OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Johnny O'Landis Bennett, Jr., Appellant.

Appeal from Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26174
Heard April 4, 2006 – Filed June 26, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek and Assistant Appellate Defender Aileen P. Claire, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Donald V. Myers, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from a capital sentencing proceeding. Appellant contends the trial court committed three errors warranting reversal. First, the trial court refused to allow defense counsel to ask jurors whether they would "stick with their vote or go with the majority" during *voir dire*. Second, the trial court determined that certain testimony and evidence about a prior offense was not inadmissible "victim impact" evidence. Third, the trial court ruled that remarks made by the Solicitor did not unfairly inject racial issues into the trial. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant received several criminal convictions in connection with the murder of Benton Smith (Victim). The evidence established that Victim was last seen leaving his residence accompanied by Appellant. After police and family members searched for Victim for several days, Appellant led police to Victim's body which was buried under wood brush behind Appellant's sister's home. Victim had been stabbed approximately seventy (70) times with a Phillips head screwdriver and died as a result of internal bleeding. Appellant gave conflicting statements to police; first denying any knowledge of Victim's murder, then confessing to the murder, and finally recanting and maintaining his innocence. After a sentencing proceeding, the jury sentenced Appellant to death.

This Court affirmed Appellant's convictions but reversed his death sentence. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997). During Appellant's second sentencing proceeding, he objected to (1) the trial court's decision to exclude a question from *voir dire*, (2) the introduction of testimony and evidence regarding a prior conviction for assault and battery of a high and aggravated nature (ABHAN), and (3) comments made by the Solicitor during cross-examination of a witness and during closing arguments.

Specifically, Appellant alleged the trial court improperly excluded the "will you go with the majority or hold to your decision" question from *voir dire*. The trial court found that the question tended to suggest the possibility of a hung jury and "the fact that [the juror] can hold things up." The court

held that the defense could ask a juror "if they understand that by their oath that [sic] they should make their own determinations of the facts . . . but certainly we cannot get into pitting them against the other jurors." *Id*.

Additionally, Appellant alleged that the trial court allowed the mothers of the two ABHAN victims to present impermissible "victim impact" testimony, that the trial court improperly admitted highly prejudicial hospital photographs of the two ABHAN victims, and that the trial court improperly allowed one of the ABHAN victims to testify about a dream he had in which "black Indians" were chasing him. The trial court determined that the testimony and photographs were relevant to Appellant's character and admissible as details of prior criminal convictions. Also, the trial court noted that the "black Indians" comment was mentioned only once, was not elicited by the State, and did not prejudice Appellant.

Furthermore, Appellant alleged that the Solicitor improperly injected racial issues into the sentencing proceeding by making inappropriate comments while questioning a witness. While cross-examining a witness about a former prison guard who had engaged in a sexual relationship with Appellant, the witness asked the Solicitor, "You mean the big girl?" The Solicitor responded, "You know, the blond lady?" The trial court found that this reference did not improperly inject race into the trial.

Finally, Appellant alleged that the Solicitor attempted to inject racial issues into the sentencing proceeding by making inappropriate remarks during the State's closing arguments. In his closing arguments, the Solicitor compared Appellant's size and violent acts to those of "King Kong" and a "Caveman." Appellant first objected to these comments in his motion for a new trial, and the trial court determined that these comments properly described the circumstances surrounding the murder, Appellant's character and violent background, his disregard for prison rules, his size, strength, and destructiveness, and were invited responses to Appellant's mitigating evidence and argument.

This appeal followed, and Appellant raises the following issues for review:

I. Did the trial court err in excluding the "will you go with the majority" question from *voir dire*?

II. Did the trial court err in admitting certain evidence regarding Appellant's prior ABHAN conviction?

III. Did the Solicitor's comments during cross-examination of a witness or during closing arguments improperly inject racial issues into the trial?

LAW/ANALYSIS

I. *Voir Dire*

Appellant argues that the trial court improperly excluded the "will you go with the majority" question from *voir dire*. We disagree.

In general, both the scope of *voir dire* and the manner in which it is conducted are within the sound discretion of the trial judge. *State v. Hill*, 361 S.C. 297, 308, 604 S.E.2d 696, 702 (2004). "To constitute reversible error, a limitation on questioning must render the trial 'fundamentally unfair.'" *Id*.

Our opinion in *State v. Hill* controls on this issue. In *Hill*, the trial court refused to allow the defense to ask jurors whether they would "give up their vote in order to go with the majority." *Id*. at 308, 604 S.E.2d at 702. Hill argued that this was improper because our opinion reversing Appellant's death sentence condoned the use of the "go with the majority" question. *Id*. Disagreeing, this court clarified that we reversed Appellant's death sentence because the trial court improperly qualified and seated a juror who answered that he would indeed "go with the majority" over his own determination. *Id*. at 309, 604 S.E.2d at 702. Ultimately, this Court held that a review of entire *voir dire* indicated that Hill's jurors were unbiased, impartial, and capable of following the instructions on the law. *Id*. at 310, 604 S.E.2d at 702. Relying on the highly deferential standard of review in *voir dire* cases, we stated:

> [W]hat is constitutionally mandated is the selection of a fair and impartial jury. No particular formula of questions is mandated to achieve this goal. In our justice system, the trial judge has the discretion and the duty to monitor the *voir dire* so as to ensure that the jury selected measures up to the constitutional standard. The judge's ruling in this case, disallowing defense counsel to question jurors about their propensity to go with the majority, did not render the trial "fundamentally unfair."

Id. at 310, 604 S.E.2d at 702-03.

Our review of the entire *voir dire* in this case reveals that Appellant had an impartial jury. As in *Hill*, the trial court extensively questioned each juror regarding the ability to be fair and impartial, and there is no evidence suggesting that any juror failed in these capacities. Because the evidence in the record supports only the conclusion that Appellant received a fair and impartial jury, and because there is no evidence suggesting that the trial court's *voir dire* limitation rendered Appellant's trial "fundamentally unfair," we affirm the trial court's decision.[1]

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[1] Appellant urges us to reconcile a perceived conflict between *Hill* and our opinion in Appellant's first appeal before this Court. As we stated in *Hill*, *Bennett* did not determine the appropriateness of the "go with the majority question." *Hill*, 361 S.C. at 309, 604 S.E.2d 702. In fact, the only issue in *Bennett* was whether the questioned juror was "unbiased, impartial, and able to carry out the law as executed." *Id*. Although Appellant properly points out that the court might never have discovered the juror in his first trial without the "go with the majority" question, it is equally true that no amount of questioning can provide a clear picture of a juror's biases or tendencies. *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). "[T]hese veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id*. This position is strengthened by our previous recognition of the trial judge's duty to focus *voir dire* upon matters enumerated in the death penalty statutes and to eliminate excessive intrusions into the privacy of prospective jurors.

II. Evidence of Prior Convictions

Appellant argues that the trial court erred in admitting the ABHAN victims' mothers' testimonies, the hospital photographs, and the testimony about the victim's "black Indians" dream because this evidence was impermissible "victim impact" evidence of prior crimes. We disagree.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court held that the Eighth Amendment did not prohibit a jury from considering "victim impact" evidence at the sentencing phase of a capital trial. In *Payne*, a brutal double murder, the defendant challenged the admission of testimony that the child of one of the victims "missed his mother" and the State's remarks in closing arguments suggesting that the continuing effects of the crimes on the victims' family favored imposing the death penalty. *Id*. at 816. Drawing on historical arguments and reasons of fairness, the Supreme Court held that a state was not constitutionally prohibited from allowing a capital sentencing jury to consider "the specific harm caused by the defendant," including the impact of the murder on the victim's family and "a quick glimpse of the life which the defendant chose to extinguish." *Id*. at 822-26.

Contrary to Appellant's assertions, none of the testimony at issue in this case was "victim impact" evidence. First, the mothers' testimonies were limited to the circumstances surrounding the ABHAN and the extent of the injuries their sons suffered. This evidence was clearly not evidence of the character of the victims or the impact on their families, but rather, evidence of the physical injuries caused by Appellant. That the descriptions of the victims' injuries came from their mothers does not automatically convert factually descriptive testimony into impact testimony regarding the victims' character or the effect on the victims' families or community.

Similarly, there can be no question that the hospital photographs were introduced to describe the extent of the injuries the ABHAN victims suffered.

State v. Plath, 281 S.C. 1, 7, 313 S.E.2d 619, 622 (1984) (*citing State v. Koon*, 278 S.C. 528, 532, 298 S.E.2d 769, 771 (1982)).

These photographs are easily distinguished from cases where photographs have been deemed "victim impact" evidence. *See State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (photograph of murder victim in his high school graduation regalia); *see also State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997) (photograph of victim and her husband taken shortly before victim was involved in fatal accident). Although, like in *Langley* and *Livingston*, the photographs in this case were certain to elicit an emotional response from the jury, these photographs were highly probative of the nature of Appellant's prior crime in that they provided the clearest picture of the aggravated nature of the assault and battery.

Finally, we hold the victim's testimony about his "black Indians" dream was not "victim impact" evidence. This testimony merely described the emotional injury to the ABHAN victim.

Though masquerading as a horse of the same color, the dissent decides an entirely different case from the one at bar. At the sentencing proceeding, Appellant argued the testimony about the ABHAN victims' injuries was "inappropriate victim impact type of information having nothing to do with the particular crime Mr. Bennett is on trial for now." Likewise, it appears Appellant's objection to the hospital photographs was based on Rule 403, SCRE (excluding relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice). Finally, Appellant objected to the introduction the victim's dream on the grounds of relevance. Before this Court, however, Appellant did not couch these objections in terms of relevance or a Rule 403 analysis. Instead, the *only* theory Appellant presented to this Court on this issue was that this evidence should have been excluded as impermissible victim impact evidence of prior crimes.

Because the evidence in this case was not victim impact evidence, Appellant's argument must fail. When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding.[2] However, we

[2] Academically, South Carolina has long recognized that information about prior convictions is admissible in a capital sentencing proceeding. *See State*

feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented. Such a case would no doubt involve considerations of when the introduction of evidence renders a proceeding so unfair as to violate due process, *see Payne*, 501 U.S. at 831, and also would implicate our rules of evidence; rules which, at the most basic level, allow proof of character by specific instances of conduct. *See* Rule 405, SCRE.

Instead of addressing any of these topics, which would be of paramount importance when considering clarifying our relevance rules, the briefs to this Court, like Appellant's argument, concerned only victim impact evidence. Under these circumstances, we feel the better course is to confine ourselves to a careful analysis of the arguments briefed and presented to us. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (abolishing *in favorem vitae* review in capital cases). Although the dissent raises intriguing questions, we think it the better course to wait to decide such a case until we are asked. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (appellate court will not consider issues not properly presented).

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v. Gaskins, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985); *and State v. Plath*, 281 S.C. at 9, 313 S.E.2d at 623 (stating that this rule is so fundamental that it requires no citation of authority). This rule is derived from the principle that receiving evidence of prior crimes is probative of the character of the defendant and consistent with the sentencing authority's duty to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Dawson v. Delaware*, 503 U.S. 159, 164 (1992); *see also State v. Skipper*, 285 S.C. 42, 47, 328 S.E.2d 58, 61 (1985) (*overruled on other grounds* 476 U.S. 1 (1986)). Appellant has not challenged this rule, and indeed, Appellant has made no discussion of these authorities (upon which the trial court directly relied).

Based on the above reasoning, we hold that the testimony about the ABHAN victims' injuries and the corresponding photographs was not impermissible victim impact evidence relating to Appellant's prior crimes.

III. Alleged Inappropriate Remarks

Appellant argues that the Solicitor's comments during cross-examination of a witness and during closing arguments improperly injected racial issues into the trial. We disagree.

As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep't. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). "[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made." *Id.* Under certain circumstances, this Court will grant a new trial despite the aggrieved party's failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998); *Toyota of Florence, Inc., v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

Additionally, a solicitor's closing arguments in a capital trial should focus on the defendant's character, his background, and the nature of the crime. *State v. Reed*, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). The arguments must be viewed in the context of the entire record, and the relevant question is whether the comments infected the trial with unfairness so as to make the resulting conviction a denial of due process. *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

As a starting point, we recognize that the terms "blond lady" and "King Kong" could have racial connotations. However, this court's jurisprudence does not prohibit the use of terms with racial meanings, nor does our case law stand for the proposition that arguments or evidence in a case must be void of racial allusions. Instead, this court has recognized that it is impermissible to

use race to "inflame the passions or prejudices" of the jury. Accordingly, our inquiry focuses on how these terms were used in Appellant's case.

In our view, the "blond lady" remark was not made to inflame the passions or prejudices of the jury. If the State had sought to make the race of Appellant's former lover an issue in this case, we believe they would have elicited evidence to this effect while examining their witness who testified extensively about the affair. Instead, this comment came while cross-examining a defense witness.

Furthermore, we find that even if this remark was inflammatory, it did not prejudice Appellant. This remark is a far cry from the outrageous and inflammatory evidence and arguments seen in *Nasim*, *Toyota*, *Dial*, and the cases cited by Appellant. The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In this case, the Solicitor made the "blond lady" comment only once and never referred to Appellant's lover's race again. Furthermore, this case involved a brutal murder, where guilt was clearly established. Accordingly, we find no evidence of prejudice from the "blond lady" remark.

Similarly, the Solicitor's use of the term "King Kong" was not an appeal to the passions or prejudices of the jury. The comment referred to Appellant's immense size, strength, and the destructiveness of his previous crimes. In this case, the trial court properly determined that Appellant's size and strength were probative of the aggravating circumstance of physical torture, which the court charged to the jury. In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.

Also, Appellant's mitigation witnesses described him as "a gentle giant," "a big old teddy bear," "the Secretary of Defense," and "the Mediator." The defense used these terms to indicate Appellant was a changed man and not a threat to others. In this regard, the trial court

correctly found that "King Kong" was an invited response to Appellant's mitigation evidence.

Finally, the Solicitor's "Caveman" comment was merely descriptive of two of Appellant's past violent incidents. A witness to Appellant's ABHAN testified that she saw Appellant dragging the motionless body of one of the victims across a parking lot by the hair. Additionally, a prison guard testified about an incident where Appellant reached into another inmate's cell and dragged the inmate out by the hair. The Solicitor made this comment while describing how Appellant dragged his victims during these incidents, and, in our view, the comment was not inflammatory.

Based on the above reasoning, we hold that the Solicitor's comments did not improperly inject racial issues into the trial.[3]

PROPORTIONALITY REVIEW

As required, we conduct a proportionality review of Appellant's death sentence. S.C. Code Ann. § 16-3-25(C) (2003). The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant. *State v. Copeland*, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, we search for similar cases in which the death sentence has been upheld. *Id*.; S.C. Code Ann. § 16-3-25(E) (2003).

After reviewing the entire record, we conclude that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Huggins*, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) (holding that the death penalty was warranted where defendant robbed and shot the victim); *State v. Hicks*, 330 S.C. 207, 219, 499 S.E.2d 209, 216 (2998) (holding that the death penalty

[3] This conclusion makes an analysis of *Nasim*, *Toyota* and *Dial*'s exception to the contemporaneous objection rule unnecessary.

was proper where the defendant robbed the victim and stabbed him numerous times in the neck, chest, and abdomen); *and State v. Byram*, 326 S.C. 107, 120, 485 S.E.2d 360, 367 (1997) (holding that death sentence was proper where the defendant entered the victim's home, stabbed her to death, and stole the victim's handbag and automobile).

CONCLUSION

For the foregoing reasons, we affirm.

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

JUSTICE PLEICONES: In 1988, twelve years before he murdered Benton Smith, appellant brutally assaulted two young men in a parking lot. He pled guilty to two counts of assault and battery of a high and aggravated nature (ABHAN), and received a Youthful Offender Act sentence. During this capital resentencing proceeding, the State introduced, without objection, graphic testimony from two eyewitnesses to the assault of the second ABHAN victim,[4] including one witness who observed appellant stomping on the unconscious victim's head. The second witness testified he saw appellant drag the prostrate victim by the hair, then kneel to punch him five or six times, then rise and kick and stomp the unconscious victim.

The State then called one of the victims' mothers to testify, and appellant objected on the grounds of relevance at a sidebar.[5] The objection was overruled, and the mother testified to receiving the call telling her to come to the hospital and the injuries to her son that she observed when she arrived. Over another relevancy objection, the State was permitted to introduce a photo of the victim taken while he was in intensive care. The mother was permitted to testify extensively to the details of her son's time in the hospital, his subsequent stay in a head trauma rehabilitation facility, and the lingering effects of the beating.

This mother's testimony was followed by that of her son. Appellant's objection at a sidebar, again on the ground of relevancy, was overruled and the victim was permitted to relate a dream he had had while hospitalized about being chased by "Black Indians." The State then called, over another unsuccessful relevancy objection, the mother of the second victim. This woman testified, as had the first mother, to her observations of her son's injuries, recovery, rehabilitation, and residual problems.

I agree with the majority that evidence of a defendant's prior criminal record is admissible in a capital sentencing proceeding because it is relevant evidence of the defendant's character. The Constitution requires that the

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[4]Both victims were lying motionless in the parking lot, "obviously injured." The scene was quite bloody.

[5] The judge later put the grounds of the objection on the record.

decision whether to impose a death sentence be "an *individualized* determination [made] on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983) (italics in original). Further, I agree that, in furtherance of the jury's understanding of the defendant's character, the State should not be limited to merely presenting the fact of the prior conviction as it would be were the purpose to impeach the defendant's veracity. See State v. Gregg, 230 S.C. 222, 95 S.E.2d 255 (1956). I do not agree, however, that the extensive testimony admitted here, from eyewitnesses, victims, and relatives of the victims of offenses wholly unrelated to the capital offense, are relevant to the issue of the appellant's character. Nor can I agree that the dream of a victim of a prior crime is, under any stretch of the imagination, relevant to "the character of the individual or the circumstances of the [capital] crime." Zant, *supra*.

The Constitution permits the sentencing authority to consider "the specific harm caused by the crime in question" through the State's introduction of "evidence about the victim and about the impact of the murder on the victim's family" because such evidence is relevant to the "defendant's moral culpability and blameworthiness" as it relates to the capital murder. Payne v. Tennessee, 501 U.S. 808 (1991). In other words, this type of evidence is admissible because it is relevant to the circumstances of the crime, not because it is relevant to the defendant's character. Id.

I agree with the majority that the State's evidence in this case cannot be characterized as victim-impact evidence under Payne since it does not relate to the murder victim or his family. In fairness to appellant's attorneys, however, they concede that this evidence would have been admissible under Payne if related to the capital crime rather than to these unrelated prior offenses. Specifically, appellant's trial objection was to the evidence "as being inappropriate, victim impact type information and having nothing to do with the particular trial that [appellant] is on trial for now." Moreover, appellant's attorney in this appeal concedes this type of evidence may be admissible as it relates to the victim of the capital crime, but argues "[t]here is no language in Payne authorizing victim impact evidence on unrelated

crimes …." I agree with appellant that the trial court erred in admitting this irrelevant evidence.

The Constitution limits even valid victim-impact evidence where it is unduly inflammatory or renders the sentencing proceeding fundamentally unfair. Payne, *supra* (Justice O'Connor, concurring). Here, the capital sentencing jury was overwhelmed with evidence of appellant's "moral culpability and blameworthiness," not for the murder of Benton Smith, but for the brutal beatings of two young men.[6] In my opinion, the State's presentation of this evidence denied appellant a fair sentencing and encouraged the jury to impose a death sentence on an improper basis. Zant, *supra* (character of the defendant and circumstances of the capital crime are relevant to determining sentence).

I therefore dissent from the majority's decision to affirm appellant's sentence.

[6] This evidence was exploited by the solicitor in his closing argument.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William Mack Burriss, E. Lee McPherson, and Anderson County School District Five, Appellants,

v.

Anderson County Board of Education, Governor of the State of South Carolina, Lieutenant Governor of the State of South Carolina, and Speaker of the South Carolina House of Representatives, Respondents.

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

Opinion No. 26175
Heard May 2, 2006 – Filed June 26, 2006

AFFIRMED

Kenneth L. Childs, William F. Halligan, John M. Reagle, and Keith R. Powell, all of Childs & Halligan, P.A., of Columbia, for Appellants.

Michael J. Giese and Seann Gray Tzouvelekas, both of Leatherwood, Walker, Todd, & Mann, of Greenville, for Respondent Anderson County Board of Education.

Attorney General Henry Dargan McMaster and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Respondents Governor of the State of South Carolina, Lieutenant Governor of the State of South Carolina, and Speaker of the South Carolina House of Representatives.

JUSTICE WALLER: This is a direct appeal from the circuit court's decision in favor of respondents on cross-motions for summary judgment. At issue is whether Anderson County's two-tiered school governance system violates the Equal Protection clause of the federal constitution and the South Carolina Constitution's guarantees of no taxation without representation and uniform taxation within a jurisdiction. Essentially, appellants argue that these violations stem from the Anderson County Board of Education's review authority over the individual districts' budgets. We affirm.

FACTS

Anderson County has five public school districts each with a popularly elected board of trustees.[1] There is also an Anderson County Board of Education ("the County Board") composed of nine members popularly elected by single member districts. Each member of the County Board represents approximately 18,739 Anderson County citizens. Anderson County School District Five ("District Five") represents 42% of the total voting age population (VAP) for the County Board's nine seats. Seats 7 and 8 on the County Board are exclusively elected by citizens in District Five; for Seat 9, 97% of those voting reside in District Five. Citizens in District Five also vote for Seats 4, 5, and 6, representing 31%, 25%, and 28%, respectively, of those voting for these seats. For Seat 1, 99% of those voting reside in Anderson County School District Four.

[1] Anderson County School District Two extends into a part of Greenville County.

The annual budget for each school district is developed through an interactive process between the individual districts and the County Board; however, the County Board exercises review and approval authority over each of the school districts' budgets. Ultimately, it is the County Board that sets the school operations tax millage rates for each school district.[2]

The County Board's budgetary review authority dates at least as far back as 1950. See 1950 S.C. Acts 868, § 38.[3] This authority over the budget was referenced again in 1982 when the Legislature provided that:

> the Anderson County Board of Education shall be vested with the power to review and approve the budget of the school districts and shall further be vested with the power to review an approve requests by the school districts for any increase or decrease in taxation or millage in keeping with the needs of each school district and the requirements of the … Education Finance Act.

1982 S.C. Acts 510, § 9. That same year, another Act authorized an advisory referendum in Anderson County to determine if the electors of the County favored an elected County Board of Education with review authority over the

[2] This is not a situation unique to Anderson County. According to the Anderson County Administrator, 46 of South Carolina's school districts must "go to a higher body (legislative delegation, county council, or county board) to get their budgets approved, or to raise the millage beyond a certain point," while 23 South Carolina school districts are "independent."

[3] This section of Act 868 provides that the district Board of Trustees "shall certify to the County Board the amount of levy upon the taxable property in its district which … is necessary … for the proper operation of the schools" and then "[u]pon the County Board approving such levy … [the] Board shall notify the auditor of [Anderson] county the amount of such levy for such school district." The Act further provides that if any individual school district "fails to certify the amount of such levy," the County Board "shall determine the amount of such levy for such school district and notify the Auditor." 1950 S.C. Acts 868, § 38.

local elected school district boards' budgets. 1982 S.C. Acts 511, § 1. The voters overwhelmingly endorsed the County Board's review authority.[4]

Nevertheless, the County Board has not often exercised its authority over the individual districts' budgets, but instead has generally approved the budgets submitted by the districts. From 1997-2002, a total of 29 budgets were submitted to the County Board by the five school districts, and the County Board approved 28 of them. However, the County Board did not approve District Five's proposed budget for the 2001-2002 school year. This proposed budget, which had been approved by District Five's Board of Trustees, was in the amount of $63,274,082. The County Board ultimately reduced District Five's 2001-2002 budget by $750,000. Eight of the nine County Board members voted for this reduction.

In addition to its budgetary review function, the County Board also serves other functions. For example, the County operates and finances an Alternative School that is open to any child in Anderson County. The Alternative School is designed to serve students with special needs such as chronic discipline and truancy problems. District Five students attend the County-run Alternative School.

The County Board also administers the following programs: (1) food service programs to Districts One, Two, Three, and Four; (2) mental health counseling to students in Districts One, Two, Three, and Four, as well as the Alternative School; and (3) attendance monitoring and dropout prevention services to students in Districts One, Two, Three, and Four, and the Alternative School. Although these programs are not administered to District Five, it appears from the Record on Appeal this is because the District has opted to provide its own district-run programs.[5]

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[4] The results of the referendum were that 69 of the County's 74 precincts (93% of the precincts) voted yes.

[5] For example, the brochure describing the County Board's mental health program indicates it is open to District Five. District Five, however, had its own pre-existing program to provide therapeutic services to students. Furthermore, District Five provides its own attendance and school food service programs.

Finally, the County Board administers the county-wide equalization tax. This equalization tax, in practice, amounts to a levy of 14.7 mills which is imposed and collected uniformly on the County's assessed value and is then distributed by the County Board to the local districts based upon student average daily membership. According to the County Board's Administrator, the equalization tax is a "county-wide effort to spread the County's wealth in an effort to see that per pupil spending does not vary too dramatically from district to district."[6]

Other than their involvement with the County Board in the budget process, the five local school districts are generally autonomous in other areas of school governance, such as the hiring and firing of teachers, setting guidelines for student discipline, and creating extracurricular student activities. The school districts perform these functions without interference from, or supervision by, the County Board.

Appellant William Mack Burriss is the chairman of the Anderson County School District Five Board of Trustees, and he resides in District Five. Appellant E. Lee McPherson is the chairman of the Anderson County School District Four Board of Trustees, and he resides in District Four. District Five itself is the third appellant in this case. In 2002, these appellants brought a declaratory action in circuit court against the County Board, as well as the following "State" respondents: the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives.

Appellants and the County Board subsequently filed cross-motions for summary judgment. In April 2004, the circuit court granted the County Board's summary judgment motion and dismissed the complaint as to the County Board and the State respondents. The circuit court found that the statutory scheme giving the County Board review authority over District Five's budget was constitutional. The circuit court further ruled that Anderson County's two-tiered governance system did not violate the South

[6] Appellants do not oppose the formula or the purpose of the equalization tax. Appellants do, however, assert that District Five is a "net donor" in this equalization scheme. The County Board, on the other hand, claims that District Five received more in equalization revenue than it paid in equalization taxes.

Carolina Constitution's bans against: (1) taxation without representation; and (2) non-uniform taxation. See S.C. Const. Art. X, §§ 5 & 6.

ISSUES

I. Did the circuit court err in finding that the statutory scheme giving the County Board budget review authority over the districts is constitutional under the Equal Protection Clause of the United States Constitution?

II. Did the circuit court err in ruling that the County Board's tax authority over the individual school districts does not violate the South Carolina Constitution's ban against taxation without representation, pursuant to Article X, Section 5?

III. Did the circuit court err in ruling that the County Board's tax authority over the individual school districts does not violate the South Carolina Constitution's ban against non-uniform taxation within a jurisdiction, pursuant to Article X, Section 6?

DISCUSSION

I. Equal Protection

Appellants argue that Anderson County's two-tiered school governance system creates an "over-inclusive franchise" which dilutes the voting rights of those residing in District Four and Five. Specifically, appellants contend that because the budgets and tax rates for these districts are ultimately determined by the County Board, which contains members who are elected by voters who live outside Districts Four and Five, the strength of their own votes is diluted. Appellants assert that this vote dilution runs afoul of the federal Equal Protection Clause's[7] principle of "one person, one vote." We disagree.

[7] U.S. Const. amend. XIV, § 1.

This Court reviews the grant of a summary judgment motion under the same standard as the trial court pursuant to Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. E.g., Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003).

Under the South Carolina Constitution, the Legislature is charged with "provid[ing] for the maintenance and support of a system of free public schools open to all children in the State." S.C. Const. art. XI, § 3. The Legislature "has wide discretion in determining how to go about accomplishing [this] duty." Horry County Sch. Dist. v. Horry County, 346 S.C. 621, 632, 552 S.E.2d 737, 743 (2001). Furthermore, "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Id. at 631, 552 S.E.2d at 742.

Without question, equal protection guarantees "one person, one vote." Gray v. Sanders, 372 U.S. 368, 381 (1963). The United States Supreme Court has recognized that an absolute ban on the franchise is not the only way a citizen's voting right can be abridged: "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 555 (1964). Indeed, "vote dilution is as nefarious as an outright prohibition on voting." Duncan v. Coffee County, Tenn., 69 F.3d 88, 93 (6th Cir. 1995).

Nonetheless, in the local government context, "normal public policy making" of the State can include expanding the franchise beyond the **required** electorate provided no unconstitutional vote dilution results. Id. at 94. Moreover, the courts have observed that "overinclusiveness is less of a constitutional evil than underinclusiveness." Sutton v. Escambia County Bd. of Educ., 809 F.2d 770, 775 (11th Cir. 1987); accord Duncan, 69 F.3d at 98.[8]

[8] See also Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev 339, 396-400 (1993) (discussing "expanded electorate/overlapping jurisdiction" cases which involved claims that a State improperly extended the local franchise and thereby unconstitutionally diluted the

The federal courts generally have applied rational basis review to evaluate this type of overinclusion, or expanded electorate, claim. For example, the Eleventh Circuit has stated that "[t]he party seeking to exclude … residents from voting in the county school board elections has the burden of demonstrating that the application of the [State] statute … is irrational or wholly irrelevant to the state's objective of electoral participation in the selection of county school board members." Sutton, 809 F.2d at 772; see also Duncan, 69 F.3d at 95 (discussing Sutton standard with approval). But see Locklear v. North Carolina State Bd. of Elections, 514 F.2d 1152 (4th Cir. 1975) (applying compelling state interest standard).[9]

The federal courts have determined whether the State statute survives this rational basis standard by further inquiring whether the expanded electorate has a "substantial interest" in the operation of the relevant school system. E.g., Duncan, 69 F.3d at 95; Phillips v. Andress, 634 F.2d 947 (5th Cir. 1981); Creel v. Freeman, 531 F.2d 286 (5th Cir. 1976), cert. denied, 429 U.S. 1066 (1977). Moreover, the Duncan court noted that four factors have emerged to determine substantial interest:

1. The degree to which one district is financing the other;
2. The voting strength of the non-resident voters;
3. The number of, or potential for, cross-over students; and
4. The existence of any joint programs.

Duncan, 69 F.3d at 96.

Nevertheless, the Sixth Circuit in Duncan observed that the substantial interest test has been difficult "to apply consistently," id. at 95, and the several federal cases have had divergent results. Compare Duncan, Sutton,

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primary local votes, but finding that most extensions of the franchise have been sustained).

[9] The strict scrutiny test employed in the Fourth Circuit's Locklear decision has not been followed by any other circuit. See Duncan, 69 F.3d at 94 (rejecting the Fourth Circuit standard "to the extent it still governs"). Indeed, Locklear is recognized as "the exception." Briffault, 60 U. Chi. L. Rev. at 397 n.232.

and Creel (all finding that the city residents had a substantial interest in the operation of the county school system thereby justifying their votes in county school board elections) with Hogencamp v. Lee County Bd. of Ed., 722 F.2d 720 (11th Cir. 1984), Phillips, and Locklear (all holding that the city residents did not have a substantial interest in the operation of the county school system thereby diluting the voting strength of the other county residents). One commentator has noted the fact-specific nature of these cases:

> The overlapping school district disputes have generated an unusual series of local voting cases in which both the state's interest in structuring local governments and the primary local constituency's interest in avoiding dilution have been weighed and the disputes have been resolved through a fact-sensitive consideration of the extent of city involvement in county schools.

Briffault, 60 U. Chi. L. Rev. at 398.

We concur with the majority of federal courts that have faced this issue the appropriate inquiry in an expanded electorate case is the rational basis test. Thus, to prevail, appellants must demonstrate that the State's decision to structure the Anderson County public education system as a two-tiered system which vests the County Board with review authority over the individual districts' budgets is irrational. See Duncan, 69 F.3d at 95; Sutton, 809 F.2d at 772. Moreover, this particular rational basis review appropriately focuses on whether the out-of-district voters have a substantial interest in the operation of the relevant school system. See, e.g., Duncan, 69 F.3d at 95. Finally, because of the fact-intensive character of these cases, we note that while the Duncan factors often may be useful for the inquiry, they are not the exclusive factors to be taken into consideration. We do, however, begin our analysis with the Duncan factors.

1. The degree to which one district is financing the other

Appellants argue this factor weighs in their favor since they claim Districts Four and Five are net donor districts. However, appellants also argue that even if these Districts are net recipient districts, the amount is

negligible when compared to the districts' overall budgets, and therefore, would not weigh in favor of finding a substantial interest for the "extraterritorial" voters.

The federal courts have often relied heavily on this factor. See, e.g., Duncan, 69 F.3d at 96 (finding that because the City provided a substantial amount from its own sales and property taxes to the County, and the funds made up a "sizable" portion of the recipient's budget (7.28%), the City votes were supported by a substantial interest); Hogencamp, 722 F.2d at 722 (finding that the City's contribution of money in the amount of 2.74% of the County board's budget did not support a finding of substantial interest). Yet, financial contribution is not determinative. See Sutton, 809 F.2d at 774 (where the facts did not show the City's financial participation in the County, but did establish a strong relationship between the two school systems, the court held that City residents had substantial interest in operation of County school system and could vote in county school board elections).

In the instant case, there is an equalization tax which, in effect, spreads the wealth in Anderson County among the individual districts. The equalization levy's goal is to create a financial in-flow to the districts that need more money, which necessarily will create an out-flow from wealthier districts. Moreover, because this levy represents a County-wide effort to distribute the County's wealth, and appellants do not object to the formula, it appears all the Anderson County districts participate in the financing of one another which, consequently, indicates that the out-of-district voters have a substantial interest in the other districts. We therefore agree with the circuit court's conclusion that the equalization tax justifies County Board's involvement with the districts' budgets.

2. The voting strength of the non-resident voters

Appellants argue that because District Four is served by only one County Board member, and District Five "only" has a controlling vote for three County Board seats, this factor weighs in their favor. Appellants further claim that because the County Board has review authority over each district, and out-of-district residents **collectively** have more County Board

votes than the single district affected by the County Board's decision, this "control" amounts to unconstitutional vote dilution. We disagree.

The underlying premise of a representative government is that citizens vote for a representative and that person then represents his or her constituents in the governing body. However, appellants contend that because District Four and District Five are unable to attain majority control of the County Board, the County Board's taxation power is rendered unconstitutional. On the contrary, as the County Board points out, Districts Four and Five collectively wield significant influence in a County Board election, with both districts able to completely control **four** seats (out of nine) on the County Board, and District Five able to cast a substantial minority vote **in another three seats**. This factor clearly favors the County Board.

3. The number of, or potential for, cross-over students

The circuit court found that because the County's Alternative School serves students residing in all five school districts, "education in Anderson County is a collective undertaking and … county-wide involvement is warranted." We agree that the Alternative School demonstrates that cross-over students exist in Anderson County. Because voters in all the districts have a substantial interest in this county-run school, this factor favors the County Board.

Appellants maintain, however, that there is no student crossover **between the school districts themselves**, and therefore this shows no substantial interest on the part of the "extraterritorial" voters. The basic flaw in appellant's argument is that these "out-of-district" voters are not voting for the district's own trustees, but rather for seats on the **County** Board. Hence, the relevant inquiry is whether **any** cross-over students exist within the County, regardless of whether that is between the districts themselves or between a district and the County. Because there is some evident cross-over, this factor weighs in favor of the "extraterritorial" voters' substantial interest.

4. The existence of any joint programs

The circuit court found that the County Board administers programs related to mental health counseling, food services, attendance monitoring, and dropout prevention. Appellants, however, maintain there are no joint programs. Their argument relies on the facts that the County Board's programs are not joint vis-à-vis the districts and District Five does not receive these services.

We hold the circuit court correctly found that the County Board's programs regarding mental health counseling, food services, attendance monitoring, and dropout prevention are evidence in support of this factor. District Five apparently has **chosen** not to avail itself of any of these programs, but that should not weigh against the County Board or negate the programs' existence; these programs clearly affect the overwhelming majority of the school districts.

Moreover, it is undisputed that the Alternative School is run by the County Board and it serves students from all five districts. This is an additional joint program; the voters from all five districts clearly have a substantial interest in the County's operation of the Alternative School.

5. Other Relevant Factors

In addition to the four Duncan factors, the circuit court also noted "other county-wide interests that warrant county-wide involvement" in the individual school districts' budgets.[10]

The circuit court found that the County Board provided "a number of fiscal services for the districts" related to tax collection and distribution, including the equalization tax. The circuit court also noted the County Board's review authority over the budgets. Finally, the circuit court found

[10] We note that these considerations, while not contemplated by the Duncan factors, are relevant to the rational basis inquiry because, as explained above, the inquiry into the constitutionality of an expanded electorate is highly fact-specific.

that every resident of a South Carolina county has a substantial interest in the education of the children of that particular county. In support of this latter finding, the circuit court cited the testimony of Dr. James Guthrie, a professor of public policy and education.

Dr. Guthrie, provided deposition testimony as an expert on behalf of the County Board. Dr. Guthrie stated that "[a]ll the residents of Anderson County hold the prospect of benefiting from the educational programs" in District Five because of what economists label "neighborhood" or "spillover" effects. In Dr. Guthrie's opinion, the closer one's proximity to someone in District Five, "the greater or more intense the likelihood that spillover effect" would pertain to that person.

Dr. Guthrie also testified that virtually every State he was familiar with, with the exception of Hawaii, had an intermediate government body between a State education department and a local school district; moreover, Dr. Guthrie stated that these intermediate bodies frequently have the authority to oversee the local school districts' budget. According to Dr. Guthrie, public policy supports the use of an intermediate body because it leads to "economy-of-scale," i.e., a more efficient use of "otherwise scarce resources." In addition, the intermediate body serves a regulatory function as an arm of the State. Dr. Guthrie explained that this is "a part of trying to balance remote, centralized state government with, presumably, local and locally sensitive and responsive local school boards" which he believed was "a reasonable activity."

We agree with the circuit court that in South Carolina it is not unreasonable for County residents to have a substantial interest in the education of other County residents, even if they reside in a different school district. Dr. Guthrie's "neighborhood effects" testimony amply supports this conclusion. Moreover, as recognized by the circuit court, "the county unit is an essential part of every South Carolinian's existence." See S.C. Const. art. VIII, § 7 (establishing Home Rule). The various financial functions performed by the County Board, including those ministerial functions related to the equalization levy, clearly are rationally related to the State's objective

in giving counties home rule and also are reasonably consistent with the State's decision to give the County Board budgetary review authority.

In sum, we hold that the State's authorization of a popularly elected County school board with review authority over the individual Anderson County school districts' budgets is neither "irrational" nor "wholly irrelevant" to the State's goals in efficiently providing public education. Sutton, 809 F.2d at 772. As the United States Supreme Court has noted, "[t]he Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." Avery v. Midland County, 390 U.S. 474, 485 (1968). Furthermore, the Constitution should not be a "roadblock[] in the path of innovation, experiment, and development among units of local government." Id. The State's establishment of the two-tiered school governance in Anderson County does not result in vote dilution and therefore does not offend the Equal Protection's guarantee of "one person, one vote." Accordingly, we affirm the circuit court's ruling on this issue.

II. No Taxation without Representation

Appellants next argue that because the County Board votes on an individual school district's budget and tax levy, yet the County Board does not directly, i.e. exclusively, represent just a single district, these tax decisions can never be "directly corrected by those who must carry the burden of the tax." Crow v. McAlpine, 277 S.C. 240, 245, 285 S.E.2d 355, 358 (1981). Appellants contend this violates Article X, Section 5 of the South Carolina Constitution. We are unpersuaded by appellants' argument.

The State Constitution provides that "[n]o tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled." S.C. Const. art. X, § 5. This Court has held that the Legislature cannot, "consistent with Article X, Section 5, delegate the unrestricted power of taxation" to a County school board composed exclusively of members **appointed** by the Governor. Crow v. McAlpine, 277 S.C. at 245, 285 S.E.2d at 358. The Court in Crow v. McAlpine stated that "[w]here the power is

delegated to a body composed of persons not **assented to by the people** nor subject to the supervisory control of a body **chosen by the people**," Article X, Section 5, is violated. Id. at 244, 285 S.E.2d at 358 (emphasis added). This Court has also noted that "[d]elegation of the taxing power should be kept with supervisory control always vested in elective bodies." Bradley v. Cherokee Sch. Dist. No. One of Cherokee County, 322 S.C. 181, 184, 470 S.E.2d 570, 571 (1996).

In the instant case, the taxation power at issue is vested in an elective body (the County Board) which is "chosen by the people" of Anderson County. Therefore, there is no violation Article X, Section 5 of the State constitution. See Bradley; Crow v. McAlpine.

The County Board consists of nine seats elected by single member districts representing approximately 18,739 Anderson County residents. The Legislature has authorized this popularly elected board with taxation authority. See 1982 S.C. Acts 510, § 9; 1950 S.C. Acts 868, § 38. Additionally, the people of Anderson County in the 1982 referendum overwhelmingly voted in favor of the County Board having review authority over the school districts' budgets. Finally, contrary to the appellants' assertions, "the power to fix and levy" Anderson County's school tax has been appropriately conferred upon the County Board, which indeed **is** "a body which stands as the direct representative of the people, [such] that an abuse of power may be directly corrected by those who must carry the burden of the tax." Crow v. McAlpine, 277 S.C. at 244-45, 285 S.E.2d at 358.

Regarding this issue, the circuit court stated the following: "The mere fact that voters in the individual school districts directly elect fewer than all of the Board members who make decisions affecting those districts does not subject those voters to taxation without representation." We agree and therefore affirm summary judgment on this issue as well.

III. Uniform Taxation

Finally, Appellants argue that the County Board's review authority enables it to impose different tax levies on the five school districts in

violation of the State Constitution's general rule against non-uniform taxation. See S.C. Const. art. X, § 6. We disagree.

Article X, section 6 of the South Carolina Constitution, entitled "Assessment and collection of taxes in political subdivisions," reads as follows, in pertinent part:

> The General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State. Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes; provided, that on properties located in an area receiving special benefits from the taxes collected, special levies may be permitted by general law applicable to the same type of political subdivision throughout the State, and the General Assembly shall specify the precise condition under which such special levies shall be assessed.

Id.

Appellants maintain that because the County Board represents the political subdivision of the County, this constitutional provision prevents the County Board from making different assessments for the individual school districts which represent five different political subdivisions. The County Board, on the other hand, asserts that the provision's "special levies" exception to the uniformity requirement applies to the school districts because the districts receive the "special benefits" from the school taxes. Specifically, the County Board argues that several state statutes establish the applicability of this exception, including S.C. Code Section 4-9-70, the Education Finance Act of 1977 ("EFA"), and the Education Improvement Act ("EIA").[11]

[11] See S.C. Code Ann. § 59-20-10 *et seq.* (2004) (EFA); S.C. Code Ann. § 59-21-1030 (2004) (EIA). These statutes, *inter alia*, set minimums for local school district funding via formulas calculated annually.

Section 4-9-70, which is part of the Home Rule Act, states that "the county council shall determine by ordinance the method of establishing the school tax millage **except in those cases where** boards of trustees of the districts or **the county board of education established such millage at the time … this chapter becomes effective**." S.C. Code Ann. § 4-9-70 (1976) (emphasis added). This Court discussed the legislative intent of section 4-9-70 in Stone v. Traynham, 278 S.C. 407, 297 S.E.2d 420 (1982):

> By enacting § 4- 9-70, the General Assembly attempted to insure that the taxing power for all school districts would be properly vested in some authority. The clear intent is to vest the power to determine the school tax levy in county council in all cases **where it is not vested elsewhere**.

Id. at 410, 297 S.E.2d at 422 (emphasis added). This statute went into effect in 1975, well after the County Board had been authorized to set the school tax millage. See 1950 S.C. Acts 868, § 38.[12]

Based on this Court's statement on Section 4-9-70's intent in Stone v. Traynham, it is clear the Legislature envisioned that the County Board would set different millage rates for the individual Anderson County school districts. Furthermore, we agree with the County Board that both the EFA and the EIA inherently contemplate that millage rates will vary among school districts within a single county. See, e.g., S.C. Code Ann. § 59-20-30(6) (stating that one of the legislative purposes of the statute is to require **each**

[12] Appellants assert that 1966 S.C. Acts 1080 establishes that the County Board did not have authority to set the school millage in 1975. The 1966 Act provided that the Anderson County school districts could not increase the tax levy more than five mills in a year without a referendum. We agree with the County Board that this legislative act simply set a maximum millage increase but did not affect the County Board's **review authority** which was established as early as 1950 and has been subsequently referenced by the Legislature. See 1950 S.C. Acts 868, § 38; 1982 S.C. Acts 510, § 9; see also 1989 S.C. Acts 269, § 1(B) (stating that the districts shall annually "recommend" to the County Board the amount of tax millage needed for the budget).

local school district "to contribute its fair share" relative to its "taxpaying ability"); S.C. Code Ann. § 59-21-1030 (local financial effort adjusted annually by inflation factor). Given that these several statutes support the County Board's argument that the special levies exception of Article X, Section 6 applies to school taxes, we affirm the circuit court's summary judgment ruling on this issue.

CONCLUSION

For the reasons discussed above, the circuit court's decision to grant the County Board's summary judgment motion and to dismiss the complaint against **all** respondents is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Henry H. Cabaniss, Respondent.

Opinion No. 26176
Submitted May 30, 2006 – Filed June 26, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Henry H. Cabaniss, of Davidson, N.C., pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a twelve month suspension from the practice of law. We accept the agreement and impose a twelve month suspension, retroactive to the date of respondent's interim suspension. In the Matter of Cabaniss, ___ S.C. ___, 629 S.E.2d 353 (2005). The facts, as set forth in the agreement, are as follows.

FACTS

From April 2003 to January 2004, respondent was employed at a law firm. A former partner of the law firm filed a complaint against respondent alleging respondent neglected or performed less than competent representation on nine files.

Respondent accepts responsibility for some of the problems in the files and now recognizes that the services he performed in some cases were not as competent as they should have been, that he was not as diligent as he should have been, and his communications with some of his clients was insufficient. In mitigation, however, respondent asserts a lack of assistance and advice by members of his law firm were contributing factors to his misconduct.

After the complaint was filed, respondent failed to respond to ODC's inquiries within the prescribed time. Thereafter, ODC sent respondent a "Treacy letter" pointing out that failure to respond to ODC constitutes sanctionable conduct. See In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent failed to respond to this inquiry as well. Thereafter, respondent was served with a Notice of Full Investigation; he failed to respond to the notice. On January 12, 2005, respondent was placed on interim suspension as a result of his failure to respond to the Notice of Full Investigation. In the Matter of Cabaniss, supra. A number of months after being placed on interim suspension, respondent responded to ODC's inquiries.

LAW

Respondent admits that, by his conduct, he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to clients); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing clients) ; Rule 1.4 (lawyer shall keep clients reasonably informed about the status of

matters); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of clients); Rule 8.1(b) (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits that his actions constitute grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct), Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to a lawful demand from a disciplinary authority), and Rule 7(a)(6), RLDE (it shall be a ground for discipline for a lawyer to violate the oath of office).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for twelve months, retroactive to the date of his interim suspension. Within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating he has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

RE: Amendments to South Carolina Appellate Court Rules

ORDER

Pursuant to Art. V, §4 of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended as follows:

(1) The title of Part V of the Rules is amended to read: "Rules Governing the Judiciary, Employees of the Judicial Department, and Others Assisting the Judiciary."

(2) The attached Rule 511 is added.

These amendments shall be effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 21, 2006

RULE 511
RULES OF PROFESSIONAL CONDUCT FOR COURT INTERPRETERS

PREAMBLE

Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency (LEP) or a speech or hearing impairment. It is essential that this communication barrier be removed, as much as possible, so that these persons are placed in the same position as a similarly situated person for whom there is no such barrier. A non-English speaker should be able to understand just as much as an English speaker with the same level of education and intelligence.

As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice. Anyone serving as a court interpreter should be required to understand and abide by the precepts set out in these Rules. Judges and attorneys should also become familiar with the Rules and expect conduct from interpreters that is consistent with them.

APPLICABILITY

These Rules shall guide and be binding upon all persons, agencies and organizations who administer, supervise use of, or deliver interpreting services to the judiciary.

RULE 1
ACCURACY AND COMPLETENESS OF INTERPRETATION

Interpreters shall render a complete and accurate interpretation, or sight translation, without altering, omitting or adding anything to what is stated or written, and without explanation or summarization. The interpreter shall preserve the nuances and level of formality, or informality, of the speech.

Commentary

The interpreter has a two-fold duty: (1) to ensure that the proceedings in English reflect precisely what was said by a non-English speaking person, and (2) to place the non-English speaking person on an equal footing with those who understand English. This creates an obligation to conserve every element of information contained in a source language communication when it is rendered in the target language.

Therefore, interpreters are obligated to apply their best skills and judgment to preserve faithfully the meaning of what is said in court, including the style or register of speech. Verbatim, "word for word," or literal oral interpretations are not appropriate when they distort the meaning of the source language. Every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted. This includes apparent misstatements.

Interpreters should never interject their own words, phrases, or expressions. If the need arises to explain an interpreting problem (e.g., a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify), the interpreter should ask the court's permission to provide an explanation. Interpreters should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker's emotions, or dramatic gestures.

Sign language interpreters, however, must employ all of the visual cues that the language they are interpreting for requires, including facial expressions, body language, and hand gestures. Sign language interpreters, therefore, should ensure that court participants do not confuse these essential elements of the interpreted language with inappropriate interpreter conduct.

The obligation to preserve accuracy includes the interpreter's duty to correct any error of interpretation discovered by the interpreter during the proceeding. Interpreters should demonstrate their professionalism by objectively analyzing any challenge to their performance.

RULE 2
REPRESENTATION OF QUALIFICATIONS

Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.

Commentary

Acceptance of a case by an interpreter conveys linguistic competency in legal settings. Withdrawing or being asked to withdraw from a case after it begins causes a disruption of court proceedings and is wasteful of scarce public resources. It is, therefore, essential that interpreters present a complete and truthful account of their training, certification and experience prior to appointment so the officers of the court can fairly evaluate their qualifications for delivering interpreting services.

RULE 3
IMPARTIALITY AND AVOIDANCE OF CONFLICT OF INTEREST

Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

Commentary

The interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant. This is true regardless of whether the interpreter is publicly retained at government expense or retained privately at the expense of one of the parties.

The interpreter should avoid any conduct or behavior that presents the appearance of favoritism toward any of the parties. Interpreters should maintain professional relationships with their clients, and should not take an active part in any of the proceedings. The interpreter should discourage a non-English speaking party's personal dependence.

During the course of the proceedings, interpreters should not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their judicial functions. It is especially important that interpreters, who are often familiar with attorneys or other members of the courtroom work group, including law enforcement officers, refrain from casual and personal conversations with anyone in court that may convey an appearance of a special relationship or partiality to any of the court participants.

The interpreter should strive for professional detachment. Verbal and non-verbal displays of personal attitudes, prejudices, emotions, or opinions should be avoided at all times.

Should an interpreter become aware that a proceeding participant views the interpreter as having a bias or being biased, the interpreter should disclose that knowledge to the presiding judge. Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest and must be disclosed to the judge. An interpreter should not serve in any matter in which payment for their services is contingent upon the outcome of the case.

Before providing services in a matter, court interpreters must disclose to all parties and the presiding judge any prior involvement, whether personal or professional, that could be reasonably construed as a conflict of interest. This disclosure should not include privileged or confidential information.

The following are circumstances that create potential conflicts of interest that must be disclosed:
(1) The interpreter is a friend, associate, or relative of a party or counsel for a party involved in the proceedings;

(2) The interpreter has served in an investigative capacity for any party involved in the case;
(3) The interpreter has previously been retained by a law enforcement agency to assist in the preparation of the criminal case at issue;
(4) The interpreter or the interpreter's spouse or child has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that would be affected by the outcome of the case;
(5) The interpreter has been involved in the choice of counsel or law firm for that case;
(6) The interpreter is an attorney in the case;
(7) The interpreter has previously been retained for private employment by one of the parties to interpret in the case;
(8) For any other reason, the interpreter's independence of judgment would be compromised in the course of providing services.

The existence of any of the above-mentioned circumstances does not alone disqualify an interpreter from providing services as long as the interpreter is able to render services objectively. An interpreter may serve if the judge and all parties consent. If an actual or apparent conflict of interest exists, the interpreter may, without explanation to any of the parties or the judge, decline to provide services.

Should an interpreter become aware that a non-English speaking participant views the interpreter as having a bias, or being biased, the interpreter should disclose that knowledge to the judge.

RULE 4
PROFESSIONAL DEMEANOR

Interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.

Commentary

Interpreters should know and observe the established protocol, rules, and procedures for delivering interpreting services. When speaking in English, interpreters should speak at a rate and volume that enables them to be heard and understood throughout the courtroom, but the interpreter's presence should otherwise be as unobtrusive as possible. Interpreters should work without drawing undue or inappropriate attention to themselves. Interpreters should dress in a manner that is consistent with the dignity of the proceedings of the court. Interpreters should avoid obstructing the view of any of the individuals involved in the proceedings. However, interpreters who use sign language or other visual modes of communication must be positioned so that hand gestures, facial expressions, and whole body movement are visible to the person for whom they are interpreting.

Interpreters are encouraged to avoid personal or professional conduct that could discredit the court.

RULE 5
CONFIDENTIALITY

Interpreters shall protect the confidentiality of all privileged and other confidential information.

Commentary

The interpreter shall protect and uphold the confidentiality of all privileged information obtained during the course of her or his duties. It is especially important that the interpreter understand and uphold the attorney-client privilege, which requires confidentiality with respect to any communication between attorney and client. This rule also applies to other types of privileged communication.

Interpreters must also refrain from repeating or disclosing information obtained by them in the course of their employment that may be relevant to the legal proceeding.

In the event that an interpreter becomes aware of information that suggests imminent harm to someone or relates to a crime being committed during the course of the proceedings, the interpreter should immediately disclose the information to the presiding judge. If the judge is not available, the interpreter should disclose the information to an appropriate authority in the judiciary.

RULE 6
RESTRICTION OF PUBLIC COMMENT

Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are, or have been, engaged even when that information is not privileged or required by law to be confidential.

Commentary

Generally, interpreters should not discuss outside of the interpreter's official duties, interpreter assignments, persons involved or the facts of the case. However, interpreters may share information for training and educational purposes. Interpreters should only share as much information as is required to accomplish their purpose. An interpreter must not reveal privileged or confidential information.

RULE 7
SCOPE OF PRACTICE

Interpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

Commentary

Since interpreters are responsible only for enabling others to communicate, they should limit themselves to the activity of interpreting or translating only. Interpreters should refrain from initiating communications while interpreting unless it is necessary for assuring an accurate and faithful interpretation. Interpreters may be required to initiate communications during a proceeding when they find it necessary to seek assistance in performing their duties. Examples of such circumstances include seeking direction when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to satisfy an assignment competently. In such instances they should make it clear that they are speaking for themselves.

An interpreter may convey legal advice from an attorney to a person only while that attorney is giving it. An interpreter should not explain the purpose of forms, services, or otherwise act as counselors or advisors unless they are interpreting for someone who is acting in that official capacity. The interpreter may translate language on a form for a person who is filling out the form, but may not explain the form or its purpose for such a person.

The interpreter should not personally serve to perform official acts that are the official responsibility of other court officials including, but not limited to, court clerks, pre-trial release investigators or interviewers, or probation counselors.

RULE 8
ASSESSING AND REPORTING IMPEDIMENTS TO PERFORMANCE

Interpreters shall assess at all times their ability to deliver their services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall immediately convey that reservation to the presiding judge.

Commentary

If the communication mode or language of the non-English-speaking person cannot be readily interpreted, the interpreter should notify the presiding judge.

Interpreters should notify the presiding judge of any environmental or physical limitation that impedes or hinders their ability to deliver interpreting services adequately (e.g., the court room is not quiet enough for the interpreter to hear or be heard by the non-English speaker, more than one person at a time is speaking, or principals or witnesses of the court are speaking at a rate of speed that is too rapid for the interpreter to adequately interpret). Sign language interpreters must ensure that they can both see and convey the full range of visual language elements that are necessary for communication, including facial expressions and body movement, as well as hand gestures. Interpreters should notify the presiding judge of the need to take periodic breaks to maintain mental and physical alertness and prevent interpreter fatigue. Interpreters should recommend and encourage the use of team interpreting whenever necessary.

Interpreters are encouraged to make inquiries as to the nature of a case whenever possible before accepting an assignment. This enables interpreters to match more closely their professional qualifications, skills, and experience to potential assignments and more accurately assess their ability to satisfy those assignments competently.

Even competent and experienced interpreters may encounter cases where routine proceedings suddenly involve technical or specialized terminology unfamiliar to the interpreter (e.g., the unscheduled testimony of an expert witness). When such instances occur, interpreters should request a brief recess to familiarize themselves with the subject matter. If familiarity with the terminology requires extensive time or more intensive research, interpreters should inform the presiding judge.

Interpreters should refrain from accepting a case if they feel the language and subject matter of that case is likely to exceed their skills or capacities. Interpreters should notify the presiding judge if they feel unable to perform competently, due to lack of familiarity with terminology, preparation, or difficulty in understanding a witness or defendant.

Interpreters should notify the presiding judge of any personal bias they may have involving any aspect of the proceedings. For example, an interpreter who has been the victim of a sexual assault may wish to be excused from interpreting in cases involving similar offenses.

RULE 9
DUTY TO REPORT ETHICAL VIOLATIONS

Interpreters shall report to the proper judicial authority any effort to impede their compliance with any law, any provision of these Rules, or any other judicial policy governing court interpreting and legal translating.

Commentary

Because the users of interpreting services frequently misunderstand the proper role of the interpreter, they may ask or expect the interpreter to perform duties or engage in activities that conflict with the provisions of these Rules or other laws, regulations, or policies governing court interpreters. It is incumbent upon the interpreter to inform such persons of his or her professional obligations. If, having been apprised of these obligations, the person persists in demanding that the interpreter violate them, the interpreter should report it to the presiding judge.

RULE 10
PROFESSIONAL DEVELOPMENT

Interpreters shall continually improve their skills and knowledge and advance the profession through activities such as professional training and education, and interaction with colleagues and specialists in related fields.

Commentary

Interpreters must continually strive to increase their knowledge of the languages they work in professionally, including past and current trends in technical, vernacular, and regional terminology as well as their application within court proceedings.
Interpreters should keep informed of all statutes, rules of courts and policies of the judiciary that relate to the performance of their professional duties.

An interpreter should seek to elevate the standards of the profession through participation in workshops, professional meetings, interaction with colleagues, and reading current literature in the field.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jason Shealy, **Appellant,**

v.

John Doe, **Respondent.**

Appeal from Hampton County
Howard P. King, Circuit Court Judge

Opinion No. 4128
Heard June 15, 2006 – Filed June 26, 2006

AFFIRMED

Ralph Shealy Kennedy, Jr., and Robert M. Cook, II, both of Batesburg-Leesville, for Appellant.

David Cooper Cleveland, Thomas J. Keaveny, II, and Bob J. Conley, all of Charleston, for Respondent.

ANDERSON, J.: Jason Shealy appeals the trial court's order dismissing his claim for uninsured motorist (UM) coverage, arguing the trial court erred in (1) finding Shealy failed to comply with the witness affidavit requirement of South Carolina Code Annotated section 38-77-170 (2002); and (2) refusing to treat a letter from Safeco Insurance Company as an admission against interest. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On June 7, 2003, Eddie Bolin was driving a pickup truck owned by Dale Leaphart. Shealy and Ronald Cromer sat in the bed of the truck. Bolin swerved abruptly, throwing Shealy and Cromer from the truck. Shealy sustained serious injuries, including a fractured skull. Bolin later explained to Shealy and the police that he swerved to avoid hitting an unknown vehicle.

Shealy filed a complaint against the unknown driver, John Doe, to recover against Safeco, Leaphart's UM carrier. Shealy submitted an affidavit, which he attached and incorporated into the complaint. The affidavit states:

> Personally appeared before me, Jason Shealy, who being duly sworn deposes and says as follows:
>
> That he is Jason Shealy and that on or about June 7, 2003, he was a passenger in a pickup truck being driven by Eddie Bolin and, upon information and belief, owned by Dale Leaphart. That the pickup truck was being driven on Highway 391 near Batesburg-Leesville, South Carolina. That Eddie Bolin sharply, unexpectedly and suddenly swerved the truck near the entrance to Leaphart Acres, throwing the affiant and another passenger from the bed of the truck onto the roadway. **That the day following the incident the affiant was told by Eddie Bolin that an unknown vehicle and driver had come onto the roadway in the path of the truck causing Eddie Bolin to sharply and**

> **unexpectedly maneuver the truck he was driving to avoid a collision.**
>
> A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

(Emphasis added.)

Doe moved to dismiss Shealy's action or, alternatively, to change venue. At the motions hearing, Shealy submitted the affidavit of Ronald Cromer, which contains identical language to Shealy's affidavit. In addition, Shealy submitted a letter from Safeco to his attorney. The letter explained:

> [Safeco has] remained consistent in the lack of negligence and lack of liability of Mr. Eddie Bolin, the driver of the automobile in which your client was occupying [sic]. Mr. Bolin's lack of negligence is due to the phantom vehicle which pulled out in front of him and caused the accident . . . .

Shealy argued the letter was an admission against interest.

The trial court granted Doe's motion to dismiss, recognizing its consideration of Cromer's affidavit and Safeco's letter converted Doe's motion to dismiss into one for summary judgment. The court held Shealy failed to comply with the witness affidavit requirement of section 38-77-170(2). Shealy filed a motion to reconsider, which the trial court denied.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss a complaint for "failure to state facts sufficient to constitute a cause of action." Rule 12(b) additionally provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]

In this case, the trial court considered Cromer's affidavit and the letter from Safeco before granting Doe's motion to dismiss. Accordingly, we review the trial court's order as if it were an appeal from a grant of summary judgment.

When reviewing a grant of summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004); see Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

LAW/ANALYSIS

I. Witness Affidavit Requirement

Shealy argues the trial court erred in holding the affidavits he submitted were insufficient to satisfy section 38-77-170(2) of the South Carolina Code Annotated (2002). We disagree.

Section 38-77-170 provides:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> > (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
> >
> > (2) the injury or damage was caused by physical contact with the unknown vehicle, **or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit**;
> >
> > (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.
>
> The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING

THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C. Code Ann. § 38-77-170 (2002) (emphasis added). "An insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met." Miller v. Doe, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994).

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). The first question of statutory interpretation is whether the statute's meaning is clear on its face. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 622, 622 S.E.2d 733, 738 (Ct. App. 2005).

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this Court has no right to impose another meaning. See Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Mun. Ass'n of S.C. v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); see also Miller, 312 S.C. at 447, 441 S.E.2d at 321 ("In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning, nothing to the contrary appearing.").

Section 38-77-170(2) is clear on its face. It expressly requires that someone other than the owner or operator of the insured vehicle **witness** the accident. As stated in Wausau Underwriters Insurance Company v. Howser, 309 S.C. 269, 275, 422 S.E.2d 106, 110 (1992), "no physical contact with the unknown vehicle is necessary when a witness other than the owner or driver of the insured vehicle is able to **attest to the facts of the accident**." (Emphasis added.) See also Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 744 (2002) ("The plain language of § 38-77-170 requires that where the

accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident 'must have been witnessed by someone other than the owner or operator of the insured vehicle' and the 'witness must sign an affidavit attesting to the truth of the facts of the accident contained therein.'"). Shealy asserts section 38-77-170(2) does not require the witness affidavit to be based on personal knowledge. This argument directly contravenes the language of the statute. Shealy submitted affidavits of two people who apparently did not witness the accident; their affidavits do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator. Thus, Shealy produced no evidence that someone other than Bolin, the operator of the insured vehicle, witnessed the accident. Shealy's and Cromer's affidavits do not comply with this express directive.

Shealy's interpretation of section 38-77-170(2) would totally eviscerate the statute's efficacy as it would allow an owner or operator to inform any third-party of the facts of the accident and have that third-party swear out an affidavit as to the owner or operator's version of the events. In Collins, our supreme court elucidated that the "obvious purpose" of the affidavit requirement of section 38-77-170(2) is "fraud prevention." Collins, 352 S.C. at 470, 574 S.E.2d at 743. Shealy's reading of the statute would circumvent the fraud-preventing function of subsection (2), rendering that section meaningless.

According to Shealy, requiring the affiant to have witnessed the accident creates an unreasonably harsh result because a sleeping passenger or blind passenger injured by a John Doe driver might be precluded from recovery. Yet the statute indubitably bars an operator and lone occupant of a vehicle from recovery where no contact is made with the unknown driver and where no one else witnesses the accident. In both instances, the result is lamentable to the injured party, but mandated by the statute. Section 38-77-170 demonstrates a policy decision by the legislature which balances the interest of parties injured in accidents with unknown drivers, with the interest of insurance companies in preventing fraudulent claims. Where the legislature determines policy and promulgates a clear rule of law, there is no room for the courts to alter that decision.

Finally, Shealy contends the affidavits comply with Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004), because the affidavits he submitted provide circumstantial evidence of the accident. In Gilliland, two young men in a truck were closely pursuing Angel Gilliland. As Gilliland sped up to get away from the truck, she lost control of her car and hit a tree. The truck never made contact with Gilliland's vehicle. A witness who was stopped at a nearby intersection testified that she "saw the lights of two cars as the cars came around the curve," and that "after the accident, she saw the lights of the car behind Petitioner's 'arc through the field' as if it were making a U-turn." 357 S.C. at 198-99, 592 S.E.2d at 627. A jury returned a verdict for Gilliland, but we held a witness "must testify to more than the actual collision itself. The witness must also be able to attest to the circumstances surrounding the accident, i.e. what actions of the unknown driver contributed to the accident." Gilliland v. Doe, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct. App. 2002). Accordingly, we reversed the trial court and granted Doe's motion for a judgment notwithstanding the verdict. However, the South Carolina Supreme Court reversed and reinstated the judgment of the trial court.

The supreme court began with a historical review of the unknown driver statute:

> The Legislature first enacted a "John Doe" statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions. The initial safeguard was a requirement that the unknown vehicle make "physical contact" with the plaintiff's car. Act No. 312, 1963 S.C. Acts 535.
>
> Then in 1987, the Legislature amended the statute once again to allow insureds to bring a "John Doe" action regardless of physical contact as long as an independent person witnessed the accident. Act. No. 166, 1987 S.C. Acts 1122.

> In 1989, the Legislature again amended the statute to require that the independent witness provide the court with a signed affidavit attesting to the unknown vehicle's involvement in the accident.

357 S.C. at 199-200, 592 S.E.2d at 627-28.

The question for the Gilliland court was "to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in 'John Doe' actions." Id. at 200, 592 S.E.2d at 628. The court answered the question with the following analysis:

> In Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106, (1992) this Court indicated that the statute required an independent witness to attest to facts that provide at least some causal connection between an unknown driver and the accident. The Court provided that the adequacy of the "causal connection" should pass the same test used in determining whether an injury or damage arose out of the ownership, maintenance, or use of the uninsured vehicle. Id. at 275, 422 S.E.2d at 110. The Court explained that this test regarding the sufficiency of the evidence is "something less than proximate cause and something more than the vehicle being the mere site of the injury." Id. at 272, 422 S.E.2d at 108 (citing Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987)).
>
> Based on the test set forth in Howser, § 38-77-170(2) may be satisfied even though an independent witness fails to provide a clear answer to the question of proximate cause. Howser suggests that § 38-77-170(2) should be interpreted liberally. This Court arguably abandoned a liberal interpretation of § 38-77-170(2) in Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002).
>
> In Collins, this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit

> requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.
>
> Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, Collins suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to Collins, is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the statute's purpose. See Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")
>
> In the case at hand, the Court of Appeals held that the witness must "be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." Gilliland, 351 S.C. at 500, 570 S.E.2d at 548. We agree that this analysis is consistent with Howser and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2). However, the Court of Appeals found that Norris failed to attest to the existence of an unknown vehicle. Gilliland, 351 S.C. at 498, 570 S.E.2d at 546. We find the record includes sufficient evidence that an unknown vehicle was involved in Petitioner's accident.

Gilliland, 357 S.C. at 199-202, 592 S.E.2d at 628-29. The linchpin of the court's ruling was its determination that the witness affidavit contained circumstantial evidence corroborating Gilliland's testimony that an unknown vehicle contributed to her accident:

> In Marks v. Indus. Life & Health Ins. Co., 212 S.C. 502, 505, 48 S.E.2d 445, 446, this Court held that "[t]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty."
>
> We now hold that the testimony of Gayle Norris **contained circumstantial evidence that supports Petitioner's testimony** that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident **sufficiently corroborates** Petitioner's testimony creating a question of fact as to causation for the jury.

Gilliland, 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added).

"For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." Gastineau v. Murphy, 331 S.C. 565, 570 n.2, 503 S.E.2d 712, 714 n.2 (1998) (citing Holland v. Georgia Hardwood Lumber Co., 214 S.C. 195, 204-05, 51 S.E.2d 744, 749 (1949)).

> Circumstantial evidence means proof that does not actually assert or represent the proposition in question, **but that asserts or describes something else**, from which the trier of fact may either (1) reasonably infer the truth of the proposition, in which case the evidence is not only relevant under Rule 401 but is sufficient as well, or (2) at least reasonably infer an increase in the probability that the proposition is in fact true, in which case the evidence is relevant under Rule 401 (assuming that the proposition is of consequence to the determination of the action) but may not be sufficient by itself to create a question for the trier of fact to decide.

29 Am. Jur. 2d Evidence § 313 (1994) (emphasis added) (footnotes omitted).

Unlike in Gilliland, the affidavits submitted by Shealy do not contain circumstantial evidence supporting the driver's version of the accident. Shealy failed to corroborate the driver's account. In Gilliland, the court found "the testimony of Gail Norris contained circumstantial evidence that **supports** Petitioner's testimony." 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added). Contradistinctively, Shealy's affidavits merely repeat the driver's account and fail to provide **any** support for his assertions.

The purpose of section 38-77-120(2) is to prevent fraud. Concomitantly, the affidavit of the independent witness must contain some independent evidence that an unknown vehicle was involved in the accident. Shealy failed to satisfy the statute's mandate; thus, the court properly granted summary judgment.

II. Admission Against Interest

Shealy contends the trial court erred in granting summary judgment to Doe because Safeco's letter constituted an admission against interest. The trial court did not rule on this issue, and Shealy did not raise it in a Rule 59, SCRCP, motion. Therefore, this issue is not preserved. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding where "the circuit court did not explicitly rule" on an argument, and no Rule 59(e) motion was made, "the issue was thus not properly before the Court of Appeals and should not have been addressed"); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct. App. 2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

Additionally, Shealy fails to cite any case law for this proposition and makes only conclusory arguments in support thereof. Thus, Shealy has abandoned this issue on appeal. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal). Accordingly, we decline to address this issue.

CONCLUSION

We hold Shealy failed to comply with the witness affidavit requirement of section 38-77-170(2). Furthermore, Shealy failed to preserve the issue of whether Safeco's letter should be considered an admission against interest that precludes a grant of summary judgment. The trial court's order is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lyn Cherry Stribling as
Personal Representative of
Joseph Neal Stribling, Respondent,

v.

Linda Diane Stribling, Appellant.

Appeal From Richland County
Kellum W. Allen, Family Court Judge

Opinion No. 4129
Heard April 6, 2006 – Filed June 26, 2006

AFFIRMED

Melissa J. Copeland, and Catherine H. Kennedy, of Columbia, for Appellant.

Robert K. Whitney, of Seneca, for Respondent.

BEATTY, J.: Lyn Cherry Stribling (Widow), as personal representative of Joseph Neal Stribling (Husband), brought an action against Linda Dianne Stribling (Wife) seeking a court order requiring Wife to waive her claim to Husband's Individual Retirement Accounts (IRAs) pursuant to a Divorce Decree. Wife appeals the family court's order, arguing the court erred in holding Wife waived interest in non-employment related retirement accounts and erred in holding any waiver applied to her expectancy interest. We affirm.

FACTS

Husband and Wife married on December 22, 1973. During their marriage, Husband established two IRAs: a Charles Schwab IRA in December of 1993 and a TD Waterhouse IRA in March of 1998. Husband named Wife as primary beneficiary for both IRAs; a charity was also named as a five percent beneficiary for the Schwab IRA.

In February 2003, Husband and Wife divorced pursuant to a Divorce Decree. The Decree incorporated the parties' settlement agreement. The Decree and agreement awarded ownership of both IRAs to Husband.[1] The Decree also provided, in relevant part:

> The parties acknowledge that each party is retaining his or her retirement accounts accumulated through their respective employment. The parties further acknowledge they are waiving any interest they may have in the other party's retirement. As a result, the parties agree to sign any and all documentation necessary to fully waive any right or entitlement he or she may have had in the retirement of the other. The parties will fully cooperate in securing the necessary waivers, releases, QDRO's or other

[1] The Decree provided that "[t]he parties have agreed to a division of their assets as set out in [their settlement agreement]" and "Wife will receive all assets in her column, and Husband will receive all assets in his column." The settlement agreement listed both IRA accounts in Husband's column.

> required documents for the signature of the waiving party.

Not long after the parties' divorce, Husband married Widow. Husband died on July 25, 2004. At the time of Husband's death, Wife was the named beneficiary of the Waterhouse IRA and the named beneficiary of ninety-five percent of the Schwab IRA. On March 16, 2005, Widow, as personal representative of Husband's estate, brought an action against Wife seeking a court order requiring Wife to waive her claim to Husband's IRAs pursuant to the Divorce Decree.

A hearing was held on May 3, 2005. By order, the family court ruled that the "language of the settlement is clear and sufficiently comprehensive so as to establish [Wife] had waived or relinquished any interest, including expectancy interest, in [Husband's] retirement." As a result, the court ordered Wife to sign documentation necessary to waive any rights or entitlement to the IRAs. This appeal followed.

STANDARD OF REVIEW

"An action to construe a written contract is an action at law." S. Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 80, 562 S.E.2d 482, 484 (Ct. App. 2002), aff'd as modified, 356 S.C. 444, 590 S.E.2d 27 (2003). Whether a contract's language is ambiguous is a question of law. South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). "[W]hen a contract is clear and unambiguous, the construction thereof is a question of law for the court." Bowen v. Bowen, 345 S.C. 243, 249, 547 S.E.2d 877, 880 (Ct. App. 2001), aff'd, 352 S.C. 494, 575 S.E.2d 573 (2003). "While a trial court's findings of fact in a nonjury action at law should not be disturbed on appeal unless they are without evidentiary support, a reviewing court is free to decide questions of law with no particular deference to the trial court." Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 849, 848-49 (Ct. App. 2004).

LAW/ANALYSIS

I. Waiver of Interest in Husband's IRAs

Wife argues the family court erred in holding the Divorce Decree clearly established Wife waived her interest in the Husband's IRAs. Specifically, Wife asserts the Divorce Decree only establishes waiver of interest in employment related retirement accounts, and the Decree does not apply to the IRAs because they are non-employment retirement accounts. We disagree.

The construction of an agreement is a matter of contract law. McDuffie v. McDuffie, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993). "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." S. Atl. Fin. Servs., 349 S.C. at 80, 562 S.E.2d at 484. "The parties' intention must, in the first instance, be derived from the language of the contract." Jacobs v. Serv. Merch. Co., 297 S.C. 123, 128, 375 S.E.2d 1, 4 (Ct. App. 1988). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." Id. "Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity." Gamble, Givens & Moody v. Moise, 288 S.C. 210, 215, 341 S.E.2d 147, 150 (Ct. App. 1986).

We find the language of the Decree unambiguously provides Wife waived any interest in all of Husband's retirement accounts. The relevant language of the Decree states that each of the parties retain their "retirement accounts accumulated through their respective employment." The Decree then provides that the parties "further acknowledge they are waiving any interest they may have in the other party's retirement." (emphasis added). The inclusion of the word "further" indicates that, in addition to each party retaining their respective employment-related retirement accounts, each party waives any interest in any of the other party's retirement. The Decree does not limit this waiver of interest to employment related retirement accounts,

but rather simply states the waiver applies to the "other party's retirement." This interpretation is further substantiated by the settlement agreement which specifically lists both IRAs in Husband's column. Accordingly, after looking at the Decree as a whole, we find the trial court did not err in finding the Decree was clearly and sufficiently comprehensive to establish Wife waived any interest in Husband's retirement, including Husband's IRAs.

II. Expectancy Interest

Wife next contends the family court erred in finding any waiver of interest in Husband's IRAs encompassed a waiver of an expectancy interest in the IRAs. We disagree.

Generally, in South Carolina, divorce does not per se affect the rights of a beneficiary interest. See, e.g., Duncan v. Investors Diversified Serv., Inc., 285 S.C. 467, 470, 330 S.E.2d 295, 296 (1985) (holding divorce does not of itself operate to defeat the beneficiary's claim to proceeds under a life insurance policy). However, it is generally recognized that a beneficiary may contract away the beneficiary interest through a separation or property settlement agreement, even if the beneficiary designation is not formally changed. Estate of Revis by Revis v. Revis, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997).

In Estate of Revis, this court held:

> [W]hen a separation agreement does not specifically address a life insurance policy in which one spouse has an expectancy as a named beneficiary, general language of release . . . is not controlling on the issue. Where the insured spouse maintains ownership and control of the policy, including the right to change beneficiaries, the question of whether or not the agreement extinguishes the right of the named beneficiary to claim the benefits upon the death of the

> estranged spouse depends upon the intention of the insured spouse as determined by the facts of each case.

Id. at 478, 484 S.E.2d at 116-17. The beneficiary interest in a life insurance policy is analogous to the beneficiary interest in an IRA. Like the beneficiary in a life insurance policy, the IRA beneficiary merely has an expectancy interest in the IRA until the owner's death. See Luszcz v. Lavoie, 787 So. 2d 245, 248 (Fla. 2d Dist. Ct. App. 2001) (in holding that the IRA beneficiary designation controlled in a case where the parties' settlement agreement did not include releases of claims against each other, the court noted that "a beneficiary's rights to proceeds do not attach until the IRA owner's death. Until then, the beneficiary merely has an expectancy in the IRA because until the owner's death, the owner can do with the IRA as desired, including changing the beneficiary designation or cashing out the account altogether"); Rishel v. Estate of Rishel, 781 N.E.2d 735, 742 (Ind. Ct. App. 2003) (in finding that the parties' settlement agreement only included a waiver of property in general and did not amount to a specific waiver of an expectancy interest in an annuity, the court noted there was no distinction between the expectancy interest in life insurance policies, retirement accounts, and annuities).

In Rushton v. Lott, this court, quoting the above language in Estate of Revis, held a separation agreement may be interpreted to preclude a beneficiary's interest in an annuity even though the agreement did not specifically mention the annuity. Rushton v. Lott, 330 S.C. 418, 420, 499 S.E.2d 222, 224 (Ct. App. 1998). The separation agreement in Rushton provided: "Each party shall retain exclusive ownership and possession of their respective savings, checking or retirement accounts now in their possession." Id. at 420, 499 S.E.2d at 223. The court held the agreement precluded the named beneficiary from claiming rights to the proceeds of an annuity because parol evidence indicated the parties viewed the annuity as an IRA and, therefore, intended to include the annuity in the separation agreement. In Rushton, this court upheld the trial court's use of parol evidence to determine the separation agreement applied to an annuity. Id. at 421, 499 S.E.2d at 224.

Thus, in South Carolina, a separation agreement may preclude a named beneficiary from recovery of an expectancy interest in two ways. First, a named beneficiary may be precluded from recovery when a separation agreement specifically addresses a particular policy/account providing an expectancy interest and the agreement contains language of release applicable to the policy/account. Second, when a separation agreement provides general language of release without specifically addressing the policy/account providing the expectancy interest, a named beneficiary may be precluded from recovery when the policy/account owner intended for the general waiver to apply to the expectancy interest. In other words, for separation agreements that do not specifically address a policy/account providing an expectancy interest, a general waiver is not controlling, and the effect of the general release on the expectancy interest "depends upon the intention of the [policy/account owning] spouse as determined by the facts of each case." Estate of Revis, 326 S.C. at 478, 484 S.E.2d at 117.

In this case, we find the waiver contained in the separation agreement is controlling because the agreement specifically addresses the IRAs. The agreement provides the parties waive "any interest they may have in the other party's retirement." (emphasis added). The agreement then clearly lists the IRAs in Husband's column and provides "Husband will receive all assets in his column." Thus, the agreement specifically references the IRAs providing the expectancy interest and is accompanied by a clear waiver of any interest, including present or future interests. Accordingly, we find the family court did not err in finding Wife waived her expectancy interest in Husband's IRAs.

CONCLUSION

Based on the foregoing, we find the family court did not err in finding Wife waived her interest in Husband's IRAs. The decision of the court is accordingly

AFFIRMED.

SHORT, and WILLIAMS, JJ., concur.