OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24

June 13, 2005

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

Mary M. Slack and Stephen H. Slack, Petitioners,

v.

Lonnie James and Shannon James, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25998
Heard February 16, 2005 - Filed June 6, 2005

AFFIRMED

Richard S. Rosen and Daniel F. Blanchard, III, of Rosen Law Firm, LLC, of Charleston, for petitioners.

Stanley C. Rodgers, of Law Offices of Stanley C. Rodgers, LLC, of Charleston, for respondents.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision reversing the trial court's order granting a

motion to dismiss counterclaims made by respondents. Slack v. James, 356 S.C. 479, 589 S.E.2d 772 (Ct. App. 2003). We affirm the Court of Appeals.

FACTS

Petitioners (Sellers) and respondents (Buyers), each represented by real estate agents, entered into a written contract for the sale of Sellers' home for $1,208,000. The sales contract includes the following provisions:

> 14. ENCUMBRANCES AND RESTRICTIONS. Buyer agrees to accept property subject to: . . . restrictive covenants and easements of record, provided they do not materially affect present use of said property.
>
> 21. ENTIRE AGREEMENT. This written instrument expresses the entire agreement, and all promises, covenants, and warranties between the Buyer and Seller. It can only be changed by a subsequent written instrument (Addendum) signed by both parties. Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein.

After entering into the contract, Buyers hired an attorney to represent them during the closing. In conducting a title examination of the property, the title examiner informed Buyers' attorney that there was a permanent four-inch sewer easement across the property. After this discovery, Buyers refused to purchase the property because, prior to entering into the written contract, Buyers had asked Sellers' real estate agent whether there were any easements on the property and the agent informed them none existed.

Sellers brought a breach of contract action against Buyers after they refused to purchase Sellers' home pursuant to the purchase contract. Buyers

brought counterclaims against Sellers alleging breach of contract, fraud, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act (UTPA).

The trial court granted Sellers' motion to dismiss Buyers' counterclaims as to the claims for fraud, negligent misrepresentation, and violations of UTPA, and struck portions of the breach of contract claim. The trial court found the alleged oral statements regarding the existence of easements on the property that allegedly occurred prior to the execution of the parties' written contract should be stricken based on the parol evidence rule and the merger doctrine. The trial court's order did not affect the remaining portions of the breach of contract counterclaim that alleged Sellers breached the terms of the written contract.[1] The trial court further found Buyers failed to exercise reasonable diligence to protect their interests and had no right to rely on the real estate agent's alleged misrepresentation as to the existence of the sewer line easement. The Court of Appeals reversed.

ISSUES

I. Did the Court of Appeals err by finding Buyers did not have a duty to investigate the truthfulness of an alleged misrepresentation by Sellers' real estate agent?

[1]In effect, Buyers could still assert their right to terminate the contract because they were not required to purchase the property if an easement, such as the sewer line easement, "materially affect[ed the] present use of said property." The Court of Appeals, when stating the facts of the case, improperly stated the sewer line easement materially affected the present use of the property. This statement by the Court of Appeals is a conclusion on an issue that was not before the court because Buyers' breach of contract counterclaim on this point was allowed to go forward by the trial court.

II. Did the Court of Appeals err by finding Paragraph 21 of the purchase contract to be a merger clause rather than a non-reliance clause?

DISCUSSION

I

The Court of Appeals, relying almost exclusively on its opinion in Reid v. Harbison Dev't Corp., 285 S.C. 557, 330 S.E.2d 532 (Ct. App. 1985), *aff'd in part*, 289 S.C. 319, 345 S.E.2d 492 (1986), reversed the trial court's order. The Court of Appeals found that, while Buyers could have ascertained the existence of the easement through investigation of public records, their failure to do so does not preclude them from asserting a tort claim for fraud or negligent misrepresentation. The court held the question of whether Buyers could reasonably rely on the statement at issue in view of the information entered upon the public record is for a jury, not the court, to determine.

Sellers argue the Court of Appeals erred by relying on their opinion in Reid v. Harbison Dev't Corp. to find Buyers did not have a duty to investigate the public records to check the accuracy of the Sellers' agent's alleged pre-contract oral statement.

In Reid v. Harbison Dev't Corp., the Reids brought an action against Harbison alleging fraud and deceit arising out of a real estate contract. The Reids alleged they were told that Harbison would own and maintain an adjacent pond. However, Harbison, when deeding the lot to a builder who then would deed the lot to the Reids, included a restrictive covenant reserving Harbison's right and stating its intent to convey the pond to a homeowners' association. Membership in the association was to be mandatory for purchasers of the lots. A declaration, which subjected the Reids' lot to the restrictions of a newly formed homeowner's association, was recorded the day of the Reids' closing.

During the closing, the Reids learned for the first time of the homeowner's association. They hesitated in continuing with the closing, but Harbison and the builder assured them the association would be formed in the future and membership would be optional. A year after purchasing the property, the Reids learned membership in the homeowners' association was mandatory and they were financially responsible for their share of the pond's upkeep.

The Court of Appeals found there was evidence upon which the jury could reasonably have found the Reids did not have actual knowledge of Harbison's misrepresentations, that they were induced to refrain from discovering the true facts, and that they acted with reasonable prudence in entering into the contract and accepting the deed. The court noted that, at the time the representations relied on were made, no instrument had been recorded in the public record; and that the Reids were laymen and would have required the assistance of an expert to ascertain from the public records the truth of Harbison's representation.[2]

While Reid is factually distinguishable from the instant case, the Court of Appeals did not err by relying on Reid and concluding there was a question of fact whether Buyers had reasonably relied on the alleged

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[2]The Court of Appeals cited *Restatement (Second) of Torts* § 540 (1979), which states that generally, as between the parties, the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation. *Restatement (Second) of Torts* § 540 is inconsistent with state law. The restatement suggests that a recipient of a fraudulent misrepresentation of fact is always justified in relying upon its truth and not conducting his own investigation. This is not the case in South Carolina. *See, e.g.*, Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112 (1985) (determination of what constitutes reasonable diligence must be made on case by case basis); Watts v. Monarch Bldrs., Inc., 272 S.C. 517, 252 S.E.2d 889 (1979) (no evidence of fraud where buyers relied on seller's agent's representation about property lines instead of conducting their own investigation).

misrepresentation. We note that when ruling on a motion to dismiss a counterclaim, the question is whether, in the light most favorable to the complainant, and with every doubt resolved in his behalf, the counterclaim states any valid claim for relief. *Cf.* Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987) (ruling on 12(b)(6) motion to dismiss must be based solely upon allegations set forth on the face of complaint and motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case). The counterclaim should not be dismissed merely because the court doubts the complainant will prevail in the action. *Cf.* Toussaint v. Ham, *supra* (question is whether in light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief).

The Court of Appeals properly found a question of fact exists as to whether Buyers' reliance on the misrepresentation was reasonable although the falsity of the alleged misrepresentation could have been ascertained by examining the public records. *See* Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 401 S.E.2d 153 (1991) (general rule is that questions concerning reliance and its reasonableness are factual questions for the jury); Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112 (1985) (right to rely must be determined in light of representee's duty to use reasonable prudence and diligence under the circumstances; determination of what constitutes reasonable diligence and prudence must be made on case by case basis). The sewer line easement is not easily discoverable without research by an expert such as an attorney. *Cf.* Thomas v. Jeffcoat, 230 S.C. 126, 94 S.E.2d 240 (1956) (buyer, relying on representations by seller's agents that lot was high in front but level, agreed to purchase the lot; court found no evidence of fraud because buyer had viewed property and failed to examine it closely as he should). *See Ex parte* Watson, 356 S.C. 432, 589 S.E.2d 760 (2003) (examining titles and preparing title abstracts constitute practicing law and therefore such activities must be conducted or supervised by licensed attorneys). *See also* In re Pstrak, 357 S.C. 1, 591 S.E.2d 623 (2004) (attorney given public reprimand for assisting in unauthorized practice of law where no lawyer examined title to real property which was subject of real estate transaction). Further, given the speedy nature of residential real estate contracts today, it is not feasible to expect a buyer to be able to

research the title of the property they are buying before entering into a contract. *But see* Watts v. Monarch Bldrs., Inc., 272 S.C. 517, 252 S.E.2d 889 (1979) (court found no evidence of fraud where buyers did not ask attorney to review metes and bounds of property, did not have survey completed, and did not examine plat of property in public record, and instead relied on seller's agent's representation about property lines of lot buyers were purchasing). Further, in this case, as in Reid, the alleged misrepresentation by Sellers' agent may have induced Buyers to refrain from discovering the true facts regarding whether there were any easements on the property before entering into a contract.

Accordingly, the Court of Appeals properly found the trial court erred by finding Buyers' reliance on agent's alleged misrepresentation was unreasonable as a matter of law.

II

The trial court, when dismissing Buyers' fraud claim of action, found that, as a matter of law, Buyers did not have the right to rely on the alleged oral statement by Sellers' agent because the written contract contained an express acknowledgement that Buyers had not received or relied upon any statements or representations by Sellers' agent (Paragraph 21). The Court of Appeals held the merger and disclaimer provisions in the contract, as quoted in Paragraph 21 above, did not afford any protection to Sellers against allegations of fraud and negligent misrepresentation.

Neither the parol evidence rule nor a merger clause in a contract prevents one from proceeding on tort theories of negligent misrepresentation and fraud. Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990). *See also* Allen-Parker Co. v. Lollis, 257 S.C. 266, 185 S.E.2d 739 (1971) (if writing was procured by words and with fraudulent intent of party claiming under it, then parol evidence is competent to prove facts which constitute fraud).[3]

[3]However, breach of contract claims based on pre-contract statements or representations are precluded by the parol evidence rule. *See* Gilliland,

Paragraph 21 of the contract, which is entitled, "ENTIRE AGREEMENT," includes the following sentence: "Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein." (Emphasis added). Sellers contend the Court of Appeals erred by finding the sentence in Paragraph 21 to be a merger clause, instead of a non-reliance clause as distinguished in Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003).

In Redwend, the Court of Appeals held the following sentence in an agreement to be an extension of the merger clause and not a non-reliance clause: "Each party agrees that representations, promises, agreements or understandings, written or oral, not contained herein shall be of no force or effect." The court explained that a non-reliance clause would contain the words, "rely" or "reliance" and set forth a statement that the parties could not or did not rely on the representations of the other party.

Although the sentence in the contract between Sellers and Buyers uses the words "relied upon," this sentence is not a non-reliance clause as explained by the Redwend court. This sentence is contained in a paragraph entitled, "ENTIRE AGREEMENT," which indicates that it is merely an extension of the merger clause. The sentence is not set apart as in the Seventh Circuit Court of Appeals case that the Redwend court utilized for its explanation. In Rissman v. Rissman, 213 F.3d 381 (7th Cir.), *cert. dismissed*, 531 U.S. 987 (2000), the federal court of appeals held a written anti-reliance clause in a stock-purchase agreement precludes any claim of deceit by prior

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supra (parol evidence rule prevents introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of written instrument when extrinsic evidence is to be used to contradict, vary, or explain written instrument; this is especially true when written instrument contains merger or integration clause). Therefore, the Court of Appeals correctly stated the law. However, the pertinent question is whether a certain sentence in Paragraph 21 is part of the merger clause rather than a separate non-reliance clause.

representations. In Rissman, the agreement contained several non-reliance statements.[4] However, in the instant case, there is only one sentence concerning reliance upon representations and this sentence is contained within the merger clause. Sellers' argument regarding Redwend and non-reliance clauses is without merit because the purchase contract does not in fact contain such a clause.

However, even if the sentence could be considered to be a non-reliance clause, we find the result would be the same because as a non-reliance clause

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[4]The statements were as follows:

> The parties further declare that they have not relied upon any representation of any party hereby released or of their attorneys, agents, or other representatives concerning the nature or extent of their respective injuries or damages.
>
> . . .
>
> (a) no promise or inducement for this Agreement has been made to him except as set forth herein; (b) this Agreement is executed by [Arnold] freely and voluntarily, and without reliance upon any statement or representation by Purchaser, the Company, any of the Affiliates or O.R. Rissman or any of their attorneys or agents except as set forth herein; (c) he has read and fully understands this Agreement and the meaning of its provisions; (d) he is legally competent to enter into this Agreement and to accept full responsibility therefor; and (e) he has been advised to consult with counsel before entering into this Agreement and has had the opportunity to do so.

(Additions omitted).

it lacks the required specificity. A general non-reliance clause, just as a merger clause, does not prevent one from proceeding on tort theories of negligent misrepresentation and fraud. *See, e.g.*, Texas Taco Cabana, L.P. v. Taco Cabana of New Mexico, 304 F. Supp. 2d 903 (W.D. Tex. 2003)(illustrating nonreliance clause in franchise agreement will bar claims to extent clause specifically identifies statements not relied on, but will not always bar claims on other issues not expressly disclaimed in agreement); Manufacturers Hanover Trust Co. v. Yanakas, 7 F.3d 319 (2d Cir. 1993) (illustrating general boilerplate nonreliance clause will not prevent fraudulent inducement suit but specific statement in contract that states party is not relying on representation as to very matter claims it was defrauded on will prevent such suit); Miles Excavating, Inc. v. Rutledge Backhoe & Septic Tank Servs., Inc., 927 P.2d 517 (Kan. App. 1997) (parol evidence admissible to show fraud even where contract contains provision stating parties have not relied on any representations other than those contained in the writing). *See also* Allen-Parker Co. v. Lollis, *supra* (even specific provisions or stipulations in a contract providing in effect for immunity from or nullification or waiver of preliminary or extraneous misrepresentations are generally ineffective, and do not prevent subsequent assertion of misrepresentations as basis for fraud). An opposite finding "would leave swindlers free to extinguish their victims' remedies simply by sticking in a bit of boilerplate." Whelan v. Abell, 48 F.3d 1247, 1258 (D.C. Cir. 1995). A party should not be given the opportunity to free himself from an allegation of fraud by incorporating a generalized non-reliance clause into a contract.

The Court of Appeals correctly concluded the merger clause could not be used as a defense by Sellers against Buyers' tort actions of fraud and negligent misrepresentation. *See* Gilliland v. Elmwood Props., *supra* (seller should not be allowed to hide behind integration clause to avoid consequences of fraudulent or negligent misrepresentation).

CONCLUSION

We find the Court of Appeals properly concluded that whether Buyers' reliance on the Sellers' agent's alleged misrepresentation was reasonable is a question of fact for the jury. Further, we find the Court of Appeals properly

concluded that the merger clause set out in Paragraph 21 of the purchase contract could not be used as a defense by Sellers against Buyers' tort actions of fraud and negligent misrepresentation. Therefore, the decision of the Court of Appeals is
AFFIRMED.

WALLER, BURNETT and PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, the sales contract Buyers signed included a binding non-reliance clause. Therefore, I would reverse the court of appeals and uphold the trial court's dismissal of Buyers' fraud and misrepresentation claims. The parties' sales contract provides in part:

> 21. ENTIRE AGREEMENT. This written instrument expresses the entire agreement, and all promises, covenants, and warranties between the Buyer and Seller. It can only be changed by a subsequent written instrument (Addendum) signed by both parties. **Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein.**

(Emphasis added). In the majority's view the above language solely constitutes a merger clause and not a non-reliance clause. The majority further contends that the merger clause cannot prevent Buyers from proceeding on tort theories of negligent misrepresentation and fraud citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990). In my opinion, the above bolded language constitutes a valid non-reliance clause.

According to the majority, the language would constitute a binding non-reliance clause only if it were included in another section of the sales contract. In my opinion, however, the majority's view renders this language entirely useless and disregards the parties' original intention as indicated by the plain meaning of the contract's language. Therefore, in my opinion, the majority has misconstrued the language of the contract.

The court of appeals has provided that a non-reliance clause would contain the words "rely" or "reliance" and set forth a statement that the parties could not rely upon the statements of the other party or a third person. *Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 469-470, 581 S.E.2d 496, 501-502 (Ct. App. 2003). In my opinion, the court of appeals'

explanation of non-reliance clauses in *Redwend* is a concise description of the above emphasized language.

Accordingly, in my opinion, the trial court correctly dismissed Buyers' counterclaims for fraud and negligent misrepresentation. Buyers, as proponents of the counterclaims, had the burden to provide at least some evidence that a genuine issue of material fact existed as to each element of fraud and negligent misrepresentation.[5] Both causes of action require Buyers to show that they relied upon the statements of Sellers' agent.[6] However, Buyers effectively waived the right to argue reliance when they signed the sales contract. Therefore, as a matter of law, Buyers cannot satisfy each element of fraud and negligent misrepresentation.

Accordingly, I would reverse the court of appeals and uphold the trial court's order dismissing Buyers' counterclaims for fraud and negligent misrepresentation.

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[5] *See Cole v. South Carolina Electric and Gas, Inc*., 355 S.C. 183, 194, 584 S.E.2d 405, 411 (Ct. App. 2003) (plaintiff has the burden to prove each element of the cause of action).

[6] *See Lundy v. Palmetto State Life Ins. Co*., 256 S.C. 506, 510, 183 S.E.2d 335, 337 (1971) (to establish a successful claim for fraud, plaintiff has the burden of proving reliance); *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 407 S.E.2d 161, 166 (2003) (to establish a successful claim for negligent misrepresentation, plaintiff has the burden of proving reliance).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James M. Wetzel and Shirley G. Wetzel, Appellants,

v.

Woodside Development Limited Partnership, WSC Corp., Woodside Venture, LLC, and Richard B. Steele, Defendants,

of whom Richard B. Steele is the, Respondent.

Appeal From Aiken County
James R. Barber, Circuit Court Judge

Opinion No. 25999
Heard March 3, 2005 – Filed June 6, 2005

REVERSED

James M. Wetzel and Shirley G. Wetzel, of Aiken, *pro se*.

James J. Corbett, of Holler, Dennis, Corbett, Ormond, Plante & Garner, of Columbia, for respondent.

JUSTICE MOORE: Appellants, James and Shirley Wetzel (hereinafter collectively referred to as Wetzel), appeal the circuit court's order quashing Wetzel's affidavit and motion alleging default by respondent, Richard B. Steele (Steele). This matter was certified from the Court of Appeals pursuant to Rule 204(b), SCACR.

PROCEDURAL FACTS

On April 4, 2003, appellants brought an action alleging unfair trade practices against Woodside Development Limited Partnership, a real estate developer; WSC Corporation, the Partnership's managing partner; Woodside Ventures, LLC, the house builder; and Steele, the individual alleged to be the alter ego of the named businesses. The deceptive act alleged by Wetzel was that an undisclosed kickback fee, in the amount of $17,370, was charged to Wetzel. This kickback fee was to be paid by the house builder to the developer; however, the house builder charged the fee to Wetzel, although it was not known to or authorized by Wetzel.

Wetzel properly served the corporate defendants; however, Steele, who is a citizen and resident of Massachusetts, alleged he was not properly served. As a result of the alleged improper service, Steele did not answer the complaint. Wetzel filed a motion for judgment by default against Steele. Thereafter, Steele moved to quash Wetzel's affidavit of default on the ground of insufficient service of the complaint. The circuit court granted Steele's motion and found Steele had not been properly served pursuant to Rule 4, SCRCP.

ISSUES

I. Should Wetzel's appeal be dismissed because it is interlocutory and therefore unappealable?

II. Did the circuit court err by finding S.C. Code Ann. § 15-9-430 (2005) inapplicable to service of process on Steele?

DISCUSSION

I

As an initial matter, Steele argues this appeal should be dismissed because the circuit court's order finding service on Steele to be improper is an interlocutory order that is not immediately appealable. The basis for Steele's argument is that the court's order was an order granting a motion to set aside the entry of default pursuant to Rule 55(c), SCRCP.

Normally, an order granting a motion to set aside an entry of default is not immediately appealable. Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988) (grant or denial of Rule 55(c) motion to set aside entry of default is not directly appealable). Here, however, the effect of granting the motion and holding that Steele has not been properly served is equivalent to granting a motion to dismiss under Rule 12(b)(5), SCRCP, since it ends the action as to Steele.[1] Therefore, it is immediately appealable.[2] Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) (grant of

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[1]Wetzel apparently recognizes this fact and argues that, because Steele's motion to quash the affidavit of default was actually a Rule 12(b)(5), SCRCP, motion to dismiss for insufficient service of process, the motion was not timely filed. This argument is not preserved for review because it was not ruled on by the circuit court. *See* Townsend v. City of Dillon, 326 S.C. 244, 486 S.E.2d 95 (1997) (issue not ruled on by trial judge is not preserved for review).

[2]Wetzel argues the circuit court erred by quashing the entry of default against Steele because the default judgment has been ministerially entered and cannot be set aside. Rule 55(a), SCRCP, states that when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend and that fact is made to appear by affidavit or otherwise, the clerk shall enter default upon the calendar. However, while a clerk may make an entry of default, a judge is required to enter a default judgment. Rule 55(b)(1), SCRCP. Specifically, the notes to the rule state that a clerk does not have authority to enter default judgments and that only a judge may

a partial motion to dismiss); Murphy v. Owens-Corning Fiberglass Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), *overruled on other grounds by* Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003) (grant of motion to dismiss as to some but not all of the parties is immediately appealable).

II

Wetzel argues the circuit court erred by finding S.C. Code Ann. § 15-9-430 (2005) inapplicable to service of process on Steele.

On April 4, 2003, Wetzel filed the summons and complaint. That same day, Wetzel, pursuant to S.C. Code Ann. § 15-9-430 (2005), sent two copies of the summons and complaint to the Secretary of State with a request that a copy be sent to Steele. The Secretary of State accepted the summons and complaint and sent a copy to Steele at the given address by certified mail with a return receipt requested. On April 21, 2003, the summons and complaint were received at Steele's address and signed for by Donna O'Brien, an employee at the address. Steele did not file an answer.

The circuit court granted Steele's motion to quash the affidavit of default on the basis there was insufficient service upon Steele as an individual. The court found that, pursuant to Rule 4(d)(8), SCRCP, the attempted service must be sent with delivery restricted to the addressee and that it must be signed for by the addressee. The court disagreed that service was effective pursuant to § 15-9-430 because, the summons and complaint were mailed to the partnership, not a corporate defendant for which Steele is a director. The court found § 15-9-430 inapplicable to service of process upon an individual, as an individual.

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enter a default judgment. *See also* Beckham v. Durant, 300 S.C. 329, 331, n.2, 387 S.E.2d 701, 703, n.2 (Ct. App. 1989) ("The entry of default is an official recognition of the failure to appear or otherwise respond, but it is not a judgment by default. Judgment by default is not properly entered until damages are determined."). Therefore, given that a judge has not entered a default judgment in this matter, Wetzel's argument is without merit.

Rule 4(d)(8), SCRCP, provides that service upon an individual may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), by registered or certified mail, return receipt requested and delivery restricted to the addressee. Rule 4(d) further provides that this service shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. If Rule 4(d)(8) were applicable, as the circuit court found, then the service upon Steele would be insufficient because delivery was not restricted to the addressee, *i.e.* Steele. However, the circuit court erred by finding Rule 4(d)(8) applicable. Instead, Rule 4(e), SCRCP, is the appropriate rule. Rule 4(e) states:

> Whenever a statute . . . provides for service of a summons and complaint . . . upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the statute . . . .

Such a statute exists in this situation. Section 15-9-430 provides the procedure for the service of process on a nonresident director of a domestic corporation. Section 15-9-430 states:

> (a) Each director of a domestic business corporation who is a nonresident of this State at the time of his election or who becomes a nonresident during his term in office, shall . . . be deemed to have appointed the Secretary of State as an agent to receive service of process upon him in any action or proceeding relating to actions of such corporation and arising while he held office as director of such corporation.
>
> (b) Service of such process shall be made by delivering to and leaving with the Secretary of State, . . . duplicate copies of such process. The Secretary

> of State shall thereupon immediately cause one of such copies to be forwarded to the nonresident director by certified mail. Proof of service shall be by affidavit of compliance with this section filed, together with a copy of the process, with the clerk of court in which the action or proceeding is pending.
>
> . . .
>
> (e) . . . Delivery of copies of service as required in subsections (b) and (c) to the nonresident director must be made by delivering the copy to the most recent address on file with the company's most current annual report or any more current interim report which has been filed with the Secretary of State pursuant to this subsection. . . .

Wetzel's service upon Steele complied with this statute and, therefore, service is sufficient. The fact that someone other than Steele signed for the documents is of no consequence because, unlike Rule 4(d)(8), § 15-9-430 does not require that the documents be delivered directly to the addressee. *See also* Wagenberg v. Charleston Wood Prods., Inc., 122 F. Supp. 745 (E.D.S.C. 1954) (not necessary that process be delivered personally to defendant; may be left at defendant's residence with person of discretion or with person employed at defendant's place of business).[3]

Further, the circuit court erred by finding service was not effective pursuant to § 15-9-430 because the summons and complaint were mailed to the partnership and not to a corporate defendant for which Steele is a director.

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[3]Wagenberg was decided under the former service upon a nonresident director statute; however, the statute was similarly stated on this point. S.C. Code Ann. § 10-432.1 (1952) stated: ". . . Secretary of State shall forthwith forward one copy of such summons and complaint to the nonresident director at the last address filed with the Secretary of State as provided in the Code."

There is no requirement in the statute that the service be mailed to the corporation's address. The statute states only that the copies must be delivered or mailed to a nonresident director at his most recent address on file. To find otherwise, would expand the statute's operation. Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996) (in interpreting statute, words must be given plain and ordinary meaning without resorting to subtle or forced construction to limit or expand statute's operation). Therefore, the circuit court erred by finding § 15-9-430 inapplicable on this ground.

Accordingly, the circuit court erred by finding the service of process on Steele was insufficient.

CONCLUSION

We find the order granting Steele's motion is immediately appealable and that the circuit court erred by finding insufficient service of process. Therefore, the decision of the circuit court is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph W. Page, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Marion County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 26000
Submitted May 18, 2005 – Filed June 13, 2005

AFFIRMED

Acting Deputy Chief Attorney Wanda P. Hagler, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, of Columbia, for Respondent.

JUSTICE BURNETT: Joseph W. Page (Petitioner) pled guilty to possession with intent to distribute crack cocaine (PWID), criminal sexual conduct (CSC), and assault and battery with intent to kill (ABIK). Pursuant to a negotiated plea agreement that included a recommended cap of twenty

years' imprisonment, Petitioner was sentenced to imprisonment for ten years for PWID and nineteen years for CSC and ABIK to be served concurrently. The post-conviction relief (PCR) judge denied Petitioner's request for relief. We affirm.

FACTUAL BACKGROUND

Petitioner argues he did not enter a guilty plea knowingly and voluntarily because he was not informed of possible liability under the South Carolina Sexually Violent Predator Act (SVPA). S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2004). We disagree.

At the PCR hearing, Petitioner testified he would not have pled guilty to CSC and ABIK if he had known about the SVPA. At the PCR proceeding, plea counsel conceded he did not recall informing Petitioner of the SVPA. The trial judge did not discuss the SVPA with Petitioner before accepting his plea.

ISSUE

> Was Petitioner's plea entered knowingly, voluntarily, and intelligently where Petitioner was not informed he would be potentially liable under the Sexually Violent Predator Act after completing his sentence?

STANDARD OF REVIEW

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Where there has been a guilty plea, the applicant must prove counsel's representation fell below the standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484

(1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000); Cherry v. State, supra. The Court will not uphold the findings when there is no probative evidence to support them. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

However, in a case raising a novel issue of law, the appellate court is free to decide the question of law with no particular deference to the trial court. Osprey v. Cabana Ltd. Partn., 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); I'On v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718 (2000). The Court will reverse the PCR judge's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004); Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

Petitioner's primary contention is that his counsel failed to inform him his CSC conviction would make him eligible for possible civil commitment under the SVPA as a "sexually violent predator."[1] Petitioner asserts he should have been informed of his potential for civil commitment as a consequence of his plea, and counsel's failure to advise him resulted in a plea that was not knowing and voluntary.

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[1] S.C. Code Ann. § 44-48-30(1)(a) provides:

(1) "Sexually violent predator" means 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 not confined in a secure facility for long-term control, care, and treatment.

The SVPA, S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2004), is a civil commitment procedure for the long-term care and treatment of sexually violent predators. S.C. Code Ann. § 44-48-20; see Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (upholding Kansas' Sexually Violent Predator Act, from which South Carolina's law is patterned); In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001); State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). The SVPA provides that one hundred eighty days before a person convicted of a sexually violent offense is released from confinement, the agency releasing the prisoner gives written notice to a multi-disciplinary team and the Attorney General. S.C. Code Ann. § 44-48-40(A). Within thirty days of receiving notice, the multi-disciplinary team, which is appointed by the Director of the Department of Corrections, assesses whether the person satisfies the definition of a sexually violent predator. If it is determined the person satisfies the definition of a sexually violent predator, the multidisciplinary team must forward a report of the assessment to the prosecutor's review committee. S.C. Code Ann. § 44-48-50. The prosecutor's review committee, which is appointed by the Attorney General, determines whether probable cause exists to believe the person is a sexually violent predator. S.C. Code Ann. § 44-48-60.

If the prosecutor's review committee determines probable cause exists to support the allegation, the Attorney General may file a petition with the court in the jurisdiction in which the person committed the offense to request that the court make a probable cause determination as to whether the person is a sexually violent predator. S.C. Code Ann. § 44-48-70. If the probable cause determination is made, the person is transferred to a secure facility for evaluation. S.C. Code Ann. § 44-48-80(D). Within sixty days of the probable cause hearing, a trial is conducted to determine whether the person is a sexually violent predator. The person or Attorney General may request a jury trial. S.C. Code Ann. § 44-48-90. The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. S.C. Code Ann. § 44-48-100.

We conclude Petitioner's counsel had no duty to inform him about the civil commitment process under the SVPA. Although eligibility for

civil commitment under the SVPA is triggered by conviction of a "sexually violent offense," civil commitment can be imposed only after testing, evaluation, a probable cause hearing, and a trial by either the court or jury. No one can be civilly committed as a "sexually violent predator" unless the State proves beyond a reasonable doubt the person suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexual violence if not confined in a secure facility. Consequently, a person may be convicted of a predicate offense, and yet not be committed under the SVPA because the evidence is not sufficient to find that his or her present mental condition creates a likelihood of future sexually violent behavior. Thus, any possible civil commitment of Petitioner would not flow directly from his guilty plea, but rather from a separate civil proceeding as a collateral consequence.

"The distinction between 'direct' and 'collateral' consequences of a plea . . . turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, 475 F.2d 1364, 1366-67 (4th Cir. 1973) (refusing to invalidate a plea where the court had failed to advise the defendant that he might be civilly committed, even though commitment flowing from the crime he committed was, for all intents and purposes, automatic); Brown v. State, 306 S.C. 381, 382, 412 S.E.2d 399, 400 (1991) ("The imposition of a sentence may have a number of collateral consequences . . . and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences.").

Other courts have concluded trial counsel does not have an obligation to inform a defendant of possible commitment under the SVPA. For example, in Bussell v. State, 963 P.2d 1250 (Kan. App. 1998), the Kansas Court of Appeals concluded trial counsel was not ineffective in failing to advise the defendant about the KSVPA. In that case, the court stated:

> It is unclear now and will remain so in the future whether the KSVPA will ever apply to defendant because he has not yet finished his criminal sentence. The uncertainty inherent in predicting whether the KSVPA will ever be invoked against defendant is such that the failure

> of his counsel to advise him of potential consequences cannot be said to be constitutionally deficient.

Id. at 1254; see also Pearman v. State, 764 So.2d 739 (Fla. App. 2000); Martin v. Reinstein, 987 P.2d 779 (Ariz. App. 1999); State v. Bollig, 593 N.W.2d 67 (Wis. App. 1999); In re Paschke, 909 P.2d 1328 (Wash. App. 1996).

CONCLUSION

For the foregoing reasons, we conclude a defendant's possible commitment under the Sexually Violent Predator Act is a collateral consequence of sentencing pursuant to a guilty plea or a conviction. Therefore counsel was under no obligation to inform Petitioner of possible commitment under the SVPA.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Teresa A. Bass, Employee, Respondent,

v.

Isochem and St. Paul Fire & Marine Insurance Co., Appellants.

Appeal From York County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 3996
Heard May 11, 2005 –Filed June 6, 2005

AFFIRMED IN RESULT AND REMANDED

Stanford E. Lacy, of Columbia, for Appellants.

David V. Benson, of Rock Hill, for Respondent.

ANDERSON, J.: In this Workers' Compensation case, the employer, Isochem Colors, Inc., appeals the circuit court's order reversing the denial of benefits to Teresa A. Bass by the Appellate Panel of the Workers' Compensation Commission. The circuit court reversed on the ground that substantial evidence did not support the Appellate Panel's decision to deny benefits because Bass failed to give timely notice of her accident to Isochem. We affirm in result and remand.

FACTUAL/PROCEDURAL BACKGROUND

In August of 1999, Bass was diagnosed with carpal tunnel syndrome. After her doctor prescribed Motrin, Bass "didn't have the problem anymore." On November 16, 2000, Bass began working at Isochem as a truck driver. Prior to starting work at Isochem, Bass had a pre-employment physical and was "pronounced fit and able to work." At Isochem, Bass was responsible for delivering large drums of powdered dye weighing between 100 to 500 pounds. This required Bass to load and unload the drums by tilting them on their edge and rolling the drums off of the truck, arm over arm, as she made deliveries. Depending on the number of delivery orders Isochem received, Bass delivered between one and fifty drums per day.

According to Bass, in January of 2001, she was delivering drums of dye to Amble Knitwear in Kings Mountain when she tipped a drum and "had some pain in [her] hand." Bass declared she "first notice[ed] problems with [her] arms when [she was] working for Isochem . . . [a]bout January of 2001." Bass did not immediately inform anyone at work of her "problems" because she "thought it would go away." Bass stated she informed her supervisor, Angela Radcliff, of the "problems" "a few months later." Bass admitted she did not remember exactly when she told Radcliff but asserted that she advised Radcliff of her "problems" "on a few occasions." Bass testified:

> I told [Radcliff] that moving the drums and all is bothering me. The pain is bothering me. I even told her that my hands were going numb at night. I told her that my hands, as a matter of fact I was driving and my hands were going numb while I was driving. And I was talking to her on the telephone at that time. And I told her that my hands were going numb then.

Radcliff did not recall Bass mentioning any "problems with her hands or wrists" until November of 2001. Radcliff professed: "[Bass] had come to me and she had said that that night during when she was sleeping that they were going numb and they were, you know, felt like they were asleep. And they were bothering her and hurting her." In the Supervisor's Accident

Investigation Report, Radcliff indicated Bass' "Hand/Wrist" injury was reported on December 6, 2001. Bridget Roberge filled out a "Workers' Compensation—First Report of Injury or Illness" form on December 6, 2001. On the form, Roberge noted the "date of injury/illness" and the "date employer notified" was "12/06/01." Roberge further noted the "type of injury/illness" was "carpal tunnel syndrome (CTS)" and the "part of body affected" was the "wrist."

After several months of progressive pain, Bass sought medical treatment from Dr. Donald H. McQueen, III on November 28, 2001. At Dr. McQueen's office, Bass answered questions on the "Patient Medical History Form" in the following manner:

> What will we be seeing you for today? wrist
>
> . . . .
>
> If this was not the result of an accident, please tell us when your pain started. If you are unsure, please give an approximate date: approx. 10 mons. ago

In his medical note from Bass' November visit, Dr. McQueen wrote: "Problem: Pain in both hands with numbness. . . . Has developed pain in both hands." Dr. McQueen diagnosed Bass with bilateral carpal tunnel syndrome and suggested surgery to alleviate her symptoms. Bass underwent a right carpal tunnel release on December 28, 2001 and a left carpal tunnel release on January 28, 2002. In a letter to Bass' attorney dated January 15, 2002, Dr. McQueen opined:

> [I] am unable to state that most probably and to a reasonable . . . degree of medical certainty that [Bass' work] activities have caused injury to her wrists.
>
> . . . [A] person with carpal tunnel syndrome would most likely aggravate a pre-existing condition if they performed a strenuous job in a repetitious manner.

> It is reasonable to say that Ms. Bass may have aggravated a pre-existing condition.

On January 9, 2002, Bass filed a Form 50 seeking Workers' Compensation benefits for bilateral carpal tunnel syndrome. On the Form 50, Bass alleged:

> 1.a. The claimant sustained an accidental injury to Both arms on 11-28-01 (12a says 12-6-01) in York County, State of South Carolina.
>
> 1.b. Describe briefly how the accident occurred Repetitive loading and unloading of drums of powdered dye weighing From 110 through 400 lbs. caused injury to both wrists and arm manifesting itself in the need (See Attachment)
>
> . . . .
>
> 4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
>
> 5. Notice of the accidental injury was given to the employer on 11-28-01 in the following manner: Angela, her supervisor—on various occasions and on 11-28-01.

Isochem denied the claim on the ground that Bass failed to give timely notice.

In spite of the surgery, Bass continued to have problems. Because of these "complications," Bass was evaluated by Dr. J. Samuel Seastrunk, an orthopedic surgeon, on April 1, 2002. When asked if she told Dr. Seastrunk "about this event in January of 2001," Bass replied: "Yes, sir, I did." Bass testified:

> I told [Dr. Seastrunk] that I was at Amble Knitwear in Kings Mountain [in January of 2001] and I tipped a drum and I realized

> that I had some pain in my hand. Then I told him that the pain got worser [sic] and worser [sic]. And I got to where I just couldn't stand it no more. And I ended up going to Dr. McQueen and he done surgery.

Counsel for Isochem asked Bass: "Is it fair to say then that the pain you were having in your hands, was the first time that you related it to rolling the drums was in January of 2001?" Bass answered: "Approximately that time."

In his medical notes, Dr. Seastrunk stated: "[Bass] relates that sometime in January of 2001 that she injured both wrists when she pulled on a drum and her wrists began hurting her." Dr. Seastrunk opined:

> IMPRESSION: 1. Bilateral carpal tunnel syndrome with bilateral carpal tunnel release as a result of Workers Comp injury from repetitive loading and unloading heavy weights.
>
> DISPOSITION AND DISCUSSION:
> From the information that I have and in accordance with my evaluation of Ms. Bass today, it is my feeling that the problems she is having with both wrists, that is carpal tunnel syndrome bilaterally, is directly related to the repetitive loading and unloading of drums which seem to be an ongoing process, necessitating her to refer herself to Dr. McQueen on 11-28-01 in which he made the diagnosis of bilateral carpal tunnel syndrome. . . . [I]t is my feeling that [Bass] is impaired to her right upper extremity by at least ten percent 10% as a result of the carpal tunnel syndrome and also to her left upper extremity by at least thirteen percent (13%) relative to the carpal tunnel syndrome and also the area of hard spot in her left palm.

In his deposition, Dr. Seastrunk said Bass described an injury to him that occurred in January of 2001:

> She was describing these drums and she apparently was pulling on the drum. I don't know exactly what these drums look like. She probably used a hand dolly or something to maneuver these things and was pulling on a drum, probably trying to get it in better position and she had a feeling of pain, if I recall, in her wrist area. . . . The date of the injury she gives is January 2001.

Dr. Seastrunk reiterated: "My opinion is that [Bass] developed carpal tunnel as a result of the type of activity she was doing."

The Single Commissioner denied Bass' claim for benefits. In the Commissioner's order under "Statement of the Case," the Commissioner declared: "This is a denied carpal tunnel syndrome case." Under "Summary of Evidence," the Commissioner stated:

> Bass has a history of carpal tunnel syndrome. On August 31, 1999, she was diagnosed with carpal tunnel syndrome by her family physician, Dr. Steven Oehme. Bass denied any long-term affects [sic] and did not return to Dr. Oehme for follow-up visits. Dr. Oehme's report . . . states claimant was diagnosed with bilateral carpal tunnel syndrome, mild, left greater than the right. Dr. Oehme's report indicates Bass should take anti-inflammatories and consider a brace. The report states that, "She agrees."
>
> . . . .
>
> Bass underwent right carpal tunnel release by Dr. McQueen on December 28, 2001. She underwent left carpal tunnel release on January 28, 2002. . . .

In the section entitled "Findings of Fact," the Commissioner found: "On August 11, 1999, claimant was first diagnosed with carpal tunnel syndrome by Dr. Oehme and was given anti-inflammatories." The Commissioner noted that Bass testified her initial injury occurred in January 2001. Under "Conclusions of Law," the Commissioner explained: "Carpal tunnel

syndrome, even if caused by repetitive motion, is compensable as an accident under the Act." The Commissioner concluded:

> Claimant suffered an injury by accident in January 2001 but did not report it until December 6, 2001. In the meantime, her condition became progressively worse such that ultimately it required a carpal tunnel release to both wrists. Although claimant had frequent conversations with her supervisor, she did not report her injury until eleven months thereafter which is unreasonable. The employer was prejudiced because it had no opportunity to provide medical treatment until claimant's condition had progressed to such an extent that surgery was required on both hands. Claimant is in violation of Section 42-15-20. Her claim is barred by her failure to give the requisite 90 days notice and her claim for benefits is denied.

The Appellate Panel unanimously affirmed the Single Commissioner and denied benefits to Bass. The Panel expounded:

> The Findings of Fact and Conclusions of Law as established by the hearing commissioner are **correct** and . . . are **adopted verbatim** by the panel as though repeated herein.
>
> Further, to support the hearing commissioner's decision, this panel notes:
>
> The commissioner found in his order that the claimant did indeed suffer an injury by accident. It was not compensable due to the claimant's failure to report and give notice as required by law.

ORDER

The order of the single commissioner is hereby **affirmed**. All Findings of Fact and Conclusions of Law are incorporated to

> become the final Decision and Order of the South Carolina Workers' Compensation Commission.

(emphasis in original). In a footnote, the Panel stated that "[a]ll unchanged Findings of Fact and Conclusions of Law as contained in the single commissioner's order are specifically referenced and included in toto in the "order" portion of this decision." (Emphasis in original).

The circuit court reversed the Appellate Panel's decision regarding compensability on the ground that substantial evidence did not support the Appellate Panel's findings. The court ruled:

> In her Form 50, Ms. Bass did place a single date of accident in January of 200[1]. She also, however, alleged that the repetitive loading and unloading of drums was the cause of her problems which resulted in the medical care and treatment of November 28, 2001. The Full Commission and the hearing commissioner ignored that alternative pleading. . . .
>
> . . . To deny [Bass] benefits based on one position in her Form 50 denies the whole purpose of the South Carolina Workers' Compensation Act which is to protect injured workers.
>
> The opinion of this Court, therefore, is that the Full Commission and the hearing commissioner's Order is not supported by substantial evidence of record and should be reversed. The medical records, particularly the testimony of Dr. Seastrunk coupled with Ms. Bass' testimony, clearly indicates that this was a repetitive motion injury deemed by our Supreme Court to be compensable. The purpose of the South Carolina Workers' Compensation Act is for inclusion of injured workers not exclusion. Ms. Bass was injured in the course and scope of her employment and is entitled to benefits.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). 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 where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).

The substantial evidence rule of the APA governs the standard of review in a Workers' Compensation decision. Frame, 357 S.C. at 527, 593 S.E.2d at 494; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); see also Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) ("Any review of the commission's factual findings is governed by the substantial evidence standard."). Pursuant to the APA, this Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. See Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005); Gibson v. Spartanburg Sch. Dist. # 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); S.C. Code Ann. § 1-23-380(A)(6) (2005); see also Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) ("A reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law."); Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (noting that in reviewing

decision of Workers' Compensation Commission, court of appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Gibson, 338 S.C. at 517, 526 S.E.2d at 729; Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Frame, 357 S.C. at 528, 593 S.E.2d at 495; Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004); Corbin, 351 S.C. at 618, 571 S.E.2d at 95; Muir, 336 S.C. at 282, 519 S.E.2d at 591. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Frame, 357 S.C. at 528, 593 S.E.2d at 495. It is not within our province to reverse findings of the

Appellate Panel which are supported by substantial evidence. Pratt, 357 S.C. at 622, 594 S.E.2d at 274-75; Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

LAW/ANALYSIS

Isochem argues the circuit court erred in reversing the Appellate Panel's denial of Workers' Compensation benefits to Bass. Isochem alleges Bass suffered a single, identifiable injury by accident in January of 2001 and failed to give notice of her injury within ninety days of its occurrence, as required by section 42-15-20 of the South Carolina Code. We disagree.

A priori, we are confronted with the novel issue arising from the factual scenario of this case: Is a repetitive trauma injury, i.e., carpal tunnel syndrome, treated separately and differently from an identifiable injury by accident under the notice mandate of section 42-15-20?

I. Principles of Statutory Construction

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002); Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins

Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Municipal Ass'n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582. The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Miller v. Aiken, Op. No. 25976 (S.C. Sup. Ct. filed May 2, 2005) (Shearouse Adv. Sh. No. 19 at 16); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 442 S.E.2d 177 (1994). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 503 S.E.2d 465 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 475 S.E.2d 762 (1996); Worsley Cos. v. South Carolina Dep't of Health & Envtl. Control, 351 S.C. 97, 567 S.E.2d 907 (Ct. App. 2002); see also Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970) (observing that where the

language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561, 486 S.E.2d at 495; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002); Adams v. Texfi Indus., 320 S.C. 213, 464 S.E.2d 109 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992).

Courts will reject a statutory interpretation which 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, 529 S.E.2d 280 (2000); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994). A court should not consider a particular clause in a statute as being construed in isolation,

but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Liberty Mut. Ins. Co., 336 S.C. at ___, 611 S.E.2d at 302; see also Mid-State Auto Auction v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996) (stating that in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

II. Notice Requirement/Section 42-15-20

The notice requirement, section 42-15-20 of the South Carolina Workers' Compensation Act, reads:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Title prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person. No compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

S.C. Code Ann. § 42-15-20 (1985) (emphasis added).

Section 42-15-20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence. Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985); see also McCraw v. Mary Black Hosp., 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42-15-

20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). Generally, the injury is not compensable unless notice is given within ninety days. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The burden is upon the claimant to show compliance with the notice provisions of section 42-15-20. See Lowe v. Am-Can Transport Servs., Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability. See Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952); Hanks, 286 S.C. at 381, 335 S.E.2d at 93. While the notice requirement must be construed liberally in favor of claimants, it is "not to be treated as a mere formality or technicality and dispensed with as a matter of course." Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951). The purpose of section 42-15-20 is twofold: "first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer." Id.

This Court addressed the notice requirement in Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002):

> The statutory efficacy of § 42-15-20 is bifurcated: (1) affording protection for the employer to investigate the facts and circumstances of an accident or injury and to question witnesses while memories are fresh; and (2) permitting the employer the opportunity and privilege to provide medical treatment and care to minimize disability and concomitant liability of the employer.
>
> We rule the language of § 42-15-20 in regard to notice should be liberally construed in favor of claimants. We conclude that notice is adequate, when there is some knowledge of

> accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.

Id. at 459, 562 S.E.2d at 683.

In his treatise on Workers' Compensation law, Professor Larson discussed the notice requirement:

> Under most acts, there are two distinct limitations periods that must be observed: The period for notice of injury, and the period for claiming compensation.
>
> Notice of injury, the first step in compensation procedure, is normally given to the employer. . . . The period is comparatively short; it may be "forthwith," or "as soon as practicable," or a specified period of a few weeks or months. The purpose is dual: First, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury. If, upon receiving notice, the employer wishes to controvert the claim, it must itself file a notice to this effect. Failure to do so, however, will not estop the employer from later asserting its defenses.

7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.01 (2004).

Section 42-15-20 is a policy statement embedded in the Workers' Compensation Act by the South Carolina General Assembly that consolidates and harmonizes the employer and employee under the statutory rubric of notification and accountability.

III. Repetitive Trauma Injury

Generally, a repetitive trauma injury, such as carpal tunnel syndrome, is compensable under the Workers' Compensation Act. Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002). The Pee court found "a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma." Id. at 174, 573 S.E.2d at 789.

Repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini-accidents." Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2002). It is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury. Id. "Applying the discovery rule to such an injury often works to the prejudice of an employee who discovers symptoms of a repetitive trauma injury but continues to work." Id. at 178, 574 S.E.2d at 195.

In a repetitive trauma case, although the statute of limitations begins to run the last day of exposure, a Workers' Compensation claimant is still required to separately give the employer notice of an injury. See Schurlknight, 352 S.C. at 178-79, 574 S.E.2d at 195-96 (citing § 42-15-20) ("We also note the separate requirement that a worker give the employer notice of an injury."). This notice requirement ensures the employer will not be unfairly prejudiced by a two-year period for filing that begins from the last date of exposure. Id.

IV. Applicability of Section 42-15-20 to Repetitive Trauma Injury/Carpal Tunnel Syndrome

A. The Extant Evidentiary Record

Deciding this case on the basis of a specific "accident" in January of 2001 is a misreckoning or inadvertency of the factual and legal record. Encapsulated in the Single Commissioner's order, as affirmed by the Appellate Panel, is specific and definitive discussion and evaluation of the carpal tunnel syndrome experienced by Bass with precedential analysis

beginning with Pee. A failure by this Court to decide the novel issue of whether carpal tunnel syndrome as a repetitive trauma injury meets the statutory mandate of section 42-15-20 at the temporal occurrence of the disabling injury would be judicial dereliction.

B. Analogy to Occupational Disease Cases

Section 42-15-20 applies in occupational disease cases. In Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985), the court of appeals explicated:

> The appellants argue that Hanks failed to comply with the statutory requirement that he give notice of his injury to his employer within ninety days after its occurrence. They point out that if the injury occurred on June 28, 1979, the date Hanks was diagnosed as permanently and totally disabled, Hanks did not give them notice of his injury until December 3, 1980, the date he filed the claim.
>
> . . . .
>
> Section 42-15-20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence. Generally, the injury is not compensable if timely notice is not given. **In the case of occupational diseases, the "accident" occurs when the employee becomes disabled and could, through reasonable diligence, discover that his condition is a compensable one.** Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962).
>
> Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in

order to minimize the disability and his own liability. Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952).

Id. at 381, 335 S.E.2d at 93 (emphasis added). Thereafter, in Bailey v. Covil Corp., 291 S.C. 417, 354 S.E.2d 35 (1987), the supreme court held:

> Employers also contend that Employee did not give timely notice of his claim. **An employee must give notice of an occupational disease claim within ninety days after the date he becomes disabled and could discover with reasonable diligence that his condition is compensable.** [White v. Orr-Lyons Mills, 287 S.C. 174, 336 S.E.2d 467 (1985); Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962); Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985)]; S.C. Code Ann. § 42-15-20 (1985). **The filing of the claim in this case within ninety days of the date of disability satisfied the requirement of timely notice.**

Id. at 419, 354 S.E.2d at 36 (emphasis added).

In Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999), the court of appeals examined the notice requirement as it applies to a claimant with an occupational disease:

> Bard avers the Circuit Court erred in refusing to reverse the Commission's decision that Muir gave timely notice of his claim pursuant to S.C. Code Ann. § 42-15-20 (1985).
>
> Section 42-15-20 requires an injured employee to "immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident." Generally, the injury is not compensable unless notice is given within ninety days. Id. With an occupational disease, the "accident" occurs when the employee becomes disabled and could, through reasonable diligence, discover that his condition is compensable. Bailey v.

> Covil Corp., 291 S.C. 417, 354 S.E.2d 35 (1987); Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985). In occupational disease cases, compensability accrues at the time of death or disability. See Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 S.E.2d 711 (1960).
>
> Bard argues Muir did not give timely notice of injury because he was not reasonable in discovering the nature of his medical problems. It does not dispute Muir's testimony that he informed his superiors at Bard in the spring of 1992 of his diagnosis and belief that he had contracted the hepatitis through handling the catheters.
>
> **Notice begins to run when the employee becomes disabled and could discover with reasonable diligence his condition is compensable.** Muir did not become disabled by his condition until August, 1992. Therefore, Muir had actually given notice of the nature of his disease before he became disabled.

Id. at 295, 519 S.E.2d at 598 (emphasis added).

Professor Larson declared: "The optimum rule in disease cases . . . is the dual type of rule worked out judicially in California: The period begins to run when the disease has culminated in disability and when by reasonable diligence the claimant could have discovered that the condition was a compensable one." 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.10[2] (2004).

C. Other Jurisdictions

Our research leads to the ineluctable conclusion that the efficacy of section 42-15-20 has never been analyzed in regard to a repetitive trauma injury, i.e., carpal tunnel syndrome. No South Carolina case has addressed this precise question. We commence our unprecedented and neoteric juridical journey in facing this novel issue by visiting other jurisdictions for edification and enlightenment. When there is no case on point in South

Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority. See Williams v. Morris, 320 S.C. 196, 464 S.E.2d 97 (1995); Silva v. Silva, 333 S.C. 387, 509 S.E.2d 483 (Ct. App. 1998); Golini v. Bolton, 326 S.C. 333, 482 S.E.2d 784 (Ct. App. 1997).

The Supreme Court of Tennessee, in Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997), ruled that, in gradual onset injuries like carpal tunnel syndrome, the date of the accident is the date on which the injury prevents the employee from working. Id. at 343; see also Central Motor Express, Inc. v. Burney, 377 S.W.2d 947 (Tenn. 1964) (noting that the beginning date for computing notice to the employer in a gradual injury case is the date on which the disability manifests itself to such an extent that employee was forced to leave work).

When faced with this issue, the Court of Appeals of Kentucky concluded that "in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest." Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. Ct. App. 1989). The Supreme Court of Kentucky announced:

> [T]he notice and limitations provisions for a gradual injury are triggered when the worker becomes aware of a gradual injury and knows that it was caused by work, regardless of whether the symptoms that led to discovery of the injury later subside. This approach is consistent with one of the purposes of the notice requirement, to enable the employer to take measures to minimize the worker's ultimate impairment and, hence, its liability.

Holbrook v. Lexmark Int'l Group, Inc., 65 S.W.3d 908, 911 (Ky. 2002). Recently, the Supreme Court of Kentucky reiterated:

> A gradual injury generally arises imperceptibly, from the physical strain of numerous instances of minor workplace

> trauma, also referred to as minitrauma. For that reason, the courts have applied a rule of discovery for establishing the date of injury. Hence, a gradual injury becomes manifest for the purpose of notice and limitations with the worker's knowledge of the harmful change and the fact that it is caused by the work.

Brummitt v. Southeastern Kentucky Rehab. Indus., 156 S.W.3d 276 (Ky. 2005).

In International Paper Co. v. Melton, 866 So. 2d 1158 (Ala. Civ. App. 2003), the trial court found: "Regarding the notice issue of [Melton's] carpal tunnel claim, the courts have held that the date of injury for cumulative trauma disorders such as carpal tunnel syndrome is the date of last exposure to the injurious job stimulation." Affirming the trial court, the Court of Civil Appeals of Alabama stated:

> Moreover, in Zeanah v. Stewart Animal Clinic, P.C., 752 So. 2d 505, 508 (Ala. Civ. App. 1999), this court relied upon Dun & Bradstreet [Corp. v. Jones, 678 So. 2d 181 (Ala. Civ. App. 1996),] in concluding that, for purposes of the notice requirements under § 25-5-78, "[f]or accidents or occurrences involving cumulative-stress disorders, the date of the worker's last exposure to the stressor is considered the date of the injury."
>
> . . . Based on the facts of this case and our holding in Zeanah, supra, we conclude that the trial court did not err in finding that Melton gave International Paper adequate and proper notice of his carpal tunnel syndrome claim.

Id. at 1162-63.

The Supreme Court of Pennsylvania, in City of Philadelphia v. Workers' Comp. Appeal Bd., 851 A.2d 838 (Pa. 2004), explained:

> [T]he question is a legal one concerning when the 120-day notice period in Section 311 begins to run in the case of an aggravation/

> cumulative trauma injury, where the claimant suffers daily aggravation of her diagnosed condition, which becomes disabling only on her last day of employment. This is a question of statutory construction . . . .
>
> . . . .
>
> . . . [I]n fixing the date of the occurrence of such an aggravation injury [carpel tunnel syndrome], it is apparent that the Commonwealth Court cases recognizing the distinct nature of such injuries are correct. Thus, where as here the credited medical evidence establishes that a cumulative trauma disorder was at issue, and that conditions at work cause [a daily] aggravation of the disorder, notice must be deemed timely so long as it was given within 120 days of the last aggravation injury—which will usually be the last day at work or the day where total disability resulted.

Id. at 843, 847-48.

The Court of Civil Appeals of Oklahoma inculcated: "[A] cumulative trauma injury is a single injury for purposes of notice and limitations. The date of last exposure applies." Fabsco Shell & Tube v. Eubank, 84 P.3d 792, 796 (Okla. Civ. App. 2003) (citations omitted).

The Court of Appeals of Iowa, in Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa Ct. App. 1993), articulated:

> Iowa adopted the cumulative injury rule in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 374 (Iowa 1985). In McKeever, the court also addressed the question of when a cumulative injury occurs for reporting and time limitation purposes: when pain prevents the employee from continuing to work, or when the pain occasions the need for medical attention. Id. The court adopted the rule finding an employee is disabled

> and injured when, because of pain or physical inability, he or she can no longer work. Id.

Id. at 424.

The Supreme Court of Montana reviewed the notice requirement:

> We conclude that claimant satisfied the notice requirement. Since claimant's disability was the result of cumulative traumas which occurred over a period of time, the date of injury, for purposes of complying with the notice requirement, is the date on which claimant was first unable to continue with his employment due to his physical condition.

Bodily v. John Jump Trucking, Inc., 819 P.2d 1262, 1267-68 (Mont. 1991).

In contradistinction to a time-dated accident, this evidentiary record posits a magnitudinous presentation of a carpal tunnel syndrome accidental injury. Bass' testimony and the testimony of Dr. McQueen and Dr. Seastrunk support Bass' contention that her arms gradually worsened over time to the extent that she needed medical treatment and was disabled.

CONCLUSION

We rule that in applying section 42-15-20 to a repetitive trauma injury, i.e., carpal tunnel syndrome, the Workers' Compensation Commission shall determine the statutory notice requirement from the time of disablement of the claimant. Notice begins to run when the employee becomes disabled and could discover with reasonable diligence his condition is compensable.

Analyzing the efficacy of section 42-15-20 in regard to the injury suffered and sustained by Bass, we agree with the circuit judge that Bass did not sustain a single, identifiable injury by accident in January of 2001. There is **NO** substantial evidence in the record to support a factual finding that Bass suffered and sustained a single, identifiable injury by accident in January of

2001. The only evidence in the record is that Bass suffered and sustained a repetitive trauma injury, carpal tunnel syndrome, over a period of time resulting in disability in November of 2001.

We remand to the South Carolina Workers' Compensation Commission to make findings of fact and conclusions of law consistent with the adoption of our holding concerning the efficacy of section 42-15-20 in a repetitive trauma injury scenario.

Based on the foregoing, we **AFFIRM IN RESULT and REMAND**.

STILWELL and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anne H. Floyd, **Respondent,**

v.

Laurens W. Floyd, Jr., individually and as Trustee of the Laurens Floyd Trust and the Charitable Remainder Trust of Laurens W. Floyd and Anne H. Floyd; Daniel D. Bozard as co-trustee of the Laurens Floyd Trust and the Charitable Remainder Trust of Laurens W. Floyd and Anne H. Floyd; Julia M. Floyd; and Robert H. Floyd, Individually, of whom Laurens Floyd, Jr., individually and as Trustee of the Laurens Floyd Trust and the Charitable Remainder Trust of Laurens W. Floyd and Anne H. Floyd; Daniel Bozard as co-trustee of the Laurens Floyd Trust and the Charitable Remainder Trust of Laurens W. Floyd are the, **Appellants.**

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 3997
Submitted May 18, 2005 – Filed June 13, 2005

AFFIRMED

M. M. Weinberg, Jr., of Sumter, for Appellants.

Clarke W. DuBose, and Sarah P. Spruill, both of Columbia, for Respondent.

ANDERSON, J.: Laurens Floyd, Jr. (Laurens) appeals a trial judge's order awarding Anne Floyd (Anne) approximately $40,000 in attorney's fees and removing him as trustee of a charitable remainder trust. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On December 1, 1999, Laurens W. Floyd, Sr. (Floyd Sr.) executed an amended and restated trust agreement establishing several trusts, including Trust A for the benefit of his wife, Anne. Trust A is a qualified terminable interest property trust, known as a Q-Tip trust. According to the trust agreement, Floyd Sr.'s houses and lots in Pawley's Island, South Carolina and his stock in the Dillon Provision Company, Inc. (or the proceeds from the sale of such stock) were to fund Trust A. Trust A was to be administered as follows:

> 1. Commencing with the date of the Settlor's death, the Trustee shall pay to or for the benefit of the Settlor's wife, Anne H. Floyd, all of the net income from Trust A in convenient installments, but not less frequently than quarter-annually. Any

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

> accrued and undistributed income at the death of the Settlor's wife shall be paid to her personal representatives and administrators.
>
> 2. In addition, the Trustee may pay to or apply for the benefit of the Settlor's wife such sums from the principal of Trust A as in the Trustee's sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of the Settlor's wife, taking into consideration to the extent the Trustee deems advisable any other income or resources of the Settlor's wife known to the Trustee.

The trust agreement directed the remainder interest go to Floyd Sr.'s children upon Anne's death.

Floyd Sr. was the original trustee of the trusts. Floyd Sr.'s son, Laurens, and his (Floyd Sr.'s) business associate, Bozard, were nominated to serve as co-trustees upon his death. In addition, the trust agreement provided upon the death or resignation of both Laurens and Bozard, First Citizen Bank and Trust Company of South Carolina (First Citizen's) was to serve as trustee.

Floyd Sr. created a separate charitable remainder trust, under which Anne was a lifetime income beneficiary, with the remainder interest passing to several charities. The charitable remainder trust document is not part of the record on appeal. However, it appears from the pleadings, correspondence, and trial testimony that the trust was established March 13, 1996. As the lifetime beneficiary, Anne was to receive 8% of the value of the trust each year. Although the case caption suggests otherwise, Bozard did not serve with Laurens as trustee for the charitable remainder trust. Laurens was the sole trustee.

In February 2000, Floyd Sr. died, and Laurens and Bozard began serving as trustees of Trust A. Trust A was funded with the two Pawley's Island homes and the Dillon Provision Company stock. Anne began residing

in one of the Pawley's Island homes. The trust rented the other home for $400 per month.

Approximately a year after Floyd Sr.'s death, Laurens sent a letter to Anne, his stepmother, explaining the administration of Trust A. Laurens wrote:

> Dear Anne:
>
> . . . .
>
> To facilitate the handling of the trust assets, a money market account will be opened with Edward Jones. The income from the assets, currently rent from the rental house, will be deposited into this account. On a quarterly basis, we will issue you a check of the accrued income from the QTIP Trust. Expenses incurred by the real property of the trust such as property taxes; property casulty [sic], liability, and flood insurance; upkeep and maintenance, etc., you will then be expected to pay for. Any of the above expenses which exceed the income generated by the assets of the QTIP trust are, according to the terms of the QTIP Trust, your personal responsibility.

Anne disagreed with Laurens' interpretation of the trust agreement and sought assistance from attorney Donnie Dial. Dial wrote letters to Charles Curry, the attorney for Floyd's estate, asserting the trust was responsible for expenses relating to trust property. Anne and Laurens engaged in several disagreements as to who was responsible for payment of various expenses related to the trust properties, including repairs to the roof of the rental house, replacement of the heat pump in Anne's house, payment of flood insurance and general property insurance, and payment of property taxes. Laurens took the position that the trust was not responsible for the payment of these expenses.

In October 2001, Anne brought an action in probate court against Laurens and Bozard individually and as co-trustees. Anne sought an

accounting of both Trust A and the charitable remainder trust, and a declaratory judgment requiring the trustees to (1) repay any advances Anne paid on behalf of Trust A, (2) reinstate flood insurance on the properties, and (3) sell the Dillon Provision Company stock and reinvest the proceeds. In addition, Anne petitioned for the removal of Laurens and Bozard as co-trustees of Trust A and Laurens as trustee of the charitable remainder trust.

The case was removed to the circuit court. The trial judge issued an interim order, which stated:

> [C]ounsel for petitioner brought to the Court's attention that the trustees are failing to pay expenses of the Trust, including but not limited to real property taxes, flood insurance, and capital improvements such as a new roof for the rental house owned by the Trust and a new heat pump for the home owned by the Trust and occupied by Mrs. Floyd.

Although he was not prepared to rule on the interpretation of the trust provisions, the trial judge indicated his concern about the preservation of the trust property. Thus, he ordered:

> [T]he Trust shall pay for all costs of upkeep, repair, and protection of the Trust assets, including but not limited to the taxes, insurance, repairs, and upkeep on the two Pawley's Island houses, and that such expenses are to be paid by the trustees first out of Trust income and then, if necessary, out of Trust principal.

After the trial judge issued this order, First Citizen's filed a motion to intervene as an interested party, which was granted.[2]

Subsequently, Anne filed a motion for a rule to show cause based on the trustees' failure to comply with the trial judge's interim order. Anne

[2] First Citizen's Bank and Laurens entered into a settlement agreement during the pendency of this appeal resolving all matters between them. Therefore, First Citizen's Bank is not a party to this appeal.

argued the trust failed to pay for the installation of a new heat pump in the house in which she resides, as required by the interim order. The trial judge held a hearing on this motion, found Laurens in contempt of court, and ordered him to pay attorney's fees incurred by Anne in enforcing the order. In addition, the trial judge addressed Laurens' argument that the trust was not responsible for the payment of the heat pump because of the provision in the trust agreement giving the trustee the discretionary power to invade the trust principal. The trial judge determined that provision did not pertain to the expenditures for maintenance of trust property. After this order, the trial judge issued another order reflecting Laurens' and Bozard's decisions to voluntarily withdraw as trustees of Trust A.

Ultimately, the trial judge held a hearing on the merits of Anne's complaint. At the hearing, Laurens objected to the admission of several letters written by Dial on behalf of Anne and letters authored by Curry. Laurens argued all of the letters were written by out-of-court declarants and, therefore, constituted inadmissible hearsay. In addition, he maintained the letters from Curry to Laurens were protected by the attorney-client privilege and thus were not admissible. The trial judge did not rule on the admissibility of the letters, but asked the parties to submit briefs supporting their positions. After the parties submitted their briefs, the trial judge ruled the Dial letters were not admitted to show the truth of the matter asserted, but "to show that the co-trustees were placed on notice as to [Anne's] position and to show her efforts to resolve this matter without litigation." The judge noted Dial's opinions contained in the letters were cumulative because the court already had interpreted the trust as requiring the trustees to protect the trust property. Additionally, the trial judge found the letters written by Curry to Laurens were not privileged because "the advice of an attorney to the trustee is not privileged from the trust beneficiaries." Furthermore, the trial judge stated Laurens waived the privilege by producing the letters in discovery, and opened the door to admission of the letters by claiming he followed the advice of counsel.

The trial judge issued a final order finding Laurens acted in bad faith and breached his fiduciary duties to Anne by (1) failing to pay the expenses of Trust A, (2) not making timely distributions of Trust A income to Anne,

(3) neglecting to provide Anne an accounting of both trusts, (4) misstating the terms of Trust A, (5) managing Trust A property solely for the benefit of the remainder beneficiaries, (6) not following the advice of counsel as to his duties as a trustee, and (7) failing to follow court orders. Based on these findings, Laurens was held personally liable for $40,347.21 of Anne's attorney's fees and $22,331.60 of First Citizen's attorney's fees. In making this determination, the trial judge stated: "the assessment of fees and costs against Floyd, Jr. as herein specified, is not an award of attorneys' fees, per se, but rather an assessment of sanctions against Floyd, Jr. for his contempt of court, together with an award of damages to Wife and Bank for his breach of fiduciary duty." Further, the trial judge removed Laurens as trustee of the charitable remainder trust, explaining, "While Floyd, Jr.'s actions in this case were not dishonest, they strongly support his removal as trustee from any trust affecting Wife."

I. Contempt and Sanctions

Laurens argues the trial judge erred in finding him in contempt. He asserts because all income from the trust must be paid to Anne, the trust did not have funds to pay for expenses related to the trust property. Therefore, he contends an invasion of the trust principal would be necessary to pay those expenses. Relying on the provision of the trust granting the trustee discretion to invade the principal for Anne's benefit, Laurens argues he properly exercised his discretion and chose not to invade the principal. Laurens maintains the trial judge abused his discretion in holding him in contempt for failure to pay for replacement of the heat pump in the home in which Anne resides. According to Laurens, the trial judge's order was unlawful and he was not required to obey that order.

Additionally, Laurens argues that even if the court did not err in holding him in contempt, the sanctions imposed were so disproportionate to the contempt as to constitute reversible error.

A. Standard of Review

A decision on contempt rests within the sound discretion of the trial court. Fagan v. Timmons, 224 S.C. 286, 78 S.E.2d 628 (1953); Tirado v. Tirado, 339 S.C. 649, 530 S.E.2d 128 (Ct. App. 2000). "On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988) (citing Means v. Means, 277 S.C. 428, 288 S.E.2d 811 (1982); Fagan v. Timmons, 224 S.C. 286, 78 S.E.2d 628 (1953)); see also Widman v. Widman, 348 S.C. 97, 120, 557 S.E.2d 693, 705 (Ct. App. 2001) ("A determination of contempt is within the sound discretion of the trial judge, but his discretion will be reversed when the finding is without evidentiary support or there is an abuse of discretion."). "A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." Haselwood v. Sullivan, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984) (citing Hicks v. Hicks, 280 S.C. 378, 312 S.E.2d 598 (Ct. App. 1984)).

B. Law/Analysis

1. Law of the Case

The finding of contempt and the award of fees are the law of the case. First, a finding of contempt is immediately appealable regardless of whether damages have been determined. Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999); Arnal v. Arnal, 363 S.C. 268, 297, 609 S.E.2d 821, 837 (Ct. App. 2005); Jarrell v. Petoseed Co., 331 S.C. 207, 208, 500 S.E.2d 793, 793 (Ct. App. 1998). Laurens did not appeal the December 24 order finding him in contempt. An unappealed ruling becomes the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Therefore, the December 24 order which found Laurens in contempt and which was not appealed is the law of the case.

Second, the trial judge's decision to award attorney's fees as both a contempt sanction and damages is the law of the case. The trial judge, in his final order, directed Laurens to pay Anne's and First Citizen's attorney's fees

as both damages and as a contempt sanction for his violation of the trial judge's prior order. Laurens, however, solely appeals the trial judge's award of attorney's fees as a contempt sanction. Therefore, because the trial judge based his award of attorney's fees and costs on more than one ground, the unappealed ground becomes the law of the case. Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996).

Further, Laurens failed to challenge the amount of the attorney's fees awarded either during the hearing when Anne's attorney submitted his attorney fee affidavit or in a subsequent Rule 59(e), SCRCP motion to alter or amend the trial judge's order. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000); Jones v. Daley, Op. No. 3951 (S.C. Ct. App. filed February 22, 2005) (Shearouse Adv. Sh. No. 10 at 92). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Ellie, Inc. v. Micchichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004). When a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

Although the contempt finding and the award of fees are the law of the case, we nonetheless find the trial judge correctly decided both issues.

2. Contempt

Adverting our analysis to the substance of Laurens' arguments, we find them without merit. "The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982) (citing McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979); State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955)); see also In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998) ("The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings.") (citation omitted); State ex rel. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979) (instructing that a court has the inherent authority to punish offenses calculated to obstruct, degrade, and undermine the administration of justice, and such power cannot be abridged). "The court's power includes the ability to maintain order and decorum." Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 841 (1988).

Contempt results from the willful disobedience of an order of the court, and before a court may hold a person in contempt, the record must clearly and specifically demonstrate the acts or conduct upon which such finding is based. Curlee at 382, 287 S.E.2d at 918; accord Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004); Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 606, 567 S.E.2d 514, 519 (Ct. App. 2002). Civil contempt must be proved by clear and convincing evidence. Durlach v. Durlach, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004) (citation omitted). A willful act is "one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (internal quotation marks and citation omitted); accord Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001).

Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence. Bevilacqua, 316 S.C. at 129, 447

S.E.2d at 217 (citing State v. Bowers, 270 S.C. 124, 241 S.E.2d 409 (1978)). "Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." Smith-Cooper v. Cooper, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001) (citations omitted).

"In order to sustain a finding of contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based." Spartanburg County Dept. of Soc. Servs. v. Padgett, 296 S.C. 79, 83, 370 S.E.2d 872, 874 (1988) (citation omitted). "In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." Hawkins, 359 S.C. at 501, 597 S.E.2d at 899 (citing Eaddy v. Oliver, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001)). "Once the movant makes a prima facie showing by pleading an order and demonstrating noncompliance, the burden shifts to the respondent to establish his defense and inability to comply." Eaddy, 345 S.C. at 42, 545 S.E.2d at 832 (internal quotation marks and citation omitted).

In State v. Kennerly, 337 S.C. 617, 524 S.E.2d 837 (1999), our supreme court noted the difference between constructive and direct contempt:

> Constructive contempt is contempt that occurs "outside the presence of the court." [Toyota of Florence v. Lynch, 314 S.C. 257,] 267, 442 S.E.2d [611,] 617 [(1994)]; State v. Johnson, 249 S.C. 1, 152 S.E.2d 669 (1967). In contrast, direct contempt involves contemptuous conduct occurring in the presence of the court. State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955).

Id. at 620, 524 S.E.2d 838 (1999).

Contempt can be either civil or criminal. Poston v. Poston, 331 S.C. 106, 502 S.E.2d 86 (1998), provides an erudite and comprehensive explication of the differences between civil and criminal contempt:

> The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised,

including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant. The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

An unconditional penalty is criminal in nature because it is solely and exclusively punitive in nature. The relief cannot undo or remedy what has been done nor afford any compensation and the contemnor cannot shorten the term by promising not to repeat his offense. If the relief provided is a sentence of imprisonment, . . . it is punitive if the sentence is limited to imprisonment for a definite period. If the sanction is a fine, it is punitive when it is paid to the court. However, a fine that is payable to the court may be remedial when the contemnor can avoid paying the fine simply by performing the affirmative act required by the court's order.

In civil contempt cases, the sanctions are conditioned on compliance with the court's order. The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do. If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order . . . . Those who are imprisoned until they obey the order, carry the keys of their prison in their own pockets. If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine by complying with the court's order.

> Civil contempt must be proven by clear and convincing evidence. In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt.
>
> . . . .
>
> In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding. Thus, the court is not required to provide the contemnor with an opportunity to purge himself of these attorney's fees in order to hold him in civil contempt. A governmental body, as a complainant, may recover attorney's fees in a successful contempt proceeding, provided no statute prohibits recovery. Although usually a complainant is not entitled to attorney's fees in a criminal contempt proceeding, depending on the circumstances, such an award may be proper. After all, the award of attorney's fees is not part of the punishment; instead, this award is made to indemnify the party for expenses incurred in seeking enforcement of the court's order.

Poston, 331 S.C. at 111-15, 502 S.E.2d at 88-91 (internal quotation marks and citations omitted). A criminal contemnor may not be sentenced to more than six months in prison unless he is afforded a trial by jury. See State v. Passmore, ___ S.C. ___, 611 S.E.2d 273 (Ct. App. 2005) (citing Bloom v. Illinois, 391 U.S. 194 (1968)).

The trial judge issued an order requiring Laurens, as trustee, to pay all "cost of upkeep, repair, and protection of the Trust assets, including but not limited to the taxes, insurance, repairs, and upkeep on the two Pawley's Island houses . . . ." Laurens clearly violated this order when he refused to pay for the heat pump for one of the homes. Thus, the trial judge did not

abuse his discretion by finding Laurens in contempt for willfully disobeying the order.

Furthermore, we reject Laurens' assertion that the order was unlawful and that he therefore is excused from complying with the order. The trial judge correctly interpreted the trust provisions. In his order finding Laurens in contempt, the trial judge addressed Laurens' contention that the decision whether or not to invade the trust principal to pay for expenses related to the trust property was left to his and Bozard's discretion. The trial judge determined the provision Laurens relies upon "does not pertain to the expenditures and maintenance of the Trust property and for Trust expenses." We agree.

The clause in Trust A relied upon by Laurens states:

> 2. In addition, the Trustee may pay to or apply for the benefit of the Settlor's wife such sums from the principal of Trust A as in the Trustee's sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of the Settlor's wife, taking into consideration to the extent the Trustee deems advisable any other income or resources of the Settlor's wife known to the Trustee.

This provision does not address payment of expenses relating to property of the trust. We emphasize that this clause is directed towards Anne's well-being and does not concern preservation of the trust property.

The trust agreement specifically provides under the section labeled "Trustee Powers":

> The Trustee and any successors in the capacity of fiduciaries are authorized in their discretion with respect to any property, real or personal, at any time held under any provision of this Trust and without authorization by any court and in addition to any other rights, powers, authority and privileges granted by any other

> provision of this Trust or by statute or general rules of law (subject to the limitations of the Article immediately following this Article):
>
> . . . .
>
> 26. To permit the Settlor's wife to occupy rent free any residence constituting a part of the assets of a trust of which the Settlor's wife is a beneficiary and to permit any other beneficiary or beneficiaries to occupy rent free any residence constituting a part of the assets of a trust for a beneficiary or beneficiaries and to pay the real property taxes thereon, expenses of maintaining the residence in suitable repair and condition and hazard insurance premiums on the residence; provided, however, the Trustee shall not exercise this power in any way which would deprive the Settlor's wife under Trust A of the beneficial enjoyment of Trust A and the Settlor's wife shall have the right to limit, restrict, or terminate Trustee's exercises of this power if it interferes with the beneficial enjoyment.

The trust property belongs to the trust. Pursuant to paragraph 26, the trustees may permit Anne or any other beneficiary to occupy rent free a residence owned by the trust. However, nothing in the trust agreement authorizes the trust to require a beneficiary to pay the taxes, insurance, and maintenance expenses of a trust-owned house. The trust, as owner, carries the responsibility for these items.

Employing a tortured interpretation of the trust agreement, Laurens breached his duties to Anne, neglected to pay expenses of Trust A, and ignored a court order. The trial judge did not abuse his discretion in finding Laurens in contempt.

3. Sanctions

Laurens argues that even if he was properly found in contempt, the trial judge erred in awarding sanctions in disproportion to his contempt. He asserts the amount of attorney's fees is excessive and some of the charges awarded relate to matters other than his contempt. However, because the trial judge awarded the fees both as sanctions and damages, we affirm.

Laurens correctly recognizes compensatory contempt is intended to restore the injured party to his original position prior to the contemnor's action and, therefore, is limited to the party's actual damages. See Whetstone v. Whetstone, 309 S.C. 227, 235, 420 S.E.2d 877, 881 (Ct. App. 1992) ("Compensatory contempt is money awarded to a party who is injured by a contemnor's action to restore the party to his original position. The award should be limited to the party's actual loss.") (citations omitted).

Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), explains the law of compensatory contempt with exactitude:

> Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order. The goal is to indemnify the plaintiff directly for harm the contemnor caused by breaching the injunction. Rendleman, Compensatory Contempt: Plaintiff's Remedy When A Defendant Violates An Injunction, 1980 Ill.L.F. 971. Courts utilize compensatory contempt to restore the plaintiff as nearly as possible to his original position. Therefore it is remedial.
>
> We have recognized compensatory contempt in at least two cases. In Ex Parte Thurmond, 1 Bailey 605 (1830), we stated that when an individual right is directly involved in a contempt proceeding, the court has the power to order the contemnor to place the injured party in as good a situation as he would have been if the contempt had not been committed, or to suffer imprisonment. In Lorick & Lowrance v. Motley, 69 S.C. 567, 48 S.E. 614 (1904), we held that a contemnor may be required to pay damages suffered by reason of his contemptuous action or

suffer imprisonment. The defendant was ordered to pay to the plaintiff the value of the trees he had destroyed in disregard of the court's order.

When . . . property of an individual is taken or destroyed in contempt of the court's order, those interested have a right to ask of the court its restoration or payment of its value at the hands of the offender, and the court requires such restoration as part of the punishment. 49 S.E. at page 615.

Compensatory contempt awards have been affirmed also by the United States Supreme Court.

Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. Where compensation is extended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss. . . .

United States v. United Mine Workers of America, 330 U.S. 258, 304-305, 67 S.Ct. 677, 701-702, 91 L.Ed. 884 (1947).

Therefore, the compensatory award should be limited to the complainant's actual loss. Included in the actual loss are the costs in defending and enforcing the court's order, including litigation costs and attorney's fees. The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant.

Curlee, 277 S.C. at 386-87, 287 S.E.2d at 919-20; accord Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002).

Further, this Court, in Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001), wrote:

> Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory. Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders. See Poston v. Poston, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998) ("In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding."); Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("A compensatory contempt award may include attorney fees.") (citation omitted); Curlee v. Howle, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-20 (1982) ("Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order . . . . Included in the actual loss are the costs of defending and enforcing the court's order, including litigation costs and attorney's fees.").

Harris-Jenkins, 348 S.C. at 178-79, 557 S.E.2d at 711-12.

The trial judge awarded attorney's fees and costs to Anne not only as a sanction for Laurens' contempt, but also as "an award of damages to Wife and Bank for [Laurens'] breach of his fiduciary duty." Therefore, the law does not limit the award to actual damages flowing from Laurens' contempt. The portion of the sum that cannot be characterized as compensatory contempt—i.e., actual damages attributable to Laurens' contempt—is accounted for in the additional damages award. Although the fees were not awarded as attorney's fees per se, the trial court nevertheless analyzed the attorney's fee affidavits and found the fees reasonable pursuant to Taylor v. Medenica, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998). Thus, we find no error in the award of $40,347.21 in attorney's fees to Anne to be paid by Laurens.

II. Admissibility of Letters

Laurens argues the trial judge abused his discretion in admitting into evidence letters written by attorneys Dial and Curry. First, he contends these letters constitute inadmissible hearsay because neither Dial nor Curry testified at the trial. In addition, Laurens maintains he had an attorney-client relationship with Curry, and therefore, letters written by Curry to Laurens were inadmissible pursuant to the attorney-client privilege. We disagree.

A. Standard of Review

The admission of evidence is within the trial court's discretion. R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000) (citing Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994)); Haselden v. Davis, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), aff'd 353 S.C. 481, 579 S.E.2d 293 (2003); Cudd v. John Hancock Mut. Life Ins. Co., 279 S.C. 623, 310 S.E.2d 830 (Ct. App. 1983). The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. R & G Construction at 439, 540 S.E.2d at 121; Elledge v. Richland/Lexington School Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002); see also Whaley v. CSX Transp., Inc., Op. No. 25935 (S.C. Sup. Ct. filed February 2, 2005) (Shearouse Adv. Sh. No. 6 at 15) (observing admission of evidence will not be reversed absent an abuse of discretion); Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996) (noting admission or exclusion of evidence will not be disturbed on appeal absent clear abuse). The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001); Sullivan v. Davis, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995); Cudd, 279 S.C. 623, 310 S.E.2d 830.

The determination whether the attorney-client privilege applies is within the sound discretion of the trial judge, and his decision will not be reversed absent an abuse of discretion. Ross v. Med. Univ. of South

Carolina, 317 S.C. 377, 453 S.E.2d 880 (1994) (citing State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980)).

B. Law/Analysis

1. Not Offered for the Truth of the Matter Asserted

Rule 801, SCRE, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See Burton v. York County Sheriff's Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). "A statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000); see also State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003) ("Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted.") (citation omitted). See, e.g., Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (finding, in a wrongful death action, that letters and a card the deceased wrote to her husband and children were not hearsay because they were offered to show the close relationship among the family and not to prove the truth of any matter asserted in the writings).

For example, in Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972), the plaintiff, Player, was injured while a passenger in an automobile driven by Nancy Carder. Bobby Thompson owned the car. Player initiated an action against Carder for "heedlessness and recklessness in the operation of the automobile," and she sued Bobby Thompson and his wife, Geraldine, under the family purpose doctrine for negligent entrustment of the automobile. Id. at 604, 193 S.E.2d at 533. A hearsay issue arose when Player sought to introduce Carder's statement

> that she (Carder) went with Geraldine Thompson, two or three weeks before the collision, to a motor vehicle inspection station. She said that the inspector refused Mrs. Thompson a sticker because 'she needed two tires.' She stated she heard the

> inspector 'tell her (Mrs. Thompson) and she (Mrs. Thompson) told me.'—'The man told her that . . . she needed two more to pass inspection."

Id. at 608, 193 S.E.2d at 534. The trial court refused to admit the evidence. The Player court explained:

> After the trial judge declined to admit the statement in evidence, counsel for plaintiff called defendant Carder as a witness. He attempted to ask her about the inspection station incident in an effort to show that both she (Carder) and Mrs. Thompson had notice of the slick tires. Defense counsel's objection was sustained on the ground that it was hearsay.
>
> In C. McCormick, Law of Evidence s 225 (1954) hearsay evidence is defined:
>
> > 'Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserted.'
>
> Our Court has recognized this sound and very basic proposition in Watson v. Wall, 239 S.C. 109, 121 S.E.2d 427 (1961). Also see 5 Wigmore on Evidence s 1361 (3rd ed. 1940).
>
> > 'If, then, an utterance can be used as circumstantial evidence, i.e. without inferring from it as an assertion to the fact asserted, the Hearsay rule does not oppose
> >
> > any barrier, because it is not applicable.' 6 Wigmore on Evidence s 1788 (3rd ed. 1940).

> It would not be improper in this case for the plaintiff to elicit testimony from Nancy Carder that a filling station attendant stated to both Mrs. Thompson and her that the automobile had bad tires. It would be receivable, not as a testimonial assertion by the attendant to prove the fact of slick tires, but as indicating that Nancy Carder and Mrs. Thompson obtained knowledge of the slick tires, the fact of slick tires being proved by other evidence.
>
> Inasmuch as the testimony was not offered to prove the truth of the matter asserted, but solely to prove notice, which is a state of mind, the hearsay rule does not apply.

Player, 259 S.C. at 609-10, 193 S.E.2d at 535.

The trial judge determined, and we agree, Anne offered these letters into evidence not to prove the truth of Dial's and Curry's statements, but to show the trustees were placed on notice of Anne's position as to the payment of expenses associated with trust property. Additionally, admission of the Curry letters demonstrates Laurens did not follow his counsel's advice. The credibility of the contents of the letters was not at issue. Rather, the letters are probative of (1) Laurens' awareness of Anne's position, and (2) Laurens' failure to follow the advice of his attorney.

Finally, Laurens was not prejudiced by the admission of the letters. The trial judge had already determined in the rule to show cause hearing that Laurens had a duty to pay trust expenses and to provide an accounting of the trusts. Therefore, the interpretation of the trust was not at issue when the trial judge received these letters into evidence. Accordingly, we find the trial judge did not abuse his discretion in admitting the letters.

2. Attorney-Client Privilege

The trial judge determined admission of the Curry letters did not violate the attorney-client privilege because (1) the privilege does not apply to Anne as she is a beneficiary of the trust, and communications between a trustee and an attorney for a trust are not privileged as to trust beneficiaries; (2) even if the privilege were to apply it was waived when Laurens produced the letters in discovery; and (3) Laurens opened the door to the introduction of the letters by his repeated testimony that he relied on counsel's advice. We agree with each ground for admitting the letters.

a. Beneficiaries as Clients

William F. Fratcher, IIA Scott on Trusts § 173 (4th ed. 1987), declares that a "beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust." This proposition is supported by two English cases, Talbot v. Marshfield, 12 L.T.R. 761 (Ch. 1865), and Mason v. Cattley, 22 Ch.D. 609 (1883). See Rust E. Reid, William R. Mureiko, & D'Ana H. Hikeska, Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Property, Probate and Trust Journal 541, 561 (1996).

Riggs National Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976), is the leading American case addressing the non-applicability of the privilege to trust beneficiaries. In Riggs, the beneficiaries of a trust sought to compel production of a legal memorandum prepared by an attorney named Workman. Workman's legal fees were paid from the corpus of the trust estate. The trustee refused to produce the document and claimed it was protected under the attorney-client and work product privileges. The document was prepared "in anticipation of potential tax litigation on behalf of the trust with the State of Delaware[.]" 355 A.2d at 710. However, the case before the court was an unrelated surcharge claim initiated by the beneficiaries.

The Riggs court concluded: "the trustee's invocation of the privileges cannot shield the document involved herein from the beneficiaries' desire to examine it." 355 A.2d at 712. The court explained:

> The trustee has been described as a mere representative whose function is to attend to the disposition and maintenance of the trust property so that it may be enjoyed by the beneficiaries in the manner provided by the settlor. In order for the beneficiaries to hold the trustee to the proper standards of care and honesty and procure for themselves the benefits to which they are entitled, their knowledge of the affairs and mechanics of the trust management is crucial. See Bogert on Trusts, 2d Ed., s 961. And, when the beneficiaries desire to inspect opinions of counsel for which they have paid out of trust funds effectively belonging to them, the duty of the trustees to allow them to examine those opinions becomes even more compelling. The distinction has often been drawn between legal advice procured at the trustee's Own expense and for his Own protection and the situation where the trust itself is assessed for obtaining opinions of counsel where interests of the beneficiaries are presently at stake. See Restatement of Trusts, 2d, s 173 comment b.

355 A.2d at 712.

Barnett Banks Trust Co., N.A. v. Compson, 629 So.2d 849 (Fla. Dist. Ct. App. 1993), presents a scenario in which a trust beneficiary may not obtain materials prepared for the trustee. In Barnett, Mr. Compson created a revocable trust with a testamentary distribution of 90% to his wife, Mrs. Compson, and 10% to his brother. Barnett Bank was named trustee. Shortly after creating the trust, Mr. Compson "changed his directive . . . by requesting that half of the assets be transferred to Mrs. Compson individually." Id. at 850. Barnett Bank, as trustee, filed an action to determine whether the later transfer was invalid under the terms of the trust agreement. Mrs. Compson counterclaimed, alleging breach of fiduciary duty and negligence. Thus, in essence, by opposing Barnett Bank's position, Mrs. Compson was asserting her rights to receive assets as an individual rather than as a beneficiary of the trust.

Mrs. Compson, relying on Riggs, requested all correspondence between the trustee and counsel. The court found Riggs did not require disclosure under the facts presented. The court distinguished Riggs as follows:

> The Riggs court's analysis hinges on a finding that the beneficiaries were the real clients of the trustee's attorney. Here, the real client is not Mrs. Compson. The opinions and strategy relating to the litigation were provided to the trustee to enable it to regain the assets of the trust and thereby diligently administer the trust to benefit the beneficiaries. Although Mrs. Compson may be a beneficiary of the trust, her position in this suit is antagonistic to the aligned beneficiaries and to her status as a beneficiary of the trust. Mrs. Compson does not stand to benefit from the trustee's actions in this suit. Thus, under the Riggs analysis, she is not the real client of the trustee's attorneys.

Barnett, 629 So.2d at 851.

The Talbot case offers a paradigmatic example as it involves one document which the beneficiaries were entitled to discover and one document which was subject to the attorney-client privilege. As the authors of Privilege and Confidentiality Issues explain:

> In Talbot the trustee obtained an opinion of counsel that a certain advance to some of the beneficiaries was permitted under the trust instrument. Funds from the trust estate were used to pay counsel for this opinion. After the trustee was sued in connection with the advance, the trustee obtained another opinion of counsel concerning the proper course to take in litigation. The second opinion was obtained with the trustee's own funds. The court ruled that the beneficiaries of the trust could discover the first opinion because it was obtained with trust estate funds and denied discovery of the second opinion because it was obtained with the trustee's own funds. Although the court never called the beneficiaries "clients" of the trustee's counsel, this seems to be the clear implication of the court's reasoning.

Privilege and Confidentiality Issues at 560-61 (footnotes omitted).

We find the Riggs rationale persuasive. In the instant case, the contested letters pertain to the administration of the trust, not litigation between the parties. Furthermore, attorney Curry was apparently compensated from the corpus of the trust. Although the record is not clear as to the source of Curry's compensation, Laurens wrote him a letter asking that he "keep a separate accounting of the fees generated by the estate—one for the estate and one for Trust A (the QTIP trust that owns the house Anne H. Floyd occupies). Trust A's expenses should be borne by the trust and not by the beneficiaries of the estate." Under these facts, we hold that the attorney-client privilege does not bar Anne, as beneficiary of Trust A, from access to the Curry letters which were generated prior to litigation, and which address the administration of Trust A.

b. Waiver of Attorney-Client Privilege

Even if the attorney-client privilege were to apply, it was waived when Laurens produced the letters in discovery. The attorney-client privilege excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege. Drayton v. Industrial Life & Health Ins. Co., 205 S.C. 98, 31 S.E.2d 148 (1944). State v. Doster, 276 S.C. 647, 284 S.E.2d 218 (1981), edifies:

> The attorney-client privilege has long been recognized in this State. The privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. The privilege belongs to the client and, unless waived by him, survives even his death. South Carolina State Highway Department v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973). Generally, the party asserting

> the privilege must raise it. State v. Love, [275] S.C. [55], 271 S.E.2d 110 (1980).
>
> Many jurisdictions strictly construe the privilege. 81 Am.Jur.2d Witnesses § 174, at 210. The reasoning behind the strict construction is that evidence excluded under the privilege is not necessarily incompetent. See generally, McCormick, Handbook of the Law of Evidence, §§ 87, et seq. (2d Ed. 1972).
>
> We agree that the privilege must be tailored to protect only confidences disclosed within the relationship.

Doster at 650-51, 284 S.E.2d 219-20.

The United States Supreme Court, in Upjohn Co. v. United States, 449 U.S. 383 (1981), observed:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. . . . The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

Upjohn at 389 (internal quotation marks and citations omitted).

In order to protect a communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor. Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct. App. 1984) (citing Branden & Nether v. Gowing, 7 Rich. 459 (S.C. 1854)).

Only confidential communications are protected by the attorney-client privilege. Cloniger v. Cloniger, 261 S.C. 603, 193 S.E.2d 647 (1973). In Ross v. Medical University of South Carolina, 317 S.C. 377, 453 S.E.2d 880 (1994), the South Carolina Supreme Court stated:

> Attorney-client privilege protects a client and any other person from disclosing confidential communications made to counsel relative to a legal matter. See generally McCormick on Evidence § 87 (E. Cleary, 3rd Ed. 1984). However, this privilege is not absolute:
>
> > Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice. This is exemplified by the widely recognized rule that the privilege does not extend to communications in furtherance of criminal tortious or fraudulent conduct.
>
> State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (internal citations omitted).

Ross at 383-84, 453 S.E.2d at 884-85.

The privilege may extend to agents of the attorney. For example, in State v. Hitopoulus, 279 S.C. 549, 309 S.E.2d 747 (1983), our supreme court held the attorney-client privilege extended to communications between a client and a psychiatrist retained to aid in the preparation of the client's case. As articulated in State v. Thompson, 329 S.C. 72, 495 S.E.2d 437 (1998):

> [I]n determining whether the attorney-client privilege extends to communications between a client and a non-lawyer, [a court] must balance two factors: (1) the need of the attorney for the assistance of the non-lawyer to effectively represent his client, and (2) the increased potential for inaccuracy in the search for

> truth as the trier of fact is deprived of valuable witnesses. However, before reaching this test, a court must ascertain whether the communication is confidential in nature.

Thompson, 329 S.C. at 75, 495 S.E.2d at 438-39.

The attorney-client privilege is owned by the client and, therefore, can be waived by the client. South Carolina State Highway Dep't v. Booker, 260 S.C. 245, 254, 195 S.E.2d 615, 620 (1973). "Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject." Marshall v. Marshall, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct. App. 1984) (citing Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp 1146 (D.S.C. 1975); U.S. v. Jones, 696 F.2d 1069 (4th Cir. 1982)).

In Marshall, Mrs. Marshall inadvertently left a letter addressed to her from her attorney in Mr. Marshall's pickup truck. The parties were separated at the time. Mrs. Marshall's attorney had been sending copies of his correspondence with Mrs. Marshall to her father, who was the surety for payment of Mrs. Marshall's attorney's fees. On appeal, Mr. Marshall argued the letters from Mrs. Marshall's attorney were admissible because the attorney-client privilege had been waived. We held that Mrs. Marshall did not waive the privilege by mistakenly leaving one of the letters in Mr. Marshall's truck. However, we found "[t]he copies of correspondence sent by Mrs. Marshall's attorney to her father" presented "a different question." Marshall at 538, 320 S.E.2d at 47.

> In order to establish the attorney-client privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. State v. Love, 275 S.C. 55, 271 S.E.2d 110 (1980). The communication involved must relate to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal

> proceeding. SEC v. Kingsley, 510 F.Supp. 561 (D.C.D.C.1981); In Re Grand Jury Proceedings, 517 F.2d 666 (5th Cir.1975). The attorney-client privilege also applies to communications originating from the lawyer rather than from the client. When the attorney communicates to the client, the privilege applies only if communication is based on confidential information provided by the client. Brinton v. Department of State, 636 F.2d 600 (C.A.D.C. 1980). The attorney-client privilege, though, does not protect communications with non-clients. State v. Love, supra.

Marshall at 538-39, 320 S.E.2d at 47.

We found that Mrs. Marshall's father was not a client of her attorney. By sending copies of the letters to the father, Mrs. Marshall's attorney was informing a third party of the current state of his client's lawsuit. However, we found that the letter Mr. Marshall sought to admit was not relevant. Therefore, the trial court was affirmed.

The record indicates Laurens produced the letters he now asserts are protected by the attorney-client privilege. Thus, assuming these letters were subject to the attorney-client privilege, Laurens waived that privilege by producing the letters.

c. Open-Door Doctrine

Finally, Anne argues that Laurens opened the door to admission of the letters by his assertions at trial that he was following the advice of counsel in administering the trust.

This Court recently undertook a comprehensive review of the door-opening doctrine in the criminal law context. See State v. Young, Op. No. 3983 (S.C. Ct. App. filed May 2, 2005) (Shearouse Adv. Sh. No. 19 at 52). The doctrine applies in the civil context as well. See, e.g., Martin v. Jennings, 52 S.C. 371, 29 S.E. 807 (1898); Central of Georgia Ry. v. Walker Truck Contractors, 270 S.C. 533, 243 S.E.2d 923 (1978); Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 426 S.E.2d 823 (Ct. App. 1993); see also Brooks

v. Kay, 339 S.C. 479, 486, 530 S.E.2d 120, 124 (2000) ("The Dead Man's Statute will not exclude . . . testimony where the party asserting the statute 'opens the door' by offering testimony otherwise excludible[.]").

One author has stated:

> The primary purpose for the rule is that of fairness and completeness of the information for making the decision. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder.

Danny R. Collins, South Carolina Evidence § 2.9 (2d ed. 2000).

At trial, Laurens repeatedly professed that he relied on the advice of various attorneys in formulating his position regarding the expenses of Trust A. Curry was not specifically named. However, Laurens made several general attestations that he was following the advice of counsel. For example, he averred his position was based on "what counsel had told us," and declared: "[t]hat's the way we were so instructed by counsel." By these assertions, he opened the door to the admission of the letters written by Curry in which Curry informed Laurens: "Eventually, you will have to pay the taxes[,]" and "You certainly will want to get the insurance paid as you have an obligation to protect the property." The letters suggest that—despite Laurens' claims to the contrary—he was not following the advice of counsel.

III. Removal as Trustee

Laurens argues the trial judge erred in removing him as trustee of Floyd Sr.'s charitable remainder trust. We disagree.

The court, in its interim order, stated that Laurens had "advised the Court that he was considering resigning as trustee of the Charitable Remainder Trust[.]" Therefore, the court ordered that he either voluntarily resign by January 31, 2003, or else provide Anne with an accounting for the

trust. Laurens did neither. The court found Laurens had committed serious breaches of trust that strongly supported his removal as trustee from any trust affecting Anne. Accordingly, the court removed Laurens as trustee of the charitable remainder trust.

A. Standard of Review

"Trusts have long and broadly been a field for the jurisdiction of equity." Epworth Orphanage v. Long, 199 S.C. 385, 389, 19 S.E.2d 481, 482 (1942). On appeal from an action in equity, tried by a judge alone, this Court has jurisdiction to find facts in accordance with our view of the preponderance of the evidence. Townes Assocs., Ltd v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000). However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. Ingram at 105, 531 S.E.2d at 291.

The removal of a trustee is within the trial court's discretion and will not be reversed absent an abuse of that discretion. Thinn v. Parks, 83 S.W.3d 430, 433-34 (Ark. App. 2002) ("The removal of a trustee is in the sound discretion of the trial court; its decision will not be overturned unless there is an abuse of that discretion."); Ivey v. Ivey, 465 S.E.2d 434, 437 (Ga. 1996) ("In the absence of an abuse of discretion, a trial court's order regarding removal of a trustee will not be reversed."); Matter of Estate of Atwood, 577 N.W.2d 60, 63 (Iowa App. 1998) ("The trial court has broad discretion in deciding whether to remove an executor or trustee."); Ward v. NationsBank of Virginia, N.A., 507 S.E.2d 616, 623 (Va. 1998) ("Removal of a trustee is within the discretion of the trial court. The trial court must determine whether it is in the best interest of the trust for the trustee to be removed."); Matter of Estate of Cooper, 913 P.2d 393, 401 (Wash. App. 1996) ("A court has a 'wide latitude of discretion' to remove the trustee, 'when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries.'") (citing Schildberg v. Schildberg, 461 N.W.2d 186, 191 (Iowa 1990)); Restatement (Second) of Trusts § 107, comment a on clause (a) ("A court may remove a trustee if his continuing to act as trustee would be

detrimental to the interests of the beneficiary. The matter is one for the exercise of a reasonable discretion by the court.").

B. Law/Analysis

In Wallace v. Foster, 15 S.C. 214 (1881), our supreme court proclaimed:

> There is no doubt but that a Court of Equity has full power, under proper proceedings, to remove trustees of all kinds, whether appointed by deed, will or order of court, upon good cause shown and when the exigency requires; and to substitute another instead of the one removed, and to invest him with title to and control over the trust estate.

Id. at 217. Although the Court of Equity has been abolished,

> The abolition of separate courts of law and equity by the South Carolina Constitution has not deprived the court of equity of its jurisdiction over trusts, i.e., treated as a matter to be tried on [the] equity side of the court, without a jury, and subject to the rules as to appellate review.

Price v. Brown, 4 S.C. 144 (1973), quoted in Coleman Karesh, Trusts 38 (1977).

"The enforcement and administration of trusts has long been peculiarly within the jurisdiction of courts of equity which are jealous of the rights of cestuis que trustent [those for whose benefit the trust was created—i.e. the beneficiaries]." Weston v. Weston, 210 S.C. 1, 11, 41 S.E.2d 372, 376 (1947) (citation omitted). "[A] court of equity has the inherent power to exercise jurisdiction over the trust estates, to supervise their administration, and to make all orders necessary for their preservation and conservation[.]" Williams v. Duncan ex rel. Pauline M. Babock, Living Trust, 55 S.W.3d 896 (Mo. App. 2001) (internal quotation marks and citation omitted); see also First Alabama Bank of Montgomery, N.A. v. Martin, 425 So.2d 415, 423

(Ala. 1982) ("Supervising the administration of trusts is a well-recognized ground of equity, . . . and the regulation and enforcement of trusts is one of the original and inherent powers of the equity court."). "[T]he probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. . . . These include, but are not limited to, proceedings to: (1) appoint or remove a trustee[.]" S.C. Code Ann. § 62-7-201 (Supp. 2004).

Luculently, in South Carolina, a court may remove a trustee pursuant to its equity power. However, the case law of this State has not outlined when this power should be exercised.

"The court will remove a trustee if he has committed a sufficiently serious breach of trust or if it is probable that he will commit such a breach of trust or where for any other reason his continuance as trustee is likely to be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 199, comment e.

According to Scott on Trusts, a trustee will be removed

> if his conduct is such as to show his unfitness to administer the trust. Such unfitness may be clearly shown by evidence of dishonesty. He may be removed for serious breaches of trust even though the breaches of trust were not committed dishonestly. The mere fact, however, that the trustee has committed breaches of trust is not necessarily a ground for his removal. The trustee may be removed as a disciplinary measure, where he refuses or neglects to obey orders of the court.
>
> The question has not infrequently arisen whether the beneficiaries can force the removal of the trustee on account of friction or hostility between him and them. The mere fact that there is such friction or hostility is not necessarily a sufficient ground for removal, since otherwise the beneficiaries could by quarreling with the trustee force him out.
>
> . . . .

> On the other hand, where there is such friction or hostility as seriously to impede the proper performance of the trust, especially if the trustee is at fault, the trustee will be removed.

William F. Fratcher, 2 Scott on Trusts § 107 (4th ed. 1987) (footnotes omitted). Although "[t]he court is less ready to remove a trustee who was named by the settlor . . . [,] [i]f the ground for removal did not exist at the time the settlor named the trustee or it was not know to the settlor, the court will not hesitate to remove him." 2 Scott on Trusts § 107.1. Bogert, in The Law of Trusts and Trustees § 519 (Rev. 2d ed.), observes: "When in the course of the administration of a trust it becomes apparent that the trustee can not, in fairness to the beneficiaries, be allowed to continue in the exercise of his powers, he may be removed."

Other jurisdictions have found a trustee may be judicially removed for neglect to perform duties, breach of trust, failure to comply with a court order, and hostility between the trustee and beneficiaries. For example, in Ackley v. Loughlin, 406 So.2d 832 (Ala. 1981), the settlor's widow filed an action to have her stepdaughter removed as trustee. The widow was an income beneficiary of the trust, and the settlor's daughter was the remainder beneficiary. The trial court removed the settlor's daughter as trustee for, among other reasons, "hostility between the parties, delays in furnishing of money to the widow, and a controversy concerning [the daughter's] unauthorized use of some of the assets of the estate." Id. at 833. The Alabama Supreme Court affirmed, finding "an abundance of evidence of such hostility as justified the removal of Mrs. Ackley. Among other things, she quite evidently treated her stepmother very high-handedly and arbitrarily." Id.

In Hargraves v. Hargraves, 686 S.W.2d 816 (Ark. Ct. App. 1985), the Arkansas Court of Appeals reviewed a trial court's removal of the settlor's son as trustee. The son's mother was a beneficiary of the trust. "The trial court removed the trustee partly on the basis of the hostility and animosity which the trustee held for his mother, the principal beneficiary under the

trust." Id. at 818. On appeal, the court noted: "The decision was soundly bottomed in fact and law." Id.

The Supreme Court of California, in In re Gilmaker's Estate, 371 P.2d 321 (Cal. 1962), reversed the trial court's refusal to remove a trustee where the court found adequate grounds for removal. Among other reasons, the trustee refused to provide an accounting. The court noted that "[h]ostility between the beneficiary and the trustee is a ground for removal of the trustee when the hostility impairs the proper administration of the trust." Id. at 324 (citations omitted).

Matter of Malone's Estate, 597 P.2d 1049 (Colo. Ct. App. 1979), affirmed the probate court's removal of the respondent as co-trustee of three separate trusts. The court observed:

> Proper grounds for removal include the existence of hostility and friction between the trustee and the beneficiaries, or between the trustee and his co-trustees, causing interference with the proper administration of the trust. Also, where ill-feeling between the trustee and the beneficiaries or between the trustee and his co-trustees reaches such a level that future cooperation and proper administration become improbable, the trustee may be removed even if misconduct is not proven. The court's paramount regard must be for the interest of the trust and the rights of the beneficiaries.

Id. at 1050 (citations omitted). The Colorado Court of Appeals found no abuse of discretion in the probate court's determination that the best interests of the beneficiaries would be served by removal of the respondent as co-trustee.

The Indiana Appellate Court reversed the probate court for failure to remove a trustee. Helm v. Odle, 157 N.E.2d 584 (Ind. App. 1959). The appellate court found

> a serious failure by the appellee administratrix to handle and conduct the trust reposed in her with the 'scrupulous integrity' required of such trustees. It is our opinion that such breach of her trust by said appellee rendered her unsuitable and disqualified from further exercise of said trust.

Id. at 585-86.

In Wilson v. Wilson, 14 N.E. 521 (Mass. 1888), the Supreme Judicial Court of Massachusetts decreed: "As to the removal of trustees without misconduct attributable to hostility, courts will remove them whenever it is essential to the due exercise of the trust, even when they have been guilty of no misconduct and wish to remain." Id. at 522.

In Maydwell v. Maydwell, 185 S.W. 712 (Tenn. 1916), the daughter of the testator and income beneficiary of a trust sought to have her mother removed as trustee. The court had no doubts about the "honesty or acumen" of the mother and found she had managed the estate well. However, the evidence showed the relationship between the mother and daughter was such that "it would be inadvisable and prejudicial to the best interests of both and of the estate for [the mother] to be continued as trustee." Id. at 713. Thus, the Tennessee Supreme Court reversed the lower court's decision to leave the mother as trustee.

The Wisconsin Supreme Court, in In re Hill's Estate, 75 N.W.2d 582 (1956), acknowledged: "The failure or refusal of a trustee to obey lawful orders of the court with respect to the trust is ground for his removal." Id. at 592 (citations omitted).

In consonance with the foregoing, we hold that a trustee may be removed: (1) where the trustee is found unfit because of (a) dishonesty, (b) serious breaches of trust, or (c) failure to adequately perform trustee duties; (2) for refusal to obey orders of a court directed to the trustee in his role as trustee; and (3) where hostility between the trustee and the beneficiaries impedes the proper administration of the trust—especially where the trustee is at fault. The question of removal is directed to the sound discretion of the

presiding judge. The appellate tribunals may find facts in accordance with their own view of the preponderance of the evidence.

In the instant case, we find multiple grounds for removing Laurens as trustee of the charitable remainder trust. First, Laurens ignored the trial court's order by failing to provide Anne with an accounting of the trust. The trial judge did not err in removing Laurens for his contempt.

Second, we find no abuse of discretion in the court's finding that Laurens' actions "strongly support his removal as trustee from any trust affecting Wife." The trial judge found Laurens acted in bad faith and breached his fiduciary duty owed to Anne by (1) failing to pay expenses of Trust A, (2) failing to make timely distributions of Trust A income to Anne, (3) failing to provide an accounting of the charitable remainder trust to Anne, (4) misstating the terms of Trust A, (5) managing Trust A property solely for the benefit of the remainder beneficiaries, (6) failing to follow the advice of counsel as to his duties as a trustee, and (7) failing to follow orders of the court.

Laurens argues there is no evidence he has mishandled his duties as trustee of the charitable remainder trust, and therefore, the trial court erred in removing him simply because of his conduct with respect to Trust A. He cites Crayton v. Flower, 140 S.C. 517, 139 S.E. 161 (1927), in support of his position. In Crayton, the trustee improperly invested trust funds in a note and mortgage in violation of the directions contained in the trust document. Id. at 518, 139 S.E. at 161. Although the court found the trustee liable for the resulting loss on the investment, it determined because the trustee's actions were performed in good faith, they were not grounds for removal. Id. at 521, 139 S.E. at 162. Laurens asserts that in Crayton even negligence did not support removal; and since he has done no wrong in administering the charitable remainder trust, there is no support for removal here.

Initially, we reject Laurens' claims of innocence as to the charitable remainder trust. He neglected to provide Anne with an accounting and violated a court order. Indeed, in Crayton, the trustee's negligence did not require his removal, but the court did order him to enter a $7,500 bond. The

court "further ordered that if [the trustee] fails to execute and file the bond above required within the time mentioned, or fails to do or perform any of the other matters and things required of him in this decree, then and in such event the said [trustee] is hereby removed as trustee of said trust estate[.]" Crayton, 140 S.C. at 521, 139 S.E. at 162. Thus Crayton firmly supports the removal of a trustee who violates a court order related to the trust.

Furthermore, were we to find Laurens innocent of wrongdoing as to the charitable remainder trust, which we do not, we reject his argument that wrongdoing as trustee of Trust A has no bearing on the question of his removal as trustee of another trust where the trusts share a beneficiary. Laurens' misconduct as trustee of Trust A is relevant to whether he should continue as trustee of the charitable remainder trust where the trusts share a common beneficiary. Because Laurens has demonstrated his inability to honor his fiduciary duties and properly administer Trust A, we find no abuse of discretion in the trial court's conclusion that Laurens is unfit to be trusted with the administration of the charitable remainder trust of which Anne is likewise a beneficiary. Accordingly, we affirm the trial court's removal of Laurens as trustee of the charitable remainder trust.

CONCLUSION

Because Laurens did not appeal the trial judge's order finding him in contempt of court, we find this decision to be the law of the case. Regardless, the contempt finding was a proper exercise of the court's discretion. We affirm award of fees as a combination of sanctions and damages. Further, we find no abuse of discretion in the trial judge's decision to admit into evidence letters written by Dial and Curry. The letters are not hearsay, and they are not protected by the attorney-client privilege. Finally, the trial judge did not err in his decision to remove Laurens as trustee of the charitable remainder trust. Accordingly, the trial judge's order is

AFFIRMED.

BEATTY and SHORT, JJ., concur.