslaughter.

At the PCR hearing, Counsel Brown testified he was surprised by petitioner's testimony that the gun was in Victim's hand and not petitioner's when it fired. It did not occur to counsel to request a charge on accident or involuntary manslaughter. Co-counsel confirmed that there was no discussion of accident or involuntary manslaughter.

The PCR judge found the fact that Victim was shot twice "in the back of the head"[2] was completely inconsistent with either accident or

---

[2]A pathologist testified at trial that the bullet wounds were to the left side of the head slightly behind the ear.

involuntary manslaughter and therefore counsel were not ineffective in failing to request these charges.

ISSUE

Were counsel ineffective for failing to request charges on accident and/or involuntary manslaughter?

DISCUSSION

Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Pickens, 320 S.C. 528, 466 S.E.3d 364 (1996).[3] Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). Here, there is evidence of a struggle over the gun. The fact that Victim's wounds may have been inconsistent with petitioner's testimony that the gun fired while in Victim's hand is not overwhelming evidence that petitioner intentionally killed Victim.

Without citation of authority, the State argues that because the jury rejected petitioner's claim of self-defense and found him guilty of murder, the jury must have found malice and therefore petitioner cannot show prejudice from the failure to submit involuntary manslaughter.[4] We disagree. The State's argument essentially suggests that if a defendant is found guilty of the greater offense, he can never challenge the failure to submit a lesser offense because the jury must have found all the elements of the greater. To the contrary,

---

[3]Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006).

[4]We rejected this analysis in the context of murder and voluntary manslaughter. State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993).

the relevant test is whether there is any evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, *supra*. Here, the evidence of a struggle for the gun supports submission of a charge of involuntary manslaughter.

Further, evidence of an accidental discharge of a gun will support a charge of accident where the defendant lawfully arms himself in self-defense. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); *see also* State v. Cameron, 137 S.C. 371, 135 S.E. 364 (1926) (approving charge of accident where gun accidentally discharged during struggle). Here, the evidence indicates Victim was the aggressor by punching petitioner in the face and then shooting at him. This evidence, along with evidence the gun discharged accidentally, supports a charge of accident.

The denial of PCR is **REVERSED.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State of South Carolina, Respondent,

v.

Colie G. Martin, Jr. and Colie G. Martin, III, Appellants.

Appeal From Richland County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26496
Heard April 2, 2008 – Filed May 27, 2008

REVERSED AND REMANDED

Brian C. Gambrell, of Hamilton & Associates, of Columbia, for Appellants.

Assistant Solicitor Jill Andrews, of Columbia, and John F. Kuppens, Joann E. Johnston, and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough LLP, all of Columbia, for Respondent.

JUSTICE WALLER: This is a direct appeal from two orders of the circuit court which was acting in an appellate capacity to review a magistrate's decision. We reverse and remand to the magistrate court.

FACTUAL/PROCEDURAL BACKGROUND

The procedural history of this case is a bit convoluted. Factually, the matter started as a criminal investigation with a search warrant issued by a magistrate on August 21, 2003, based on allegations of animal cruelty. On the same date, the magistrate issued an order which placed approximately 60 horses in the protective custody of South Carolina Awareness and Rescue for Equines, Inc. (SCARE). The order stated the following in pertinent part:

> On August 21, 2003 a Search Warrant was issued against the Defendant(s) … for the seizure of neglected and maltreated livestock, including, but not limited to horses.
>
> IT IS ORDERED THAT the livestock, including but not limited to the horses, are [sic] hereby placed in the protective custody of [SCARE], and further that the animals remain on the property for assessment and medial treatment and care, as deemed necessary by SCARE and their [sic] agents.
>
> IT IS FURTHER ORDERED that agents acting for or on behalf of SCARE will have access to these animals for the purposes stated above, and that the removal of these animals are [sic] at the sole discretion of SCARE and its agents.

("August Order").

When the first search warrant was executed on Friday, August 22, 2003, SCARE effectuated an "on-site" seizure of the horses pursuant to the August Order. This allowed for on-site assessments by veterinarians during the following few days. However, as the week went on, SCARE decided to remove the horses from appellants' property, which happened on Saturday, August 30, 2003.

Pursuant to S.C. Code Ann. § 47-1-150(C)(2) (Supp. 2007), a hearing was supposed to be held within three days of the animals' seizure to determine whether the owners were "fit to have custody of the animal."

Although a hearing apparently was scheduled for September 16, 2003, no one from the State appeared.[1] On September 17, 2003, appellants moved to vacate the magistrate's August Order. Appellants based their request on due process grounds because there had been no hearing as required by statute.

A hearing on the motion was held on October 1, 2003. The magistrate agreed with appellants' due process argument and found that SCARE had failed to request a post-seizure hearing to determine whether appellants could adequately care for the horses. See § 47-1-150(C)(2). As a remedy, appellants sought the immediate return of their horses. The magistrate disagreed and instead ordered SCARE to petition the court for the hearing contemplated by the statute. ("October Order").

Specifically, the magistrate concluded in the written order as follows:

> It is the ruling of this court that S.C. Code § 47-1-150 requires a hearing be sought within 24 hours after the seizure of an animal pursuant to any subsection of this statute. Based on that holding, this court finds that SCARE failed to comply with the requirements of the statute when it failed to petition for a hearing…. **However, the appropriate remedy is the holding of the hearing required by this code section rather than the immediate return of the horses to an environment that could potentially be harmful to them.**
>
> IT IS THEREFORE ORDERED that SCARE shall immediately comply with the hearing requirement of S.C. Code § 47-1-150(C)(2).

[1] On September 15, 2003, appellants were arrested on charges related to ill treatment of animals. See S.C. Code Ann. § 47-1-40 (Supp. 2007). The arrests occurred **after** the seizure of the horses, but prior to this scheduled hearing.

(Emphasis added). Prior to that hearing taking place, however, appellants filed for circuit court review of the magistrate's decision.[2]

While the appeal was pending, appellants were indicted in February 2004 on 60 counts each of ill treatment of animals.[3] In June 2004, they were each convicted of four counts, but acquitted on the other 56 counts. They were sentenced in December 2004. Except for the forfeiture of the four horses which were the subject of the convictions, no decision was made on the custody of the other 56 horses.[4]

On February 25, 2005, the circuit court issued a Form 4 order which found that the horses had been properly removed. Appellants filed a motion for reconsideration pursuant to Rule 59(e), SCRCP. The circuit court did not rule on the reconsideration motion until March **2007** when it denied the motion. In the written order, the circuit court found no post-seizure hearing was required, and even so, noted that appellants had "declined" the hearing the magistrate had ordered. These two circuit court orders are the subject of the instant appeal.[5]

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[2] Appellants' counsel at the October 1, 2003 hearing told the magistrate that he was "probably not going to attend the hearing" and instead would file an appeal. Nonetheless, the magistrate indicated he would "set the hearing up."

[3] Colie G. Martin, III was indicted for ill treatment, second offense, while Colie G. Martin, Jr. was indicted for conspiracy to commit ill treatment of animals

[4] It appears that because the appeal to the circuit court was still pending on the magistrate's decision, the sentencing court did not rule on the other horses, believing it to be a civil matter.

[5] Meanwhile, in July 2006, appellants filed a separate civil action against respondent, SCARE, and Janice Carter, SCARE's executive director. In their complaint, appellants alleged replevin, conversion, defamation, malicious prosecution, abuse of process, intentional infliction of emotional distress, negligence, and civil conspiracy. Regarding the horses, appellants sought the return of their horses, including the offspring of the horses that had originally been seized. Apparently, that lawsuit has been stayed pending the outcome of this appeal.

ISSUES

1. Did the circuit court err by finding that no post-seizure hearing was required under S.C. Code Ann. § 47-1-150(A) or § 47-1-150 (C)(1)?

2. Did the circuit court err when it refused to order the return of appellants' horses?

3. Did the circuit court err in finding that appellants had waived their right to a hearing?

DISCUSSION

1. Post-seizure hearing under Section 47-1-150

Appellants first argue that the circuit court erred by essentially reversing the magistrate's ruling that a post-seizure hearing was required under section 47-1-150. We agree.

Section 47-1-150 appears in the chapter entitled "Cruelty to Animals" and is entitled "Issuance of search warrant; purpose of section; motions regarding custody of animal; notice; care, disposal of, or return of animal." It is, admittedly, a confusingly drafted statute, which provides in pertinent part:

> (A) When complaint is made on oath or affirmation to any magistrate authorized to issue warrants in criminal cases that the complainant believes and has reasonable cause to believe that the laws in relation to cruelty to animals have been or are being violated in any particular building or place, such magistrate, if satisfied that there is reasonable cause for such belief, shall issue a search warrant authorizing [law enforcement] to search such building or place…. If an animal is seized pursuant to this section and the South Carolina Society for the Prevention of Cruelty of Animals, or other society incorporated for that purpose is involved with the seizure, the animal may be held pending

criminal disposition of the case at a facility maintained or contracted by that agency.

(B) The purpose of this section is to provide a means by which a neglected or mistreated animal can be:

(1) removed from its present custody, or

(2) made the subject of an order to provide care, issued to its owner by the magistrate or municipal judge, any law enforcement officer, or any agent of the county or of the South Carolina Society for the Prevention of Cruelty to Animals, or any society incorporated for that purpose and given protection and an appropriate and humane disposition made.

(C) Any law enforcement officer or any agent of any county or of the South Carolina Society for the Prevention of Cruelty to Animals, or any society incorporated for that purpose may move before a magistrate for an order to:

(1) lawfully take custody of any animal found neglected or cruelly treated by removing the animal from its present location if deemed by the court that removal is necessary to prevent further suffering or ill-treatment, or

(2) order the owner of any animal found neglected or cruelly treated to provide certain care to the animal at the owner's expense without removal of the animal from its present location, **and shall forthwith petition the magistrate or municipal judge of the county or municipality wherein the animal is found for a hearing, to be set within twenty-four hours after the date of seizure of the animal or issuance of the order to provide care and held not more than two days after the setting of such date, to determine whether the owner, if known, is able to provide adequately for the animal and is fit to have custody of the animal**. The hearing shall be concluded, and the court order entered the date the hearing is commenced.

> No fee shall be charged for the filing of the petition. Nothing herein is intended to require court action for the taking into custody and making proper disposition of stray or abandoned animals as lawfully performed by animal control agents.

§ 47-1-150 (emphasis added).

The above-emphasized language in section 47-1-150(C)(2) is the hearing requirement at issue. Respondent argues, and the circuit court found, that a post-seizure hearing is not required if the animals are seized pursuant to section 47-1-150(A) or (C)(1), because the language regarding the hearing is located in section 47-1-150(C)(2), and the sections 47-1-150(C)(1) and (C)(2) are separated by the word "or."

However, we agree with appellants, that a hearing was required.[6] The language in section 47-1-150(C)(2) very clearly contemplates that whether the animal is "seized and removed" (presumably under § 47-1-150(C)(1) and/or arguably under § 47-1-150(A) by search warrant); or the animal is seized but remains on-site for its care (under § 47-1-150(C)(2) which permits an order to provide care to the animal without removing it); a hearing is supposed to be held within three days of the seizure.[7]

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[6] We note the August Order issued by the magistrate in effect ordered an on-site seizure by SCARE and also granted SCARE the authority to remove the animals. Arguably, then, the magistrate's order was a hybrid version of what is contemplated by sections 47-1-150(C)(1) and (C)(2).

[7] The parties both have cited Florida's version of the statute which has some language that is virtually identical to South Carolina's version, but the statute is formatted differently:

> (2) Any law enforcement officer or any agent of any county or of any society or association for the prevention of cruelty to animals appointed under the provisions of s. 828.03 may:
>
> (a) Lawfully take custody of any animal found neglected or cruelly treated by removing the animal from its present location, or

cont'd

Accordingly, we hold the magistrate correctly found that a hearing should have been requested by SCARE under § 47-1-150, and therefore, the circuit court erred in finding no hearing was required.

2. Refusal to Return Horses

Next, appellants argue the circuit court erred by not ordering the immediate return of their "illegally seized horses."[8] Appellants contend that because they were acquitted on 56 charges, those 56 horses are not subject to forfeiture. We disagree.

> (b) Order the owner of any animal found neglected or cruelly treated to provide certain care to the animal at the owner's expense without removal of the animal from its present location,
>
> and shall forthwith petition the county court judge of the county wherein the animal is found for a hearing, to be set within 30 days after the date of seizure of the animal or issuance of the order to provide care and held not more than 15 days after the setting of such date, to determine whether the owner, if known, is able to provide adequately for the animal and is fit to have custody of the animal. The hearing shall be concluded and the court order entered thereon within 60 days after the date the hearing is commenced….

Fla. Stat. Ann. § 828.073(2). We agree with appellants that Florida's layout of this section indicates that the envisioned hearing relates to both subsection (a) and (b). Likewise, we find the hearing requirement located in § 47-1-150(C)(2) relates to both §§ 47-1-150 (C)(1) and (C)(2).

[8] Appellants do not challenge the forfeiture of the four horses which resulted from their four convictions. See S.C. Code Ann. § 45-1-170 (Supp. 2007) (person who is convicted of animal cruelty "forfeits ownership, charge, or custody of the animal and at the discretion of the court, the person who is charged with or convicted of a violation of this chapter must be ordered to pay costs incurred to care for the animal and related expenses.").

Section 47-1-150(F) provides that whoever takes charge of an animal under the statute:

> [S]hall provide for the animal until either:
>
> (1) The owner is adjudged by the court to be able to provide adequately for, and have custody of, the animal, in which case the animal shall be returned to the owner upon payment for the care and provision of the animal while in the agent's or officer's custody; or
>
> (2) The animal is turned over to the officer or agent as provided in Section 47-1-170 and a humane disposition of the animal is made.

In our opinion, section 47-1-150(F)(1) applies to the 56 horses at issue (plus their offspring). Therefore, some type of hearing and fact-finding are required to determine whether appellants are able to adequately provide for the horses. If so, the horses may be returned upon payment for their care. Id.

Thus, we reject appellants' contention that the circuit court erred by refusing to order the return of appellants' horses. In addition, we find a remand to the magistrate is necessary to determine whether appellants are now able to adequately provide care for these horses. If appellants are deemed able to care for the horses, the return of the horses may be ordered, provided that appellants make the requisite payments envisioned by section 47-1-150(F)(1).

3. Waiver

Finally, appellants take issue with the circuit court's statement that they "refused" or "declined" their opportunity for a hearing offered by the magistrate. Appellants claim this inappropriately penalizes them for exercising their right to appeal the magistrate's order.

Respondent makes several arguments why this entire appeal should be dismissed, with one argument focusing on waiver.[9] Respondent contends appellants waived their opportunity to have the hearing to which they were entitled by strategically deciding to file an appeal. In support of this argument, respondent cites Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006), and other cases, for the general proposition that "a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced."

Although we are somewhat bothered by the fact that appellants did not avail themselves of the post-seizure hearing the magistrate ordered in his October Order, we find appellants arguably were aggrieved by the magistrate's order, and therefore believed they had a right to an appeal.

Accordingly, we decline to dismiss this appeal. Instead, given the somewhat unusual factual and procedural posture of this case, we find the appropriate remedy is a remand for a hearing in front of the magistrate, as discussed above.[10]

CONCLUSION

In sum, we reverse the circuit court's ruling that appellants were not entitled to a post-seizure hearing. We remand this matter to the magistrate for a hearing to determine whether appellants are able to provide adequately for the animals and are fit to have custody of the animals.

REVERSED AND REMANDED.

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

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[9] In addition to waiver, respondent argues the appeal is moot and is barred by *res judicata* because the criminal action has been finalized and there was no motion to suppress the evidence seized by the search warrant. We agree with appellants that these claims are without merit.

[10] Of course, we note with some irony that this was the initial relief granted to appellants by the magistrate back in 2003.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

M. Cindy Wilson, Appellant,

v.

Joey Preston, Anderson County Administrator, Respondent.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 26497
Heard January 23, 2008 – Filed June 2, 2008

AFFIRMED

Jay Bender and Holly Palmer Beeson, both of Baker, Ravenel & Bender, L.L.P., of Columbia, for appellant.

William A. Coates, D. Randle Moody, II, and Ella Sims Barbery, all of Roe Cassidy Coates & Price, P.A., of Greenville, for respondent.

Robert E. Lyon, Jr., and M. Clifton Scott, both of the South Carolina Association of Counties, of Columbia, for *Amicus Curiae*.

JUSTICE MOORE: Appellant (Wilson), a member of the Anderson County Council (Council), filed a petition for writ of mandamus. She sought access to records pertaining to the operation of county government, including financial records and legal bills, which were in respondent's (Administrator), possession. Both parties subsequently filed motions for summary judgment. The Administrator's motion was granted. Wilson appealed to the Court of Appeals. We granted Wilson's motion to certify the appeal to this Court.

FACTS

Anderson County operates under a Council-Administrator form of government. In this type of government, the Council is elected by the county's citizens and the Council employs an administrator who serves as the administrative head of the county government and is responsible for the administration of all departments over which the Council has control. S.C. Code Ann. § 4-9-610 and § 4-9-620 (1986).

The powers and duties of the administrator include: executing the policies, directives, and legislative actions of the council; preparing budgets for submission to the council and, in the exercise of that responsibility, having the authority to require such reports, estimates, and statistics on an annual or periodic basis as the administrator deems necessary from all county departments and agencies; preparing annual, monthly, and other reports for council on finances and administrative activities of the county; and performing such other duties as may be required by the council. S.C. Code Ann. § 4-9-630 (1986).

The Administrator was hired by the Council in 1996. Wilson, who was sworn into office in 2001, is one of seven members who comprise the Council. Since being sworn into office, Wilson has sought from the Administrator various financial records pertaining to the operation of county government. At the time of Wilson's 2005 deposition, she had received over 59,000 pages of documents from the Administrator. Wilson stated that she shares the information she receives from the Administrator with the media and the Anderson County Taxpayers Association.

In response to Wilson's requests, the Council adopted an ordinance in 2003 involving the prioritization of the Administrator's duties. Wilson was the lone dissenting vote. The ordinance states:

> In performing the duties of his office, the Administrator shall be governed by the following prioritization of functions: those duties established by law or contract, by the Anderson County Code, by the South Carolina Code of Laws, by the Administrator's contract with the County; those duties required for the efficient and effective day-to-day operations and functioning of County government; other duties, as time permits after completion of the first two sets of priorities.

Specifically in regard to this appeal, Wilson sought vendor files where legal expenditures were described, an annual financial report, weekly copies of the general ledger report, and records containing information concerning details of transfers between accounts in excess of $2,500.

After determining the Administrator was failing to give her the documents in a timely and complete manner, Wilson sought a writ of mandamus that would allow her full access to all financial records pertaining to the operation of the county government. The trial court granted the Administrator's motion for summary judgment on the ground that the Administrator's duties in regard to the above documents are discretionary.

ISSUES

I. Did the trial court err by ruling mandamus cannot issue to compel the Administrator to disclose financial records to a county council member?

II. Did the trial court err by ruling mandamus cannot issue to compel the Administrator to disclose to Wilson the narratives in the County's legal bills?

DISCUSSION

A lower court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Connor Holdings, LLC v. Cousins, 373 S.C. 81, 644 S.E.2d 58 (2007). In determining whether any triable issues of fact exist, the lower court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Id.*

The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law. Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002). To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. *Id.* Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999). Mandamus is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal. *Id.*

The duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial). Redmond v. Lexington County Sch. Dist. No. Four, 314 S.C. 431, 445 S.E.2d 441 (1994). The character of an official's public duties is determined by the nature of the act performed. Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659 (1973). The duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. Redmond, *supra*. It is ministerial if it is defined by law with such precision

as to leave nothing to the exercise of discretion. *Id.* In contrast, a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. *Id.*

I. Financial Records

In her complaint, Wilson alleged she has sought and repeatedly been denied copies of the annual financial report (GLR 153), and timely copies of the weekly general ledger reports (GLR 110).

Wilson's complaint regarding the GLR 153 was that she wanted to receive an unaudited version immediately at the end of the fiscal year. The Administrator informed her that the annual report was typically only run after the audit was completed and all required adjustments had been made due to the volume and cost associated with running the report. She was told she would be promptly provided with the report after all accounts were closed out and the external audit finalized. A finance department employee stated that an unaudited version of the report is not very relevant because certain items are overstated or understated. Wilson was given the 2004 GLR 153 in December 2004, after the audit was complete.

Regarding the GLR 110s, Wilson's complaint is that she receives them in bunches of four to six and she believes she is entitled to receive them weekly, *i.e.* immediately after the finance department completes them.

In his deposition, the Administrator stated that he provides Wilson with the GLR 110s as soon as he can. However, he noted that he likes to review them first so that he may anticipate Wilson's future inquiries. He stated that sometimes he did not have time to review them and so there would be a delay in delivery.

Wilson previously moved twice before Council that Council, as a body, instruct the Administrator to provide the ledger reports in a timely manner for their review. The motions died for lack of a second.

Wilson argues the trial court erred by ruling that a writ of mandamus cannot issue to compel the Administrator to disclose financial records to a county council member in a particular manner or time frame. She contends that the Administrator's duty to do so is ministerial and not discretionary.

We find that providing a council member with the county financial information in a particular time frame or manner are discretionary actions on the Administrator's part. The law does not require the Administrator to give the documents to a single council member in any particular manner. *See* § 4-9-630 (outlining administrator's powers and duties); Long v. Seabrook, *supra* (duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts). We emphasize the Administrator cannot deny a council member access to county financial documents.[1] However, here, the Administrator has not denied Wilson access to the documents. The Administrator, in his discretion, has delayed the delivery of some documents so that he may be able to respond to queries by Wilson. Further, the Council, acting as a whole with only Wilson dissenting, has enacted an ordinance prioritizing the Administrator's duties so as to ensure that the Administrator takes care of the County's business before fulfilling Wilson's requests. Additionally, the Council has twice declined to accept Wilson's motion to require the Administrator to produce documents in a timelier manner. Given all these circumstances, the Administrator's duty to deliver documents to Wilson is a quasi-judicial duty which requires the exercise of his discretion in determining how the act of delivering the documents shall be done. *See* Redmond, *supra* (quasi-judicial duty requires the exercise of discretion in determining how or whether the act shall be done or the course pursued).

[1]*See* S.C. Atty. Gen. Op. dated June 7, 2001 (2001 WL 790260); S.C. Atty. Gen. Op. dated September 23, 1997 (1997 WL 665446); S.C. Atty. Gen. Op. dated March 24, 1995 (1995 WL 803345); S.C. Atty. Gen. Op. dated August 18, 1983 (1983 WL 181974); S.C. Atty. Gen. Op. dated December 2, 1977 (1977 WL 24717).

Accordingly, the trial court did not err by ruling a writ of mandamus cannot issue to compel the Administrator to deliver the County's financial documents to Wilson in a particular manner or within a particular time frame.[2]

II. Legal Bill Narratives

In 2001, Wilson requested copies of the complete legal vendor files. She was given copies of the legal fees of the county's law firm summarized by fund. In 2003, Wilson was given a listing of general legal expenditures for the year 2002 through March 2003.

Wilson requested again in November 2003 for the complete vendor files. In response to this request, the Administrator sent a memorandum to all members of the Council. In this memo, he stated that Wilson's request for copies of vendor files "where legal expenditure questions are concerned" is attorney-client privileged information with the County being the client. The Administrator informed the Council that only the Council, acting as a corporate body, can authorize the release of those records to anyone, acting as an individual. He stated that if Council authorized and directed the release, then Wilson could have the records; otherwise, the records would not be released.

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[2]The dissent disagrees with "the majority's decision that mandamus cannot issue to compel the Administrator to disclose financial information to a member of county council." However, this is not our holding. We reiterate the Administrator cannot deny a council member access to county financial documents. If such a denial occurs, issuing a writ of mandamus is clearly appropriate. However, in this case, the Administrator did not deny Wilson's requests for financial documents. Wilson's argument is that the Administrator should be compelled to disclose the financial documents in a particular time frame and manner. We find that a writ of mandamus cannot issue to compel the Administrator to deliver the County's financial documents to Wilson in a particular manner or within a particular time frame.

The next month, Wilson requested the legal expense files from 1997 to 2003. The Administrator responded and attached a summary of all of the County's law firm fees and expenses summarized by fiscal year. The amounts were categorized and she was also given a list of the check numbers and the dates. The Administrator emphasized that only the Council could authorize the release of narrative detail of those records.

In 2004, Wilson made a Freedom of Information Act request for the legal expense vendor files, including a narrative of billable hours supporting each payment. The Administrator gave Wilson the legal expense vendor files, with the narratives redacted. At the October 5, 2004, Council meeting, Wilson moved that Council, as a body, instruct the Administrator to provide the legal expense vendor files. The motion died for lack of a second.

At a subsequent Council meeting, the County's attorney made a presentation. He stated he is the legal adviser to the County and that the County is his client. The attorney stated the narrative descriptions at issue involved the County's legal strategy and that it is attorney-client privileged information. He stated only the Council acting for the County can release that information and the Administrator cannot waive that privilege.

The Administrator stated that when a request for a document is made, he consults with the County's legal counsel and asks whether it is attorney-client privileged information. His determination is based on legal advice he receives from the County's attorney.

In her deposition, Wilson agreed that the description of the legal work in the bills may reveal litigation strategy. Wilson admitted that if she was given the legal narratives and she saw something that was "silly," she would release the information to the public.

Initially, Wilson argues the lower court erred by not reviewing the legal bill narratives *in camera* when making its decision. However, Wilson did not request that they be reviewed *in camera* below and she did not raise this argument until on appeal. In any event, the trial court was not required to actually review the legal bill narratives to determine if the privilege existed.

We have held that the trial court must determine the question of privilege without first requiring disclosure of the substance of the communication. State v. Doster, 276 S.C. 647, 284 S.E.2d 218 (1981).[3] *See also* Tucker v. Honda of South Carolina Mfg., Inc., 354 S.C. 574, 582 S.E.2d 405 (2003) (trial court should not require disclosure of attorney client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication; if necessary to determine the application of the privilege, the trial judge may consider, *in camera*, the material); State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980)[4] (whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination is conclusive in the absence of an abuse of discretion). In the instant case, in light of the fact that Wilson never requested such an *in camera* review, the trial court did not abuse his discretion by determining the existence of the privilege without reviewing the narratives in the legal bills.

The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. State v. Doster, *supra*. The attorney-client privilege belongs to the client and not the attorney, and may be waived only by the client. Tucker v. Honda of South Carolina Mfg., Inc., *supra*. In general, the burden of establishing the privilege rests upon the party asserting it. State v. Love, *supra*.

Wilson argues the Administrator should not be making judgments about what is subject to the attorney-client privilege. However, when a request for a document is made, the Administrator consults with the County's attorney and asks whether it is attorney-client privileged information. The determination of what is privileged information is based on legal advice the

[3]*Cert. denied*, 454 U.S. 1030 (1981).

[4]*Cert. denied*, 449 U.S. 901 (1980).

Administrator receives from the County's attorney. Therefore, we find the Administrator is not making the determination but is relating the information he receives from the County's attorney to the Council when a request is made for possibly privileged documents.

Wilson, as a council member, cannot independently review attorney-client privileged documents. The privilege belongs to the client County; and the Council, as a whole, is authorized to release that information and has to waive the privilege before an individual council member can review privileged documents. *See* S.C. Code Ann. § 30-4-40(a)(7) (2007) (a public body may but is not required to exempt from disclosure the following information: correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships). The trial court did not abuse its discretion by finding a writ of mandamus cannot issue against the Administrator to compel him to release information where the Council has not authorized such a release. *See* Redmond, *supra* (quasi-judicial duty requires discretion in determining how or whether the act shall be done or the course pursued); Charleston County Sch. Dist., *supra* (appellate court will not overturn decision not to issue a writ of mandamus unless the trial court abuses its discretion).

CONCLUSION

We find the trial court did not err by ruling a writ of mandamus cannot issue to compel the Administrator to deliver the county's financial documents to Wilson in a particular manner or within a particular time frame. We further find the trial court did not err by ruling a writ of mandamus cannot issue to compel the Administrator to release attorney-client privileged information without authorization by the client County. Accordingly, the decision of the trial court is

AFFIRMED.

WALLER, J., concurs. TOAL, C.J., concurring in a separate opinion in which PLEICONES, J., concurs. BEATTY, J., concurring in part and dissenting in part in a separate opinion.

CHIEF JUSTICE TOAL: Although I concur in the majority's decision to deny Appellant Wilson's petition for a writ of mandamus, I write separately because I believe that this dispute is not a proper matter for this Court's consideration. In seeking the disclosure of the financial records in such a particular form and manner, Appellant essentially asks the Court to delve into internal disputes among Anderson County Council members and to overturn the Council's decisions.[5] In my view, issues related to the propriety of Respondent's actions in this case present purely political questions, the resolution of which rests solely within the Council's domain. In my opinion, any ruling from this Court would impermissibly operate as judicial review of the Council's policy decisions, and I would decline Appellant's request to intrude in this area. *See S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142-43, 632 S.E.2d 277, 279 (2006) (observing that adjudication of nonjusticiable political questions would place a court in conflict with a coequal branch of government, and thus, a court will not rule upon questions which are political in nature rather than judicial). For these reasons, I would hold that this is a nonjusticiable political question and would therefore deny Appellant's request for a writ of mandamus.

PLEICONES, J., concurs.

[5] For example, the Council declined Appellant's motion to compel Respondent to disclose the documents and the Council passed a specific ordinance prioritizing Respondent's job responsibilities.

JUSTICE BEATTY: I concur in part and dissent in part. I concur in the opinion of the majority that mandamus cannot issue to compel the Administrator to disclose attorney-client privileged information. However, my concurrence is limited to the facts of this case where Wilson admits that she would disclose the privileged information to the public at large. The privilege belongs to the Council, not Wilson.

In my view, an elected official by virtue of the office held has the inherent right of timely access to any and all information possessed by the governmental entity that he or she is duly elected to. To hold otherwise would condone the disenfranchisement of the people the elected official represents. The denial of information would clearly hinder, if not nullify, an elected official in the performance of his duties. Accordingly, I respectfully dissent in the majority's decision that mandamus cannot issue to compel the Administrator to disclose financial information to a member of county council.

Moreover, the Freedom of Information Act requires a governmental entity or other public body to disclose the type of financial information requested by Wilson. See S.C. Code Ann. § 30-4-30 (a) (2007) (providing that any person has the right to copy or inspect a public record); S.C. Code Ann. § 30-4-50(A)(6) (2007) (defining as "public information" any "information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies"). This statutory requirement removes any discretion on the part of the public body. In this instance, the lack of discretion whether to disclose the requested information makes the disclosure ministerial in nature and subject to mandamus, but for the injunctive remedy provided by section 30-4-100. Further, the county ordinance prioritizing the duties of the Administrator is unavailing in its attempt to delay responding to a request for financial information of the sort at issue here. Section 30-4-30 allows only 15 days for a response to a request for information. If the request is granted (in this case it must be) the information must be available for review.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clay Drummond, individually and on behalf of a class of others similarly situated, designated as Diabetic Products Purchasers Class [DPPC], Appellant,

v.

State of South Carolina, and South Carolina Department of Revenue, Respondents.

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

Opinion No. 26498
Heard April 16, 2008 – Filed June 2, 2008

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Donald E. Jonas, of Cotty & Jonas, of Columbia; Gary W. Poliakoff, of Poliakoff & Assoc., PA, of Spartanburg; Gregory M. Alford, of Alford & Wilkins, PC, of Hilton Head Island; and C. Bruce Littlejohn, of Spartanburg, for appellant.

Ronald W. Urban and Milton G. Kimpson, of South Carolina Department of Revenue; and John J. Pringle, Jr. and John Thomas Lay, both of Ellis Lawhorne & Sims, PA, of Columbia, for respondent.

JUSTICE MOORE: Appellant commenced this action as the representative of a putative class of persons denied a state sales tax exemption for diabetic supplies under S.C. Code Ann. § 12-36-2120(28)(b) (Supp. 2007). The trial court granted summary judgment against appellant on his cause of action under the South Carolina Taxpayers' Bill of Rights and dismissed the remaining causes of action for failure to exhaust administrative remedies as provided in the Revenue Procedures Act. We affirm in part, reverse in part, and remand.

FACTS

Section 12-36-2120(28)(b) provides an exemption from sales tax for:

> hypodermic needles, insulin, alcohol swabs, blood sugar testing strips, monolet lancets, dextrometer supplies, blood glucose meters, and other similar diabetic supplies sold to diabetics under the authorization and direction of a physician.

(emphasis added). Appellant contends respondent South Carolina Department of Revenue (Department) improperly promulgated regulations that do not conform to § 12-36-2120(28)(b) because the regulations allow the sales tax exemption only for diabetic supplies sold pursuant to a prescription or written authorization, which appellant claims is not required under the statute.

The first regulation challenged is the former version of 27 S.C. Reg. 117-174.257 which read:

> Medicines, prosthetic devices and hypodermic needles, insulin, alcohol swabs and blood sugar testing strips sold to diabetics to be exempted from the tax must be sold on prescription, in writing, by a medical doctor, a dentist, an osteopath or a chiropodist.

(emphasis added). Although the regulation required a "prescription," in practice Department required only some form of written medical authorization to support the claimed sales tax exemption. The regulation was subsequently changed to conform to this practice and effective June 2001 was amended to provide:

> Hypodermic needles, insulin, alcohol swabs, blood sugar testing strips, monolet lancets, dextrometer supplies, blood glucose meters, and other similar diabetic supplies sold to diabetics are only exempt if sold pursuant to the written authorization and direction of a physician.

(emphasis added). Finally, the regulation was recodified as 27 S.C. Reg. 117-332 with no change in substance.

Appellant sought damages from Department's promulgation of these regulations and alleged several causes of action including a violation of S.C. Code Ann. § 12-58-170 (2000), which was formerly part of the South Carolina Taxpayers' Bill of Rights.[1] This section provided:

> (A) If any employee of the department wilfully, recklessly, and intentionally disregards department published procedures, a taxpayer aggrieved by that action may bring an action for damages against the State of South

[1]This section was repealed effective June 9, 2005, after this action was filed.

Carolina in Circuit Court but not against any state employee.

(B) In action *(sic)* brought under subsection (A), upon a finding of liability on the part of the State of South Carolina, the State is liable to the plaintiff in an amount equal to the sum of actual and direct monetary damages sustained by the plaintiff as a result of the actions or omissions.

(emphasis added). The trial court found this section did not apply to Department's promulgation of regulations and granted Department's motion for summary judgment. Further, the trial court dismissed appellant's causes of action seeking disgorgement of tax revenue on the ground appellant had failed to exhaust administrative remedies as provided by the Revenue Procedures Act.

ISSUES

1. Was appellant's cause of action under § 12-58-170 properly dismissed?

2. Was injunctive or mandamus relief properly denied?

3. Must appellant exhaust administrative remedies under the Revenue Procedures Act?

4. Should a declaratory judgment action be allowed under § 1-23-150?

DISCUSSION

1. Section 12-58-170

As noted above, Section 12-58-170 provided in pertinent part that a taxpayer could bring a cause of action for damages when an employee of Department "wilfully, recklessly, and intentionally disregards department published procedures." Appellant contends

Department wilfully, recklessly, and intentionally disregarded the diabetic supplies sales tax exemption statute, § 12-36-2120(28)(b), when Department promulgated its regulations.

The trial court ruled that appellant's complaint failed to state a cause of action under § 12-58-170 because this section specifically refers to "disregard[ing] department published procedures" which does not include the alleged disregard of a statute. We agree.

Until repealed, § 12-58-170 was part of Chapter 58, Title 12, entitled the South Carolina Taxpayers' Bill of Rights. This chapter deals with Department's treatment of taxpayers in the context of taxpayer complaints (§12-58-30), tax information and education (§ 12-58-50 & -60), collection of taxes (§ 12-58-70, -90, -100, -110), and liens (§ 12-58-120 through -160). A plain reading of § 12-58-170 supports the trial court's ruling. *See* Buist v. Huggins, 367 S.C. 268, 625 S.E.2d 636 (2006) (words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation). Statutes, which are enacted by the General Assembly, are not published by Department; nor do statewide statutes qualify as "department procedures." Department procedures are essentially Department's directives to its employees regarding internal procedures.

Further, we find the trial court properly ruled that the promulgation of a regulation cannot be accomplished by the willful, reckless, or intentional act of a Department employee. As provided by statute, regulations are promulgated only upon notice and public hearing, then submitted to the General Assembly for review and approval before enactment by the legislature. S.C. Code Ann. §§ 1- 23-110-120 (2005 & Supp. 2007).

Finally, appellant alleges Department employees violated Department published procedures regarding the promulgation of regulations. The subject of the procedures referenced by appellant includes the dissemination of policy documents to the public and the use of various documents such as revenue rulings, revenue procedures,

private letter rulings, technical advice memoranda, and information letters. The trial court correctly concluded appellant has shown no violation of a Department procedure to support a cause of action under § 12-58-170.

2. Injunction or mandamus relief

The trial court denied appellant's request for injunctive or mandamus relief to enjoin the collection of sales tax on diabetic supplies. The court relied on the Revenue Procedures Act, S.C. Code Ann. § 12-60-60 (Supp. 2007), which provides:

> An action of a court or administrative law judge cannot stay or prevent the department or an officer of the State charged with a duty in the collection of taxes, from acting to collect a tax, whether or not the tax is legally due.

This section plainly provides that a court may not enjoin the collection of taxes. Accordingly, the trial court properly refused injunctive or mandamus relief as provided in § 12-60-60.

3. Failure to exhaust administrative remedies

Appellant's complaint includes causes of action for unjust enrichment and breach of constructive trust. He contends these are equitable causes of action that should not have been dismissed for failure to pursue administrative remedies under the Revenue Procedures Act. Because the relief sought in these causes of action is a disgorgement of tax monies collected, they are governed by the Revenue Procedures Act and are limited to the remedies provided therein as stated in S.C. Code Ann. § 12-60-80 (2005):

> (A) Except as provided in subsection (B),[2] there is no remedy other than those provided in this chapter in any

[2] (B) Notwithstanding subsection (A), an action for a declaratory judgment where the sole issue is whether a

case involving the illegal or wrongful collection of taxes, or attempt to collect taxes.

The trial court properly ruled that these causes of action are governed by the Revenue Procedures Act.

4. Declaratory judgment under § 1-23-150

Appellant's fifth cause of action is a request for a declaratory judgment that S.C. Reg. 117-332 exceeds Department's authority. Appellant contends it was error to dismiss this cause of action for failure to exhaust administrative remedies under the Revenue Procedures Act. We agree.

Section § 1-23-150 (2005) provides:

§ 1-23-150. Appeals contesting authority of agency to promulgate regulation.

(a) Any person may petition an agency in writing for a declaratory ruling as to the applicability of any regulation of the agency or the authority of the agency to promulgate a particular regulation. The agency shall, within thirty days after receipt of such petition, issue a declaratory ruling thereon.[3]

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statute is constitutional may be brought in circuit court. This exception does not include a claim that the statute is unconstitutional as applied to a person or a limited class or classes of persons.

[3]Appellant states he amended his complaint to allege this cause of action under § 1-23-150 after Department declined to "repeal" the regulation. It is clear from Department's opposition to this lawsuit that Department takes the position that the regulation is valid.

> (b) After compliance with the provisions of paragraph (a) of this section, any person affected by the provisions of any regulation of an agency may petition the Circuit Court for a declaratory judgment and/or injunctive relief if it is alleged that the regulation or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or that the regulation exceeds the regulatory authority of the agency. The agency shall be made a party to the action.

The trial court ruled the Revenue Procedures Act, rather than this section, applies because the Revenue Procedures Act is a more specific and more recently enacted law. *See* Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993) (generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation).

While it is correct that a more specific statute usually prevails, in this instance we conclude the Revenue Procedures Act, although more specific to cases regarding the collection of taxes, cannot apply because of the limitation on the authority of the Administrative Law Court to rule on the validity of a regulation. As we have stated:

> ALJs[4] are an agency of the executive branch of government and must follow the law as written until its constitutionally is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.

(emphasis added). Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). Although appellant is not challenging the constitutionality of the regulation, he *is* challenging its validity under state law. Because the Administrative Law Court is part of the executive branch, as stated in Video Gaming, it has no authority to rule on the facial validity of Reg. 117-332. Appellant therefore may pursue this issue as an action for

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[4]The judges of the Administrative Law Court were formerly referred to as Administrative Law Judges or "ALJ's."

declaratory judgment in circuit court under § 1-23-150.[5] Therefore, we reverse the trial court's dismissal of appellant's cause of action under § 1-23-150 and remand for a determination on the merits.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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

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[5] We note that § 12-60-80(C), which prohibits a class action, applies not only to administrative law cases but also to tax cases brought in circuit court. This section provides:

> Notwithstanding subsections (A) and (B), a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Judge Division or any court of law in this State, and the department, political subdivisions, or their instrumentalities may not be named or made a defendant in any other class action brought in this State.

Accordingly, this action may not be certified as a class action.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard Allen McDowell, Sr., Respondent.

Opinion No. 26499
Submitted April 25, 2008 – Filed June 2, 2008

DEFINITE SUSPENSION

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

Philip Christopher Smith, Jr., of Law Offices of Desa Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a public reprimand or the imposition of a definite suspension not to exceed two years. We accept the Agreement and impose a two year suspension from the practice of law. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

In June 2006, respondent was retained to represent Complainant A in a domestic matter. He received a partial retainer of $1,000. Subsequently, respondent learned that Complainant A had previously filed an action for divorce in Oklahoma but that the action had been set aside. Respondent represents he informed Complainant A that her situation was unique and the he would have to conduct extensive research in the matter.

During his representation of Complainant A, Complainant A was served with divorce papers from her husband in Oklahoma. Respondent represents he informed Complainant A that she needed to retain an attorney in Oklahoma to represent her in the Oklahoma action as he was not licensed to practice law in that state.

Respondent admits he failed to keep Complainant A reasonably informed about the status of her case. He further admits he failed to act diligently as he did not do any meaningful work on Complainant A's case during the five months in which he represented her. Respondent refunded Complainant A's entire retainer fee.

Matter II

Respondent closed loans on four properties on behalf of Complainant B who was the purchaser of the properties. Respondent failed to properly record the deed on one of the properties which resulted in Complainant B not receiving a tax notice and Complainant B paying $295.94 in late fees as a result of respondent's error. Respondent failed to comply with Complainant B's reasonable request for information as he did not supply a copy of the cancelled check submitted to the clerk's office which would have prevented Complainant B from incurring late penalty fees for delinquent taxes on the property. Respondent was not properly reconciling his trust

accounts and, as a result, did not discover the recording problem until contacted by the seller.

On two other property purchases, respondent used an incorrect address which resulted in Complainant B not receiving the tax notices. Complainant B discovered the problem when he went to the clerk's office to check the status of his tax notices.

Matter III

Respondent was retained by Complainant C for purposes of a domestic action. Complainant C was an out-of-state resident who met with respondent for the first time the day before her first court appearance. Respondent failed to keep Complainant C reasonably informed regarding the status of her case and her obligations to make child support payments. Respondent failed to return Complainant C's telephone calls and to comply with reasonable requests for information.

Matter IV

In November or December 2006, respondent was retained by Complainant D to represent Complainant D's son in a domestic matter. Respondent received $1,300 towards his fee of $1,500.

In May or June 2007, respondent was also retained to secure an official birth certificate for Complainant D. He received $500 from Complainant D as the entire fee in this matter.

Respondent failed to keep Complainant D and Complainant D's son reasonably informed regarding the status of their cases. Prior to concluding Complainant D and his son's cases, respondent closed his law firm and withdrew from the practice of law. Respondent failed to surrender papers and property to which Complainant D and his son were entitled and failed to refund Complainant D and his son any advance of fees and expenses that had not been earned or incurred.

Matter V

In August 2006, respondent was retained to represent Complainants E in a domestic matter. Respondent was paid a $3,000 retainer. Respondent informed the Complainants that he would send a schedule of fees, a copy of his contract, and a status report within thirty (30) days. He also informed the Complainants that he would provide a final disposition notice and a detailed bill at the conclusion of their case.

Respondent failed to keep Complainants E reasonably informed about the status of their case. He failed to promptly comply with reasonable requests for information by the Complainants and failed to provide them with documents as promised.

Prior to concluding Complainants' case, respondent closed his law firm and withdrew from the practice of law. He failed to give Complainants E reasonable notice of his intentions to withdraw from their case, failed to surrender papers and property to which they were entitled, and failed to refund any advance payments of fees or expenses that had not been earned or incurred by respondent.

Matter VI

In June 2006, Complainant F retained respondent following a judgment discontinuing her child support for her 18-year-old daughter who was in college. Respondent was paid $1,000 to represent Complainant F in the action.

Respondent failed to keep Complainant F reasonably informed regarding the status of her case and failed to return most of Complainant F's telephone calls. Complainant F did contact respondent in October 2006. At that time, respondent informed her that he was unable to effect service on the opposing party. Complainant F had her co-worker pick up the summons from respondent and the co-worker was able to effect service on the opposing party.

Complainant F received a summons to appear in court in Richland County. Complainant F called respondent to inform him that both she and the opposing party resided in Lexington County. Complainant F took vacation time from work in order to attend the hearing. On the morning of the hearing, respondent's office contacted Complainant F and informed her that the hearing was cancelled and would be rescheduled in Lexington County.

Complainant F terminated respondent's services and demanded a refund of her money. She arranged a date and time to meet with respondent to obtain her files and a refund but when Complainant F arrived at respondent's office it was closed, locked, and dark. Respondent failed to surrender papers and property to which Complainant F was entitled and failed to refund Complainant F any advance payment of fees or expenses that had not been earned or incurred by respondent.

Matter VII

Respondent was retained to represent Complainant G in a domestic matter. He received a total of $6,000 as his fee. Respondent informed Complainant G that he would bill at the rate of $125.00/hour.

Respondent failed to keep Complainant G reasonably informed regarding the status of the case. He failed to comply with Complainant G's request for information and failed to render a full accounting regarding Complainant G's funds in spite of Complainant G's requests for the information. Respondent failed to surrender papers and property to which Complainant G was entitled and failed to refund to Complainant G any advance payments of fees or expenses that had not been earned or incurred by respondent.

Matter VIII

Respondent was retained through pre-paid legal services to represent Complainant H in a property dispute matter. Respondent received a $1,000 retainer.

Respondent failed to keep Complainant H reasonably informed regarding the status of her case. Prior to concluding the case, respondent closed his office and withdrew from the practice of law. He failed to give Complainant H reasonable notice of his intentions to withdraw from Complainant H's case, failed to surrender papers and property to which Complainant H was entitled, and failed to refund Complainant H any advance payments of fees or expenses that had not been earned or incurred by respondent.

Matter IX

Complainant I retained respondent to seek legal guardianship for Complainant I's father. Prior to concluding Complainant I's case, respondent closed his law firm and withdrew from the practice of law. Respondent failed to give Complainant I reasonable notice of his intention to withdraw from Complainant I's case, failed to surrender papers and property to which Complainant I was entitled, and failed to refund Complaint I any advance payments of fees or expenses that had not been earned or incurred by respondent.

Matter X

Respondent was retained to assist Complainant J in an adoption matter. Prior to concluding the matter, respondent closed his law firm and withdrew from the practice of law. Respondent failed to give Complainant J reasonable notice of his intention to withdraw from Complainant J's case, failed to surrender papers and property to which Complainant J was entitled, and failed to refund Complaint J any advance payments of fees or expenses that had not been earned or incurred by respondent.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, 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). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 1.16(d) (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect client interests, such as giving reasonable notice to client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance of payment of fees or expenses that has not been earned or incurred); and Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a two year definite suspension from the practice of law. 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.

DEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Patrick James Thomas Kelley, Respondent.

Opinion No. 26500
Submitted April 28, 2008 – Filed June 2, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Stephanie Nichole Weissenstein, of Law Offices of Desa Ballard, of West Columbia, for respondent.

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

FACTS

Respondent was retained to represent the Complainant's live-in boyfriend based upon an incident report alleging the boyfriend had assaulted the Complainant. Later, the Complainant and her

boyfriend hired respondent to represent them in a civil matter involving a stop payment order on a check. Respondent represents that he explained the existence of a conflict in representing the boyfriend in the criminal matter with the Complainant as the victim and the Complainant and her boyfriend in the civil matter.[1]

At some point, respondent discovered from the Complainant that her boyfriend had altered the check involved in the civil matter and, further, that he had diverted the money for his own benefit. Even after making these discoveries, respondent continued to represent the Complainant and her boyfriend in the civil matter. Respondent now recognizes that he should have immediately withdrawn from his representation of both clients after he learned that the boyfriend had altered the check and diverted the money.

Respondent failed to appear at the hearing in the civil matter. Respondent represents that, prior to the hearing, the Complainant's boyfriend represented to him that the parties were able to reach an agreement without involvement of the lawyers.[2] Further, respondent represents that, after receiving this information, he attempted to contact opposing counsel but was unable to speak to him. Based upon the Complainant's boyfriend's representations, respondent failed to appear at the hearing. A civil judgment was entered against the Complainant and her boyfriend.

Respondent filed a motion to set aside the default judgment but failed to diligently pursue the matter. As a result, the matter was closed with a judgment against the Complainant.

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[1] Respondent did not obtain a written conflict waiver when undertaking representation in the civil matter. At the time, the Rules of Professional Conduct did not require a written waiver.

[2] Respondent admits he failed to communicate with the Complainant concerning this representation but asserts he believed the boyfriend had notified her about the agreement.

Respondent continued to represent the boyfriend in the criminal matter in which the Complainant was the victim and arranged a plea for the boyfriend. Respondent asked the Complainant to sign an affidavit indicating her desire to have the criminal charges against her boyfriend dismissed and she did so. The boyfriend was allowed to plead guilty to a lesser offense of misdemeanor criminal domestic violence and was sentenced to time served.

Respondent has been fully cooperative with ODC in its investigation of this matter. Respondent represents that his conduct in this matter is not indicative of his usual practice of law.

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); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and explain matter to client to extent reasonably necessary to permit client to make informed decision); Rule 1.7 (lawyer shall not represent client if representation may be materially limited by lawyer's responsibility to another client unless lawyer reasonably believes representation will not be adversely affected); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct prejudicial to administration of justice).[3] Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(1)(5) (it shall be ground for

[3] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

discipline for lawyer to engage in conduct tending to pollute administration of justice or bring courts or legal profession into disrepute); and 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken upon admission to practice law in this state).

CONCLUSION

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Aiken County Magistrate and
Burnettown Municipal Court
Judge Charles T. Carter, Respondent.

Opinion No. 26501
Submitted April 24, 2008 – Filed June 2, 2008

PUBLIC REPRIMAND

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

Kristina M. Anderson, of Anderson & Anderson, LLP, of Aiken, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] The facts as set forth in the Agreement are as follows.

[1] On or about June 12, 2007, respondent resigned from judicial office. Since he no longer holds judicial office, a public

FACTS

In early January 2007, respondent was arrested and charged with two crimes: 1) "Misconduct in Office. Violation Section 8-1-0080/Common Law" and 2) receiving information in his official capacity concerning the unlawful sexual misconduct of a county employee and failing to report the information to law enforcement as required by S.C. Code Ann. § 44-23-1150(E) (Supp. 2007).[2] On or about March 15, 2007, respondent was indicted on both charges in the Aiken County General Sessions Court. In particular, the first indictment for misconduct in office alleged respondent had committed acts of fraud and corruption while acting in his official capacity as a judge and that he had disregarded his duties to enforce the law of the State in violation of S.C. Code Ann. § 8-1-80 (Supp. 2007). The second indictment alleged respondent had received information in his professional capacity regarding the sexual misconduct of a county employee with a South Carolina Department of Corrections inmate and then failed to report the information to the appropriate law enforcement authority in violation of S.C. Code Ann. § 44-23-1150(E) (Supp. 2007).

On or about January 30, 2008, respondent entered an Alford plea to misconduct in office and the solicitor entered a nolle prosequi on the remaining charge. Respondent was sentenced on the same day.

Respondent admits the crime to which he pled guilty constitutes a "serious crime" as defined by Rule 2(aa), RJDE, Rule 502, SCACR, in that it adversely reflected upon his honesty, trustworthiness, and fitness to hold judicial office, and interfered with

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reprimand is the most severe sanction the Court can impose. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

[2] On January 10, 2007, the Court placed respondent on interim suspension.

the administration of justice. Respondent further admits he engaged in inappropriate conduct with a county employee.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 4A(1) (judge shall conduct all extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge); Canon 4A(2) (judge shall conduct all extra-judicial activities so they do not demean the judicial office); and Canon 4A(3) (judge shall conduct all extra-judicial activities so that they do not interfere with proper performance of judicial duties). Respondent also admits his misconduct constitutes grounds for discipline pursuant to Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct), Rule 7(a)(3) (it shall be ground for discipline for judge to be convicted of serious crime), and Rule 7(a)(9) (it shall be ground for discipline for judge to violate the Oath of Office contained in Rule 502.1, SCACR) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall not seek or accept any judicial position whatsoever in this State without the express written permission of this Court after due service on ODC of any petition

seeking the Court's authorization.[3] Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

[3] As stated in the agreement, if he elects in the future to request the Court for permission to seek or accept a judicial position, respondent irrevocably consents to allow ODC to disclose to the Court any and all information contained in the on-the-record appearances made in this matter without any requirement for authenticating the testimony from the appearances. Further, respondent irrevocably waives any claim of confidentiality for purposes of disclosure of the on-the-record appearances.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ryan Corey Stradford, Respondent,

v.

Bettina Rashunda Wilson, Appellant.

Appeal From Lancaster County
Brian M. Gibbons, Family Court Judge

Opinion No. 4393
Submitted March 5, 2008 – Filed May 20, 2008

REVERSED

Coreen B. Khoury, of Lancaster, for Appellant.

Govan T. Myers, III, of Lancaster, for Respondent.

HEARN, C.J.: Bettina Wilson (Mother) appeals the family court's order changing her child's surname from Wilson to Stradford, the surname of

the child's father, Ryan Stradford (Father). Finding Father failed to carry his burden of proving the name change was in child's best interest, we reverse.[1]

FACTS

Jane Doe Wilson (Child) was born to Mother and Father on March 14, 2004. Mother and Father never married,[2] and since birth, Child has lived with Mother, Mother's sister, Child's half-sister, and Child's maternal grandmother in the grandmother's home. Father lives in the same town with his mother in her home.

In April 2005, Father filed a complaint seeking to establish his paternity and requesting liberal visitation. Father thereafter amended his complaint seeking to change Child's name to Stradford. In October 2005, the parties informed the court they had reached an agreement on all issues, except changing Child's name. Accordingly, the family court entered an order finding Father was Child's biological father, ordering the birth certificate to reflect Father's paternity, and establishing a visitation schedule; however, the court continued Father's request to change Child's name pending the appointment of a guardian ad litem (GAL).

At the March 13, 2007 trial, Father testified he wanted Child to have his surname because he planned on supporting her the rest of his life. The paternal grandmother also testified Child should have Father's surname because "[w]e have a family tradition, a long family tradition." Mother, on the other hand, testified Child's surname should remain Wilson because Child lives with the Wilson family, Child is close to her half-sister, and "both of them know now that their last name is Wilson." Mother's half-sister testified to the difficulty she had experienced living in a household with a different surname from that of other family members.

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[1] We decide this case without oral argument, pursuant to the parties' request and Rule 215, SCACR.

[2] Father has a second daughter, who lives with her mother and is two years younger than Child. Mother has a second daughter, who lives with her and is a year older than Child.

The GAL recommended changing Child's surname to either Stradford or Wilson-Stradford, stating: "I think it's important that this child have the recognition that she is her father's child and that she does have that strong relationship with both families." The court stated from the bench it would grant Father's petition to change Child's surname and issued a written order on April 15, 2007. This appeal followed.

LAW/ANALYSIS

Mother argues the family court erred in granting Father's petition to change Child's surname from Wilson to Stradford because Father failed to prove changing the name was in Child's best interest. We agree.

When one parent petitions the court to remove the other parent's surname from the parties' minor child, each parent has a protectible interest in receiving notice and being heard on the petition. Ex parte Stull, 276 S.C. 512, 513, 280 S.E.2d 209, 210 (1981). However, "the parent seeking to change the child's surname has the burden of proving that the change will further the child's best interests." Mazzone v. Miles, 341 S.C. 203, 210, 532 S.E.2d 890, 893 (Ct. App. 2000).

In Mazzone, the family court granted the father's request to change the name of the parties' young child from mother's surname to his, in which it found: the child's parents had never married; the child had been in the mother's custody since birth; the father, mother, and child had lived together for two years; the father had a close relationship with the child; and the child was comfortable with her present name. Mazzone, 341 S.C. 203. 532 S.E.2d 890. On appeal, this court reversed, and identified nine factors to consider in determining whether changing a child's surname is in the child's best interest, including: (1) the length of time the child has used the present surname; (2) the effect of the proposed change on the preservation and development of the child's relationship with each parent; (3) the identification of the child as part of a family unit; (4) the wishes of each parent; (5) the reason the petitioning parent states for the proposed change; (6) the motive of the petitioning parent and the possibility the child's use of a different name will cause insecurity or a lack of identity; (7) the difficulty,

harassment, or embarrassment the child may experience if the child bears a surname different from that of the custodial parent; (8) if the child is of age and maturity to express a meaningful preference, the child's preference; and (9) the degree of community respect associated with the present and proposed surnames. Id. at 210-11, 532 S.E.2d at 893-94. The court explained:

> [B]oth parents have an equal interest in the child bearing their respective surname . . . While it may be a custom to name a child after the father, giving greater weight to the father's interest fails to consider that, where the parents have never been married, the mother has at least an equal interest in having the child bear the maternal surname. In these times of parental equality, arguing that the child of unmarried parents should bear the paternal surname based on custom is another way of arguing that it is permissible to discriminate because the discrimination has been endured for many years.

Id. at 211-12, 532 S.E.2d at 894 (internal citations omitted).

In this case, the family court's order recognized that Mazzone controlled and noted the applicable burden of proof. Although the order lists the Mazzone factors and states the court considered each factor, it does not contain specific findings pursuant to Mazzone. Applying the Mazzone factors to this case, as we are permitted to do under the broad scope of review accorded to us, we make the following findings based on the preponderance of evidence: (1) Child, who was three years old at the time of the hearing, is known in the community by the Wilson name; (2) Child already is aware her name is Wilson; (3) although we agree changing Child's name could help develop her relationship with Father's family, it also could have a negative impact on Child's continuing relationship with her custodial family; (4) Child's relationship with Father's family will develop primarily through regular participation in the visitation granted by the court; (5) Father's basis for changing Child's name is insufficient; and (6) Child could experience embarrassment if her name differs from that of her custodial family.

Accordingly, we reverse the order of the family court changing Child's surname to Wilson. The decision of the family court is

REVERSED.

PIEPER, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beaulah Platt, as guardian for Asia Platt, a minor under the age of fourteen years, as Personal Representative of the Estate of Valerie Marie Platt, deceased, and as Personal Representative of the Estate of William Leroy Platt, deceased, **Appellant,**

v.

CSX Transportation, Inc., and South Carolina Department of Transportation, **Defendants,**

of whom South Carolina Department of Transportation is **Respondent.**

Appeal From Berkeley County
Roger M. Young, Circuit Court Judge

Opinion No. 4394
Heard May 6, 2008 – Filed May 20, 2008

AFFIRMED

David L. Savage, of Charleston; Ronnie Lanier Crosby, of Hampton, for Appellant.

Jonathan J. Anderson, Lisa A. Reynolds, and Eric M. Johnsen, all of Charleston, for Respondent.

ANDERSON, J.: Beaulah Platt, as guardian of Asia Platt and as personal representative of the estates of Valerie Platt and William Leroy Platt, appeals the trial court's grant of summary judgment in favor of the South Carolina Department of Transportation (Department). Platt contends: (1) the Department had a duty to protect the public from the dangerous condition created by a malfunctioning railroad warning device; (2) the trial court improperly held the Department satisfied its duty by informing CSX Transportation, Inc. (CSX) of the malfunctioning signals; and (3) the Department's negligence in failing to maintain the traffic signals in compliance with the signal plans was a proximate cause of the collision. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

On June 19, 1999, William Corley was driving Valerie Platt, Asia Platt, and William Corley Jr., in his automobile on Red Bank Road toward Highway 52 in Goose Creek, South Carolina.[1] Red Bank Road intersects both Highway 52 and a CSX railroad track, which are parallel to one another. In the direction Corley was traveling, he would cross over the railroad tracks before entering the Red Bank Road and Highway 52 intersection. There were railroad crossing arms and warning lights approximately two car lengths on either side of the railroad tracks.

As Corley approached the intersection of Red Bank Road and Highway 52, traffic was stopped at the traffic signal. While Corley waited, the railroad track crossing arms and warning lights activated and lowered in front of his

[1] William Corley and Valerie Platt considered themselves to be common law married. Asia Platt and William Corley Jr., were their two children.

vehicle. A train did not pass, the crossing arms lifted, and Corley drove forward. Soon thereafter, the crossing arms again lowered, placing Corley's vehicle between the crossing arms and the railroad tracks. Testimony differs regarding Corley's actions at this point, but it appears Corley backed up at least once to ensure his vehicle was clear from the tracks. At least one vehicle was in front of Corley's but on the other side of the tracks between the tracks and the stop light at Highway 52. Prior to the train's arrival, no vehicles blocked Corley's forward progress to the intersection. Corley drove forward and was struck by an oncoming CSX train. Asia Platt was the sole survivor in the vehicle, and has since been cared for by her maternal grandmother, Beaulah Platt.

Beaulah Platt, as the guardian for Asia Platt and personal representative of the estates of Valerie and William Platt, filed a negligence action against CSX and the Department. Beaulah Platt and CSX reached a settlement agreement prior to oral argument on the Department's summary judgment motion. The trial court granted the Department's summary judgment motion, finding: (1) the Department fulfilled its duty by reporting defects in the warning signals to CSX; (2) the Department had no duty to make repairs of the crossing arms; (3) the Code of Federal Regulations vests only CSX with the duty to maintain crossing signals; and (4) the proximate cause of the collision was a malfunction of the crossing arms and not the Department's traffic signals.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007); Bennett v. Investors Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006); see Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); Medical Univ. of S.C. v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Hackworth v. Greenville County, 371 S.C. 99, 102, 637 S.E.2d 320, 322 (Ct. App. 2006); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." BPS, 362 S.C. at 325, 608 S.E.2d at 159; see also Higgins v. Medical Univ. of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (a trial judge considering a motion for summary judgment must consider all documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Catawba Indian Tribe of South Carolina v. The State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

Summary judgment is not appropriate where further inquiry into where further inquiry into the facts is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). Even when there is no dispute as to evidentiary facts, summary judgment is not appropriate if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. BPS, 362 S.C. at 325, 608 S.E.2d at 159.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)); Moore v. Weinberg, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007); Mulherin-Howell v. Cobb, 362 S.C. 588, 596-97, 608 S.E.2d 587, 592 (Ct. App. 2005). Because summary judgment is a drastic remedy, summary judgment should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); B & B Liquors, Inc. v. O' Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

LAW/ANALYSIS

I. Public Duty Rule

Platt avers the Department had a duty to protect the public from a dangerous condition created by the malfunctioning warning device. We disagree.

The public duty rule was originally adopted by the South Carolina Supreme Court in Parker v. Brown, 195 S.C. 35, 52, 10 S.E.2d 625, 632 (1940):

> The law necessarily grants certain discretion to its officers in handling the public business. In one instance it may be wise for a public officer to pursue one course, in another instance, another course. Those charged with protecting the public interest should view that interest as supreme, should consider what is best for the public, and should be free at all times to prosecute the course that appears to be in the public interest . . . . It is well settled that an individual has no right of action against a public officer for breach of a duty owing to the public only,

> even though such individual be specially injured thereby. Where a duty is owing to the public only, an officer is not liable to an individual who may have been incidentally injured by his failure to perform it.

Under South Carolina's public duty doctrine, public officials are not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than to anyone individually. Tanner v. Florence Co. Treasurer, 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999); Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991); Arthurs v. Aiken County, 338 S.C. 253, 262, 525 S.E.2d 542, 546 (Ct. App. 1999) (Arthurs I) aff'd as modified, 346 S.C. 97, 551 S.E.2d 579 (2001) (Arthurs II).

The public duty rule is not a separate legal doctrine. Arthurs I, 338 S.C. at 262, 525 S.E.2d at 546; Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 105, 374 S.E.2d 910, 915 (Ct. App. 1988). The public duty rule is a special application of the broader principle that an action for negligence based upon an alleged violation of a statute cannot be maintained if the statute was enacted for a purpose other than preventing the complained of injury. Arthurs I, 338 S.C. at 262, 525 S.E.2d at 546; Rayfield, 297 S.C. at 105, 374 S.E.2d at 915. The rule applies to the special case of statutes which create or define the duties of a public office. Rayfield, 297 S.C. at 105, 374 S.E.2d at 915.

An essential element in a negligence cause of action is the existence of a legal duty of care owed by the defendant to the plaintiff. Wyatt v. Fowler, 326 S.C. 97, 101, 484 S.E.2d 590, 592 (1997); Rogers v. S.C. Dep't of Parole and Cmty. Corr., 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). Without such a duty, there can be no actionable negligence. Rogers, 320 S.C. at 255, 464 S.E.2d at 592. To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. Tanner, 336 S.C. at 561, 521 S.E.2d at 158. The court must determine, as a matter of law, whether the law recognizes a particular duty. Steinke v. S.C. Dep't of Labor, Licensing &

Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); see also Rogers v. Atl. Coast Line R.R., 222 S.C. 66, 71 S.E.2d 585 (1952) (whether defendant is under legal duty to plaintiff is question of law for court); Araujo v. S. Bell Tel. and Tel. Co., 291 S.C. 54, 351 S.E.2d 908 (Ct. App. 1986) (question of whether defendant owes duty, the breach of which may constitute negligence, is a question of law, not of fact).

Ordinarily, there is no common law duty to act. Arthurs I, 338 S.C. at 264, 525 S.E.2d at 547. However, an affirmative legal duty may be created by statute, contract relationship, status, property interest, or some other special circumstance. Jensen, 304 S.C. at 199, 403 S.E.2d at 617. Many statutes impose an affirmative duty on public officials to perform certain acts. Arthurs I, 338 S.C. at 264, 525 S.E.2d at 547; Wells v. City of Lynchburg, 331 S.C. 296, 306, 501 S.E.2d 746, 752 (Ct. App. 1998). Normally, such officials enjoy immunity from a private cause of action under the public duty rule. Wells, 331 S.C. at 307, 501 S.E.2d at 752. This rule limits public officials' liability to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than an individual. Id. Thus, when the duty is owed to the public in general, the official is not liable to an individual who may have been incidentally injured by the failure to perform the duty. Id. An exception to the general rule against liability exists when a duty is owed to specific individuals rather than the public at large. Id.

The public duty rule "presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public." Arthurs I, 338 S.C. at 265, 525 S.E.2d at 548; Tanner, 336 S.C. at 562, 521 S.E.2d at 158; Wells, 331 S.C. at 308, 501 S.E.2d at 752. Generally, such statutes create no duty of care towards individual members of the public. Arthurs I, 338 S.C. at 265, 525 S.E.2d at 548. An exception is recognized where the plaintiff can establish the defendant owed a special duty of care to the plaintiff. Bellamy v. Brown, 305 S.C. 291, 294, 408 S.E.2d 219, 221 (1991); Arthurs I, 338 S.C. at 265, 525 S.E.2d at 548; Wells, 331 S.C. at 308, 501 S.E.2d at 752.

To determine if a special duty is owed to the plaintiff, the court looks to the statute and the facts of the particular case. Arthurs I, 338 S.C. at 265, 525 S.E.2d at 548. In Rayfield, 297 S.C. at 106, 374 S.E.2d at 916, this court articulated a six-part test for determining whether a statute creates a special duty to an individual member of the public:

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

See also Jensen, 304 S.C. at 200, 403 S.E.2d at 617 (wherein the supreme court adopted the Rayfield six step special duty analysis as an exception to the public duty rule). A plaintiff may prevail against a public duty defense if the statute not only concerns the duties of a public office, but has the essential purpose of protecting identifiable individuals from a particular kind of harm. Arthurs I, 338 S.C. at 265, 525 S.E.2d at 547-48. In such cases, the statute creates a special duty which may give rise to a negligence suit against an officer for failure to perform his duties properly. Id.

South Carolina courts have been "reluctant to find special duties statutorily imposed." Tanner, 336 S.C. at 562, 521 S.E.2d at 158. See, e.g., Brady Dev. Co. v. Town of Hilton Head Island, 312 S.C. 73, 439 S.E.2d 266 (1993) (holding city owed lot purchaser no special duty of care in issuing development permit under municipal development standards ordinance, and thus, could not be held liable to purchaser for alleged negligence in issuing permit to developer); Bellamy, 305 S.C. at 291, 408 S.E.2d at 219 (finding statutorily prescribed exceptions to the disclosure requirements of the State's

Freedom of Information Act did not establish a duty to maintain confidentiality); Wells, 331 S.C. at 296, 501 S.E.2d at 746 (ruling plaintiff could not sue city for failing to maintain fire hydrants because suit was barred by a provision of the Tort Claims Act and city owed duty only to public generally); Summers v. Harrison Constr., 298 S.C. 451, 381 S.E.2d 493 (Ct. App. 1989) (concluding a State statute requiring officers who issue building permits to secure evidence that the builders and renovators of residences are licensed did not create a special, actionable duty to protect homeowners); Rayfield, 297 S.C. 95, 374 S.E.2d 910 (explaining a State statute requiring prison and parole officials to prepare adequate reports concerning parole candidates did not create a special duty to protect particular members of the public against crimes committed by released prisoners).

In Arthurs v. Aiken County, 346 S.C. 97, 551 S.E.2d 579 (2001), the South Carolina Supreme Court first considered the public duty rule and its interplay with the South Carolina Tort Claims Act (Tort Claims Act). See also Trousdell v. Cannon, 351 S.C. 636, 641, 572 S.E.2d 264, 266-67 (2002). Arthurs confirmed the continuing viability of the public duty rule and its compatibility with the Tort Claims Act, but clarified when the public duty rule can be properly raised. Trousdell, 351 S.C. at 641, 572 S.E.2d at 266-67. The Arthurs court stated, "[w]hen, and only when, the plaintiff relies upon a statute as creating the duty does a doctrine known as the 'public duty rule' come into play." Id. at 103, 551 S.E.2d at 582. In other words, when the plaintiff's negligence claim is founded upon a government entity's statutorily created duty, the question of "whether that duty will support the claim should be analyzed under the rule. On the other hand, where the duty relied upon is based upon the common law, . . . then the existence of that duty is analyzed as it would be were the defendant a private entity." Id. at 105, 551 S.E.2d at 583.

Platt urges this court to find the Department had a statutory duty to protect the public pursuant to section 57-5-10 of the South Carolina Code (2006) which provides: "The state highway system shall consist of a statewide system of connecting highways which shall be constructed by the Department of Transportation and which shall be maintained by the department in a safe and serviceable condition as state highways . . . ."

Because Platt's claim is based upon a statutorily created duty it must be analyzed under the public duty rule. Where, as here, the statutory duty is owed to the public as a whole, the "public duty rule" bars Platt from maintaining a negligence action against the Department. As a result, the public duty rule bars Platt's claims unless a special duty is owed by the Department.

Moreover, we find the Department did not owe a special duty of care to Asia Platt, Valerie Platt, and William Leroy Platt. From her brief, Platt contends the protected class is the "traveling public." However, this class is not found in the statute but rather is a post hoc class created in light of this tragic accident. S.C. Code Ann. § 57-5-10. Because the statute created no special duty from the Department to Asia Platt, Valerie Platt, and William Leroy Platt, the trial court properly granted the Department's summary judgment on the statutory duty claims.

II. Federal Preemption

Platt maintains the trial court erred in finding the Department satisfied its duty to report defects in highway-rail grade crossing warning systems to CSX.

According to 49 U.S.C.A. § 20106 (West 2007), applicable federal regulations may pre-empt any state "law, rule, regulation, order, or standard relating to railroad safety."[2] Thus, the issue before the Court is whether the

[2] In August 2007, Congress amended § 20106 adding the following language:

> (b) Clarification regarding State law causes of action.—
>
> (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--
>
> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland

Secretary of Transportation (Secretary) has issued regulations covering the same subject matter as South Carolina law pertaining to malfunctioning crossing arms and false activations.

Where a state statute conflicts with, or frustrates, federal law, the former must give way. U.S. Const., Art. VI, cl. 2; Maryland v. Louisiana, 451 U.S. 725, 746 (1981). "In the interest of avoiding unintended encroachment on the authority of the states, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993). Thus, pre-emption will not lie unless it is "the clear and manifest purpose of Congress." Id.; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. Easterwood, 507 U.S. at 644; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, (1983). If the statute contains an express pre-emption clause, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." Easterwood, 507 U.S. at 644.

Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.--Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

In 1970, Congress enacted the Federal Railroad Safety Act (FRSA) "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C.A § 20101 (West 2007). The FRSA grants the Secretary the authority to "prescribe regulations and issue orders for every area of railroad safety," 49 U.S.C.A. § 20103(a) (West 2007), and directs the Secretary to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem." 49 U.S.C.A. § 20134(a) (West 2007). The FRSA also contains an express pre-emption provision, which articulates:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C.A. § 20106; see also Norfolk Southern Ry. Co. v. Shanklin, 529 U.S. 344, 348 (2000).

"Three years after passing the FRSA, Congress enacted the Highway Safety Act of 1973, § 203, 87 Stat. 283, which, among other things, created the Federal Railway-Highway Crossings Program" (Crossings Program). Shanklin, 529 U.S. at 348; see 23 U.S.C.A § 130 (West 2007). The Crossings Program makes funds available to states for the "cost of construction of projects for the elimination of hazards of railway-highway crossings." 23 U.S.C.A. § 130(a). To participate in the Crossings Program, all states must "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C.A. § 130(d). That schedule must, "[a]t a minimum, . . . provide signs for all railway-highway crossings." Id.

One regulation promulgated by the Secretary, through the Federal Highway Administration (FHWA), addresses the adequacy of warning

devices installed under the Crossings Program. 23 C.F.R. § 646.214(b). According to section 646.214(b)(3), adequate warning devices "on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals." Because these regulations "establish requirements as to the installation of particular warning devices . . . when they are applicable, state tort law is pre-empted." Shanklin, 529 U.S. at 353.

Additionally, the Secretary, through the Federal Railroad Administration (FRA), has promulgated several regulations for the design and installation of crossing warning devices and other areas of railroad safety. These regulations include additional preemption provisions:

> Under 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and that does not impose an unreasonable burden on interstate commerce.

49 C.F.R. § 213.2.

In CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993), the United States Supreme Court addressed the pre-emptive effect of the FHWA's regulations implementing the Crossings Program. The Easterwood court explained the language of the FRSA's pre-emption provision dictates that, to pre-empt state law, the federal regulation must "cover" the same subject matter, and not merely "'touch upon' or 'relate to' that subject matter." Id., at 664; see also 49 U.S.C.A. § 20106 (West 2007). Thus, "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Easterwood, at 664.

In Easterwood, the Court concluded a wife's wrongful death action alleging a railroad company was negligent under Georgia law for failing to maintain adequate warning devices at a crossing was not pre-empted because the warning devices for which federal funds had been obtained were never actually installed at the crossing where the accident occurred. 807 U.S. at 673. Conversely in Shanklin, the United States Supreme Court found state law tort claims for inadequacy of warning devices were pre-empted when the devices are actually installed with the use of federal funds. 529 U.S. at 359 (emphasis added).

The Code of Federal Regulations in addressing a warning system malfunction states:

> (a) Upon receipt of a credible report of a warning system malfunction, a railroad having maintenance responsibility for the warning system shall promptly investigate the report and determine the nature of the malfunction. The railroad shall take appropriate action as required by § 234.207. (b) Until repair or correction of the warning system is completed, the railroad shall provide alternative means of warning highway traffic and railroad employees in accordance with §§ 234.105, 234.106 or 234.107 of this part. (c) Nothing in this subpart requires repair of a warning system, if, acting in accordance with applicable State law, the railroad proceeds to discontinue or dismantle the warning system. However, until repair, correction, discontinuance, or dismantling of the warning system is completed, the railroad shall comply with this subpart to ensure the safety of the traveling public and railroad employees

49 C.F.R. § 234.103. Further, when a railroad company "receives a credible report of a false activation, a railroad having maintenance responsibility for the highway-rail grade crossing warning system shall promptly initiate efforts

to warn highway users and railroad employees at the crossing . . . ." 49 C.F.R. § 234.107.

Platt relies on South Carolina Code section 57-5-10 (2006), in alleging the Department was responsible for the malfunctioning signals. Section 57-5-10 provides, "The state highway system shall consist of a statewide system of connecting highways which shall be constructed by the Department of Transportation and which shall be maintained by the department in a safe and serviceable condition as state highways . . . ." In the case at hand, the warning devices in place at Red Bank Road were funded by the FHWA under the Crossings Program. Additionally, the regulations in place gave CSX maintenance responsibility once they received a credible report of a warning system malfunction or false activation. 49 C.F.R. § 234.103. As a result Platt's claims based on state law are pre-empted because the federal regulations subsume the state statute by imposing these duties upon CSX, not the Department.

III. Proximate Cause

Platt advances the Department's negligence in failing to maintain the traffic signals was a proximate cause of the collision. This issue fails on the merits.

> [P]roximate cause is the efficient, or direct, cause-the thing which brings about the injuries complained of. Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided.

Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). Proximate cause requires proof of both causation in fact and legal cause. Oliver v. S.C. Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's

negligence. Id. Legal cause is proved by establishing foreseeability. Id. "Foreseeability is determined by looking to the natural and probable consequences of the act complained of. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (citations omitted).

Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Kennedy v. Custom Ice Equip. Co., 271 S.C. 171, 246 S.E.2d 176 (1978); Small v. Pioneer Mach., Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997); see also Oliver, 309 S.C. at 313, 422 S.E.2d at 128 (holding the legal cause component of proximate cause is ordinarily question of fact for jury); Childers v. Gas Lines, Inc., 248 S.C. 316, 149 S.E.2d 761 (1966) (explicating questions of proximate cause are normally within province of jury). The particular facts and circumstances of each case determine whether the question of proximate cause should be decided by the court or by the jury. Newton v. S.C. Pub. Rys. Comm'n, 312 S.C. 107, 439 S.E.2d 285 (Ct. App. 1993), rev'd on other grounds, 319 S.C. 430, 462 S.E.2d 266 (1995). Only when the evidence is susceptible to only one inference does it become a matter of law for the court. Small, 329 S.C. at 464, 494 S.E.2d at 843.

In the case at bar, Platt failed to prove any negligent act or omission attributable to the Department is the proximate cause of the collision. The record contains no evidence but for a different signal sequence, there would not have been a collision. Several eyewitnesses testified no cars blocked Corley's ability to move forward in the direction of the traffic light in order to clear the tracks. Platt's own expert witness admitted he did not focus on the sequencing of the lights because the gate arm malfunction created the situation leading to the collision.

Witness Ann Turnball, who saw the collision from a nearby parking lot, described the accident:

A: … I noticed that the car did not move. The lights—the cars in front of him moved, they went forward through the green light. The light turned red. I noticed that the car stayed in that particular position. It didn't move anywhere. I noted a—I then noticed that the bar for the train—the lights came on flashing and I noticed the bar came down and the car was right in front of the bar. I remember hearing whistles and brakes…

…

Q: And he was between the tracks and the arm?

A: Yes, ma'am.

Q: Okay, can you—

A: I then noticed—well, my friend Holly and I had a—we were screaming. I know I was screaming, asking what in the world has that car doing, why wasn't it moving. I then noticed that the rear—the reverse lights on the car came on. And I screamed saying, what are you doing, go forward. I then noticed that the car tried to go forward and stopped.

And then the car's reverse lights came on again, the car tried to back up again and stopped. And then I noticed that the car tried to put all the gas it possibly could to go. And that's when the train hit them.

Holly Anne Daniels, who was in the company of Ann Turnball, testified:

Q: So the warning lights are going off and you looked up and you saw a four-door cream-colored car stopped with—to the extent where the lowering arm would have been behind him?

A: (Nodded.)

Q: Well, did you see the arm come down or was it already down when you noticed the cream-colored vehicle?

A: I remember seeing it start to come down. I don't know if I must have turned my eyes for a second or looked at Ann, because the next thing I remember looking at is when I saw it was down completely. That's when I notice the cream-colored car sitting there.

Q: Okay.

A: At that point Ann and I both got a little frantic, saying, why isn't he moving. There's a—you know, there's a car on the tracks, what's he doing? At that point I noticed when the light was green and there were no cars in front of him, I started to say, go forward, go forward, go forward. At that point I remember seeing his brake lights come on.

He went in reverse for just a second, and he stopped, went forward for second, he kind of jerked forward. The reverse lights came on again to go back. He stopped. And then at the last second I guess he tried to go forward. He, I assumed, gunned the car because the car started to swivel a little bit and you could bear the tires peeling. And at that point the train hit them.

Another witness in the same parking lot saw the train hit Corley's car. David Wayne Minor similarly stated the Corley moved his car forward and backwards before the collision. Minor was asked about his observations of any traffic ahead of Corley:

Q: Do you recollect whether there were any vehicles directly in front of that car that would have prohibited him from

going ahead and driving across the tracks and getting out of the way?

A: …[t]hey weren't close enough to the tracks to prohibit him from crossing the tracks in this forward movement. Nor do I recall a car being directly behind that gate.

Q: So there was nothing that would physically have obstructed him from going across the track and getting out of the way.

A: In my opinion there wasn't, no.

In his deposition, Platt's expert witness, Dr. Kenneth Heathington, offered a general description of traffic signal preemption. He acknowledged the railroad warning system and the traffic lights were interconnected. However, he admitted the focus of his investigation did not center on the traffic signals:

Q: And what's your understanding of how it worked?

A: Well, it was preempting. In other words, you would—and I didn't look at the traffic signal thing in detail, because I didn't think that's where the problem was, for that—for this particular accident, I thought it was a malfunction of the gate arms. …. Now, I didn't go through and check out exactly how all the signal cycles worked or anything of this nature, because to me, this particular accident was a function of the failure of the gate arm system itself….

Ergo, the trial court did not err in holding there was no genuine issue of material fact as to the proximate cause of the collision.

CONCLUSION

Based on the foregoing, the trial court's grant of summary judgment is

AFFIRMED.

HUFF, J., concurs.

KITTREDGE, J., concurs in a separate opinion.

KITTREDGE, J. (concurring): I concur in result. I write separately because I would affirm on the sole basis of federal preemption as to the claims against the South Carolina Department of Transportation in connection with the warning devices at the railway crossing. Even assuming the Department owed a duty under state law in connection with the railway crossing warning devices under the facts presented, any such state tort law duty imposed on the Department was preempted by federal law. Concerning the preemption issue, I join in the thorough analysis by Judge Anderson. This would serve as an alternative sustaining ground to the trial court's grant of summary judgment on the basis of a lack of proximate cause. I further find it appropriate to rely on the preemption ground as an alternative sustaining ground, for the issue was squarely before the trial court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (noting that appellate court has discretion to affirm on any ground appearing in the record, especially when issue has been vetted in the trial court). Concerning the trial court's ruling on proximate cause, I concur in the majority opinion's affirmance only insofar as the holding addresses the claims arising from the Department's purported negligence as to the adjacent, state-maintained traffic signal.