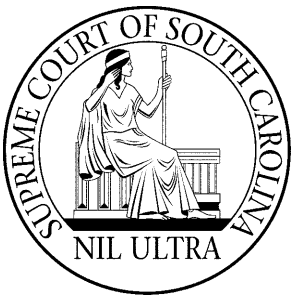

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
July 11, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of James Carl Miller, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
James R. Barber, Circuit Court Judge
Larry R. Patterson, Circuit Court Judge

Opinion No. 26995
Heard May 5, 2011 – Filed June 27, 2011

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R.J. Shupe, Assistant Attorney General William M. Blitch, Jr., of Columbia, for Respondent.

JUSTICE BEATTY: James Carl Miller (Miller) appealed the circuit court's order committing him to the custody of the Department of Mental Health under the Sexually Violent Predator Act (SVPA),[1] asserting the State failed to try the case within sixty days of the probable cause hearing as mandated by the SVPA. The Court of Appeals affirmed Miller's civil commitment on the grounds the State properly moved for a continuance, the State established that there was good cause for the delay, and that Miller was not substantially prejudiced by the continuance. In re Care & Treatment of Miller, 385 S.C. 539, 685 S.E.2d 619 (Ct. App. 2009). This Court granted Miller's petition for a writ of certiorari to review the decision of the Court of Appeals.

Although we affirm the decision of the Court of Appeals, we use this case as an opportunity to clarify certain procedural aspects of the SVPA. Specifically, we consider the appropriate remedy when the State fails to timely conduct a civil commitment trial within the time provisions mandated by the SVPA.

I. Factual/Procedural History

On September 6, 2001, Miller pled guilty to committing a lewd act on a child under the age of sixteen years and criminal domestic violence of a high

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[1] S.C. Code Ann. §§ 44-48-10 to -170 (2002 & Supp. 2009); see In re Care & Treatment of Chandler, 382 S.C. 250, 254, 676 S.E.2d 676, 678 (2009) ("The Act provides for the involuntary civil commitment of an individual deemed to be a sexually violent predator, which is defined under the Act as a person who (a) has been convicted of a sexually violent offense, and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if the person is not confined in a secure facility for long-term control, care, and treatment.").

We have cited to the 2009 supplement as several of the provisions of the SVPA were amended effective May 12, 2010. These amendments are not applicable to the instant case.

and aggravated nature (CDVHAN).[2] The circuit court sentenced Miller to fifteen years' imprisonment suspended upon the service of ten years' imprisonment with five years' probation for the lewd act charge and to ten years' imprisonment for CDVHAN. The sentences were to be served concurrently.

In May 2005, prior to his scheduled release date of December 1, 2005, the Department of Corrections referred Miller's case to the multidisciplinary team[3] to assess whether Miller constituted a "Sexually Violent Predator" (SVP) as defined by the SVPA. Having determined that Miller satisfied the statutory definition of an SVP, the multidisciplinary team referred the case to the prosecutor's review committee (committee).[4] In turn, the committee found probable cause existed to believe that Miller was an SVP.[5] Based on the committee's finding, the State petitioned the circuit court to conduct a hearing and make a judicial determination of probable cause.[6]

Although a probable cause hearing was initially scheduled for August 29, 2005, the circuit court did not conduct the hearing until November 3, 2005, due to a number of unforeseeable delays.[7] On that same day, the circuit court found probable cause and issued an Order for Evaluation.[8]

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[2] These charges arose out of a 1998 incident where the mother of a ten-month-old girl walked into a room and found Miller leaning over her child with his pants pulled down while the baby's diaper was off. When confronted, Miller punched the mother as he attempted to escape from the room.

[3] S.C. Code Ann. § 44-48-40(A)(1) (Supp. 2009).

[4] Id. § 44-48-50.

[5] Id. § 44-48-60.

[6] Id. § 44-48-70.

[7] During the three-month time period, the following delays occurred: (1) Miller's original, court-appointed counsel was relieved and a new attorney

Pursuant to section 44-48-90 of the SVPA, the circuit court had sixty days to conduct Miller's civil SVP trial.[9] During this time, Miller was to remain incarcerated.

On December 29, 2005, the State moved for a continuance past the sixty-day deadline pursuant to section 44-48-90. In its motion, the State noted that January 2, 2006 was a holiday, and the last day for a trial of Miller's case would be December 30, 2005. Additionally, the State claimed the court-ordered evaluation of Miller would not be completed until January 31, 2006 due to problems in obtaining information regarding Miller's prior North Carolina convictions.[10]

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appointed; and (2) there were several scheduling changes due to the untimely death of Circuit Court Judge Marc Westbrook.

[8] S.C. Code Ann. § 44-48-80(A) (Supp. 2009).

[9] Section 44-48-90 provides in relevant part:

> Within sixty days after the completion of a hearing held pursuant to Section 44-48-80, the court must conduct a trial to determine whether the person is a sexually violent predator. . . . The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and only if the respondent will not be substantially prejudiced.

S.C. Code Ann. § 44-48-90 (Supp. 2009).

[10] Miller pled guilty to taking indecent liberties with children arising from an offense involving a four-year-old girl that occurred on June 5, 1995 in North Carolina. As a result of the plea, Miller was sentenced to probation and ordered to participate in outpatient, sex offender treatment. After he violated the terms of his probation, Miller was incarcerated for two and a half months in 1996. In 1998, Miller fled North Carolina while still on probation and was considered a fugitive at the time of the South Carolina offense.

On January 13, 2006, the circuit court held a hearing on the State's motion for a continuance. At the beginning of the hearing, the State informed the court that the mental health evaluation had been received that morning and the State was ready to proceed to trial. The circuit court set the case for January 17, 2006. In response to this ruling, Miller's counsel referenced the sixty-day time limit of the SVPA and asked that the case be dismissed as the State had not established "good cause" for the motion and Miller had been substantially prejudiced by the delay. In support of this argument, counsel relied on In re Care & Treatment of Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001).[11] The court, however, did not rule on the request but stated that Miller needed to file a formal motion to dismiss.

On January 17, 2006, Miller filed a motion to dismiss pursuant to Rule 41 of the South Carolina Rules of Civil Procedure.[12] In the motion, counsel argued that the State's petition "should be dismissed with prejudice due to the State's failure to pursue the prosecution of this matter in a reasonably timely manner." Specifically, counsel claimed that the "case should have been tried on or before January 4, 2006 because [Miller's] continued incarceration beyond December 1, 2005 [was] certainly prejudicial." In opposition, the State claimed it had "good cause" for a continuance as the forensic psychiatrist, who conducted all of the state's SVP evaluations, was unable to complete the evaluation within the sixty-day time period.

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[11] In Matthews, this Court held the time period set forth in section 44-48-90 is not a jurisdictional requirement. Id. at 644, 550 S.E.2d at 314. Additionally, this Court stated that "[w]hen the sixty day period has passed, and no continuance has been granted," the proper procedure is to file a motion to dismiss. Id.

[12] Rule 41 provides in relevant part, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Rule 41(b), SCRCP.

Circuit Court Judge Larry R. Patterson conducted a hearing the same day the motion to dismiss was filed; however, the court did not rule on the motion but instead took it under advisement. On July 24, 2006, the court issued an order denying Miller's motion to dismiss. Although the court expressed its displeasure with the State's routine delay in initiating the SVP process, it found the State's interest in proceeding with the SVP trial outweighed the prejudice to Miller. Additionally, the court found there was no substantial prejudice to Miller.

On November 27, 2006, Circuit Court Judge James R. Barber, III conducted Miller's SVP jury trial. After the jury found Miller was an SVP, the court issued an Order of Commitment.[13]

Miller appealed to the Court of Appeals, arguing the circuit court erred in denying his motion to dismiss as the SVP trial was not held within the sixty-day statutory limit and a continuance had not been granted. Additionally, Miller claimed he was substantially prejudiced by the delay as he was faced with the following two choices: (1) he could have proceeded to trial on January 13, 2006 without having an independent psychiatric evaluation, thus, depriving him of an opportunity to prepare a defense; or (2) he could have requested a continuance in order to obtain the independent psychiatric evaluation, which would have resulted in his continued incarceration past his release date.

The Court of Appeals affirmed Miller's civil commitment. In re Care & Treatment of Miller, 385 S.C. 539, 685 S.E.2d 619 (Ct. App. 2009). Although the court recognized that the SVPA established a definite time-limit of sixty days, it found the State complied with Matthews by filing a motion for a continuance prior to the expiration of the sixty-day time period and noting why the case could not be tried within sixty days. Id. at 547, 685 S.E.2d at 623. The court also found the State established "good cause" for delay based on the following factors: (1) Miller's change of counsel delayed the case over thirty days; (2) a thorough report by the Department of Mental Health served the best interest of Miller as the report could have been in his favor; and (3) the grant of the State's motion for a continuance on January 13,

[13] S.C. Code Ann. § 44-48-100(A) (Supp. 2009).

2006 was only ten days after the expiration of the sixty-day window set on November 3, 2005. Id. at 548, 685 S.E.2d at 624. Furthermore, the court concluded that Miller was not substantially prejudiced by the grant of a continuance as it allowed him the time to "adequately prepare for his trial and develop a trial strategy." Id. at 549, 685 S.E.2d at 624.

Additionally, while recognizing that Miller was incarcerated past his release date, the court stated that it was "hesitant to set a bright line rule which would require reversal of an SVP's commitment when an individual is detained past his release date." Id.

Despite its holding, the court expressed concern that Miller's civil commitment trial did not occur until well over a year after the probable cause hearing was held. Although the court found the facts of the case did not warrant reversal, it emphasized that "SVP trials should take priority when scheduling a court's docket, precisely because of the potential for the prolonged incarceration evidenced in this case." Id. at 549, 685 S.E.2d at 624-25.

Following the denial of his petition for rehearing, Miller petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals. This Court granted Miller's petition for a writ of certiorari.

II. Discussion

A.

Miller contends the Court of Appeals erred in affirming the circuit court's denial of his motion to dismiss as the SVP trial was not held within sixty days after the probable cause determination and a continuance had not been granted. In support of this contention, Miller claims the Court of Appeals misapprehended the significance of the issue in this case, "which is that [he] was incarcerated in the county detention center for over a year with no criminal charges pending because he had served the sentence he received for his criminal charge in 2001." Accordingly, Miller asserts that he suffered substantial prejudice as a result of the State's motion for a continuance.

Miller also challenges the Court of Appeals' finding that the State established "good cause" for the delay. Specifically, Miller avers the State had "the information [it] claimed was the cause of the delay." Miller also contends the State acted in an "unfair manner" by informing the circuit court that it was ready to proceed for trial on the day it received the psychiatric evaluation as this forced him to choose between proceeding to trial without an independent evaluation or moving for a continuance, which in turn resulted in an extended period of incarceration.

B.

"The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007).

When reviewing a motion to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCP, an appellate court may reverse the trial court's decision upon an abuse of discretion. McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Kiriakides v. Sch. Dist. of Greenville County, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

C.

Cognizant of the applicable standard of review, we agree with the Court of Appeals that the circuit court did not abuse its discretion in denying Miller's motion to dismiss as the court properly applied the provisions of the SVPA with respect to the State's motion for a continuance.

Initially, we note the State adhered to the SVPA's time limits until the civil commitment trial. As to the civil commitment trial, the State filed the motion for a continuance prior to the expiration of the sixty-day time limit. Significantly, the statute does not require that a continuance be issued before the end of the sixty-day time period. See Matthews, 345 S.C. at 644, 550 S.E.2d at 314 ("It is not a significant burden on the State or the trial court to

require the issuance of a continuance, or even a notation in the record, indicating: (1) the trial cannot be held within sixty days; (2) good cause for the delay; and (3) the respondent will not suffer prejudice." (emphasis added)).

In ruling on the State's motion, the circuit court correctly took into consideration whether the State had established "good cause" for the delay and whether Miller would be "substantially prejudiced" by the delay. S.C. Code Ann. § 44-48-90 (Supp. 2009). We find the court's ruling regarding these two factors is supported by the evidence.

The State presented evidence establishing the unforeseeable delays in scheduling the civil commitment trial. At the time of Miller's case, there was only one court-appointed psychiatrist employed to handle all of the SVP evaluations. This, in and of itself, justified the State's delay and supported the circuit court's finding of "good cause." Moreover, as soon as the State received the psychiatric evaluation on January 13, 2006, approximately two weeks after the sixty-day time period, it informed the circuit court that it was ready to proceed to trial. Thus, we find that Miller was not substantially prejudiced by the State's delay as any delay was created by the circuit court's failure to expeditiously rule on Miller's motion to dismiss and schedule the civil commitment trial.

Furthermore, we find our decision to affirm the Court of Appeals does not effectively change Miller's plight as his counsel conceded at oral argument that Miller suffers from pedophilia and needs continued treatment. Miller, however, is not without recourse as the SVPA provides that an SVP may petition, on an annual basis, to be released from incarceration. See S.C. Code Ann. § 44-48-110 (Supp. 2009) (providing procedures for annual mental evaluation of SVP and for petitioning for release from the SVP program).[14]

[14] We note that delays similar to the instant case may not be as prolific in the future given the Legislature amended the SVPA in 2010 to impose time limits for the completion of a court-appointed examiner's evaluation and to expand the length of time in which a circuit court must conduct a civil commitment trial following the issuance of the evaluation. See S.C. Code

D.

Although we affirm the decision of the Court of Appeals, we utilize this case as an opportunity to clarify certain procedural aspects of the SVPA. We find this is an important issue as the SVPA's procedures were promulgated in order to avoid due process violations and to prevent inmates from being arbitrarily incarcerated beyond their release dates. See In re Care & Treatment of Luckabaugh, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) (noting that the SVPA "provides for constitutional safeguards such as probable cause hearings to ensure individuals are not arbitrarily held beyond their release dates").

Specifically, we consider the appropriate remedy for when the State fails to timely conduct a civil commitment trial within the time provisions mandated by the SVPA. In making this determination, we must address the following questions: (1) whether a motion to dismiss should be granted with or without prejudice to the State; and (2) if the motion to dismiss is granted without prejudice, whether an inmate should be detained or released while the State re-files with the circuit court the petition that precipitates a civil commitment trial?

In answering these questions, we have carefully balanced the interests of the State in pursuing SVPs and protecting the public versus the offender's

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Ann. § 44-48-90(B) (Supp. 2010) ("If a request is made, the court must schedule a trial before a jury in the county where the offense was committed within ninety days of the date the court appointed expert issues the evaluation as to whether the person is a sexually violent predator, pursuant to Section 44-48-80(D), or, if there is no term of court, the next available date thereafter. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and only if the respondent will not be substantially prejudiced." (emphasis added)); id. § 44-48-80(D) ("The expert must complete the evaluation within sixty days after the completion of the probable cause hearing. The court may grant one extension upon request of the expert and a showing of good cause. Any further extensions only may be granted for extraordinary circumstances.").

rights not to be indefinitely detained and to have a timely adjudication of his status as an SVP.[15]

E.

In order to answer the first question regarding the ultimate resolution of an inmate's motion to dismiss, we must assess our decision in Matthews.

In Matthews, this Court held that where a civil commitment trial is not conducted within sixty days of the probable cause hearing and no continuance has been granted, the proper procedure is for an inmate to file a motion to dismiss. Matthews, 345 S.C. at 645, 550 S.E.2d at 314. We, however, did not enunciate whether a dismissal would be with or without prejudice.

Taking into consideration the language of Rule 41 governing a motion to dismiss and our state's jurisprudence regarding the SVPA, we now definitively rule that a grant of an inmate's motion to dismiss should be without prejudice to the State.

As evidenced by the language of Rule 41(b), a court is authorized to specify in its order that a dismissal is without prejudice. See Rule 41(b), SCRCP (outlining rules governing an involuntary dismissal and stating that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits" (emphasis added)).

Furthermore, this Court has determined that a violation of the SVPA's time limits does not divest the circuit court of subject matter jurisdiction. See Matthews, 345 S.C. at 645, 550 S.E.2d at 314 (interpreting section 44-48-90

[15] Notably, the court-appointed psychiatrist in this case testified that she deems only one-third of the inmates that she evaluates as SVPs. Thus, approximately two-thirds of the alleged SVPs are subjected to unjustified, prolonged terms of incarceration.

and holding that "the State's failure to comply with the time period set forth in the section, when a proper continuance has not been issued, does not deprive the court of subject matter jurisdiction to hear the case"). Thus, we have expressly found that a court may still hear an SVP case despite procedural errors committed by the State.

Finally, because a decision on a motion to dismiss does not necessarily constitute an adjudication of the merits of the case, permitting the State to re-file would have no *res judicata* implications. Cf. Small v. Mungo, 254 S.C. 438, 443-44, 175 S.E.2d 802, 804 (1970) (stating, in a pre-Rule 41 case, "[a]n order of dismissal for failure to proceed with the suit is in the nature of a discontinuance of the action and is not an adjudication of the merits. Ordinarily, it does not put an end to the cause of action, but merely terminates the suit itself").

Based on the foregoing, we find the appropriate procedure in granting a motion to dismiss in the SVP context is to do so without prejudice to the State. To decide otherwise, we believe would be contrary to the purpose of the SVPA as it would represent an invalidation of the entire Act based on a technical time violation. See Osborne v. State, 907 So. 2d 505, 508 (Fla. 2005) (concluding State's petition for SVP civil commitment, which was not brought within the requisite time period, is without prejudice absent a demonstration of prejudice; stating that "[a] dismissal of a petition with prejudice would terminate the case on procedural grounds, essentially divesting the circuit court of jurisdiction").

While we find that a dismissal without prejudice is the proper resolution, we are concerned that there is no real "consequence" if the State delays the SVP proceedings. Arguably, the State could continue its delay tactics in perpetuity without any deleterious effects on its case against an alleged SVP. Cf. In re the Detention of Fowler, 784 N.W.2d 184, 190 (Iowa 2010) (concluding that inmate's case should be dismissed and inmate released from custody where State did not file a motion to continue for good cause until after the ninety-day period as "[a]ny remedy other than dismissal would render a time limitation for trial meaningless").

Thus, the question becomes whether an inmate, who is granted a dismissal, should be detained or released from custody pending the State's re-filing of its petition for the circuit court to conduct a hearing and make a judicial determination of probable cause.

At least one decision of our Court of Appeals would implicitly support the release of an inmate as the court concluded that a person may be civilly committed as an SVP even though he is not currently serving a sentence for a sexually violent offense. See In re Care & Treatment of Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010) (concluding civil commitment of an SVP does not require the person to be currently serving a sentence for a sexually violent offense, but recognizing that the process is "triggered" once a person has been convicted of a sexually violent offense); see also S.C. Code Ann. § 44-48-40(B) (Supp. 2009) ("If the person is determined to be a sexually violent predator pursuant to this chapter, the person is subject to the provisions of this chapter even though the person has been released on parole or conditional release.").

Because our appellate courts have not explicitly ruled on this issue, we are guided by the decisions from other jurisdictions holding that an inmate should be released during the pendency of the re-filed SVP proceedings. See Osborne, 907 So. 2d at 509 (concluding that "where a respondent has completed his criminal sentence and is being detained awaiting a [SVP civil commitment] trial and the trial period has exceeded [the requisite time period] without a continuance for good cause, the respondent's remedy is release from detention and a dismissal without prejudice of the pending proceedings").

Based on the above-outlined authority, we believe the release of an inmate is a proper remedy in that it ensures individuals are not arbitrarily held beyond their release dates and serves as an incentive to the State to comply with statutorily-mandated time provisions of the SVPA. Thus, we hold that once a motion to dismiss is granted an inmate may be released from custody provided that he has completed his sentence as determined by the Department of Corrections. In the event an inmate is released, it is incumbent upon the

State to expeditiously re-file its petition with the circuit court for a probable cause determination.[16]

In initiating this process, we do not believe the State needs to begin the SVP proceedings anew as both the multidisciplinary team and the prosecutor's review committee will have made the requisite probable cause determinations necessary to support the State's petition to the circuit court for a probable cause hearing. See In re Care & Treatment of Valentine, 377 S.C. 244, 254-55, 659 S.E.2d 227, 233 (Ct. App. 2008) (reversing and remanding circuit court's finding that State failed to meet its burden for ordering civil commitment of inmate under SVPA; recognizing that three separate probable cause determinations precede a civil commitment trial under the SVPA).

III. Conclusion

In conclusion, we affirm the decision of the Court of Appeals as the circuit court did not abuse its discretion in denying Miller's motion to dismiss. As to future cases arising after the issuance of this opinion, we hold that if an inmate is granted a dismissal the proceedings should be dismissed without prejudice to the State. If the motion to dismiss is granted, the inmate may be released from custody while the State re-files its petition to the circuit court provided that the inmate has completed his sentence as determined by the Department of Corrections.

AFFIRMED.

TOAL, C.J., KITTREDGE, J., and Acting Justice Dorothy M. Jones, concur. PLEICONES, J., concurring in a separate opinion.

[16] See S.C. Code Ann. § 44-48-80(A) (Supp. 2009) ("Upon filing of a petition, the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility.").

JUSTICE PLEICONES: I agree with the Court of Appeals' ruling that the hearing judge did not abuse his discretion in denying petitioner's motion to dismiss, and thus concur in the result reached by the majority in that regard. Having answered the question upon which review was granted, I would not seek to provide a procedure to govern the disposition of such motions in future cases.

However, as a prospective procedure has been set forth, I address that portion of the opinion. I agree with the majority that Rule 41(b), SCRCP, authorizes a court to specify its dismissal is without prejudice. I note, however, that the default standard is that the grant of a motion to dismiss operates as adjudication on the merits, i.e., a dismissal with prejudice. In other words, a trial judge is invested with the authority to exercise his discretion in such matters, and I would not deprive the judge of that authority by mandating the dismissal be without prejudice.

Furthermore, I would not mandate a standard procedure for dealing with the disposition of the case in the event the trial judge exercises his discretion to grant a motion without prejudice. In short, I would not require a specific result where the exercise of discretion is allowed.

For the foregoing reasons, I concur only in the result reached in this case.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolyn Cole and Windy Price, Appellants,

v.

Town of Atlantic Beach Election Commission, Respondent.

Josephine Isom and Charlene Taylor, Intervenors.

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 26996
Heard April 5, 2011 – Filed July 7, 2011

REVERSED

Charles B. Jordan, Jr., of Thompson & Henry, PA, of Myrtle Beach, for Appellants.

Charles L.A. Terreni, of Columbia, John C. Zilinsky, of Zilinsky & Gordon, LLC, of Conway, and Malinda McAleer Pennington, of Greenville, for Respondent.

John M. Leiter and Lee Ann W. Rice, both of Myrtle Beach, for Intervenors.

Patricia Bellamy, of Atlantic Beach, Pro Se, for Amicus Curiae.

CHIEF JUSTICE TOAL: This case involves a dispute over the results of a town council election in Atlantic Beach, South Carolina, held on November 3, 2009. Carolyn Cole and Windy Price (collectively, Appellants) appeal the circuit court order affirming the Town of Atlantic Beach Municipal Election Commission's (MEC) decision to de-certify and order a new election for two Atlantic Beach Town Councilmember positions. We reverse.

FACTS/ PROCEDURAL HISTORY

This Court has unfortunately become familiar with the Town of Atlantic Beach's municipal elections, and the disputes that inevitably accompany them.[1] Before framing the procedural particulars of this dispute, an initial explanation of the municipal government structure of Atlantic Beach is instructive. Similarly, an analysis of the issues presented is incomplete without providing the background of events leading up to the election.

The Town of Atlantic Beach employs a council-manager form of government, provided for in title 5, chapter 13 of the South Carolina

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[1] *See Armstrong v. Atlantic Beach Mun. Election Comm'n*, 380 S.C. 47, 668 S.E.2d 400 (2008) (finding the circuit court erred by ordering the reopening of the filing period for candidacy for mayor because that decision was based on facts not considered by the election commission when it ordered a new election for the parties concerned); *see also Taylor v. Town of Atlantic Beach Election Comm'n*, 363 S.C. 8, 609 S.E.2d 500 (2005) (finding the Municipal Election Commission was not required to state findings of fact and conclusions of law when rendering decisions, and holding that a limited number of ballot secrecy violations did not give rise to a constitutional violation sufficient to set aside the mayoral and town council elections).

Code. S.C. Code Ann. § 5-13-10–100 (2004). Under this form of government, the governing body is the municipal council, which is comprised of a mayor, and four, six, or eight councilmembers.[2] *Id.* § 5-13-20(a). This governing body is responsible for appointing three electors as members of the municipal election commission. *Id.* § 5-15-90. The municipal election commission, in turn, has the power to "supervise and conduct all municipal . . . elections," *id.* § 5-15-100, and in the case of contested election results, the power to "conduct a hearing on the contest, decide the issues raised," and when a decision is made to invalidate an election, to order a new election. *Id.* § 5-15-130. Therefore, while the mayor and town council have the power to appoint the election commissioners, the election commissioners have wide discretion to determine the outcome of contested mayoral and town council elections. Additionally, the town council is charged with the duty of employing a town manager and fixing his salary. *Id.* §§ 5-13-30(1) & -50. At the time of the town council election, Alice Graham (Commissioner Graham), Linda Booker (Commissioner Booker), and Nicole Kenion (Commissioner Kenion) sat on the MEC. Commissioner Booker's husband, William Booker (Town Manager), was the town manager. Intervenors Josephine Isom and Charlene Taylor were incumbent town councilmembers.

At some point in 2009, Price, the head minister of the Atlantic Beach CME church, and Cole, former Atlantic Beach town manager, decided to run as candidates in the upcoming town council election. Prior to their attempts to establish residency in Atlantic Beach, Price lived in North Myrtle Beach and Cole lived in Florida. On August 15, 2009, Price signed a lease agreement with Cole to move into an apartment building in Atlantic Beach, owned in part by Cole. This property had been designated for demolition in March 2008. The property managers subsequently determined that it was more cost-effective to renovate the building, and Cole wrote to Mr. Booker informing him of that decision. Price's husband, a contractor, began

[2] The Atlantic Beach Town Council is comprised of four at-large council seats.

working to renovate the building in August 2009, with plans to move in to the building on September 1. On September 14, 2009, town council, whose members included candidates in the upcoming town council election, Isom and Taylor, passed an ordinance to have this property condemned. On August 29, 2009, Town Manager wrote to Santee Cooper and requested that they turn off the electricity in the building Cole and Price were renovating.

With the plans to move into the apartment building thwarted, Cole and Price moved in with Atlantic Beach resident and former mayor, Retha Pierce. In September 2009, Price changed the address on her driver's license to Pierce's address and obtained a voter registration card for the Atlantic Beach precinct using this address. On September 16, 2009, Commissioner Graham received a letter from Pierce's landlord, Mr. Connie McCullough, stating he did not have a rental agreement with Price and that Pierce's lease agreement prohibited her from allowing anyone to live with her at his property. In fact, Pierce's lease specifically allowed up to two additional tenants. Appellants allege that Commissioners Graham and Booker and Town Manager sent Mr. McCullough the letter stating Price was not permitted to live at his property, and Mr. McCullough signed the letter upon their request without checking the lease. Mr. McCullough subsequently sent a letter to Commissioner Graham disavowing that letter and corroborating the claim that Commissioner Graham sent him the letter with a request for him to sign.

Price timely filed a Statement of Candidacy for Office of Councilmember with the Town of Atlantic Beach on September 4, 2009. On September 25, 2009,[3] Commissioner Graham informed Price by letter that she would not appear on the election ballot because of her failure to submit a Statement of Economic Interest Form to the State Ethics Commission, and for her failure to meet the residency

[3] Commissioner Graham misdated the letter as October 25, 2009.

requirements for candidacy.[4] Thereafter, Appellants Cole and Price campaigned for these seats as write-in candidates.

On November 3, 2009, the Town of Atlantic Beach held an election for the two positions on town council. After the polls closed, there were 39 contested ballots. The MEC held a challenged ballot hearing on November 5, 2009, at 10:00 a.m., after which, 28 of the challenged ballots were accepted. These accepted ballots included those of Price and Cole. At this hearing, the MEC announced the following vote count: Windy Price (64), Carolyn Cole (52), Charlene Taylor (43), Josephine Isom (35), and Paul Curry (5); thus, declaring Carolyn Cole and Windy Price as the duly elected councilmembers for Atlantic Beach. The MEC certified these results after the close of the hearing. The deadline for protesting the results of this election, according to section 5-15-130 of the South Carolina Code,[5] occurred at 7:00 p.m. on that same day, November 5, 2009. Candidates Isom,

[4] On September 25th, Price filed a Statement of Economic Interest with the State Ethics Commission. The Statement of Economic Interest form states that the penalty for late filing is a fine of $100 per day, rather than disqualification. On October 1, 2009, Price filed a complaint in circuit court against Commissioners Graham and Booker, Gary Baum of the South Carolina Election Commission, and Atlantic Beach town clerk, Cheryl Pereira, requesting the court to issue a temporary restraining order preventing Defendants from removing her name from the November 3, 2009 town council election ballot. The circuit court dismissed the case on October 26, 2009 for improper service and improper parties, but the court did not file the order until January 20, 2010, well after the election.

[5] "Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported by the managers by filing a written notice of such contest together with a concise statement of the grounds therefor with the Municipal Election Commission . . . ."

Taylor, and Curry submitted letters protesting the MEC's certification of the election on the afternoon of November 5th.[6]

The MEC conducted a protest hearing on November 7th at 10:00 a.m. and adjourned that meeting, with a motion to continue, at 10:03 a.m., before Appellants arrived. The stated reason for the continuance was to "allow legal counsel to be present" at the hearing.

The MEC conducted and then continued the protest hearing on November 11th, and again on November 20th. At these hearings, the MEC heard testimony concerning the allegations raised in Taylor, Isom, and Curry's letters of protest. In pertinent part, these candidates contested the election of Appellants on the grounds that Appellants failed to meet the residency requirements to run as candidates, they violated absentee voting laws, and voting irregularities merited overturning the election.

At the close of the November 20th hearing, Commissioners Graham and Booker voted to grant Isom and Taylor's petitions for a new election, with Commissioner Kenion voting to deny. On November 30, 2009, Commissioner Kenion filed a dissent explaining the reasons for her vote. On that same day, Appellants appealed the MEC's decision to the circuit court. The MEC did not issue a written order until January 29, 2010.[7] That order summarily found Appellants did not meet the residency requirements of running for public office in Atlantic Beach, and that voting irregularities and questionable absentee ballots rendered the results of the election doubtful. Thus, the MEC de-

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[6] Appellants allege Isom and Taylor failed to submit their protest letters before the 7:00 p.m. deadline. Because we decide this case on other grounds, we do not reach this issue.

[7] Section 5-15-140 provides that a party aggrieved by a decision of the municipal election commission has ten days after notice of the decision to appeal it to circuit court. *Id.* § 5-15-140 (2004 & Supp. 2010). Appellants filed their appeal within ten days of the close of the protest hearings, but before the MEC issued a written order.

certified the election results and ordered a new election. The circuit court judge heard the appeal on May 19, 2010, and issued a Form 4 order that same day affirming the decision of the MEC. The circuit court later granted Isom and Taylor's motions to intervene. This case is before this Court on direct appeal from the circuit court, pursuant to Rule 203(d)(1)(A)(iv), SCACR.

ISSUES

I. Whether the MEC's failure to comply with the provisions of section 5-15-130 of the South Carolina Code requires this Court to vacate its decision to de-certify and order a new election.

II. Whether sufficient evidence exists in the record to uphold the decision of the MEC.

III. Whether Commissioner Booker should have recused herself from any deliberations concerning the election of town council members.

IV. Whether Intervenors failed to strictly comply with the requirements of section 5-15-130 of the South Carolina Code when protesting the election.

STANDARD OF REVIEW

"In municipal election cases, this Court reviews the judgment of the circuit court upholding or overturning the decision of a municipal election commission only to correct errors of law." *George v. Mun. Election Comm'n of the City of Charleston*, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999). This review only extends to findings of fact when those findings are wholly unsupported by the evidence. *Id.* (citations omitted). "The Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful." *Id.* (citations omitted).

ANALYSIS

I. Failure to Comply with Section 5-15-130 of the South Carolina Code

Appellants argue this Court should vacate the MEC's decision to de-certify and order a new election because the MEC failed to comply with the requirements of section 5-15-130 of the South Carolina Code, the statute that delineates the procedure for contesting results of a municipal election. We believe Respondent's complete disregard of the provisions of section 5-15-130 was perpetuated by a conscious decision to ignore the will of the voters, and this delay ultimately undermined the legislative purpose behind requiring the expeditious handling of election disputes. Therefore, we agree with Appellants and vacate the decision of the MEC. Accordingly, the MEC's initial certification of the town council election, declaring Appellants Cole and Price as winners, shall be restored.

Section 5-15-130 provides:

> Within forty-eight hours after the filing of [a candidates' protest] notice, the Municipal Election Commission shall, after due notice to the parties concerned, conduct a hearing on the contest, decide the issues raised, file its report together with all recorded testimony and exhibits with the clerk of court of the county in which the municipality is situated, notify the parties concerned of the decisions made, and when the decision invalidates the election the council shall order a new election as to the parties concerned.

S.C. Code Ann. § 5-15-130 (1976).

The MEC conducted a protest hearing within forty-eight hours of the candidates filing protests, but that hearing lasted just three minutes and was continued to proceed on November 11, 2009. In fact, the MEC adjourned the November 7th protest hearing before the arrival of

Appellants.[8] The MEC held a protest hearing on November 11, 2009, and concluded the hearing on November 20, 2009. It did not file a report of the hearing until January 29, 2010—more than two months after the protest hearing adjourned. The MEC did not produce a transcript of the proceedings until March 21, 2010. Price's husband (Mr. Price), by sworn affidavit, informed the circuit court that on November 27, 2009, he contacted the court reporter who transcribed the hearings in an effort to procure the transcript. She informed him that the MEC's attorney told her not to give Mr. Price the transcript and that it would cost him $3,400 to procure it. She also told him she did not plan to file a copy with the town clerk once she completed the transcript and if he wanted a copy, he needed to contact Commissioner Graham. Without an official order from the MEC, and without the transcript of the hearings, on November 30, 2009, Appellants appealed the oral decision of the MEC. *See* S.C. Code Ann. § 5-15-140 (1976) (a party aggrieved by the decision of the municipal election commission has ten days after notice of the decision to appeal it to the circuit court). The MEC contends there was nearly twenty hours of testimony and it was impossible to produce transcription within forty-eight hours. Under normal circumstances, we understand it would be unreasonable to expect the completion of such a transcript within two days. However, we find totally unworthy of belief the MEC's excuse for the delay because as of January 7, 2010, nearly seven weeks after the hearing adjourned, the MEC had yet to order the transcript. Because the circuit court had nothing on which to base its review, the circuit court judge continued the hearing, upon the MEC's request, to May 17, 2010. The circuit court did not file its final order until September 28, 2010. As a result of the MEC's delay tactics, Intervenors Isom and Taylor have remained in their town council seats as incumbents for nearly two additional years, pending the disposition of the election dispute.

[8] According to testimony at the November 11th hearing, Appellants were not served with formal notice of the hearing, as required by section 5-15-130.

This Court recognizes that perfect compliance with an election statute is, in many cases, unlikely. Therefore, we hesitate to vacate a decision of a municipal election commission based on minor violations of technical requirements. In *George v. Municipal Election Commission of the City of Charleston*, this Court set forth guiding principles for determining whether the provisions of an election statute are mandatory, or merely directory. 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999). Generally, courts consider the provisions of election laws mandatory when the statute expressly declares that a particular act is essential to the validity of an election, or when a party seeks enforcement of the law in a direct proceeding before the election takes place. *Id.* In the interest of avoiding the disenfranchisement of voters after an election has taken place, a statute that uses seemingly mandatory terms such as "shall" or "must," will be considered directory if the party seeking enforcement alleges no fraud or if that party fails to prove fraud. *Id.*

> Courts justly consider the main purpose of such law, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end, and, in order not to defeat the general design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voter's choice.

Id. (*quoting State ex rel. Parler v. Jennings*, 79 S.C. 414, 419, 60 S.E. 967, 968–69 (1908)). However, courts may deem statutory provisions mandatory after an election when "the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election." *Id.* at 187, 516 S.E.2d at 208 (*citing Zbinden v. Bond County Cmty. Unit Sch. Dist. No. 2*, 2 Ill.2d 232, 117 N.E.2d 765, 767 (1954)).

Section 5-15-130 requires the municipal election commission to take a number of actions within forty-eight hours of the candidates filing protests—conduct a hearing, decide the issues, file a report that includes the transcribed testimony and exhibits with the county clerk, notify the parties of the decision, and order a new election, if necessary. We believe the main purpose of this law is to expeditiously finalize protested municipal elections in the interest of realizing the voters' will and seamlessly transitioning governmental offices. Therefore, insubstantial deviations from these provisions would not ordinarily require this Court to nullify a protest hearing decision. However, in this case, the MEC's startling disregard of the statute in no way merits lenient application of the statute by this Court. The MEC's delay in ordering the transcript and filing the final order was not just by a few hours, or even days, but by several months. During this time, the parties protesting the election—Isom and Taylor—remained in their town council positions. We believe the delay was a direct attempt by the MEC to interfere with the full and fair expression of the voters' choice. "The Court . . . will not sanction practices which circumvent the plain purposes of the law and open the door to fraud." *May v. Wilson*, 199 S.C. 354, 360, 19 S.E.2d 467, 470 (1942). Therefore, we vacate the MEC's decision to de-certify and order a new election, and conclude that the original certification of the election, declaring Appellants Cole and Price as the winners, should be restored.

CONCLUSION

In light of our holding in this case, we find it unnecessary to address the additional issues argued by Appellants. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). However, if this Court were to reach these arguments, this opinion would include facts no less astonishing than those thus far relayed. We accompany this decision with strong admonishment of the MEC and other involved parties, who worked diligently to obstruct the town council election process. The attempts by members of the MEC and the town manager to prevent Cole and Price from establishing residency were deplorable. The manner in which the MEC conducted the protest hearings causes us great concern and makes us question

whether future election protests can be properly conducted in Atlantic Beach without direct monitoring by the State Election Commission. Nearly every Atlantic Beach municipal election held in recent history has found its way to this Court. We have grown weary of the shenanigans engaged in by all parties involved in the election process at Atlantic Beach, and will not hesitate to issue sanctions if the election laws of this State continue to be blatantly disregarded. For the forgoing reasons, we vacate the MEC's decision to de-certify the election, and order the original certification of Appellants Cole and Price as winners to be restored. Accordingly, Cole and Price should immediately begin serving in their capacities as town councilmembers upon issuance of the remittitur in this case. The ruling of the circuit court is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Albert Epstein, Appellant,

v.

Coastal Timber Co., Inc., Respondent.

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 26997
Heard June 9, 2011 – Filed July 11, 2011

REVERSED AND REMANDED

Darrell Thomas Johnson, Jr. and Mills L. Morrison, Jr., both of The Law Offices of Darrell Thomas Johnson, Jr., L.L.C., of Hardeeville, for Appellant.

Philip C. Thompson, of Thompson & Henry, P.A., of Conway, for Respondent.

JUSTICE BEATTY: Albert Epstein ("Epstein") brought this action for damages against Coastal Timber Co., Inc. ("Coastal"), alleging Coastal cut and removed standing timber that was subject to mortgages he held on the

property. The circuit court found Epstein failed to properly secure an interest in the timber under South Carolina's Uniform Commercial Code ("UCC"). Epstein appeals. We reverse and remand.

I. FACTS

In March 2004, Epstein purchased real property in Horry County from TMAC Investors IX, L.L.C. for $130,000.00. The deed was recorded on April 19, 2004. The area, known as the old Conway Mill site, included just under 120 acres of land and a building of 294,080 square feet.

In May 2006, Epstein sold the property to Ascott Valley Development, L.L.C. for a purchase price of $3.3 million. Ascott was formed by Wynn Housel and Howard B. Schwartz, who intended to develop the property for a residential neighborhood. Their plans were to divide the acreage into two sections according to use: (1) the building and the 45 acres on which it stood would be used to manufacture homes, and (2) the homes would be placed on the remaining wooded portion of the property that measured a little over 70 acres.

As part of the sales arrangement, Epstein provided 100% owner financing. Ascott executed two mortgages and two notes in favor of Epstein, using the property as collateral. The deed and mortgages were signed on May 25, 2006 and filed on June 1, 2006. According to Epstein, he took two mortgages to better secure Ascott's obligations—a $2.0 million note secured with a mortgage on the 45 acres, and a $1.3 million note secured by a mortgage on the remaining 70-plus acres. The sum of the two mortgages on the property thus equaled the $3.3 million purchase price.

On June 6, 2006, Ascott executed a "Timber Title" conveying to Coastal for $115,000.00 all merchantable pine timber and all merchantable hardwood of 14 inches "across stump or larger" located on the property. The document called for the timber to be removed within twelve months. Coastal, the purchaser, recorded the Timber Title documenting the sale on

June 12, 2006 in the Office of the Horry County Register of Deeds. Coastal thereafter cut and removed the timber and paid Ascott the full proceeds.

Ascott subsequently defaulted on its obligations to Epstein, who brought foreclosure proceedings. During this process, Epstein learned of the removal of the timber.

On April 22, 2009, while the foreclosure against Ascott was still pending,[1] Epstein filed the current action against Coastal, alleging the timber was cut without his knowledge or permission and that he had received no portion of the proceeds. Epstein asserted his recorded mortgages constituted notice to all parties that he had a lien upon timber on the property, and that his lien was "superior in priority" to the Timber Title and had not been released or waived. Epstein sought damages for the actual value of the timber removed and the diminution of the property's fair market value caused by the removal of timber. He also sought clean-up costs, treble damages, post-judgment interest, and "further relief as may be just and proper."

Coastal answered and denied liability, asserting Ascott was the owner of the property, that it had paid Ascott for the full value of the timber cut, and there was no agreement between Coastal and Ascott that would permit it to withhold the sales proceeds from Ascott. Coastal also stated Epstein had "assumed the risk that timber on the subject property would be cut and sold when he failed to properly secure the timber as collateral, either through the form of his mortgage or through the use of a security agreement and financing statement."

Coastal thereafter moved for summary judgment, asserting South Carolina's UCC now provides that a contract for the sale of standing timber is

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[1] The foreclosure action against Ascott was eventually resolved by Epstein obtaining a deficiency judgment against Ascott for $305,000.00. Coastal alludes to the possibility of a double recovery, but there is nothing in the record to establish whether Epstein actually recovered on the judgment; further, any allegation in this regard is best considered by a trial court in the first instance.

a sale of goods, not realty, and that Epstein's two mortgages do not cover the timber because they do not meet UCC requirements for creating a security interest. Specifically, the mortgages do not provide a description of the collateral as being standing timber or timber to be cut.

Epstein moved for partial summary judgment, arguing the timber was encumbered by his mortgages because the timber was not expressly excluded. Epstein argued, "It is black letter law that standing timber is a part of real property until it is severed."

The circuit court granted Coastal's motion for summary judgment and denied Epstein's motion. The circuit court found the UCC was controlling and that Epstein's mortgages did not meet the requirements to maintain a security interest in the timber under the UCC. Epstein made a Rule 59(e), SCRCP motion, which was denied.

Epstein appealed to the Court of Appeals. This Court issued an order certifying the case for its review pursuant to Rule 204(b), SCACR.

II. STANDARD OF REVIEW

A trial court may grant a party's motion for summary judgment "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." Rule 56(c), SCRCP.

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment. Id.

III. LAW/ANALYSIS

On appeal, Epstein argues the circuit court erred in granting summary judgment to Coastal after finding his mortgages did not constitute a lien on the standing timber cut by Coastal.

In South Carolina, standing timber has historically been defined as "a part of the realty, as much so as the soil itself." First Carolinas Joint Stock Land Bank of Columbia v. N.Y. Title & Mortgage Co., 172 S.C. 446, 450, 174 S.E. 406, 408 (1934) (citation omitted); see also D.W. Alderman & Sons Co. v. Kirven, 209 S.C. 446, 455, 40 S.E.2d 791, 794 (1946) ("We have held . . . that trees growing upon lands are a part of the realty, and continue to be realty until severed from the soil."). "The conveyance of timber land without reservation or exception of timber carries the timber." First Carolinas, 172 S.C. at 450, 174 S.E. at 408 (citation omitted).

The mortgagor of land is the owner in fee and has title to the land so mortgaged, but the mortgagee has a lien upon the land to secure his debt. Simms v. Kearse, 42 S.C. 43, 20 S.E. 19 (1894); see also S.C. Code Ann. § 29-3-10 (2007) (stating "the mortgagor shall be deemed the owner of the land and the mortgagee as owner of the money lent or due"). A mortgage on real property includes the standing timber unless it has been excepted from the mortgage. See First Carolinas, 172 S.C. at 450, 174 S.E. at 407-08 ("Growing timber constitutes a portion of the realty embraced by a mortgage on the land unless expressly or impliedly excepted." (citation omitted)); see also 59 C.J.S. Mortgages § 236 (2009) ("As a general rule, crops, timber, and nursery stock growing on mortgaged land are covered by the mortgage unless expressly or impliedly excepted therefrom.").

The circuit court, while recognizing these general principles, found the South Carolina cases classifying timber as realty predated the 1988 amendment to section 36-2-107 in the UCC, particularly subsection (2), which the court found "transformed timber from realty to goods." Section 36-2-107 provides in full as follows:

§ 36-2-107. Goods to be severed from realty; recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller, but until severance, a purported present sale, which is not effective as a transfer of an interest in land, is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third-party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

S.C. Code Ann. § 36-2-107 (2003) (emphasis added). The South Carolina Reporter's Comments following section 36-2-107 explain the purpose for the 1988 revision of the statute was to facilitate the financing of timber transactions and to provide a method for noticing the sale in the real estate records:

> Several timber-growing states changed the 1962 Text to make timber to be cut under a contract of severance qualify as goods, regardless of the question who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of "goods" in Section

> 9-105 of the 1988 UCC Amendments. To protect persons dealing with timberlands, filing on timber to be cut is required . . . to be made in real estate records in a manner comparable to fixture filing.

S.C. Reporter's Comments to section 36-2-107, Note to 1988 Amendment (emphasis added).

The circuit court concluded "the 1988 amendment to South Carolina's Uniform Commercial Code converted standing timber from real property to personal property and requires that it be treated as a sale of goods and secured as such." The circuit court stated additional support for this conclusion is found in the definition of "goods" in section 36-9-102. This section provides in relevant part: "The term [goods] includes . . . standing timber that is to be cut and removed under a conveyance or contract for sale . . . ." S.C. Code Ann. § 36-9-102(a)(44) (2003).

The circuit court further observed that to be valid and enforceable, section 36-9-203 of the UCC requires a security interest in timber to be cut under a contract of sale to be evidenced by a security agreement that is authenticated and contains a description of the collateral. See id. § 36-9-203(b)(1), (2) & (3)(A) (stating a security interest is enforceable only if (1) "value has been given," (2) "the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party," and (3) "the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned" (emphasis added)).

In addition, the circuit court noted that section 36-9-502 of the UCC "provides two methods by which a security interest in timber can be perfected[;] one is by filing a financing statement that specifies that the collateral covered is timber and the other is by filing [] a Mortgage that meets the requirements of [a] financing statement and specifies the goods that it covers." See id. § 36-9-502 (setting forth UCC requirements for financing statements covering goods).

The circuit court found none of the documents submitted to the court included a financing statement, and Epstein's mortgages contained no language specifically identifying the timber. Therefore, the mortgages on the property did not secure Epstein's interest in the timber since they did not meet the UCC requirements. The circuit court stated although Epstein did present case law identifying timber as realty, all of the cases predated the 1988 amendment to the UCC. For these reasons, the circuit court granted Coastal's motion for summary judgment.

Epstein filed a Rule 59 motion, asserting the circuit court had misinterpreted the UCC provisions. Epstein argued the provisions cited by the circuit court identifying timber as "goods" all refer to standing timber to be cut under a contract of sale and that the UCC did not convert all standing timber into "goods." Since standing timber remains real estate, it is subject to being encumbered by a mortgage. He maintained the Reporter's Comments to section 36-2-107 state the main purpose of the 1988 amendment is to facilitate the financing of timber to be cut under a contract of sale. Epstein's Rule 59 motion was denied. On appeal, Epstein asks this Court to reverse the order granting summary judgment to Coastal on the basis his mortgage on the real property included the timber.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (quoting Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). "The determination of legislative intent is a matter of law." Id. (citation omitted). Where a statute's language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning. Id. at 148, 694 S.E.2d at 530.

Statutes in derogation of the common law are strictly construed. Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786 (1982); Major v. Nat'l Indem. Co., 267 S.C. 517, 229 S.E.2d 849 (1976). "Where no conflict with common law exists, however, this Court will not substitute its view of public

policy for that of the legislature." Standard, 278 S.C. at 340, 295 S.E.2d at 788.

Statutory language must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Cox v. BellSouth Telecomms., 356 S.C. 468, 589 S.E.2d 766 (Ct. App. 2003). Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application. Id.

The parties point to no South Carolina case examining the relationship between these UCC statutory provisions and existing real estate law. However, we conclude the UCC can be read in harmony with the common law so as to give full effect to each.

We find the UCC provisions recited by the circuit court[2] pertain specifically to timber to be cut under a contract of sale. The purpose of the UCC amendment was, as noted above, to facilitate the financing of a transaction to purchase timber by treating timber to be cut under a contract of sale as a sale of goods, even though the timber is still attached to the land, and to provide a method for a purchaser to document a security interest in such timber under contract. The UCC requires a party to include a specific description of the collateral and the real property in this instance in order to identify the timber under contract and provide adequate notice to other parties of the declared interest.

We agree with Epstein that section 36-2-107(2) did not convert all standing timber to goods and thereby divest him of his interest in the timber. This section and the related UCC provisions do not cancel the effect of a mortgage or lien on timber that is already recorded in the real estate records.

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[2] Sections 36-2-107(2) (recording contracts for the sale of goods to be severed from realty, including contracts for the sale of timber to be cut), 36-9-102(a)(44) (defining "goods" to include timber to be cut under a contract of sale), 36-9-203 (security interests in timber to be cut and as-extracted collateral), 36-9-502 (financing statements for timber to be cut and as-extracted collateral).

Rather, any security interest later recorded on timber to be cut under a contract of sale would be junior to any existing interests. To hold otherwise would allow a mortgagor to unilaterally void an existing lien imposed by a mortgage on the real property, which includes the timber, simply by thereafter executing a contract to sell the timber.

Support for this interpretation is found in section 36-2-107 of the UCC itself, which states in subsection (3): "The provisions of this section [36-2-107] are subject to any third-party rights provided by the law relating to realty records . . . ." S.C. Code Ann. § 36-2-107(3). Thus, on its face, the UCC expressly recognizes the need to harmonize with existing real estate records, such as interests in the property that have already been recorded.

Epstein's mortgage was sufficient under the common law to secure a lien on the property, including the timber, and he was not required to satisfy the UCC requirements as found by the circuit court. Those requirements were relevant only to those seeking to secure their interest in the timber to be cut under a contract of sale, and such interests would be subject to Epstein's previously-recorded interest.

In a similar case, Feliciana Bank & Trust v. Manuel & Sessions, L.L.C., 943 So. 2d 736 (Miss. Ct. App. 2006), the plaintiff, a bank, brought an action for damages after standing timber was sold and removed from land on which it held a deed of trust.[3] Id. at 737. The Court of Appeals of Mississippi reversed the grant of summary judgment to the defendant and found the plaintiff's deed of trust was sufficient to provide a security interest in the timber. Id. at 739. The court rejected the defendant's argument that no perfected security interest existed because the plaintiff did not make a filing in accordance with the UCC, which now recognizes contracts for the sale of timber to be cut as a sale of goods. Id. at 738-39.

[3] "A deed of trust is a security interest in property, similar to a mortgage." Manios v. Nelson, Mullins, Riley & Scarborough, L.L.P., 389 S.C. 126, 132 n.1, 697 S.E.2d 644, 647 n.1 (Ct. App. 2010) (citing Black's Law Dictionary 414 (6th ed. 1990) (defining a deed of trust)).

In evaluating the effect of the UCC changes in timber to be cut relative to the common law pertaining to real property, the court "conclude[d] that the proper analysis is not one of cancellation but of priority." Id. at 740. The court held the bank had a security interest in the timber and the rights of any subsequent purchasers of the timber were subordinate to the bank's interest. Id. The court noted that "[t]he bank's failure to perfect its interests under the UCC was irrelevant to its right to remain secure." Id.

In reaching this result, the court explained that the changes in the UCC did not displace the common law regarding securing interests in timber:

> The trial court in essence concluded that the Mississippi commercial code displaced the common law on the securing of interests on timber. Under that view, either a deed of trust no longer applies to timber at all, or the security is lost as soon as a conveyance or contract for sale of timber occurs. The legislature has certainly defined standing timber as personal property upon the execution of a contract for its cutting. Someone involved in that cutting may make a UCC filing to secure the interest that has been obtained. Prior to such a contract, though, the UCC does not cause timber to be classified as "goods." Absent any statutory forcing of a change in the common law, the timber prior to a contract for its cutting would remain real property. The UCC does not purport to cancel the reach of a pre-existing deed of trust which at least would secure timber that is not subject to a contract for harvesting. Consequently, the most the UCC would have done is cancel the lien of a deed of trust as soon as a contract for a timber sale occurs. If cancellation is the result of the Code, there would be no lasting security over timber created by a deed of trust.
>
> We conclude that the proper analysis is not one of cancellation but of priority. Historically, a deed of trust granted a security interest in all property that was part of the realty. Under the UCC, though, if a typical deed of trust is executed after a

> contract for the cutting of the timber has been executed but before the actual harvesting of the trees, the deed of trust will either not apply to the timber at all because the timber is now personalty, or else the deed of trust will be subordinate to a prior UCC filing. Conversely, if the deed of trust predates any contract to cut the timber, the security interest vests in timber and cannot be divested simply by a contract for sale. Again, the matter is one of priority. . . . [T]he previously quoted section on sales relating to timber recognizes the continuing effect of real property rules when it states that timber sales under the UCC "are subject to any third party rights provided by law relating to realty records . . . ." Miss.Code Ann. § 75-2-107(3).

Id. at 739-40 (emphasis added).

We find the reasoning in the Feliciana Bank case is sound. Based on the foregoing, we hold the circuit court erred in finding Epstein was divested of his security interest in the timber based on the UCC. The UCC changes did not effect a wholesale cancellation of existing real estate law in South Carolina and did not convert all standing timber to "goods." At the time Epstein's mortgages were executed and recorded, they secured his interest in the real property, including the standing timber, and this interest vested before there ever was a contract to cut the timber. Thus, Epstein's mortgages secured a lien on the property as well as the timber and any subsequent interests are subordinate. This result is not in conflict with, but in harmony with, the UCC provisions.

IV. CONCLUSION

We hold the circuit court erred in finding Epstein's mortgages were insufficient to secure a lien on the timber for the subject property and that he was required to meet the UCC requirements. The UCC requirements pertain to securing an interest in timber to be cut under a contract of sale, and these interests are subject to liens already noticed in the real estate records.

Consequently, we reverse the circuit court's order granting summary judgment to Coastal and remand the matter for further proceedings.[4]

REVERSED AND REMANDED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

[4] We decline to address the additional sustaining ground Coastal raises in its brief. Further, Coastal also challenges certain material listed in Epstein's Designation of Matter that was included in the record—a two-page excerpt from Tommy Grainger's deposition. There is no indication Coastal interposed a timely objection by filing a motion to strike at the time the material was designated for inclusion in the record. Moreover, Coastal has shown no prejudice. The few factual details included in the excerpt (that Grainger was the owner of Coastal and had bid on the timber) were not in dispute and had no bearing on the outcome of this case, in any event.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Robert Lee Nance, Respondent.

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 26998
Heard April 7, 2011 – Filed July 11, 2011

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter III, of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, for Appellant.

John D. Delgado, of Bluestein, Nichols, Thompson & Delgado, LLC, and Jonathan McKey Milling, of Milling Law Firm, LLC, both of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State appeals the trial court's grant of Robert Lee Nance's (Respondent) pre-trial motion to suppress the testimony of Robert Fraley, the victim, in Respondent's new trial after this Court granted post-conviction relief (PCR) in *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (*Nance II*).

Mr. Fraley survived Respondent's attack in 1993 and testified at the first trial but is now deceased. Respondent argues that, because in *Nance II* this Court found he received ineffective assistance of counsel due to defense counsel's failure to subject the State's case to meaningful adversarial testing, he lacked the opportunity to cross-examine Mr. Fraley as required by the Confrontation Clause of the Sixth Amendment to the United States Constitution. Therefore, Respondent argues, the State may not read Mr. Fraley's testimony into the record as an unavailable witness under Rule 804, SCRE, because it would violate his constitutional right to confront witnesses against him.

FACTS/PROCEDURAL BACKGROUND

The following are the facts as developed during Respondent's first trial. One very early November morning in 1993, Respondent knocked on the Fraleys' door, rousing the elderly Mr. Fraley and Violet Fraley, his wife of forty-three years, from bed. When Mr. Fraley answered the door, Respondent called Mr. Fraley by name, told him he had car trouble, and asked to use the Fraleys' telephone. Mr. Fraley, unaware that Respondent had cut the phone lines before knocking, told Respondent he could use the phone in his detached workshop. As Mr. Fraley began opening the door to hand Respondent a flashlight to light his way to the workshop, Respondent yanked the door open and repeatedly stabbed Mr. Fraley with a screwdriver as the two men struggled through the house and into the kitchen.

After Mrs. Fraley, who had come out of her bedroom during the scuffle, gave Respondent her purse and car keys, he repeatedly raped her on

the kitchen floor as Mr. Fraley slumped in a nearby chair, conscious and bleeding. Respondent then stabbed Mrs. Fraley in the chest, killing her, and stabbed Mr. Fraley one final time before violating Mrs. Fraley again. Respondent finally stole the Fraleys' car and left.

Miraculously, Mr. Fraley was able to drag himself to another vehicle, drive to a neighbor's house, and contact the authorities. Police officers arrested Respondent later that morning, driving the stolen car[1] and covered in Mrs. Fraley's blood. Mr. Fraley testified at trial, and defense counsel did not cross-examine him. In addition to Mr. Fraley's testimony, the State presented physical evidence linking Respondent to the crimes.[2] The jury found Respondent guilty of murder, first degree criminal sexual conduct, first degree burglary, assault and battery with intent to kill, and armed robbery. He was sentenced to death on the murder charge, and received an assortment of sentences for the other charges.

This Court affirmed his convictions and sentences on direct appeal. *State v. Nance*, 320 S.C. 501, 466 S.E.2d 349 (1996). Respondent filed an application for PCR, which was granted by this Court in *Nance v. Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004) (*Nance I*), presuming prejudice under *United States v. Cronic*, 466 U.S. 648 (1984) because defense counsel failed to challenge the prosecution's case. The United States Supreme Court granted certiorari, vacated *Nance I*, and remanded for consideration in light of *Florida v. Nixon*, 540 U.S. 1217 (2004), which explained the *Cronic* presumption is rare and reserved for cases in which counsel fails to meaningfully oppose the prosecution's case. This Court again granted Respondent's PCR request, holding "there was a total breakdown in the

[1] Two other men were in the car with Respondent. One man fled and was not apprehended, but the other man was arrested. He testified that he did not know Respondent and that Respondent had picked him and the other man up on the side of the road. *Nance II*, 367 S.C. at 549, 626 S.E.2d at 879.

[2] In addition to a bevy of other evidence, the State presented evidence Respondent was covered in Mr. and Mrs. Fraley's blood and his semen was found on Mrs. Fraley.

adversarial process during both the guilt phase and the penalty phase of [Respondent's] trial." *Nance II*, 367 S.C. at 555, 626 S.E.2d at 882. This Court awarded Respondent a new trial, and the current appeal stems from this new trial. Mr. Fraley is now deceased, and the State intended to read his sworn testimony from the first trial into the record during the current trial. Respondent moved to suppress the testimony, arguing the introduction of the prior testimony would violate his rights under the Confrontation Clause because Respondent lacked the opportunity to cross-examine Mr. Fraley during the first trial. The trial court granted Respondent's motion, and this appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001).

ANALYSIS

The State argues the trial court erred in finding a violation of the Confrontation Clause would occur if Mr. Fraley's prior testimony were introduced in the current trial. We agree.

Rule 804 of the South Carolina Rules of Evidence states that an unavailable declarant's former testimony may be admitted at a later trial if the party against whom the testimony is offered had the "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Rule 804(b)(1), SCRE. This is the rule under which the State wishes to introduce Mr. Fraley's prior testimony. As we understand the Record and the briefs, Mr. Fraley's unavailability is not in issue, nor is Respondent's motive in developing the testimony. The sole issue is whether Respondent had the opportunity to cross-examine Mr. Fraley at the prior trial.

The accused's opportunity to cross-examine a witness against him is protected by the Confrontation Clause of the Sixth Amendment to the United States Constitution. As we explained in *State v. Stokes*, confrontation "(1) insures the witness will give his statement under oath . . . ; (2) forces the witness to submit to cross-examination . . . ; and (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement . . . ." 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009) (*quoting California v. Green*, 399 U.S. 149 (1970)). The Confrontation Clause "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 401–02, 673 S.E.2d at 439 (*quoting United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838 (1988)) (emphasis in original). Therefore, if a defendant has the opportunity to cross-examine a witness, there is no violation of the Confrontation Clause.

Respondent argues that he was not provided with an opportunity for cross-examination of Mr. Fraley at the first trial because of his trial counsel's ineffectiveness. At the first trial, trial counsel's strategy was to not challenge guilt, but rather to establish Respondent's mental illness. In *Nance II*, this Court found Respondent did not receive effective assistance of counsel, and that he should be awarded a new trial. In so holding, this Court found there was "a total breakdown in the adversarial process during both the guilt phase and the penalty phase" of the trial, noting eight specific reasons trial counsel was ineffective in acting as an adversary to the State. 367 S.C. at 555, 626 S.E.2d at 882. First, we found Respondent was disadvantaged because lead counsel was ill and taking medication, and co-counsel had only been practicing law for 18 months. Second, trial counsel wanted Respondent to appear in the courtroom unmedicated, but failed to inform the jail personnel. As a result of that failing, Respondent continued taking his prescribed Haldol throughout the trial. Third, during his opening argument, co-counsel told the jury that neither he nor lead counsel chose to represent Respondent, but had been appointed. Fourth, defense counsel failed to present adequately the evidence necessary to establish a guilty but mentally ill defense. Counsel did not qualify their own expert, and elicited testimony concerning Respondent's mental irregularities only after the expert had testified. Fifth, counsel

presented no adaptability evidence at sentencing. Instead, the only evidence presented concerning Respondent's confinement was that he threw urine at a corrections officer. Sixth, counsel presented no mitigating social history at trial, though extensive evidence would have been available upon investigation. Seventh, the paltry mitigation presentation failed to provide any insight into Respondent's mental health. Finally, in closing argument, defense counsel called Respondent "a sick man who did sick things." *Id.* at 555–57, 626 S.E.2d at 882–83.

The circuit court judge in the current trial suppressed Mr. Fraley's testimony from the first trial, stating "[n]o more glaring deficiency exists than with Mr. Fraley's testimony" because "the only eye witness" was not cross-examined. The circuit court judge repeatedly focused on the lack of adversarial confrontation of Mr. Fraley. We find the circuit court judge placed unnecessary emphasis on the lack of cross-examination and failed to consider the valid overall trial strategy of not contesting guilt.

In *Florida v. Nixon*, a PCR appeal, the United States Supreme Court explained that defense counsel's decision not to test the prosecution's case is not always presumed ineffective assistance of counsel. 543 U.S. 175 (2004). The circumstances in this case are similar to those in *Nixon*. The criminal defendant in *Nixon* was charged with the kidnapping and gruesome murder of a stranger he approached for help in mall parking lot. *Id.* at 179–80. At trial, defense counsel conceded the defendant's guilt and did not present a guilt phase defense, knowing the prosecution would submit overwhelming evidence of guilt of a very violent and shocking crime. *Id.* at 180–81. Instead, defense counsel focused on presenting mitigating evidence during the penalty phase to establish the defendant's mental infirmities in a bid to save the defendant from the death penalty. The defendant was convicted of murder and, despite defense counsel's efforts, received the death penalty. *Id.* at 184. On PCR, the defendant argued his counsel was ineffective for conceding guilt without his express consent. The Supreme Court recognized that although under *Cronic*, prejudice is presumed when counsel does not subject the prosecution's case to a "meaningful adversarial testing," defense

counsel may validly choose to focus on the sentencing phase of a capital case and not contest guilt:

> . . . [Defense counsel's] concession of Nixon's guilt does not rank as a "failure to function in any meaningful sense as the Government's adversary." Although such a concession in a run-of-the-mine (sic) trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime is heinous. In such cases, "avoiding execution may be the best and only realistic result possible."
>
> Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared.

Nixon, 543 at 190–91 (citations omitted).

Here, Respondent argues he was deprived of his Sixth Amendment right to effective assistance of counsel during the first trial, and that introducing Mr. Fraley's testimony from the first trial into the second will perpetuate the constitutional infirmities. At the PCR hearing, defense counsel explained the decision not to cross-examine Mr. Fraley was based upon the overall trial strategy to concede guilt and attempt to establish Respondent's mental illness at the time of the crimes. Defense counsel testified that in light of the decision to focus on mitigation, nothing could be gained from antagonizing a sympathetic witness who had just given graphic and highly emotional testimony. We find the behavior Respondent complains of falls under *Nixon* as a valid, articulated strategic decision to focus on saving Respondent from a death penalty rather than futilely

contesting guilt in the face of the prosecution's overwhelming evidence. Defense counsel's decision not to cross-examine Mr. Fraley was reasonable and did not amount to ineffective assistance of counsel. *See Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). As previously explained in *Nance II*, we found eight specific grounds on which to base our finding of ineffective assistance of counsel. None of those grounds concerned defense counsel's decision not to cross-examine Mr. Fraley. Defense counsel's ineffectiveness was not in choosing not to cross-examine Mr. Fraley, or otherwise test the prosecution's case during the guilt phase, but rather was in failing to adequately present a mitigation case during sentencing. The decision to allow Mr. Fraley to leave the witness stand without cross-examination was a reasonable strategy often employed in capital cases. That defense counsel was unsuccessful at mitigating during the penalty phase does not negate the reasonableness of the approach to the guilt phase of the trial.

During the first trial, Mr. Fraley was sworn, on the witness stand, and Respondent had the opportunity to cross-examine him as required by the Sixth Amendment. Therefore, we find defense counsel's strategic decision not to cross-examine Mr. Fraley was reasonable in light of *Florida v. Nixon* and did not give rise to a Confrontation Clause violation. *See Stokes*, 381 S.C. at 402, 673 S.E.2d at 440.

CONCLUSION

For the above reasons, we find the circuit court erred in suppressing Mr. Fraley's testimony. As allowing the State to introduce Mr. Fraley's prior sworn testimony injects no constitutional infirmity into the trial, the circuit court is

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. Our scope of review is limited to determining whether the trial court's decision to suppress the prior testimony was an abuse of discretion, that is, to determine whether that ruling was without evidentiary support or controlled by an error of law. State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). Finding no abuse here, I would affirm.

In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) (Nance), we granted respondent post-conviction relief (PCR), citing United States v. Cronic, 466 U.S. 648 (1984) and Florida v. Nixon, 543 U.S. 175 (2004), stating:

> In light of the recent holding in *Nixon*, we believe the present case represents one of the rare cases where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." Moreover, counsel did not act as an adversary to the prosecution's case, but instead helped to bolster the case *against* his client.
>
> Nance at 553, 626 S.E.2d at 881(emphasis in original).

We continued, finding that the trial, "in its entirety," demonstrated "a total breakdown in the adversarial process during both the guilt phase and the penalty phase" such that Nance was presumed to have suffered prejudice requiring a new trial. Id. at 555, 626 S.E.2d at 882. We emphasized "the desultory manner in which defense counsel tried this case," id. and reiterated that counsel "failed to 'function…as the government's adversary,'" acting instead "to reinforce the case against his client" while "abandon[ing] his role as defense counsel." Id. at 557-558, 626 S.E.2d at 883.

The majority finds error in the trial court's focus on the lack of cross-examination of Mr. Fraley in determining whether that testimony should be barred, choosing to rely instead on counsel's "valid overall trial strategy of not contesting [Nance's] guilt." In my opinion, while this could be a valid strategy in isolation, this Court as well as the circuit court is bound by our

finding in Nance that counsel's performance during the guilt phase of the trial "further bolster[ed] the prosecution's case against [Nance] rather than providing him with a defense." Nance, 367 S.C. at 558, 626 S.E.2d at 883. The majority exceeds the scope of review when it supplies a trial strategy to lawyers who had none.

In my opinion, the majority also errs when it reverses the circuit court's suppression decision that respondent was denied "an opportunity for **effective** cross-examination…." State v. Stokes, 381 S.C. 390, 401-2, 673 S.E.2d 434, 439 (2009) *citing* United States v. Owens, 484 U.S. 554 (1988) (emphasis supplied), by reading this Confrontation Clause jurisprudence merely to require "an opportunity for cross-examination." As the majority rightly points out, the Confrontation Clause does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. Nonetheless, the circuit court's finding that admitting Mr. Fraley's trial testimony would violate respondent's Confrontation Clause rights because he had an inadequate opportunity to cross-examine the witness at that proceeding is supported by the evidence. The circuit court found that respondent effectively had no representation at his first trial, a finding amply supported by our opinion in Nance which held not only that respondent's "counsel failed to provide an adversarial challenge to the prosecution" but that they actively aided the State's case against him. Nance, at 557-558, 326 S.E.2d at 883.

I would find no abuse of discretion in the suppression of Mr. Fraley's trial testimony, State v. Wright, *supra*, and would therefore affirm.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Clyde Louis Pennington, Respondent.

Opinion No. 26999
Heard May 5, 2011 – Filed July 11, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Clyde Louis Pennington, *pro se*, of Laurens.

PER CURIAM: In this attorney discipline matter, Respondent Clyde Louis Pennington has been accused of misconduct including, among other things, failure to remit funds owed to third parties, failure to refund unearned fees, failure to protect client interests upon suspension from the practice of law, and failure to respond to inquiries by the Office of Disciplinary Counsel. At the time these formal charges were filed, Respondent was subject to a two-year suspension for other misconduct. Respondent appeared *pro se* before a panel of the Commission on Lawyer Conduct ("the Panel"), and a majority of the Panel recommended Respondent be disbarred. Respondent has not opposed this recommendation. We concur in the Panel's recommendation, and therefore, Respondent is disbarred.

I.

In October 2008, Respondent was suspended from the practice of law for two years as a result of misconduct violating Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.5, 1.7, 1.8(h), 1.15, 3.1, 3.2, 3.4, 8.1, and 8.4. See In re Pennington, 380 S.C. 49, 668 S.E.2d 402 (2008). The Office of Disciplinary Counsel has now received six additional complaints alleging misconduct on the part of Respondent. These six complaints, summarized below, are the subject of the current proceeding.

A.
Misconduct in the handling of client funds

In Matters I and II, Respondent accepted fees for the purpose of representing clients in criminal matters, did no work on the matters prior to his suspension, and failed to refund the unearned attorney's fees.

In Matter III, a client facing fraudulent check charges entrusted Respondent with funds to pay the checks at issue. Respondent failed to make the payments, and the client went to jail.

In Matter IV, Respondent obtained a personal injury settlement on behalf of his client in 2003, but he failed to pay the client's medical providers and insurers out of the settlement funds. The funds owed to third parties totaled over $17,000. At the time of his suspension in 2008, the funds in Respondent's trust account were insufficient to cover the amount due. Respondent had not maintained the trust account records required by Rule 417, SCACR.

B.
Failure to protect client interests upon suspension

In Matter II, Respondent did not notify his client of his suspension from the practice of law. In Matter V, Respondent likewise failed to notify his client of his suspension, even though Respondent

had agreed to file an appeal on his client's behalf and had not yet done so at the time he was suspended. Respondent did not instruct his client regarding the steps necessary to protect his client's interests.

C.
Acting as a surety

In Matter VI, Respondent posted bond for a client in violation of Rule 604, SCACR, which provides: "An attorney or other officer of any court of this State shall not: (1) Be . . . a surety upon any recognizance or undertaking in any court of this State . . . ."

D.
Failure to respond

Respondent failed to respond to the Notices of Full Investigation regarding Matters I, II, and V. He also failed to appear at the investigatory interview regarding those matters. See Rule 19, RLDE, Rule 413, SCACR (permitting Disciplinary Counsel to "issue subpoenas . . . conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints").

Respondent did not respond to the Notice of Formal Charges. However, he did appear at the hearing before the Panel and present evidence in mitigation.

II.

The Panel found Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence), Rule 1.2 (scope of representation), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 1.15 (safekeeping property), Rule 1.16 (declining or terminating representation), Rule 8.1 (bar admission and disciplinary matters), and Rule 8.4(e) (conduct prejudicial to the administration of justice).

The Panel considered three aggravating factors: Respondent's disciplinary history, his pattern of misconduct, and his "indifference to the disciplinary process." In mitigation, the Panel considered Respondent's testimony regarding "personal and family issues" and his acknowledgement of wrongdoing. The Panel did not consider Respondent's testimony that the funds missing from his trust account were not taken for his individual use. Respondent failed to present records in support of such testimony, and therefore, the Panel applied a "presumption that [Respondent] failed to safekeep his clients' money."

In light of these findings, three members of the Panel recommended Respondent be disbarred, while two members recommended he be suspended for a definite period of three years. In addition, the Panel recommended Respondent be ordered to pay costs and restitution and, prior to seeking reinstatement, complete the Legal Ethics and Practice Program and Trust Account School.

Respondent took no exception to the Panel report.

III.

This Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission." Rule 27(e)(2), RLDE, Rule 413, SCACR. An attorney's failure to answer the formal charges against him is an admission of the factual allegations set forth in those charges. Rule 24(a), RLDE, Rule 413, SCACR.

IV.

We find Respondent has committed misconduct in the respects identified by the Panel. Thus, we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competence), Rule 1.2 (scope of representation), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 1.15 (safekeeping property), Rule 1.16 (declining or terminating representation), Rule 8.1(b) (knowing failure

to respond to a lawful demand for information from a disciplinary authority), and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Further, we concur in the Panel's findings that Respondent's prior disciplinary history, pattern of misconduct, and disregard for the disciplinary process are aggravating factors. Respondent was suspended in October 2008 for misconduct violating Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.5, 1.7, 1.8(h), 1.15, 3.1, 3.2, 3.4, 8.1, and 8.4. In addition, Respondent's disciplinary history includes an October 2000 letter of caution citing Rule 8.1 and a December 2001 confidential admonition citing Rules 8.1 and 8.4(e).[1] Respondent's testimony in mitigation does not excuse his persistent pattern of failures to exercise appropriate diligence, safekeep his clients' property, and cooperate with the Office of Disciplinary Counsel.

We find that disbarment is an appropriate sanction in this case. See, e.g., In re Dicks-Woolridge, 371 S.C. 42, 637 S.E.2d 565 (2006) (disbarring an attorney who failed to repay unearned fees, failed to timely remit funds owed to third parties, converted trust funds to her own use and failed to maintain proper trust account records, failed to protect her client's interests upon suspension, and failed to cooperate with ODC's investigation). As we have recognized, "[t]he primary purpose of disbarment . . . is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney." In re Burr, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976). The current allegations, which Respondent has admitted, include misconduct that has resulted in significant harm to his clients. Moreover, Respondent's disciplinary history shows a pattern of misconduct and a persistent failure to

[1] Respondent also received a May 2009 confidential admonition citing Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.8(h), 3.3, 8.1, and 8.4, but this sanction post-dated the conduct at issue in this proceeding. In addition to the disciplinary history cited above, Respondent was suspended for failure to pay annual license fees and assessments in 1999 and for failure to comply with continuing legal education requirements in 2002 and 2006.

cooperate with Disciplinary Counsel's investigations. And finally, Respondent appeared before this Court and did not oppose the Panel's recommendations.

V.

Respondent has engaged in a pattern of misconduct warranting disbarment, and he has not raised any exceptions to that sanction. We hereby disbar Respondent. Within fifteen days of the date of this opinion, Respondent shall surrender his certificate of admission to practice law and shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR.

Pursuant to the Panel's recommendations, Respondent is ordered to pay restitution to the clients and/or third parties in Matters I through IV. He shall receive credit against these payments for any funds paid to the Lawyers' Fund for Client Protection out of his trust account at the time of his 2008 suspension. Respondent is further ordered to pay the costs of the Panel proceedings. Finally, Respondent must complete the Legal Ethics and Practice Program and Trust Account School prior to petitioning for reinstatement to the Bar.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Irby Ezell Walker, Jr., Respondent.

Opinion No. 27000
Submitted June 14, 2011 – Filed July 11, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

George Hunter McMaster, of Tompkins and McMaster, LLP, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, 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 the Agreement, respondent admits misconduct and consents to disbarment pursuant to Rule 7(b), RLDE, Rule 413, SCACR. He requests the disbarment be imposed retroactively to the date of his interim suspension, September 18, 2009. In the Matter of Walker, 384 S.C. 536, 683 S.E.2d 476 (2009). In addition, respondent agrees not to seek reinstatement until he has fully completed his criminal sentence, fully paid restitution to the parties affected by the misappropriation of funds from his trust accounts, fully reimbursed the Lawyers' Fund for Client Protection, and satisfied all judgments against him arising from the practice of law. Respondent

further agrees to reimburse ODC and the Commission on Lawyer Conduct (the Commission) for costs incurred in the investigation and prosecution of this matter once he has completed the active term of his prison sentence.

We accept the Agreement and disbar respondent from the practice of law in this state with the conditions set forth in the Agreement. The disbarment shall be retroactive to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent represented a client in a dispute with a carpenter. Respondent failed to competently perform some tasks on the client's behalf, failed to diligently work on her case, and failed to adequately communicate with the client. In addition, respondent submitted his initial response only after receiving ODC's reminder letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

Matter II

Respondent conducted a real estate closing. The funds to be disbursed included a loan payoff of $105,600. Respondent failed to submit a timely payoff. For more than six (6) months, respondent was unaware of this problem because he was not properly reconciling his real estate trust accounts or adequately supervising his staff. The payoff was ultimately made, but additional interest of $5,483.57 accrued during the delay. Respondent admitted he was responsible for the delay and agreed to reimburse the seller for the additional interest, but failed to so. Respondent later self-reported to ODC that Jessamine Johnson, his sole real estate paralegal and the member of his staff who managed his real estate trust accounts, had been stealing money from his trust accounts.

Respondent admits he did not maintain accurate and complete trust account records as required by Rule 417, SCACR. Accordingly, the full extent of Ms. Johnson's misappropriation is unknown. However, from May 2006 through December 2008, Ms. Johnson made approximately $145,550 in payments on her American Express account by wiring funds from one of respondent's real estate trust accounts to the company. Further, from September 2008 through February 2009, she wired approximately $11,600 from another real estate trust account to her husband's business, Crescent Development, LLC. Ms. Johnson also issued checks to herself, her husband, and her husband's business totaling $36,350.67 from respondent's real estate trust accounts.

Because the slowdown in the real estate market resulted in small balances in respondent's real estate trust accounts, Ms. Johnson eventually began to misappropriate funds to conceal her prior thefts. In addition to the payoff discussed in Matter I, Ms. Johnson failed to submit payoffs in four other closings totaling approximately $250,000. In April 2009, she wired $100,000 from respondent's litigation trust account to one of his real estate trust accounts, and then wrote two checks totaling $40,100 from that real estate trust account to the other real estate trust account.

Although it appears Ms. Johnson also altered bank statements to hide her activities, respondent's failure to adequately maintain his trust account and properly supervise his staff led to a significant delay in the discovery of Ms. Johnson's theft, and thus prolonged the period of time she had access to client funds. Respondent reported Ms. Johnson and her husband, who allegedly assisted in the theft, to law enforcement. Although the exact figure is not available, Ms. Johnson and her family have paid some restitution.

Matter III

In August 2010, respondent pled guilty to solicitation of a felony. Specifically, respondent admitted attempting to hire a "hit

man" to murder another member of the South Carolina Bar. Respondent paid the "hit man" in part with a post-dated check because he did not have sufficient funds in his account to pay the check's face value. Respondent was sentenced to ten (10) years imprisonment, suspended upon service of three (3) years imprisonment and five years of probation.

Matter IV

Complainant, the attorney respondent attempted to have murdered, represented the wife in a domestic matter. Respondent represented the husband. After being relieved from the case, respondent went with the husband to the wife's home and convinced her to fire Complainant and reach an agreement with the husband. Respondent told the wife not to tell anyone about the visit. Respondent prepared a quit claim deed for the husband to sign as part of the settlement he was proposing.

Matter V

Respondent agreed to represent a client in a personal injury case on a contingency fee basis. Respondent never filed suit and did not adequately communicate his decision with the client. The statute of limitations expired and, almost three years after accepting the case, respondent wrote "Close - We did not pursue" on the client's file.

Matter VI

A client hired respondent to represent him in a personal injury case arising from an automobile accident. Respondent did not work diligently on the case. When the client came to respondent in need of money, respondent guaranteed an $8,000 bank loan for the client. Respondent promised the client he would quickly settle the case and pay off the loan, but failed to do so. The note was renewed multiple times and respondent paid interest on the loan on at least one occasion.

Matter VII

In August 2009, respondent accepted a $4,000 retainer from a husband and wife to represent them in a foreclosure matter. Respondent had not earned his fee upon receipt of the retainer and did not deposit the retainer into his trust account. Instead, respondent endorsed the check and gave it to a third person who endorsed and negotiated the check.

Matter VIII

On or about December 5, 2008, respondent accepted a $2,000 retainer to pursue a divorce on behalf of a seriously ill man who believed his wife was poisoning him. The client wanted the action filed immediately and for respondent to seek an expedited hearing as well as an expedited divorce on the ground of habitual drunkenness. The client died on December 13, 2008, before respondent had filed a domestic action or otherwise performed work on his case. Respondent did not refund any portion of the retainer.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation and consult with client as to means by which they are pursued); 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 the status of a matter and promptly comply with reasonable requests for information); Rule 1.5(a) (lawyer shall not make agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses); Rule 1.8(e) (lawyer shall not provide financial assistance to client in connection with pending or contemplated litigation); Rule 1.8(i) (lawyer shall not acquire proprietary interest in cause of action or subject matter of

litigation the lawyer is conducting for client); Rule 1.15 (lawyer shall safeguard client funds); Rule 1.15(c) (lawyer shall deposit into client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred); Rule 4.2 (lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order); Rule 5.3 (lawyer who possesses managerial authority in law firm shall make reasonable efforts to ensure that firm has in effect measures giving reasonable assurance that non-lawyer employee's conduct is compatible with the professional obligations of lawyer; lawyer having direct supervisory authority over non-lawyer shall make reasonable efforts to ensure that non-lawyer's conduct is compatible with the professional obligations of lawyer); Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to commit a criminal act involving moral turpitude); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits he violated the recordkeeping provisions of Rule 417, SCACR.

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to a lawful demand for response from disciplinary authority), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate

the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent retroactively to September 18, 2009, the date of his interim suspension. Respondent shall not file a petition for reinstatement until he has fully completed his criminal sentence, fully paid restitution to the parties affected by the misappropriation of funds from his trust accounts, fully reimbursed the Lawyers' Fund for Client Protection, and satisfied all judgments against him arising from the practice of law. Once he has completed the active term of his prison sentence, respondent shall make arrangements to fully reimburse ODC and the Commission for costs incurred in the investigation and prosecution of this matter.

Within fifteen (15) 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 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ. HEARN, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Louis S. Moore, Respondent.

Opinion No. 27001
Submitted May 16, 2011 – Filed July 11, 2011

DEFINITE SUSPENSION

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

Louis S. Moore, of Reidsville, North Carolina, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension from the practice of law for up to ninety (90) days. Respondent further agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission). We accept the Agreement and definitely suspend respondent from the practice of law in this state for ninety (90) days, retroactive to respondent's May 18, 2009, suspension from the practice of law. See In the Matter of Moore, 382 S.C. 610, 677 S.E.2d 598 (2009). In addition, respondent

shall pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

FACTS

On May 18, 2009, the Court suspended respondent from the practice of law for one (1) year. Id. He has not been reinstated. On or about March 1, 2010, respondent issued a check in the amount of $547.00 drawn on a law firm trust account enrolled in the Interest on Lawyer's Trust Account (IOLTA) program. Respondent acknowledges there were insufficient funds in the account at the time he wrote the check. Respondent had made arrangements to have funds deposited by others into the account prior to the check being negotiated, however, the deposit was not made prior to the check being presented for payment.

Respondent maintains no client funds were maintained in the trust account. ODC does not dispute respondent's claim.

Respondent states that, due to his lack of steady employment and poor credit history, he was unable to open a personal checking account. Respondent admits he was using the trust account for payment of living expenses and acknowledges that the personal use of the trust account was wrong. He asserts he was desperate to take care of his family when he engaged in the misconduct.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer may only deposit personal funds in trust account for sole purpose of paying service charges on the account) and Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent acknowledges his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate

Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period, retroactive to respondent's May 18, 2009, definite suspension from the practice of law. See In the Matter of Moore, id. Within thirty (30) days of the date of this opinion, respondent shall reimburse ODC and the Commission for costs incurred in the investigation and prosecution of this matter. 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., PLEICONES, BEATTY, and KITTREDGE, JJ., concur. HEARN, J., not participating.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gwendolyn Long Robinson, Respondent.

Opinion No. 27002
Submitted June 14, 2011 – Filed July 11, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Susan B. Hackett, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Gwendolyn Long Robinson, of Mount Pleasant, pro se.

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 agrees to the imposition of an admonition, public reprimand, or definite suspension not to exceed nine (9) months. In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter. We accept the Agreement, issue a public reprimand, and order respondent to pay the costs in this matter within thirty (30) days of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent represented the plaintiff in an action brought in the United States District Court for the District of South Carolina; Complainant represented the defendants in the suit. The suit alleged a violation of the plaintiff's civil rights.

Respondent interviewed Witnesses A and B and prepared affidavits for the witnesses based upon her interviews. Respondent faxed the affidavits to the witnesses and requested they call her if they had any problems with the affidavits. Respondent did not receive a call from either witness.

On June 18, 2010, respondent filed the two affidavits with the court in support of her Motion in Opposition to Complainant's Motion for Summary Judgment. One of the affidavits purported to contain the sworn testimony of Witness A. The affidavit was not signed by Witness A. Instead, respondent affixed the following to the signature line: "/s/ Witness A." Respondent then typed her name as the notary public for the document with a date of June17, 2010.

The other affidavit purported to contain the sworn testimony of Witness B. The affidavit was not signed by Witness B. Instead, respondent affixed the following to the signature line: "/s/ Witness B." Respondent then typed her name as the notary public for the document with a date of June 17, 2010.

Neither Witness A nor Witness B personally appeared before respondent on June 17, 2010, and neither signed the affidavits on June 17, 2010. When respondent affixed her name as the notary, she indicated the affiant personally appeared before her and attested to the veracity of the contents of the document. This was not true.

On June 24, 2010, respondent met with Witness A and Witness B. One of them confronted respondent regarding the affidavits. Both insisted respondent make amendments to the contents of their affidavits. Respondent made the amendments. Both then

signed the affidavits and respondent filed the amended affidavits. Respondent admits the requested changes weakened her client's position.

On June 25, 2010, Complainant obtained affidavits from Witness A and Witness B indicating they did not sign the affidavits purported to be signed by them on June 17, 2010. Complainant filed a motion with the court asking the court to disregard the documents. The court did not issue a decision Complainant's motion because the case settled.

The use of "s/" followed by a name indicates that the document is a copy, the original contains an original signature, and the copy has been conformed to match the original by use of the symbol. Thus, when respondent typed "/s/" followed by the names of Witness A and Witness B on the affidavits, she represented to the court that these individuals had signed original affidavits and she was merely conforming the copies to the signed originals. Respondent admits this was a misrepresentation to the court as signed originals did not exist on June 17, 2010, or June 18, 2010, when the affidavits were filed.

The United States District Court for the District of South Carolina has established Policies and Procedures for e-filing. Section 10.5 of the ECF Policies and Procedures manual provides that "documents containing the signature of persons other than *Filing Users* are to be filed electronically as a scanned image." Additionally, the United States District Court for the District of South Carolina has published an Attorney's Manual. Section 7 of the Manual explains that "[s]ome documents which bear the signatures of persons other than the particular *Filing User* who filed the document (including other Filing Users) must be electronically filed as scanned images (e.g., affidavits)." Therefore, the federal court's Policies and Procedures required respondent to file scanned images of the originally signed affidavits, not copies with conformed signatures.

LAW

Respondent admits that, by her misconduct, she has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal or fail to correct false statement of material fact previously made to the tribunal by lawyer); Rule 8.4(a) (it is professional misconduct for lawyer to violate or attempt to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4 (e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent acknowledges that her 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).

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 her misconduct. Respondent shall pay the costs associated with the investigation and prosecution of this matter within thirty (30) days of the date of this opinion.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur. HEARN., J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Pikaart, Respondent,

v.

A & A Taxi, Inc. and South Carolina Uninsured Employers' Fund, Appellants.

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27003
Heard April 6, 2011 – Filed July 11, 2011

AFFIRMED

Brown W. Johnson, of Clarke, Johnson, Peterson & McLean, and Samuel Thompson Brunson, both of Florence, for Appellants.

Charles Vance Leonard, of Harris & Leonard, P.A., of Myrtle Beach, for Respondent.

JUSTICE BEATTY: A & A Taxi, Inc. and the South Carolina Workers' Compensation Uninsured Employers' Fund (collectively, Appellants) appeal from a circuit court order finding Robert A. Pikaart was an employee of A & A Taxi, Inc. at the time he was injured in two automobile accidents and that he was entitled to certain workers' compensation benefits. Appellants contend Pikaart was an independent contractor, not an employee; therefore, the South Carolina Workers' Compensation Commission has no jurisdiction in this matter. They further argue the circuit court improperly made findings of fact that did not bear on the limited issue of jurisdiction that was before it. We affirm.

I. FACTS

A & A Taxi, Inc. is a taxi company located in Myrtle Beach, South Carolina. It was formed by Romeo A. Liriani, the company's owner and president.

Pikaart had over twenty years of experience in the taxi business at the time this action arose. Pikaart was involved in two unrelated automobile accidents in Horry County on October 23, 2004 and January 2, 2005 while performing errands for A & A Taxi.[1] In April of 2005, Liriani and Pikaart parted ways. According to Pikaart, he was terminated after he advised Liriani that he would need surgery as a result of his injuries.

Pikaart sought workers' compensation coverage for alleged injuries he sustained to his neck, back, arms, hands, and fingers. A & A Taxi denied

[1] The first accident occurred when Pikaart used a taxi to pick up a driver who had no transportation to work. The taxi was struck from behind while waiting at a red light. The second accident occurred after Pikaart had driven to a repair shop to check on the status of a mechanical problem with another taxi. Before leaving the shop, Pikaart called a dispatcher to inquire whether they needed any assistance, and he was directed to pick up a paying passenger in Socastee. Pikaart was on his way to pick up the fare when a driver in another car ran a stop sign, and the two collided. A & A Taxi owned the taxis involved in both accidents.

responsibility for Pikaart's claims on the basis Pikaart was an independent contractor, not an employee. A & A Taxi did not carry workers' compensation coverage, so the South Carolina Workers' Compensation Uninsured Employers' Fund was made a party to the action.

A hearing was held before a commissioner of the Workers' Compensation Commission. Pikaart testified that he had been employed by Liriani as A & A Taxi's office manager at the time of his accidents. He outlined his duties, which included the following: making a schedule for all of the taxis; implementing a $10 dispatch fee all drivers were required to pay A & A Taxi for dispatch services, which saved the company some overhead costs; processing the trip vouchers that were submitted for every taxi; implementing a rotation system for high-paying fares and a method for selling accounts receivable to provide immediate cash flow; hiring and firing drivers for Liriani; finding independent cabs to take calls whenever A & A Taxi was fully booked; overseeing vehicle maintenance for the taxis; filling in as a dispatcher and a driver whenever needed; and communicating with insurance companies, City Hall, and others on behalf of A & A Taxi.

In contrast, Liriani testified Pikaart was "never" the manager of A & A Taxi. Liriani stated Pikaart leased five cabs and three certificates (or medallions) from him, and that Pikaart leased two medallions from other individuals and operated all five of those cabs as his own business. He stated Pikaart never performed any duties for him; rather, he just controlled the five cabs he leased.

The commissioner found Pikaart was not an employee of A & A Taxi, but was instead operating his own taxi business. The commissioner concluded the Commission did not have jurisdiction over this case because no employer-employee relationship existed. An Appellate Panel of the Commission upheld the commissioner's order.

Upon review, the circuit court, noting it could take its own view of the preponderance of the evidence on jurisdictional matters, determined Pikaart was the manager of A & A Taxi and therefore an employee. The circuit court

stated Pikaart "ran the entire [A & A Taxi] operation and was present every day" and that his "managerial duties [were] extensive." The circuit court noted "it is clear [Pikaart's] overall task was to increase revenue for the company," and "[h]is injuries occurred when furthering the business of [A & A Taxi]." Citing Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002), the circuit court found A & A Taxi exercised extensive control over Pikaart as well as the other workers. The circuit court additionally found Pikaart was entitled to certain workers' compensation benefits.

Appellants appealed. Pursuant to Rule 204(b), SCACR, we certified this case from the Court of Appeals.

II. STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this Court can reverse or modify the decision of the Commission where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. Pierre, 386 S.C. at 540, 689 S.E.2d at 618; Transp. Ins. Co. v. South Carolina Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)).

An award under workers' compensation law is not authorized unless an employer-employee relationship existed at the time of the injury for which a claim is made. Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct. App. 1987); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984); see also S.C. Code Ann. § 42-1-130 (Supp. 2010) (defining "employee" under workers' compensation law to include "every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written . . . .").

The question whether a claimant is an employee or an independent contractor is a jurisdictional issue. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009); Vines v. Champion Bldg. Prods., 315 S.C. 13, 431 S.E.2d 585 (1993). Where the disputed issue concerns jurisdiction, this Court may take its own view of the preponderance of the facts upon which jurisdiction is dependent. Wilson v. Georgetown County, 316 S.C. 92, 447 S.E.2d 841 (1994); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct. App. 1996).

It is South Carolina's policy to resolve jurisdictional questions in favor of inclusion of employees within workers' compensation coverage rather than exclusion. Shuler v. Tri-County Elec. Co-op, 385 S.C. 470, 684 S.E.2d 765 (2009); Hill v. Eagle Motor Lines, 373 S.C. 422, 645 S.E.2d 424 (2007); Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010).

Although we may take our own view of the preponderance of the evidence on matters affecting jurisdiction, this broader scope of review does not require this Court to ignore the findings of the Commission, which was in a better position to evaluate the credibility of the witnesses. Paschal v. Price, Op. No. 26958 (S.C. Sup. Ct. filed Apr. 4, 2011) (Shearouse Adv. Sh. No. 12 at 44); Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000).

III. LAW/ANALYSIS

On appeal, Appellants contend the circuit court erred in (1) finding Pikaart was an employee of A & A Taxi, rather than an independent contractor, and (2) making findings of fact numbered one through nine because they do not relate to the limited issue of jurisdiction that was before the court.

A. Employee Versus Independent Contractor

Under South Carolina law, the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has the right to control the employee in the performance of the

work and the manner in which it is done. Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993). "The test is not the actual control exercised, but whether there exists the right and authority to control and direct the particular work or undertaking." Id. at 68, 437 S.E.2d at 49.[2]

The four principal factors indicating the right of control are (1) direct evidence of the right to, or exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. South Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995); Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971).

In Wilkinson, this Court announced a return to our jurisprudence that evaluates the four factors with equal force in both directions to provide an even-handed and balanced approach. Wilkinson, 382 S.C. at 300, 676 S.E.2d at 702. This overruled the analytical framework previously set forth in Dawkins v. Jordan, 341 S.C. 434, 534 S.E.2d 700 (2000) on the basis it unduly weighted the factors in a manner that favored a finding of employment by providing the existence of any single factor was virtually proof of an employment relationship, while contrary evidence as to any one factor was only mildly persuasive evidence of contractorship. Id.

In the current matter, the circuit court found the case of Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002) to be controlling. In Nelson, we considered the jurisdictional question whether a taxi driver, who had been murdered while driving his cab, was an employee or an independent contractor of Yellow Cab. We noted there was a split of authority as to the status of a taxi driver who leases a taxi under a per diem payment agreement

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[2] In Kilgore, we observed that "[u]nder the South Carolina Employment Security Law, employment is defined to include 'any service performed by any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . .'" Kilgore, 313 S.C. at 68, 437 S.E.2d at 49 (quoting S.C. Code Ann. § 41-27-230(1)(b) (1986)). In this case, the Employment Security Commission ruled Pikaart was an employee of A & A Taxi.

and keeps his fares and tips as compensation, but observed that the majority of cases hold that under such circumstances the taxi driver is an employee by virtue of the cab company's exercise of control. Id. at 595, 564 S.E.2d at 113.

Wilkinson expressly overruled Nelson to the extent it applied the Dawkins test, but this does not alter the fundamental principle established in Nelson regarding the taxi driver's employment status. Although the Nelson Court recited the Dawkins test, as a practical matter, it did not rely upon the presence of only one factor as being determinative of an employment relationship. Rather, it considered in detail all four factors and found by a preponderance of the evidence that these factors, on balance, were indicative of an employment relationship. Therefore, the result in Nelson would be the same under the approach announced in Wilkinson.

Similarly, in the current appeal, the circuit court recited the Dawkins test in passing,[3] but it did not rely upon the presence of only one factor. Instead, the court evaluated all four factors before finding, by a preponderance of the evidence, that an employment relationship existed between Pikaart and A & A Taxi.

Pikaart maintains that "[i]t is clear when considering the Nelson factors, even when using the approach approved in [Wilkinson], that [he] was an employee of [A & A Taxi] and the decision of the Circuit Court should be affirmed." We agree.

Appellants note in their brief that a number of former drivers testified that Pikaart was the general manager of A & A Taxi and also testified about the degree of control A & A Taxi exerted over them. Appellants concede: "If one of those drivers had been injured, it is clear that under the Nelson case, they would have been considered employees." Nevertheless, Appellants argue "those drivers' positions at A & A Taxi, Inc. differed from that of the Claimant, Robert Pikaart."

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[3] Wilkinson was published only a couple of days prior to the date the circuit court's order was signed.

Appellants deny that Pikaart was ever A & A Taxi's manager, but argue that, even if he was the manager, "he was not injured in that role. He was allegedly injured while driving a cab." The fact that Pikaart was employed as the company's manager (which included duties such as driving a taxi and performing dispatching services when needed), as opposed to being employed solely as a taxi driver, does not negate his status as an employee, and Appellants have pointed to no specific evidence to support its assertion that being a manager somehow invalidated his employment status.

Appellants further contend Pikaart was merely leasing five cabs from Liriani and operated those cabs for his own independent business. As in Nelson, the fact that Pikaart leased his cabs from A & A Taxi and split the fares with A & A Taxi to receive compensation is typical for the industry and is not determinative that he ran his own taxi company within Liriani's taxi company. As noted in Nelson, the majority of jurisdictions considering the question have held that such an arrangement constitutes an employment, not an independent contractor, arrangement. It is clear from the record, and Appellants conceded as much at oral argument, that Pikaart did perform tasks for the benefit of, and on behalf of, A & A Taxi, not strictly for himself. Further, Pikaart took nothing with him when he parted ways with A & A Taxi, and there is no evidence he operated his own independent business.

Appellants next assert that Pikaart has started his own cab company, Red Top Cabs, since parting ways with A & A Taxi. However, Pikaart's activities after leaving A & A Taxi are not relevant to Pikaart's employment status at the time of the accidents at issue here.

Appellants also state Pikaart has been in the taxi business for over twenty years and during that time he never purchased workers' compensation insurance for his drivers, but he now wants compensation for himself. This point likewise is not relevant to the jurisdictional question of whether Pikaart was an employee or an independent contractor with A & A Taxi at the time of his accidents. Appellants contend this information goes to credibility. But by the same token, Liriani admittedly has never provided workers'

compensation coverage to anyone working for him, either, so he is in the same position as Pikaart in this regard.

Although Appellants did not individually address the four factors, we now examine some of the pertinent evidence as it relates to the four individual factors in evaluating the right of control.

(1) Direct Evidence of the Right to Control

The circuit court noted the workers at A & A Taxi needed advance permission to be taken off of the work schedule, they were not allowed to give out their own phone numbers for business, and all calls were required to go through the dispatcher.

Pikaart, in particular, testified that Liriani required all calls to go through the dispatcher, and he was not allowed to give out his own cell phone number, name, or business card. Liriani controlled the advertising and provided business cards for the workers to use. Further, workers were expected to respond to the dispatcher when called and to make trips as directed. Pikaart said that he would call the dispatcher if he were out of the cab for any reason, such as to get something to eat or use the restroom.

Pikaart primarily performed managerial tasks for Liriani and A & A Taxi, but he also filled in as a dispatcher and he drove cabs when needed. In fact, both of the accidents he is seeking compensation for occurred while he was driving vehicles owned by A & A Taxi and running errands on behalf of the company. Although Pikaart had some discretion as manager and, in fact, came up with several business concepts for the company, such as the $10 dispatch fee, it is clear from the record that these were all in furtherance of A & A Taxi's business, and Pikaart did not implement any substantial changes without Liriani's consent. We find this factor weighs in favor of an employment relationship.

(2) Furnishing of Equipment

The circuit court found A & A Taxi furnished the cabs, provided maintenance, and also procured insurance and permits for all cars. It also advertised the company's services and provided business cards and dispatching services, as well as a common paint scheme with the "A & A Taxi" name on all of the cabs. The circuit court noted A & A Taxi also provided a phone number, customers, vouchers, and rules to abide by, and drivers were not allowed to give out personal business cards or contact numbers.

These findings are all supported by the record, as the former workers with A & A Taxi testified that the company provided most of the necessary equipment and services. As to Pikaart in particular, he testified that he did not own the dispatch service and equipment, phone numbers, cabs, or anything else while he was working for A & A Taxi, and he took nothing with him when he left. He further testified that Liriani purchased the city business license. We find this factor weighs heavily in favor of finding an employment relationship.

(3) Method of Payment

The circuit court found the drivers in this case were allowed to keep fifty percent of their fares, which was similar to the situation in Nelson. The circuit court noted Pikaart received payment much the same as the employee in Nelson, except that he derived his income from five cabs, rather than from one, and he paid a weekly rate to the employer instead of a daily rate. The circuit court specifically found that Pikaart was not operating his own business within the A & A Taxi business.

Pikaart testified that he was never given a W-2 form or a Form 1099 when he worked at A & A Taxi. However, he said he listed A & A Taxi as his employer on his tax returns. Further, Pikaart testified that he "derived all

of [his] living from A&A Taxi." Liriani confirmed that he never provided Pikaart with either a W-2 form or a Form 1099.

The parties operated primarily on a cash basis, and it appears this was intended to avoid reporting requirements on both sides. Due to the lack of records in this regard, the evidence does not preponderate in favor of either party and we consider this a neutral factor.

(4) Right to Fire

As noted by the circuit court, several of the witnesses testified that those working at A & A Taxi could be fired for a variety of reasons. For example, Charles Michael Clark, a former driver and dispatcher for A & A Taxi, testified that he had been terminated by Liriani. Clark stated workers could be terminated for a variety of reasons, including failing to pick up a customer or not showing up, drinking on the job, having too many wrecks, making a false application, carrying a weapon, stealing, or cheating on trip sheets, etc.

Pikaart testified that he was fired after he told Liriani that he would need surgery as a result of his accidents. Pikaart stated Liriani would sometimes fire people, but would on occasion direct him or a dispatcher to do the firing.

Upon questioning, Liriani adamantly denied that he could terminate any of the workers at A & A Taxi. He was asked if he could terminate them under various extreme scenarios, such as if they didn't show up for work ten days in a row, or if they had ten wrecks in a row, and he said "absolutely not." Liriani even stated that if one of the drivers "blows up the Myrtle Beach Convention Center" (his example), he still could not fire them, but would "report them to the police department." This testimony reflects adversely upon Liriani's credibility. We find this factor also weighs heavily in favor of finding an employment relationship existed.

Based on the foregoing, we hold the circuit court correctly considered the jurisdictional facts and found, by a preponderance of the evidence, that Pikaart was the general manager of A & A Taxi and thus, its employee. Accordingly, the circuit court's determination in this regard is affirmed.

B. Additional Findings of Fact

Appellants next contend that, even if this Court agrees with the circuit court's determination that Pikaart was an employee, the circuit court committed "obvious error" by making additional findings of fact regarding the benefits to which Pikaart is entitled. Appellants state these findings encompassed such matters as the compensability of Pikaart's claims, his average weekly wage, the dates for which he was to receive benefits, and his entitlement to additional medical care.

Appellants state the Commission never reached the issue of benefits because it found it had no jurisdiction. Appellants assert these findings go beyond the limited jurisdictional issue presented on appeal, i.e., whether an employer-employee relationship existed, and the circuit court lacks the authority to make its own findings of fact on issues not related to jurisdiction. Instead, such issues should have been remanded to the Commission.

Although the circuit court committed error for the reasons stated by Appellants, there is no indication in the record that Appellants ever presented this argument to the circuit court to allow it the opportunity to amend its ruling. Thus, any error was not preserved and it is not properly before this Court.

A matter may not be presented for the first time on appeal; rather, it must have been both raised to and ruled upon by the court below. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

Although Rule 59(e), SCRCP motions are not applicable in matters before the Commission itself,[4] such motions are applicable when the circuit court sits in an appellate capacity, and they are required to preserve an issue for review by the Court of Appeals or this Court. See Shealy, 341 S.C. at 460, 535 S.E.2d at 444 (holding, in a workers' compensation case, that the alleged error was not preserved for appellate review where the circuit court did not rule on the issue and no Rule 59(e), SCRCP motion was made); Leviner v. Sonoco Prods. Co., 339 S.C. 492, 530 S.E.2d 127 (2000) (observing neither party filed a timely motion under Rule 59(e), SCRCP seeking clarification of the circuit court's order in an appeal from the Commission); see also Hill v. South Carolina Dep't. of Health & Envt'l Control, 389 S.C. 1, 698 S.E.2d 612 (2010) (stating Rule 59(e), SCRCP motions are necessary to preserve issues not ruled upon for review when the circuit court sits in an appellate capacity (citing City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007)).

IV. CONCLUSION

Because the issue on appeal concerns jurisdiction, i.e., whether an employer-employee relationship existed, this Court may take its own view of the preponderance of the evidence. We hold the facts in this case preponderate in favor of a finding that Pikaart was the general manager of A & A Taxi and, thus, was an employee subject to the jurisdiction of the Commission. To the extent Appellants contend the circuit court erred in making additional findings of fact that were not related to jurisdiction, we hold this issue is not properly before this Court on appeal as it was not preserved. Consequently, we affirm the circuit court's order in full.

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[4] Stone v. Roadway Express, 367 S.C. 575, 582, 627 S.E.2d 695, 699 (2006) ("Rule 59(e) is not applicable in proceedings before the commission."); Nettles v. Spartanburg Sch. Dist. #7, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000) (stating workers' compensation law does not contain a motion to reconsider; rather, a party must appeal).

AFFIRMED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jamey Allen Reid, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 27004
Heard April 19, 2011 – Filed July 11, 2011

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R. J. Shupe, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, and Solicitor Christina Theos Adams, of Anderson, for Respondent.

JUSTICE KITTREDGE: In State v. Reid, 383 S.C. 285, 679 S.E.2d 194 (Ct. App. 2009), the court of appeals affirmed Petitioner Jamey Allen Reid's convictions for attempted second-degree criminal sexual conduct (CSC) with a minor and criminal solicitation of a minor. We granted a writ of certiorari to review the court of appeals' analysis and disposition of Petitioner's conviction and sentence for attempted second-degree CSC with a minor. The single issue before us is whether the court of appeals erred in upholding the trial court's denial of Petitioner's directed verdict motion. We affirm.

I.

The underlying facts are detailed in the court of appeals' excellent opinion. In essence, Petitioner entered an Internet chat room (under the screen name "Fine_Ass_Seminoles_Fan") believing he was chatting with a fourteen-year-old female. The supposed minor was, in fact, Westminster Police Officer Mark Patterson. Officer Patterson used the screen name "Skatergurl." Petitioner quickly turned the conversation to one of a sexual nature, as he desired a sexual encounter with Skatergurl. Skatergurl asked, "You don't care I am 14?" to which Petitioner responded, "No." Petitioner suggested a meeting place and time, specifically the parking lot of the Westminster Middle School between 2:00 and 2:15 a.m. Skatergurl agreed. Petitioner's stated intention was to take Skatergurl to his apartment.

Officer Patterson and a fellow officer traveled to the Westminster Middle School parking lot. At approximately 2:30 a.m., Petitioner arrived in the parking lot, driving his vehicle. The officers stopped Petitioner and arrested him.

Petitioner was indicted and tried for attempted second-degree CSC with a minor and criminal solicitation of a minor. At the close of the State's case, Petitioner moved for a directed verdict in connection with the attempted CSC

charge, arguing that the State had failed to present evidence of an overt act as required by the attempted CSC charge. Because the trial court held there was sufficient evidence presented to create a jury question, the directed verdict motion was denied. The jury convicted Petitioner on both charges, and he was sentenced. Petitioner appealed the attempted CSC conviction, which was affirmed by the court of appeals in a scholarly opinion.

II.

We granted a writ of certiorari to determine whether Petitioner's traveling to a predetermined location constituted sufficient evidence of an overt act, which is an essential element in establishing an "attempt" to commit the underlying crime. Petitioner contends the evidence, as a matter of law, was insufficient on the question of specific intent and further rose only to the level of "mere preparation," entitling him to a directed verdict of acquittal on the attempted CSC charge. Under the facts of this case, we agree with the court of appeals that because a jury question was presented, the directed verdict motion was properly denied.[1]

Turning to the substance of Petitioner's argument, South Carolina law provides that "[a] person is guilty of criminal sexual conduct with a minor in the second degree if . . . the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(B)(1) (Supp. 2010). A person guilty of attempt is punishable as if he had committed the underlying offense. State v. Sutton, 340 S.C. 393, 396 n.3, 532 S.E.2d 283, 285 n.3 (2000). To prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent. State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001).

A.

[1] The court of appeals' opinion correctly sets forth the proper standard of review when considering a challenge to a trial court's denial of a directed verdict motion. Reid, 383 S.C. at 292, 679 S.E.2d at 197.

In the context of an attempt crime, specific intent means the defendant intended to complete the acts comprising the underlying offense. Sutton, 340 S.C. at 397, 532 S.E.2d at 285 ("In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense."). The evidence here presented a jury question on the element of specific intent. As detailed by the court of appeals, Petitioner clearly indicated his desire to have a sexual encounter with Skatergurl, whom he believed to be fourteen years old.

B.

Beyond the evidence of specific intent, we find that Petitioner's actions also presented a jury question as to whether he committed an overt act in furtherance of the underlying crime. To prove attempt, the State must prove that the defendant committed an overt act, beyond mere preparation, in furtherance of the intent to commit the crime. Nesbitt, 346 S.C. at 231, 550 S.E.2d at 866 (citing State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942)); see also State v. Rallo, 304 S.C. 258, 269, 403 S.E.2d 653, 659 (1991) (Toal, J., dissenting) ("In order to constitute an attempt to commit a crime, it is essential that, coupled with the intent to commit the offense, there be some overt act, beyond mere preparation, in furtherance of the intent . . . .").

In Quick, this Court stated,

> No definite rule as to what constitutes an overt act can safely be laid down in cases of this kind. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom, subject to general principles applied as nearly as can be, with a view to working substantial justice.
>
> It is well settled that the "act" is to be liberally construed, and in numerous cases it is said to be sufficient that the act go far enough toward accomplishment of the crime to amount to the

> commencement of its consummation. While the efficiency of a particular act depends on the facts of the particular case, the act must always amount to more than mere preparation, and move directly toward the commission of the crime. In any event, it would seem, the act need not be the last proximate step leading to the consummation of the offense.

199 S.C. at 259, 19 S.E.2d at 102.[2] The Court further stated, "The preparation consists of devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made." Id. at 260, 19 S.E.2d at 103.[3]

We agree with the court of appeals that the Quick framework remains viable in the emerging area of Internet sex crimes. While we have not previously had occasion to address the mere preparation–overt act distinction in the context of an alleged attempted sex crime stemming from use of the Internet, the court of appeals canvassed the law from other jurisdictions. The majority of jurisdictions that have confronted this issue have concluded that an agreement to meet a fictitious minor at a designated place and time, coupled with traveling to that location, may constitute evidence of an overt act.[4] We agree with the majority approach and hold that an agreement to

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[2] Quick did not involve an attempt crime, but its analysis of the mere preparation–overt act distinction has been applied in the attempt context. See Nesbitt, 346 S.C. at 231, 550 S.E.2d at 866–67.

[3] In Nesbitt, the court of appeals considered the overt act requirement in the armed robbery context and adopted this language from Quick. The court of appeals held that approaching a convenience store masked and armed constituted an overt act for purposes of attempt. Nesbitt, 346 S.C. at 235, 550 S.E.2d at 868.

[4] These jurisdictions employ various tests—primarily the substantial step test—to determine whether the defendant has moved beyond mere preparation. See United States v. Farner, 251 F.3d 510 (5th Cir. 2001) (defendant took substantial step toward committing crime by arranging and traveling to meet fictitious minor); Kirwan v. State, 96 S.W.3d 724 (Ark. 2003) (defendant's arranging to meet fictitious minor for sexual relations and traveling constituted substantial step); People v. Reed, 61 Cal. Rptr. 2d 658 (Cal. Ct. App. 1996) (arranging and

meet a fictitious minor at a designated place and time, coupled with traveling to that location, may constitute evidence of an overt act, beyond mere preparation, in furtherance of the crime. We do not, however, create a categorical rule.

Given Petitioner's express desire for a sexual encounter with a fourteen-year-old minor, coupled with his designation of a vacant parking lot in the middle of the night as the clandestine meeting place—and his travel to that place—we concur with the court of appeals that a jury question was presented on whether Petitioner had the specific intent to commit CSC with a minor and whether his conduct constituted an overt act.

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traveling moved beyond mere preparation); State v. Sorabella, 891 A.2d 897 (Conn. 2006) (finding traveling to a prearranged location to have sexual relations with someone one thinks is an underage minor constitutes a substantial step); State v. Nero, 1 A.3d 184 (Conn. App. Ct. 2010) (driving to arranged meeting place constituted substantial step); State v. Glass, 87 P.3d 302 (Idaho Ct. App. 2003) (arranging a meeting place and time for the purpose of sexual activity with a purported minor and arriving with condoms sufficient for overt act); People v. Patterson, 734 N.E.2d 462, 470 (Ill. App. Ct. 2000) (arranging to travel for sexual relations with decoy minor, combined with actual traveling to agreed-upon place constituted substantial step; "defendant had taken every possible step he could have taken in order to commit the offense"); State v. Peterman, 118 P.3d 1267, 1273 (Kan. 2005) ("[Defendant's] act of driving . . . to pick up a child for the purpose of sexual intercourse constituted an overt act beyond mere preparations. [Defendant] went as far as he could toward completing his criminal intentions prior to discovering that the child victim was fictional."); State v. Risinger, 194 P.3d 52 (Kan. Ct. App. 2008) (engaging in online conversations with fictitious child victim, arranging a meeting, driving to agreed-upon location, and knocking on door sufficient for overt act); Commonwealth v. Bell, 853 N.E.2d 563 (Mass. App. Ct. 2006) (finding sufficient evidence of overt act where defendant agreed to pay undercover officer $200 to permit him to engage in sexual relations with five-year-old child, made arrangements to meet undercover officer, and traveled to meeting place); State v. Tarbay, 810 N.E.2d 979 (Ohio Ct. App. 2004) (defendant's arranging to meet fifteen-year-old to engage in sexual relations and traveling to meeting place constitutes a substantial step); Cook v. State, 256 S.W.3d 846 (Tex. App. 2008) (defendant's discussing sex online with fictitious child, arranging to meet, traveling to agreed-upon location with underwear, toiletries, camera, pocketknife, candle, condoms, and lubricant constituted attempt); State v. Townsend, 57 P.3d 255 (Wash. 2002) (en banc) (defendant's engaging in graphic sexual discussions with fictitious minor, arranging to meet, and traveling to meet constituted sufficient evidence of a substantial step). Our overt act jurisprudence is in line with the "substantial step" test.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Town of Mt. Pleasant, Appellant,

v.

Treva Roberts, Respondent.

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27005
Heard June 7, 2011 – Filed July 11, 2011

AFFIRMED AS MODIFIED

Charles Mac Gibson, Jr., of Charleston, and Ira A. Grossman, of Mt. Pleasant, for Appellant.

Diedreich P. von Lehe, III, of Charleston, for Respondent.

JUSTICE BEATTY: The Town of Mount Pleasant ("Town") appeals the circuit court's order reversing and dismissing Treva Roberts's municipal court conviction for driving under the influence ("DUI")[1] on the ground the arresting officer's vehicle was not equipped with a video camera pursuant to section 56-5-2953 of the South Carolina Code.[2] The Town contends the

[1] S.C. Code Ann. § 56-5-2930 (2006).

[2] Section 56-5-2953 provides in relevant part:

circuit court erred in: (1) ruling on the appeal as it was divested of appellate jurisdiction given Roberts failed to obtain a bond or pay her court-ordered fine prior to initiating her appeal; and (2) "narrowly construing" section 56-5-2953 to require the reversal of Roberts's DUI conviction and dismissal of the charge. We affirm as modified.

I. Factual/Procedural History

On November 11, 2007, at approximately 1:00 a.m., Officer Bruce Burbage of the Town of Mount Pleasant's Police Department conducted a traffic stop of Roberts after observing her driving erratically. As a result of his initial observations, Officer Burbage conducted three field sobriety tests, on which he noted Roberts "performed pretty poorly."

Subsequently, Officer Burbage arrested Roberts for DUI and transported her to the Mount Pleasant Police Department where Roberts was

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> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped.
>
> (1) The videotaping at the incident site must:
>
> (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and
>
> (b) include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered.

S.C. Code Ann. § 56-5-2953 (2006). This section was amended effective February 10, 2009. Act No. 201, 2008 S.C. Acts 1682-85. Accordingly, we have cited to the 2006 Code as the amended statute is not applicable to the instant case.

offered, but refused, a breathalyzer test. There was no recording of the initial traffic stop, field sobriety tests, or the arrest as neither Officer Burbage's vehicle nor the backup officer's was equipped with a video camera.[3]

In response to Roberts's discovery motions,[4] which included a request for production of the incident site videotape, the Town's prosecutor forwarded an "Affidavit for Failure to Produce Videotape" executed by Officer Burbage on October 16, 2009. The affidavit, a form generated by the Town, included a "checked" box that stated:

> At the time of the Defendant's arrest the vehicle I was operating had not been equipped with a videotaping device and therefore pursuant to Section 18 of Senate Bill 174 of 1998,[5] the videotaping requirement regarding vehicles is not applicable.

On October 30, 2009, a municipal court judge conducted a jury trial on Roberts's DUI charge. Prior to trial, Roberts moved to dismiss the charge based on Officer Burbage's failure to videotape the entire arrest pursuant to section 56-5-2953. Roberts asserted that section 56-5-2953 conferred upon

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[3] At the time of Roberts's arrest, the "best case scenario" was that only two of the Town's twelve police department vehicles on patrol that night were camera-equipped. According to the annual inventory records of the South Carolina Department of Public Safety, the Town in 2007 had a total of seven in-car camera systems, of which one was acquired in 2001 and the remaining six in 2002.

[4] Brady v. Maryland, 373 U.S. 83 (1963); Rule 5, SCRCrimP.

[5] Section 18 provides in relevant part:

> The provisions in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement as soon as the law enforcement vehicle used for traffic enforcement is equipped with a videotaping device.

Act No. 434, 1998 S.C. Acts 3236.

her a statutory right to have the roadside arrest videotaped. Because Officer Burbage failed to comply with the statutorily-mandated procedure, Roberts claimed this violation warranted the dismissal of her DUI charge. The motion to dismiss was denied.

The Town relied on subsection (G) of the statute for the proposition that the videotaping requirement took effect only "once the law enforcement vehicle is equipped with a videotaping device."[6] Because Officer Burbage's vehicle was not equipped with a video camera, the Town argued that the videotaping provisions of section 56-5-2953 were inapplicable and, thus, the failure to videotape Roberts's arrest did not warrant the dismissal of the DUI charge.[7]

In support of her motion, Roberts called several law enforcement officers from Charleston, Berkeley, and Dorchester counties in an attempt to establish that the Town had fewer video cameras than other municipalities despite the Town's significantly higher number of DUI arrests.[8] Given these

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[6] Subsection (G) provides in pertinent part:

> The provisions contained in Section 56-5-2953(A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a videotaping device.

Id. § 56-5-2953(G).

[7] As will be discussed, this argument would be valid but for the Town's obvious intentional efforts to avoid complying with section 56-5-2953.

[8] According to records produced by the South Carolina Law Enforcement Division (SLED), the Town made 2,796 DUI arrests between 1998 and 2008. Based on these arrest records, the Town ranked first out of all municipalities for total DUI arrests. The Department of Public Safety used these statistics to determine the priority for issuing additional video cameras; thus, law enforcement agencies with the "highest ranking" for DUI arrests received priority in terms of the issuance of additional video cameras.

statistics, Roberts argued that the Town had willfully avoided complying with the 1998 statute as it had not requested from the South Carolina Department of Public Safety (DPS) additional video cameras in response to the increasing number of DUI arrests. Roberts also offered evidence that the Town was financially able to purchase additional video cameras, but had chosen not to do so.[9]

The Town countered Roberts's arguments by claiming that DPS was solely responsible for providing the video cameras and, thus, the Town did not have a duty to request or purchase additional cameras in order to comply with the statute.[10]

Despite these statistics, several nearby municipalities with fewer DUI arrests had received more video cameras from DPS than the Town, for example: (1) the City of Folly Beach made 162 DUI arrests and received 6 cameras; (2) the Town of Moncks Corner made 198 DUI arrests and received 13 cameras; and (3) the City of the Isle of Palms made 339 DUI arrests and received 13 cameras.

[9] Roberts offered evidence that the Town had recently expended: (1) $65,145 for the replacement of a "Town of Mt. Pleasant" sign at the Long Point Road Exit of I-526 East; (2) $100,000 for a marketing firm's development of a new Town slogan and logo; (3) $1,328,064.70 for the renovation of the "Farmer's Market" on Coleman Boulevard; and (4) $6,000,000 for a parcel of property known as the "O.K. Tire Store," which was intended to be developed into a park.

[10] In support of its claim, the Town referenced subsection (D) of section 56-5-2953, which states in relevant part:

> The Department of Public Safety is responsible for purchasing, maintaining, and supplying all videotaping equipment for use in all law enforcement vehicles used for traffic enforcement. The Department of Public Safety also is responsible for monitoring all law enforcement vehicles used for traffic enforcement to ensure proper maintenance of videotaping equipment.

At the conclusion of the pre-trial hearing, the municipal court judge denied Roberts's motion to dismiss based on a "strict interpretation" of section 56-5-2953. In his written return, the judge concluded that "there is no requirement that the Town of Mount Pleasant obtain any video cameras and that the statute only provides what the Town must do once they get the video cameras on board." Further, the judge ruled that "Section 56-5-2953(G) indicated that the other provisions of [the statute] take effect . . . once the vehicle is equipped with a [videotaping] device."

Roberts was convicted and appealed her conviction to the circuit court, arguing the municipal court judge erred in denying her motion to dismiss the charge based upon the Town's failure to comply with the "mandatory" videotaping provisions of section 56-5-2953.

The Town moved to dismiss the appeal for lack of jurisdiction based on Roberts's failure to obtain a bond or pay the court-ordered fine prior to initiating the appeal. The Town contended the circuit court was without jurisdiction to rule on the appeal given Roberts did not comply with the procedural requirements of section 14-25-95 of the South Carolina Code,[11] which governs appeals from municipal court to circuit court.

Id. § 56-5-2953(D).

[11] Section 14-25-95 provides:

> Any party shall have the right to appeal from the sentence or judgment of the municipal court to the Court of Common Pleas of the county in which the trial is held. Notice of intention to appeal, setting forth the grounds for appeal, must be given in writing and served on the municipal judge or the clerk of the municipal court within ten days after sentence is passed or judgment rendered, or the appeal is considered waived. The party appealing shall enter into a bond, payable to the municipality, to appear and defend the appeal at the next term of the Court of Common Pleas or shall pay the fine assessed.

S.C. Code Ann. § 14-25-95 (Supp. 2010).

The circuit court judge issued a written order in which it reversed Roberts's DUI conviction and dismissed the charge. The judge initially determined that it had "subject matter jurisdiction" to hear the appeal. In so ruling, the judge found jurisdiction was vested in the circuit court when Roberts timely filed and served her notice of appeal as required by section 14-25-95. The judge further concluded that Roberts's "non-entry into a bond and non-payment of the fine assessed [did] not deprive [the court] of the subject matter jurisdiction." Additionally, the judge held that all issues with respect to the non-entry into a bond or non-payment of the fine were moot as Roberts had appeared at the hearing and paid her fine the day of the hearing.

As to the merits of Roberts's appeal, the judge specifically found that the videotaping requirements of section 56-5-2953 were mandatory based on this Court's decision in City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007).[12] Interpreting subsection (G) of the statute, the judge concluded that this provision was "merely to provide a reasonable grace period for law enforcement agencies to equip their vehicles with video recording devices." The judge explained that to construe subsection (G) as proposed by the Town would permit law enforcement agencies to "successfully circumvent [the statute's videotaping requirements] *ad infinitum*" by not requesting video cameras from DPS.

The judge also ruled that the Town's failure to produce a videotape of Roberts's conduct at the incident site was not "excused" as none of the enumerated exceptions in subsection (B) of section 56-5-2953[13] were satisfied.

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[12] City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) ("Section 56-5-2953 commands the arresting officer to videotape the individual during a DUI arrest.").

[13] Id. § 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if [certain exceptions are met])."

The judge concluded that the Town's failure to comply with the videotaping requirements a decade after the enactment of section 56-5-2953 was "unreasonable" and constituted a violation of the statute that warranted the reversal of Roberts's conviction and the dismissal of the DUI charge.

The Town appealed the circuit court's order to the Court of Appeals. This Court certified the case from the Court of Appeals pursuant to Rule 204(b), SCACR.

II. Discussion

A. Standard of Review

"In criminal appeals from a municipal court, the circuit court does not conduct a de novo review; rather, it reviews the case for preserved errors raised to it by an appropriate exception." City of Cayce v. Norfolk S. Ry. Co., 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011); see S.C. Code Ann. § 14-25-105 (Supp. 2010) ("There shall be no trial de novo on any appeal from a municipal court."). "Therefore, our scope of review is limited to correcting the circuit court's order for errors of law." Suchenski, 374 S.C. at 15, 646 S.E.2d at 880.

B. Appellate Jurisdiction

As a threshold matter, we must address the Town's jurisdictional challenge as any defect in the circuit court's appellate jurisdiction would necessarily affect this Court's jurisdiction to rule on the Town's appeal.

The Town asserts the circuit court judge erred in characterizing its jurisdictional challenge as one that implicated subject matter jurisdiction rather than appellate jurisdiction. The Town avers the circuit court judge did not have appellate jurisdiction to rule on Roberts's appeal given Roberts failed to either pay the court-ordered fine or obtain a bond prior to initiating her appeal to the circuit court. Under the Town's interpretation of section 14-25-95, the circuit court could only be vested with appellate jurisdiction if one of the above-listed prerequisites was satisfied.

Because our analysis of this issue and the Town's second issue is dependent upon our evaluation of the applicable statutes, we begin with an overview of this state's well-established rules of statutory construction.

1.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). However, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citation omitted).

In ascertaining legislative intent, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

If the statute is ambiguous, however, courts must construe the terms of the statute. Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

"Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Bennett v. Sullivan's Island

Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

2.

As an initial matter, we agree with the Town's argument that the circuit court judge erred in classifying the jurisdictional challenge as one of subject matter jurisdiction. See Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000) ("The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case, but it does not affect the court's subject matter jurisdiction."); see also State v. Brown, 358 S.C. 382, 596 S.E.2d 39 (2004) (recognizing that failure to timely appeal a conviction from magistrate court does not implicate subject matter jurisdiction).

Clearly, the circuit court had subject matter jurisdiction to hear and determine Roberts's appeal from her municipal court conviction as the Legislature has specifically authorized it to do so. See S.C. Code Ann. § 14-5-340 (1977) ("Circuit judges may hear appeals from magistrates' courts and municipal courts to the court of general sessions and the court of common pleas, upon notice as required by law being given for the hearing of such appeals."); S.C. Const. art. V, § 11 ("The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.").

As for the circuit court's appellate jurisdiction, we find that Roberts properly met the prerequisites of section 14-25-95. Pursuant to this Code section, Roberts was required to file her notice of appeal with the municipal court "within ten days after sentence is passed or judgment rendered, or the appeal is considered waived." Id. § 14-25-95. There is no dispute that Roberts timely filed her appeal with the municipal court. Having met this procedural prerequisite, the circuit court was vested with appellate jurisdiction to determine Roberts's appeal. Cf. Town of Hilton Head Island v.

Goodwin, 370 S.C. 221, 224, 634 S.E.2d 59, 61 (Ct. App. 2006) ("A party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction.").

Unlike the Town, we do not believe the circuit court was divested of appellate jurisdiction because Roberts failed to obtain a bond or pay her court-ordered fine prior to filing her notice of appeal with the municipal court. These two provisions of section 14-25-95 do not implicate jurisdiction as there is no temporal restriction in that sentence of the statute. Instead, these provisions serve the purpose of insuring that an appellant will appear for the hearing before the circuit court. If an appellant fails to comply with these provisions, the municipality may issue a bench warrant to address any delinquency on the part of the appellant.

Finally, we note that Roberts appeared at the hearing and paid her fine; therefore, any related issue is moot. See Linda Mc Company, Inc. v. Shore, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief." (citations omitted)).

C. Reversal of DUI conviction/Dismissal of DUI charge

Having found that the circuit court was vested with appellate jurisdiction, we must next decide whether the Town's violation of the videotaping provisions of section 56-5-2953 warranted the reversal of Roberts's DUI conviction and the dismissal of the charge.

Although this is the specific question presented, we believe there is a more fundamental question to consider in analyzing section 56-5-2953: if the Legislature imposes a statutory obligation on the State to create evidence and provides a sanction for inexcusable noncompliance, does the State's failure to do so necessarily warrant a per se dismissal of the accused's case?

Up until this point, our appellate courts have affirmatively answered this question when a law enforcement agency inexcusably failed to videotape

a DUI arrest with an existing video camera. In the instant case, the Town failed to create a videotape of Roberts's DUI arrest because the patrol vehicle had never been equipped with a video camera.

The Town argues the circuit court judge erred in construing section 56-5-2953 to require the dismissal of Roberts's DUI charge on the basis that the arresting officer's vehicle was not equipped with a video camera.

Applying the rules of statutory construction, the Town maintains that in promulgating section 56-5-2953 the Legislature clearly provided for instances where an incident site videotape would not be available as demonstrated by certain statutory exceptions.[14] Furthermore, because the Legislature mandated in subsection (D) that DPS would supply the video cameras, the Town claims that it was not obligated to purchase or request additional videotape equipment; thus, its failure to equip Officer Burbage's vehicle with a camera rendered the mandatory provisions of section 56-5-2953 inapplicable pursuant to subsection (G).

The key case in the analysis of this issue is City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). In Suchenski, the defendant was convicted in municipal court for driving with an unlawful alcohol concentration (DUAC). Id. at 14, 646 S.E.2d at 879. On appeal, the circuit court reversed the conviction based on the City of Rock Hill's failure to videotape the defendant's entire arrest as the arresting officer's camera "ran out of tape." Id. The circuit court did not address whether the arresting officer's failure to comply with section 56-5-2953 was excused pursuant to an exception in subsection (B) of the statute. Id. at 14, 646 S.E.2d at 880.

This Court affirmed the circuit court's decision. In so ruling, we found that any argument concerning the exceptions for noncompliance in section 56-5-2953(B) was not preserved as the circuit court had not ruled on this issue and the City of Rock Hill had not sought a post-judgment ruling

[14] See, e.g., State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) (recognizing that law enforcement agency's failure to videotape a DUI arrest was excusable as the arresting officer submitted an affidavit that certified the videotape machine was inoperable at the time of the arrest).

regarding this issue. Id. at 16, 646 S.E.2d at 880. We also rejected the City of Rock Hill's contention that a violation of the videotaping statute should not result in dismissal of a charge if there was no showing of prejudice to the defendant. Id. at 16, 646 S.E.2d at 881. We found the plain language of the statute provided that the "failure to produce videotapes would be a ground for dismissal if no exceptions apply." Id.

Although the decision in Suchenski indisputably established that the videotaping provisions of section 56-5-2953 are mandatory and not optional, we did not address whether the failure to comply with the statute could be excusable if the law enforcement vehicle was never equipped with a camera. Specifically, we were not required to assess the import of subsection (G) with respect to the statutory exceptions of subsection (B).

Subsection (B) of section 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Noncompliance is excusable: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

Our appellate courts have strictly construed section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case. See Suchenski; 374 S.C. at 17, 646 S.E.2d at 881 (holding that "dismissal of the DUAC charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions"); Murphy v. State, Op. No. 4816 (S.C. Ct. App. filed Apr. 6, 2011) (Shearouse Adv. Sh. No. 13 at 49) (recognizing the State's noncompliance with section 56-5-2953, which is not mitigated by a statutory exception, warranted dismissal; holding that video complied with section 56-5-2953(A) even though it did not capture a continuous full view of the accused at the incident site (citing Suchenski)).

Although our appellate courts have acknowledged these statutory "escape valves," they have so far considered their application only where a law enforcement agency failed to create a video recording of the DUI arrest because the video camera malfunctioned. Our courts, however, have not analyzed whether these exceptions apply where the law enforcement vehicle has never been equipped with a video camera as in the instant case.

Taking into consideration the purpose of section 56-5-2953, which is to create direct evidence of a DUI arrest, we find the Town's protracted failure to equip its patrol vehicles with video cameras, despite its "priority" ranking, defeats the intent of the Legislature and violates the statutorily-created obligation to videotape DUI arrests. Accordingly, we do not believe that the Town should be able to continually evade its duty by relying on subsection (G) of section 56-5-2953. Thus, we hold that the Town's failure to equip its patrol vehicles does not negate the application of the statutory exceptions in subsection (B).

Under the specific facts of this case, we find the Town failed to satisfy any of the above-outlined statutory exceptions. Significantly, the Town conceded in municipal court and before the circuit court that the initial three exceptions did not apply and could not justify its failure to videotape Roberts's DUI arrest.

Thus, the only feasible exception is that there was a "valid reason" for the Town's failure to comply with the mandatory videotaping requirements. Although the Town did not explicitly reference this provision, it argued that Officer Burbage's patrol vehicle was not equipped with a video camera because DPS had not supplied the Town with a sufficient number of cameras and the Town was not obligated to expend funds to purchase the cameras.

As we interpret the circuit court judge's order, we do not discern a ruling that the Town was obligated to purchase the cameras with its own funds. Instead, the circuit court judge imposed an obligation on the Town to request additional video cameras given the Town's "high ranking" for DUI arrests as compared to other municipalities.

Consequently, the question becomes whether the Town's failure to request additional video cameras constituted a "valid reason for the failure to produce the videotape based upon the totality of the circumstances." Id. § 56-5-2953(B). We find the Town's explanation is disingenuous given its significantly higher number of DUI arrests as compared to smaller municipalities.[15] Moreover, the Town's interpretation of subsection (G) is nonsensical as the requirements of section 56-5-2953 could be circumvented in perpetuity if a law enforcement agency purposefully does not request additional video cameras.

Admittedly, the Legislature was silent with respect to a time requirement for when vehicles must be equipped with video cameras. However, applying the rules of statutory construction, we find the Town's interpretation would defeat the legislative intent of section 56-5-2953 and the overall DUI reform enacted in 1998.

Finding that neither subsection (G) nor the statutory exceptions in subsection (B) excuse the Town's noncompliance with section 56-5-2953, the question becomes whether the failure to videotape a DUI arrest warrants a per se dismissal of the DUI case or whether, as the Town contends, the accused must establish that he or she was prejudiced.

As evidenced by this Court's decision in Suchenski, the Legislature clearly intended for a per se dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. Id. § 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of

[15] It is interesting to note that the Town requested fifty additional cameras in May 2009 apparently after recognizing that its failure to videotape DUI arrests may severely impact the prosecution of its pending DUI cases. The Town's request was in response to a DPS survey, dated April 28, 2009, that stated in part, "The Department is glad to announce that the original requests have been fulfilled, and we have officially awarded over 3200 camera systems."

any charge made pursuant to Section 56-5-2930 . . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of section 56-5-2953.

Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal context. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.

Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in Suchenski.

Our decision should in no way be construed as eradicating subsection (G) of section 56-5-2953. Instead, we emphasize that subsection (G) is still viable and must be read in conjunction with subsection (B) as these exceptions, under the appropriate factual circumstances, could operate to excuse a law enforcement agency's noncompliance due to the failure to equip a patrol vehicle with a video camera. For example, we can conceive of a scenario where a law enforcement agency establishes a "valid reason" for failing to create a video of the incident site by offering documentation that, despite concerted efforts to request video cameras, it has not been supplied with the cameras from DPS.

III. Conclusion

In conclusion, the circuit court judge erred in classifying the Town's jurisdictional challenge as one involving subject matter jurisdiction. Because Roberts timely served her notice of appeal on the municipal court, she met the procedural requirements of section 14-25-95; thus, her failure to obtain a bond or pay the court-ordered fine did not divest the circuit court of appellate jurisdiction.

As to the merits, we find the Town's prolonged failure to equip its patrol vehicles with video cameras defeats the intent of the Legislature; therefore, the Town should not be able to avoid its statutorily-created obligation to produce a videotape by repeatedly relying on subsection (G) of section 56-5-2953. Because the Town failed to establish any statutory exception to excuse its noncompliance, we hold the circuit court judge correctly reversed Roberts's DUI conviction and dismissed the charge. Accordingly, we affirm as modified the decision of the circuit court judge.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Georgetown County League of Women Voters, Appellant,

v.

Smith Land Company, Inc., Respondent.

Appeal from Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27006
Heard May 27, 2010 – Filed July 11, 2011

REVERSED

James S. Chandler, Jr. and Amy E. Armstrong, both of Pawleys Island, for Appellant.

Norwood David DuRant, of Surfside Beach, for Respondent.

JUSTICE PLEICONES: This is an appeal from an order dismissing appellant's (League's) declaratory judgment action seeking a declaration that respondent had unlawfully filled wetlands and an injunction requiring it to restore those wetlands. Finding that the circuit court erred in holding that: (1) the South Carolina Department of Health and Environmental Control

(DHEC) lacks jurisdiction to regulate these wetlands; (2) respondent did not violate the South Carolina Pollution Control Act (Act);[1] and (3) the Act does not create a private cause of action, we reverse.

Respondent owns a .332 acre lot in Pawleys Island, .19 acres of which are isolated wetlands often referred to as Carolina Bays. Before developing the lot, respondent notified both the Army Corps of Engineers and DHEC of its plans. While the Corps cautioned respondent to notify DHEC before performing the work and respondent did so, it received no response from DHEC. Respondent then filled the wetlands.

The League then filed this suit seeking a declaratory judgment and related equitable relief. After a hearing, the circuit court held that DHEC does not have jurisdiction over isolated wetlands, that respondent complied with all requirements before filling the wetlands, and that the League cannot maintain this private suit under the Act. The League appeals.

ISSUES

1) Did the circuit court err in finding DHEC did not have jurisdiction over the isolated wetlands on respondent's lot?

2) Did the circuit court err in holding that respondent met all the legal prerequisites for filling the wetlands?

3) Did the circuit court err in finding the League could not maintain a private cause of action under the Act?

[1] S.C. Code Ann. §§ 48-1-10 et seq. (2008 and Supp. 2010).

ANALYSIS

I. DHEC Jurisdiction

The circuit court held that the isolated wetlands located on respondent's lot were without the jurisdiction of both the Army Corps of Engineers and DHEC, relying upon Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 121 S.Ct. 675 (2001). As we explained in Spectre, LLC v. S.C. Dep't of Health and Enviro. Cntrl., 386 S.C. 357, 688 S.E.2d 844 (2010), Solid Waste holds that the Corps may not regulate isolated wetlands, but has no impact on DHEC's ability, as a state agency, to do so. While Spectre decided DHEC's continuing authority under the coastal management program developed pursuant to the statutory mandate found in the Coastal Zone Management Act, this Act specifically defines the waters subject to its regulation by DHEC to include isolated wetlands. See S.C. Code Ann. § 48-1-10(2) (2008).

We find the circuit court erred in holding DHEC lacked jurisdiction over the isolated wetlands located on respondent's Pawleys Island lot.

II. Compliance

The circuit court also held that respondent "complied with all of its legal obligations prior to filling the isolated wetlands" located on its lot. The League argues, and we agree, that respondent was required to obtain a DHEC permit under S.C. Code Ann. § 48-1-90(a) (2008) before it could lawfully fill the wetlands by discharging "orange sand" into these wetlands. See § 48-1-10(6) (definition of fill substances requiring a DHEC permit includes sand).

We reverse the circuit court's order finding that respondent complied with all legal requirements for filling the wetlands as it is uncontroverted that it did so without obtaining a permit from DHEC as required by the Act.

III. Private Cause of Action

The circuit court dismissed the League's complaint, finding that there is no private right of action under the Act, and thus the League lacked standing. We reverse.

"In determining whether a statute creates a private cause of action, the main factor is legislative intent[.]" Doe v. Marion, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007). Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute. Id.

The Act provides that "causes of action resulting from the violation of the prohibitions contained in this chapter inure to…any person or persons damaged as the result of any such violation." § 48-1-250. The word "inure" is defined, in part, as "to become legally effective" and "accrue." Merriam-Webster's Third New Int'l Dictionary 1188 (2002). The League alleges that its members have been harmed by respondent's unlawful filling of the wetlands in that the filling has destroyed bird and wildlife habitats, impacting the members' ability to enjoy their recreational and aesthetic interests, and that they have therefore been damaged within the meaning of the Act. We agree that the League had alleged damages sufficient to allow it to maintain this suit pursuant to § 48-1-250.[2]

The circuit court found there was no private cause of action based upon S.C. Code Ann. § 48-1-220: "Prosecutions for the violation of a final determination or order shall be instituted only by [DHEC] or as otherwise

[2] The dissent addresses the League's individual and associational standing to maintain this suit. This issue was neither raised nor ruled upon below, nor do the parties mention it in their briefs. There is no standing issue before the Court other than that encompassed in the ruling that the Act does not create a private cause of action. Cf., South Carolina Dep't of Transp. v. Horry County, 391 S.C. 76, 705 S.E.2d 21 (2011) (issues must be raised and ruled upon to be preserved for appellate review).

provided for in this chapter." Here, there is neither a final determination nor an order. Moreover, this suit cannot be characterized as a "prosecution." Section 48-1-220 is irrelevant.

We find the Act provides for a private cause of action in § 48-1-250,[3] and reverse the circuit court's order finding no such suit can be maintained by the League under the Act.

CONCLUSION

The circuit court's order is

REVERSED.

TOAL, C.J., and BEATTY, J., concur. HEARN, J., concurring in part and dissenting in part, in a separate opinion, in which KITTREDGE, J., concurs.

[3] The dissent would find there is no private cause of action under the Act based upon § 48-1-90(b). Leaving aside for the moment the fact that the circuit court order rests exclusively and erroneously on § 48-1-220, it is the true that § 90(b) grants the State a cause of action for violations of § 48-1-90(a). That cause of action, however, is for damages for harm to "fish, shellfish, aquatic animals, wildlife or plant life." Section 90(b) allows other governmental agencies to bring actions for damages caused by a violation of § 90(a), but does not purport to limit a private party's right to seek remedies other than damages, such as the declaratory and injunctive relief sought by the League here. Therefore, the right to maintain this private cause of action is found in § 48-1-250, and is not limited by anything in § 48-1-220, as was held by the circuit court, or in § 48-1-90(b), as is posited by the dissent.

JUSTICE HEARN: I agree with the majority that the circuit court erred in finding DHEC was without authority to regulate these wetlands and that Smith did not violate the South Carolina Pollution Control Act. However, I believe the circuit court correctly held that no private right of action was created under the Act and that the League lacked standing to bring this lawsuit. Therefore, I respectfully concur in part and dissent in part.

I. Private Right Of Action

In finding that a private right of action exists under the Act, the majority ignores the controlling provision, section 48-1-90(b), as well as scholarly interpretations of the Act, instead choosing to rely exclusively on section 48-1-250. That section is general in nature and merely states that "[c]auses of action resulting from the violation of the prohibitions contained in this chapter inure to and are for the benefit of any person or persons damaged as the result of any such violation." In my view, this general statement stops short of creating a private right of action and actually presupposes that a valid cause of action is created elsewhere in the Act. However, the section under which the League brings this action expressly limits who may bring such an action to State entities as opposed to creating a private cause of action.

The League alleges that Smith violated section 48-1-90(a) of the Act by dumping fill materials into the wetlands without first obtaining a DHEC permit. Subsection (b) of that provision unequivocally states that actions for violations of subsection (a) "shall be *brought by the State* in its own name or in the name of the Department." (emphasis added). It further provides: "the amount of any judgment for damages recovered by the State, less cost, shall be remitted to the agency, commission, department or political subdivision of the State that has jurisdiction over . . . the wildlife or plant life damaged or destroyed." *Id.* Lastly, subsection (b) states: "[t]he civil remedy herein provided shall not be exclusive, and any agency, commission, department or political subdivision of the State with appropriate authority may undertake in its own name an action to recover such damages as it may deem advisable independent of this subsection." Thus, contrary to the view of the majority,

the plain language of section 48-1-90(b) does not permit any entity other than the State or its agencies, commissions, departments, or political subdivisions to bring the cause of action asserted by the League here.

Additionally, at least one environmental scholar has stated that no private cause of action is created under the Act. *See* Randy Lowell, *Private Actions and Marine and Water Resources: Protection, Recovery and Remediation*, 8 S.C. Envtl. L.J. 143, 196 n.369 (2000) ("[I]n South Carolina, the Pollution Control Act was originally enacted in 1950 and is extremely broad in scope. . . . *However, there, is no private right of action, leaving enforcement strictly to the state*. . . . [C]itizens and environmental groups must rely on keeping a constant vigil on developments in their communities and become parties in the permit process to protect their rights in administrative hearings.") (emphasis added).

The majority's sole reliance on section 48-1-250 ignores the section of the Act on which the League brought this action, a section which includes a specific provision on the precise issue at hand: whether or not a private right of action is created. Moreover, the majority's misplaced reliance on section 48-1-250 improperly accords controlling weight to a general statute where there is a narrow, more specific statute that permits only State entities to pursue the very remedy sought by the League in this case. *See Spectre, LLC v. S.C. Dep't of Health & Evnt'l Control*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."). It is therefore of no moment that section 48-1-90(b) "does not purport to limit a private party's right to seek remedies other than damages"; because subsection (b) specifically limits the enforcement of the provisions of subsection (a) to certain actions by the State, I would not presume that the public has an unfettered right to enforce this subsection in all other instances. *See Whitworth v. Fast Fare Mkts.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) ("[T]he general rule is that a statute which does not purport to establish a civil liability, but merely makes a provision to secure the safety or welfare of the

public as an entity is not subject to a construction establishing a civil liability." (quoting 73 Am. Jur. 2d *Statutes* § 432 (1974)). Accordingly, consistent with the specific language in section 48-1-90(b), which I believe controls, as well as scholarly interpretations of the Act, I would hold that no private right of action exists for the claim raised by the League.

II. Standing

As an initial matter, the majority posits that the issue of the League's standing to bring this action is not preserved for our review. While the majority is absolutely correct that standing was not argued in the parties' briefs to this Court, the majority incorrectly states that it was not raised to or ruled upon by the circuit court. The circuit court's order first specifically found that the Act does not create a private cause of action. The court then went on to find that notwithstanding this conclusion, the League does not have standing to enforce the provisions of the Act. While I am cognizant that the circuit court, in a later part of its order, appeared to conflate the issue of standing and the existence of a private right of action,[4] this in no way diminishes its previous specific finding that the League lacks standing even if the Act creates a private cause of action. Because, as the majority aptly recognizes, the League did not challenge this portion of the order on appeal, the only preservation principle implicated is that the League's lack of standing is the law of the case. *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling, right or wrong, is the law of the case). Therefore, I would hold that the League's lack of standing to bring this action is the law of the case.

[4] These two concepts are quite different. To have standing, an individual must generally have a personal stake in the litigation or qualify as a real party in interest. *Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). By contrast, the determination of whether a party has a private right of action under a particular statute is merely a matter of legislative intent. *See Overcash v. S.C. Elec. & Gas Co*, 364 S.C. 569, 576, 614 S.E.2d 619, 622 (2005) ("The main factor in determining whether a statute creates a private cause of action is legislative intent.").

Moreover, even if this issue is properly before us and I were to agree with the majority that the Act created a private right of action, I would affirm the circuit court's holding on the merits that the League lacks standing. The three-part test to determine whether an individual or an entity has standing to bring a lawsuit is as follows:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not "conjectural" or "hypothetical[."] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)). The linchpin of this analysis is that the plaintiff must have a personal stake in the litigation, meaning he is the real party in interest. *Id.* at 600, 550 S.E.2d at 291. In other words, the party seeking relief must have a real, material, or substantial interest in the litigation, not a merely nominal or technical one. *Id.* "Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639-40, 528 S.E.2d 647, 650 (1999). The party asserting standing bears the burden of proving all of its elements. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. However, this burden is "substantially more difficult" where the party bringing the claim was not the object of the action "but rather seeks to challenge government action or inaction because of the alleged illegality." *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001).

I would hold the League is unable to proceed against Smith in its own name. Section 48-1-250 states any "person or persons damaged" by the alleged violation of the Act may institute a suit. The Act defines a "person" as "any individual, public or private corporation, political subdivision, government agency, municipality, industry, copartnership, association, firm, trust, estate, or any other legal entity whatsoever." *Id.* § 48-1-10(1). The League is a validly registered non-profit organization under the laws of South Carolina, and therefore it is a person under the Act. However, the League only alleges that its members have suffered an injury and not that it as an entity has been damaged. Thus, the League has no right that it can enforce in its own name and does not have individual standing.

However, a party may bring an action either in its own name as set forth above or, if certain criteria are met, in a representative capacity. "When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act." *Sea Pines*, 345 S.C. at 600-01, 550 S.E.2d at 291 (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)). To supplement the analysis for individual standing we adopted from *Lujan*, the courts of this state have adopted another three-part test from the United States Supreme Court regarding the standing of an organization to bring a claim on behalf of its members: (1) its members would have standing to sue individually; (2) the interests at stake are germane to the organization's own interests and purpose; and (3) neither the claim asserted nor the relief sought requires the involvement of individual members. *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

> [T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."

Int'l Union, United Auto, Aerospace, & Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)). As *Brock* made clear, the policy behind permitting associational standing is to allow a group with shared resources to pursue a common, collective interest. Accordingly, our analysis must center on whether the organization seeks to enforce the rights of the group as a whole and not just the right of an individual.

Turning to the facts before us, I would find the League satisfies the first two prongs of the *Hunt* test. "South Carolina case law has specifically recognized an injury to one's aesthetic and recreational interests in enjoying and observing wildlife is a judicially cognizable injury in fact." *Sea Pines*, 345 S.C. at 601-02, 550 S.E.2d at 291-92. With that in mind, I would have little trouble concluding that individual members of the League can claim they suffered an injury in fact as a result of Smith's actions that can likely be redressed under the Act. Additionally, this interest is germane to the League's goal of furthering "the promotion of good government and the protection and conservation of natural resources, sound planning and zoning practices and protection of the quality of life within Georgetown County."

However, the League fails to satisfy the third prong of the *Hunt* test under my interpretation of it in light of the purposes underlying associational standing. In my view, in order to satisfy this prong, the organization must show that the right it seeks to vindicate is common to the membership and the interest of the harmed members in the proceedings derives from their membership. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("[T]he association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."); *Creek Pointe Homeowners' Ass'n v. Happ*, 552 S.E.2d 220, 227 (N.C. Ct. App. 2002) (opining in dicta that the plaintiff homeowner's association would have standing because its members' claim of right vested through their membership in the association). Although the League has generally averred to the harm its "members" have suffered and will continue to suffer as a result of Smith's actions, the evidence adduced before the circuit court focused on just one of the League's members, Sue Myers, and two of her neighbors who

are not members of the League. There is no evidence in the record before us that anyone other than the surrounding property owners were impacted by Smith's actions in filling in the pond.

Therefore, the evidence presented by the League demonstrated that Smith's actions affected only one member of the League. While harm to one member may be sufficient on different facts, even assuming that the League could bring a cause of action under section 48-1-250, that cause of action inures, by the statute's own terms, only to those damaged as a result of a violation of the Act. Although every member of the League does enjoy the same right to enjoy wildlife, injury to one member's right does not extend to the rest of the League. With harm occurring to only one member of the League and a cause of action thereby inuring only to that one member, the right the League is pursuing under the Act is not a common one. Further, the harm suffered by Myers does not flow from her membership in the League, but rather from her status as an individual, independent landowner. While I appreciate the League's interest in ensuring that the residents of Georgetown County comply with this State's environmental laws, I would require more than a laudable goal to establish standing. Accordingly, I would hold that even if a private right of action exists for violation of the Act, the League failed to meet its burden of establishing standing to pursue this lawsuit.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

In the Matter of David Ransom Lawson, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Philip A. Berlinsky, Esquire, is hereby appointed to assume primary responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Berlinsky shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Berlinsky may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office

account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Philip A. Berlinsky, Esquire, has been duly appointed by this Court.

This Order, when served on any office of the United States Postal Service, shall serve as notice that Philip A. Berlinsky, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Berlinsky's office.

In addition, the Court appoints Thomas H. Brush, Esquire, to assist Mr. Berlinsky in fulfilling the duties imposed by Rule 31, RLDE, Rule 413, SCACR.

These appointments shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

July 5, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Preston D. Wannamaker, Appellant,

v.

Katherine Thomas Wannamaker, Respondent.

Appeal From Richland County
Deborah Neese, Family Court Judge

Opinion No. 4848
Heard November 4, 2010 – Filed June 29, 2011

AFFIRMED IN PART AND REVERSED IN PART

April P. Counterman, of Chester, for Appellant.

C. Cantzon Foster, II, and Bryan Caskey, both of Columbia, for Respondent.

LOCKEMY, J.: In this domestic action, Preston D. Wannamaker (Husband) appeals the family court's award of alimony to Katherine Thomas Wannamaker (Wife) and the court's valuation of the parties' retirement accounts. We affirm in part and reverse in part.

FACTS

Husband and Wife were married in December 1991, and no children were born as a result of the marriage; however, Wife had two children from a previous marriage. During the first seven years of the parties' marriage, Husband was the primary provider and earned approximately $30,000 per year. Wife did not work outside the home.

Subsequently, Husband lost his job, returned to school, and earned an undergraduate and two master's degrees. After completing his education, Husband secured employment as an instructor at Midlands Technical College and earned approximately $60,000 per year between 2002 and 2006. When Husband lost his job, Wife secured employment with the State of South Carolina, earning approximately $30,000 per year. Wife's income was the parties' primary, but not the sole, means of support while Husband completed his education. Although Wife attended college in the mid-1970s, she never finished her undergraduate degree. The parties separated in January of 2006, and Husband initiated this action for divorce in March 2006.

In June 2006, the family court issued a temporary order providing: "In lieu of alimony to be paid [Wife], Husband is hereby ordered to continue paying $50.00 per month to the Department of Mental Health" for drug abuse treatment for Wife's son. The temporary order did not otherwise mandate alimony. Wife received the sole and exclusive use of the marital home, and Husband was ordered to pay the first mortgage, while Wife was ordered to pay the second mortgage.

After a final hearing, the family court issued a final decree of divorce declaring the parties divorced. The family court awarded Wife $500 per month in permanent periodic alimony beginning in May 2008. Although Husband presented expert testimony establishing the present day value of the parties' accounts, the family court used the date of filing valuation. To effectuate a fifty-fifty equitable division of the marital estate, the family court awarded Wife $42,977 from Husband's account. Husband also received credit for all payments he made on the first mortgage pursuant to the temporary order.

Wife filed a 59(e), SCRCP, motion requesting the family court reconsider its decision to not award her attorney's fees and credit her the payments she made on the second mortgage. Husband also filed a 59(e) motion maintaining the family court erred in awarding permanent periodic alimony and valuing the parties' retirement accounts.

After a hearing, the family court amended the final decree of divorce. The amended order awarded Wife credit for the second mortgage payments she made pursuant to the temporary order. The family court also awarded Wife retroactive alimony and required Husband to pay Wife $500 for each month from the date of the temporary order through April 2008.[1] The order further provided the retroactive alimony payment was due upon the sale of the marital home and was to be deducted from Husband's portion of the net proceeds from the sale. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this Court reviews factual and legal issues de novo." Simmons v. Simmons, Op. No. 26970 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 29). Accordingly, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 42, 51). However, we recognize that the family court is in a superior position to determine the credibility of the witnesses and the weight of the evidence. See id. at 51. The burden is on the appellant to demonstrate the family court's findings are against the preponderance of the evidence. Id.

LAW/ANALYSIS

I. Permanent Periodic Spousal Support

Husband argues the family court abused its discretion because it improperly weighed several factors in awarding Wife permanent periodic spousal support. We disagree.

[1] This totaled $12,500.00.

Alimony is a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage. Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). If an award of alimony is warranted, the family court has a duty to make an award that is fit, equitable, and just. Id. The family court may grant alimony in such amounts and for such a term as it considers appropriate under the circumstances. Davis v. Davis, 372 S.C. 64, 79, 641 S.E.2d 446, 454 (Ct. App. 2006). The family court must consider the following factors: (1) duration of the marriage, (2) the physical and emotional health of the parties, (3) educational background of the parties, (4) employment history and earning potential of the parties, (5) standard of living during the marriage, (6) current and reasonably anticipated earnings of the parties, (7) current and reasonably anticipated expenses of the parties, (8) marital and nonmarital property of the parties, (9) custody of the children, (10) marital misconduct or fault, (11) tax consequences, (12) prior support obligations, and (13) any other factors the family court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2010). However, "[t]he family court is only required to consider relevant factors." King v. King, 384 S.C. 134, 142, 681 S.E.2d 609, 613 (Ct. App. 2009); see also Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994) (remanding for consideration of all relevant factors in section 20-3-130(C)).

Husband maintains the family court improperly weighed several factors in awarding Wife permanent periodic alimony. The record reflects the family court considered the relevant statutory factors, but it is difficult to determine how the family court applied those factors because the final decree of divorce merely lists the factors considered without making specific findings of fact and conclusions of law. When an order of the family court violates Rule 26(a), SCRFC, by failing to set forth specific findings of fact and conclusions of law, this court may remand the matter to the family court or make its own findings of fact in accordance with the preponderance of the evidence if the record is sufficient to allow such a review. Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct. App. 1998). We find the record in the instant case is sufficient to allow such a review.

Here, the parties were married for sixteen years. Nothing in the record indicates the parties have any physical or mental health issues. Husband has

a bachelor of science degree in mathematics and master's degrees in computer resources and information systems management and business administration. Wife is a high school graduate and attended college classes in the 1970s. Husband's current and reasonably anticipated earnings are approximately $60,000 per year while Wife's are approximately $30,000 per year. The parties current and reasonably anticipated expenses are approximately equal. However, Husband's personal credit card debt is substantially higher than Wife's. The parties each have retirement and stock accounts in their own names, though some portion of each may be marital property. The parties stipulated that Husband's stock account was non-marital. Because no children were born of the parties' marriage, custody is not an issue. Although Wife alleged Husband may have committed adultery, the parties stipulated to a divorce on grounds of one year's continuous separation. Additionally, the record does not reveal any tax consequences or prior support obligation owed by either party.

In sum, the parties have been married for sixteen years. Husband has the ability to pay $500 per month from his $5,392 gross monthly income and neither party is more at fault than the other in the breakdown of the marriage. Further, Wife's education and age appear to cap her future earning potential at approximately $30,000 per year. See Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004) (finding when awarding permanent periodic alimony the three important considerations are "(1) the duration of the marriage; (2) the overall financial situation of the parties, especially the ability of the supporting spouse to pay; and (3) whether either spouse was more at fault than the other."). Based on a preponderance of the evidence in the record and the statutory factors, we hold the award of permanent periodic alimony is proper.

II. Retroactive Alimony

Husband argues the family court abused its discretion in awarding retroactive alimony. We agree.

Initially, the primary thrust of Husband's argument is that the family court erred in increasing his spousal support obligation retroactively without a showing of changed circumstances pursuant to section 20-3-170 of the

South Carolina Code (1985).[2] Husband's argument misconstrues the family court's order. The family court did not issue an order modifying a prior support obligation. Rather, the family court issued an order amending its final decree of divorce pursuant to Rule 59(e) motions filed by the parties. Accordingly, section 20-3-170 is inapplicable, and Wife was not required to show a change in circumstances.

Husband further argues the family court erred in amending the final decree of divorce to award Wife retroactive alimony when no such request was made. Here, Wife filed a Rule 59(e) motion requesting the family court reconsider its failure to award her attorney's fees and credit for the second mortgage payments she made pursuant to the temporary order. Although Wife attempted to justify her entitlement to the credit by arguing there was no award of temporary alimony, Wife never requested the family court reconsider its decision not to award her retroactive alimony in the final decree of divorce. After the Rule 59(e) hearing the family court issued an order amending the final decree of divorce to award Wife retroactive alimony and credit for the second mortgage payments.

The family court lacks the authority to alter or amend a judgment on its own initiative once the judgment is more than ten days old. Heins v. Heins, 344 S.C. 146, 157, 543 S.E.2d 224, 230 (Ct. App. 2001). Here, the final decree of divorce was filed on August 7, 2008. Wife filed a motion to alter or amend the judgment on August 20, 2008, and a hearing was held on September 3, 2008. The order amending the final decree of divorce and awarding Wife retroactive alimony was filed approximately two months after the final decree of divorce on October 6, 2008. Because the family court awarded Wife retroactive alimony on its own initiative more than ten days after the final decree of divorce, we find the family court erred in awarding Wife retroactive alimony.

III. Equitable Distribution

Husband argues the family court abused its discretion in determining the value the parties' retirement accounts. According to Husband, the family

[2] Section 20-3-170 provides that a prior award of alimony is modifiable upon a showing of changed circumstances.

court erred because it disregarded the testimony of his expert witness establishing the present cash value of the parties' retirement accounts. We disagree.

Husband presented expert testimony at trial to establish the present cash value of the parties' retirement accounts. However, Wife requested the family court value the accounts based upon the actual contributions and interest as of the date of filing. The family court opted to value the parties' retirement accounts based upon the amount of contributions and interest as of the date of filing. Contrary to Husband's suggestion, the family court was not required to accept his expert's valuation of the parties' retirement accounts. See Webb v. CSX Transp., Inc., 364 S.C. 639, 651, 615 S.E.2d 440, 447 (2005) (noting the trier of fact may properly disregard expert testimony). The family court was free to accept Wife's method of valuation and reject Husband's. See Abercrombie v. Abercrombie, 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct App. 2007). Because the family court's valuation is within the range of evidence presented at trial, we find the family court's valuation of the parties' retirement accounts was proper. See id. (finding "the [family] court's valuation of marital property will be affirmed if it is within the range of evidence presented").

CONCLUSION

For the foregoing reasons, we affirm the family court's decisions regarding permanent periodic alimony and equitable distribution. However, we reverse the family court's award of retroactive alimony.

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George Rabon, Respondent,

v.

Arrow Exterminating, Inc., and Twin City Fire Insurance Co., Appellants.

Appeal From Charleston County
J. C. "Buddy" Nicholson, Jr., Circuit Court Judge

Opinion No. 4849
Submitted April 1, 2011 – Filed July 6, 2011

AFFIRMED

Richard Daniel Addison, of Columbia, for Appellants.

Stephen H. Cook and John K. Koon, of Columbia, for Respondent.

SHORT, J.: Arrow Exterminating, Inc. (Arrow) and Twin City Fire Insurance Co. (collectively, Appellants) appeal from the circuit court's order reversing the Appellate Panel and finding that George Rabon was an employee of Arrow and suffered a compensable injury. Appellants argue the court erred in reversing the Appellate Panel because Rabon made a material misrepresentation in his employment application, which vitiated his employment contract with Arrow and barred him from workers' compensation benefits. We affirm.[1]

FACTS

Rabon was working for Arrow as a carpenter on December 28, 2006, when he fell approximately six to ten feet from his ladder, injuring his neck, back, and ribs, and resulting in numbness and weakness in his left leg. On January 17, 2007, Rabon filed a Form 50, requesting that a hearing be set to determine whether he was entitled to medical examination, treatment for neurosurgery and follow-up care, and temporary total disability benefits from December 28, 2006, and continuing to maximum medical improvement (MMI) as a result of the alleged injury. Arrow timely filed its Form 51, answering Rabon's request and denying he was injured in the scope of his employment with the company. Arrow also raised all special and affirmative defenses available under the S.C. Workers' Compensation Act, and the defense enunciated in Cooper v. McDevitt & Street Co., 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973), regarding a material false statement made in a job application.

A hearing on the matter was set for April 10, 2007; however, prior to the commencement of the hearing, Arrow moved for postponement, requesting more time to obtain all of Rabon's medical records, records pertaining to Rabon's prior disability award from the Workers' Compensation Commission, and the deposition of Dr. Byron Bailey. The Commissioner found Arrow had established good cause to postpone the hearing and set the

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

hearing for a later date. The Commissioner heard the case on June 26, 2007. The next day, the Commissioner filed his order, finding: (1) there was no evidence that Rabon knowingly and willfully made a false representation regarding his physical condition and Arrow admitted Rabon was physically able to do any job given to him in an exemplary manner; (2) there was no material misrepresentation by Rabon that led to Rabon's injury on December 28, 2006; (3) Rabon could not have materially misrepresented his past injuries to Arrow if Arrow never inquired as to whether he had any past injuries; (4) Arrow did not materially rely on Rabon's physical ability as the primary purpose for hiring, but rather relied on the skills he possessed as a carpenter when he applied for the job; (5) Rabon was entitled to temporary total benefits; (6) Arrow was required to pay past due and continuing temporary total benefits until Rabon reaches MMI; and (7) Arrow was to pay all medical bills for Rabon's neck surgery and all future medical care.

Arrow appealed the case to the Appellate Panel of the Workers' Compensation Commission, and on January 17, 2008, the panel issued its order reversing the order of the Single Commissioner. The Appellate Panel found Rabon sustained an injury by accident and the employee-employer relationship existed at the time of the injury; however, it found the injury was not compensable because Rabon made a false representation to Arrow as to his physical condition, which induced Arrow to find he was a suitable candidate for the carpenter position. The Panel also found Rabon was not credible, and a causal connection existed between Rabon's false representation and his injury because had he informed Arrow of his condition, Arrow would not have placed him in a position where he could further aggravate his injury. Thus, the Panel found Rabon was not entitled to any workers' compensation benefits.

Rabon appealed the Appellate Panel's decision to the circuit court. After a hearing on the matter, the court filed its order on September 22, 2008, reversing the order of the Appellate Panel. The court held: (1) Rabon did not knowingly or willfully make a false representation as to his physical condition because the application did not ask about Rabon's physical condition or any prior injuries sustained by Rabon, and Arrow's interviewer

did not ask Rabon about his physical condition; and (2) Arrow failed to establish a causal connection between Rabon's alleged false representation and his injuries because nothing in the record established that Rabon's pre-existing injuries caused Rabon to fall off the ladder. Therefore, the court determined that because the employment was not induced by fraud and the Appellate Panel found an injury by accident, Rabon was entitled to temporary total benefits and medical benefits as set forth in the Single Commissioner's order. Arrow filed a motion to reconsider, which the circuit court denied on May 22, 2009. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5) (Supp. 2010); Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the Appellate Panel reached. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Recently, in Brayboy v. WorkForce, 383 S.C. 463, 464, 681 S.E.2d 567, 567 (2009), our supreme court determined that when reviewing a case where the employer asserts the employee's concealment of prior injuries

vitiated the employment relationship, this court reviews the Appellate Panel's findings on the relationship's existence according to our own view of the preponderance of the evidence. See Fredrick, 385 S.C. at 16, 682 S.E.2d at 519-20 (citing Brayboy). "However, even under this broad standard of review, the final determination of witness credibility is usually reserved to the Appellate Panel." Fredrick, 385 at 16, 682 S.E.2d at 520.

LAW/ANALYSIS

Appellants argue the circuit court erred in reversing the Appellate Panel's decision because Rabon made a material misrepresentation in his employment application, which vitiated his employment contract with Arrow and barred him from workers' compensation benefits. We disagree.

An employee is not entitled to recover workers' compensation benefits if he or she makes a false statement in his or her employment application and the following factors are present: (1) the employee knowingly and willfully made a false representation as to his or her physical condition; (2) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury. Cooper v. McDevitt & St. Co., 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973); Fredrick v. Wellman, Inc., 385 S.C. 8, 20, 682 S.E.2d 516, 522 (Ct. App. 2009). All three factors must be present for the employer to avoid paying benefits to the employee. Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993).

In Brayboy v. WorkForce, 383 S.C. 463, 464-65, 681 S.E.2d 567, 567-68 (2009), despite having multiple prior back problems, Brayboy answered in the negative to all the questions in the employment application about prior back injuries, physical defects, medical conditions, or previous workers' compensation claims. Our supreme court found WorkForce had established the first factor because Brayboy's false responses were willful, and Brayboy admitted he provided false information on his application. Id. at 467, 681 S.E.2d at 569. Also, in Fredrick, 385 S.C. at 20-21, 682 S.E.2d at 522, this court found Fredrick knowingly falsified her employment questionnaire as to

her prior back problems when she responded "no" to the question "Have you had back trouble of any kind?," and she had previously received significant treatment for lower back pain and a disc herniation.

In contrast, in Ferguson v. R.F. Moore Construction Co., 298 S.C. 457, 461, 381 S.E.2d 496, 499 (Ct. App. 1989), this court found that Ferguson's statements to the construction company that he was a good laborer, strong, and able to operate a jackhammer did not mislead the employer because nothing in the record indicated Ferguson believed his statements were not true, and he did not make any representations concerning his back.

Here, on the first page of the application in the lines next to "Subjects of Special Study/Research, Work, or Special Training/Skills," Rabon stated he could do "painting, finishing sheetrock, tile, trim work, framing, plumbing, heating & air, vinyl siding, roofing, windows, hang doors, run gas line, little bit electric, run my own crew."[2] The application did not ask Rabon if he had any current or prior injuries. Chuck Inabinet hired Rabon, and was his direct supervisor. Inabinet asked Rabon if he could crawl under houses and do carpentry work, and Rabon said he could. Inabinet did not ask Rabon about his prior injuries, and Rabon did not volunteer to tell him about them. Rabon did not have an affirmative duty to disclose his prior injuries to Arrow. See id. at 460, 381 S.E.2d at 498-99 (rejecting employer's contention that claimant had an affirmative duty to disclose his prior injury).

Additionally, nothing in Rabon's application was false. Despite his previous injuries, Rabon was able to do all the jobs assigned to him by Arrow. Rabon had been working for Arrow for almost a year when he fell in December 2006, and he testified that during that time, he was never given a job he could not do because of his past physical injuries; he never missed any work because of problems with his neck or back; and he never needed a reassignment or required any special assistance in doing any jobs Arrow gave

[2] The parties all agree Rabon is illiterate, Rabon's wife filled out his employment application, and Rabon signed his name. The application provided in the Record is only one page; however, at the bottom of the page, it says "Continued on other Side."

to him. Inabinet testified Rabon was physically able to do all the jobs he hired him to do; he never saw Rabon take any medication to "help him through the day"; and Rabon never had to quit a job because he was having problems with pain or bodily functions. David Clark, the president of Arrow, testified that prior to Rabon's fall, he was doing his work in a normal fashion and was not complaining about being in any pain. Clark also testified that Rabon was always physically able to do his work. Wesley Byars, who worked with Rabon daily, testified that Rabon was physically able to do the work, and he never heard Rabon say he could not do a job because of pain.

Therefore, because Arrow never asked Rabon if he had any current or prior injuries, and regardless of his injuries, Rabon was physically able to do all the jobs Arrow hired him to do, we find Rabon did not knowingly and willfully make a false representation as to his physical condition. Consequently, because we find Rabon did not knowingly and willfully make a false representation as to his physical condition, we need not address the second and third factors. See Vines, 315 S.C. at 16, 431 S.E.2d at 586 (stating all three factors must be present for the employer to avoid paying benefits to the employee); Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

Appellants also assert the circuit court erred in disregarding the Appellate Panel's finding that Rabon was not credible. However, we need not address this issue because we find Rabon did not knowingly and willfully make a false representation as to his physical condition. See Futch, 335 S.C. at 613, 518 S.E.2d at 598 (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the circuit court's order is

AFFIRMED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina, Respondent,

v.

Mario Ramos Hinojos, as Defendant and Richard G. Thompson, d/b/a All-Out-Bail Bonding, as Surety, Accredited Property & Casualty Ins., as Surety,

of whom Richard G. Thompson, d/b/a All-Out-Bail Bonding, as Surety, Accredited Property & Casualty Ins., as Surety, are Appellants.

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

Opinion No. 4850
Heard February 8, 2011 – Filed July 6, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Robert T. Williams, Sr., of Lexington, for Appellants.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant

Attorney General S. Creighton Waters, of Columbia,
for Respondent.

LOCKEMY, J.: Richard G. Thompson, d/b/a All-Out Bail Bonding (All Out), and Accredited Property and Casualty Insurance (collectively, the Appellants) appeal the trial court's estreatment of Mario Hinojos's bond. The Appellants contend the trial court abused its discretion by modifying Hinojos's bond without proper notice and consent. The Appellants also argue their obligations under the bond were completed at the time of Hinojos's guilty plea. We affirm in part, reverse in part, and remand.

FACTS

On August 18, 2005, Hinojos was arrested in Greenville County and charged with trafficking methamphetamine and cocaine, conspiracy to traffic methamphetamine and marijuana, and possession of a firearm during the commission of a violent crime. On August 22, 2005, the trial court set a $200,000 surety bond that included conditions that Hinojos be placed on electronic monitoring, maintain contact with the State Grand Jury Clerk, report weekly to South Carolina Law Enforcement Division (SLED) Special Agent Max Dorsey, and not leave the state. Hinojos procured three bonding companies to secure his release: the Appellants; Tracy Bowen, d/b/a Bonds by Gaynell; and Leon Stowers, d/b/a Giggie's Bonding Company. Each bonding company was responsible for one-third of the total bond, or $66,666.66.

At a March 15, 2007 hearing, the trial court granted Hinojos's motion to have the electronic monitoring condition of his bond removed. Written notice of the hearing was not provided to the three bondsmen, and none were present at the hearing. On November 20, 2007, Hinojos entered guilty pleas to each of the five charges against him. Hinojos's sentencing was deferred until his testimony in the trial of a co-conspirator the week of December 10, 2007.[1] Hinojos requested the trial court allow him to remain out of jail on

[1] The trafficking methamphetamine and cocaine charges to which Hinojos pled guilty carried mandatory minimum sentences of seven years'

bond pending his cooperation in his co-conspirator's trial. The State did not oppose Hinojos's request, provided the bonding companies agreed to remain on the bond. Mike Curlee, representing All Out, was the only bondsman present at the guilty plea and consented to remain on the bond until Hinojos's sentencing.

On December 10, 2007, Hinojos failed to appear in court for sentencing as ordered. All three bondsmen were present when the trial court verbally issued a bench warrant for Hinojos's arrest. Subsequently, on January 17, 2008, the State filed a Petition for Estreatment of Bond against all three bonding companies. Estreatment hearings were held in March and November 2008. At the November 7, 2008 hearing, the State conceded a modification was made to Hinojos's bond on March 15, 2007, without the notice or consent of the three bondsmen. The State also withdrew its Petition for Estreatment of Bond against all of the bondsmen except the Appellants because Curlee was present at the guilty plea and consented to remain on the bond.

On April 15, 2009, the trial court estreated $66,666.66 of Hinojos's $200,000 bond to the State. In its order, the trial court noted the Appellants were given "notice and hearing" of Hinojos's guilty plea as required by section 17-15-50 of the South Carolina Code (2003) and Curlee appeared and orally agreed to the conditions of the bond. The trial court determined that while bond modifications must comply with the Statute of Frauds, equitable estoppel may be invoked to bar the Statute of Frauds. The trial court noted that "estoppel applies if a person, by his action, conduct, words, or silence which amounts to a representation, or a concealment of material facts causes another to alter his position to his prejudice of injury." The trial court held that the State "suffered a definite, substantial, detrimental change of position in reliance on the proposed agreement" after Curlee agreed to remain on the bond and Hinojos did not appear for sentencing. This appeal followed.

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incarceration. At the guilty plea, the State recommended a cap of ten years' concurrent incarceration on all charges.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this court is bound by the trial court's factual findings unless they are clearly erroneous. Id. "On review, this [c]ourt is limited to determining whether the [trial] court abused its discretion." State v. Simmons, 384 S.C. 145, 158, 682 S.E.2d 19, 26 (Ct. App. 2009).

LAW/ANALYSIS

I. March 15, 2007 Bond Modification

The Appellants argue the trial court erred in estreating Hinojos's bond where there was a modification of the bond without the proper notice and consent of the Appellants. We disagree.

The Appellants argue they were not given proper notice of the removal of Hinojos's electronic monitoring device. They maintain they were not notified of the March 15, 2007 hearing and did not consent to the bond modification. The Appellants also assert Hinojos's bond was originally in writing and was not modified in writing as required by the Statute of Frauds. The Appellants rely on State v. McIntyre, 307 S.C. 363, 365, 415 S.E.2d 399, 400 (1992), where our supreme court determined the bond modification at issue violated the Statute of Frauds and section 17-15-50 because it was not in writing and the surety was not properly notified.

The State concedes the Appellants were not properly notified of the March 15, 2007 hearing; however, the State maintains the Appellants erroneously argue the March 15, 2007 bond modification is the bond modification at issue. The State asserts it complied with the notice and hearing requirements of section 17-15-50 and properly notified the Appellants of Hinojos's November 20, 2007 guilty plea. The State maintains the Appellants were represented at Hinojos's plea and consented to remain on the bond.

We agree with the State that the March 15, 2007 bond modification is not the modification at issue in this case. While the Appellants were not properly notified of the March 15, 2007 hearing, Hinojos still appeared before the trial court in November 2007 and entered a guilty plea. Curlee also appeared at the guilty plea and agreed to remain on the bond after the trial court stated the conditions of the bond, which did not include electronic monitoring. We find this case is distinguishable from McIntyre. In McIntyre, the surety did not agree to remain on the bond after a modification. 307 S.C. at 365, 415 S.E.2d at 400. Here, although Curlee was not notified of the March bond modification, he agreed at the November hearing to remain on the bond after the modification. Therefore, the issue before us is whether estreatment was proper after Curlee, on behalf of the Appellants, consented to the bond modification and agreed to remain on the bond after Hinojos's November 2007 guilty plea.

II. Equitable Estoppel

The Appellants argue the trial court erred in estreating Hinojos's bond where their obligations were completed at the time of Hinojos's plea. We disagree.

"The State's right to bond estreatment arises from contract." McIntyre, 307 S.C. at 364, 415 S.E.2d at 400. Pursuant to the South Carolina Statute of Frauds, a promise to answer for the debt of another must be in writing and signed by the party to be charged. S.C. Code Ann. § 32-3-10(2) (2007). "The general rule is that the court cannot redraft a bond so as to impose conditions or obligations not contemplated by the parties." State v. White, 284 S.C. 69, 71, 325 S.E.2d 64, 65 (1985). Pursuant to section 17-15-50, "the court may, at any time after notice and hearing, amend the order to impose additional or different conditions of release." S.C. Code Ann. § 17-15-50 (2003).

The doctrine of estoppel may be invoked to prevent a party from asserting the Statute of Frauds. Atlantic Wholesale Co. v. Solondz, 283 S.C. 36, 41, 320 S.E.2d 720, 723 (Ct. App. 1984). Estoppel "applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." Rushing v. McKinney, 370 S.C. 280, 293, 633 S.E.2d

917, 924 (Ct. App. 2006). "In order to overcome statutory requirements that an agreement be in writing, the party asserting estoppel must show that he suffered a definite, substantial, detrimental change of position in reliance on such agreement and that no remedy except enforcement of the bargain is adequate to restore his former position." Player v. Chandler, 299 S.C. 101, 106, 382 S.E.2d 891, 894 (1989).

The Appellants maintain their obligations under Hinojos's bond were completed after his guilty plea, and the subsequent agreement by Curlee to remain on the bond was not enforceable because it was not in writing and did not satisfy the Statute of Frauds. The Appellants argue that without an agreement by all three bondsmen, the trial court created and imposed new obligations outside the original bond. The State argues the Appellants' obligations were not completed at the time of Hinojos's plea, but continued until Hinojos's sentencing. The State maintains the trial court properly determined the Statute of Frauds was barred by equitable estoppel, and that but for Curlee's agreement to remain on the bond, the State would have opposed Hinojos's release.

We agree with the State and find the trial court did not err in determining the doctrine of equitable estoppel barred the Statute of Frauds. At the guilty plea, the State informed the trial court that it did not oppose Hinojos's request to remain out on bond until his sentencing, provided the bondsman agreed to continue on the bond. The trial court advised Hinojos of the conditions of his bond, including that he stay in contact with his attorney, the clerk of court, and SLED. Hinojos's attorney informed the court that Curlee was present and agreed to remain on the bond. Subsequently, the trial court again stated the conditions of Hinojos's bond, which did not include electronic monitoring, and Curlee agreed to remain on the bond, stating he could only answer for All Out and not the other bondsmen. The State informed the court that if Hinojos did not show up for sentencing it would move to estreat his bond.

While Curlee's agreement to remain on Hinojos's bond was not in writing, we find the Appellants are still liable on the bond pursuant to the doctrine of equitable estoppel. Curlee orally agreed to continue on the bond, and the State relied upon this agreement to its detriment. But for Curlee's representation to the trial court, the State would not have consented to

Hinojos's release and he would have been taken into custody. Because the State relied upon Curlee's agreement, the Appellants are equitably estopped from denying liability on the bond.

III. Abuse of Discretion

The Appellants argue the trial court abused its discretion in estreating $66,666.66 of Hinojos's $200,000 bond. We agree.

Section 38-53-70 of the South Carolina Code (2010) provides, "[i]n making a determination as to remission of the judgment, the court shall consider the costs to the State or any county or municipality resulting from the necessity to continue or terminate the defendant's trial and the efforts of law enforcement officers or agencies to locate the defendant." S.C. Code Ann. § 38-53-70 (2010). Furthermore, in Ex parte Polk, 354 S.C. 8, 13, 579 S.E.2d 329, 331 (Ct. App. 2003), this court determined:

> [w]hile the decision regarding remission is within the discretion of the trial court, the court should consider, at a minimum, the costs to the State as well as the purpose of the bond and the nature and willfulness of the default in determining whether, and to what extent, a bond forfeiture should be remitted.

The Appellants argue the trial court failed to consider the three factors established in Polk. The State maintains the trial court did not abuse its discretion and argues the trial court held two rule to show cause hearings, reviewed the transcripts, and requested briefs from both parties. The State also maintains the Appellants failed to show the trial court did not consider the Polk factors.

We agree with the Appellants. As noted by this court in Polk, section 38-53-70 "unambiguously provides that the trial court must consider the costs to the State in determining remission of the judgment on a forfeited bond." 354 S.C. at 12, 579 S.E.2d at 331. The trial court should also examine, at the least, the purpose of the bond and the nature and willfulness of the default. Id. at 13, 579 S.E.2d at 331. We believe Hinojos's bond was forfeited and the trial court properly entered judgment on the bond. However, because the trial

court failed to address, at a minimum, the three factors set forth in Polk, we find it abused its discretion in ordering the estreatment of Hinojos's bond in the amount of $66,666.66. Accordingly, we reverse the trial court's estreatment amount determination and remand to the trial court to consider the Polk factors in its reconsideration of the estreatment amount.

CONCLUSION

We affirm the trial court's estreatment of Hinojos's bond. We reverse the trial court's estreatment amount determination and remand to the trial court to consider the Polk factors in its reconsideration of the estreatment amount.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.