The Supreme Court of South Carolina

In the Matter of Victoria T. Roach, Petitioner

ORDER

By Order dated April 7, 2005, the Court accepted the resignation of Petitioner as a member of the Bar of this State. The Order required Petitioner to provide the Clerk of this Court with an affidavit showing that she had fully complied with the provisions of the Order and to deliver to the Clerk her certificate to practice law in this State. These actions were to be taken within fifteen days of the date of the order, and the order stated that her resignation was not effective until these acts were completed.

The records in the Office of the Clerk of Court show that on April 7, 2005, Petitioner was sent a copy of the Order by certified mail-return receipt requested. On May 19, 2005, the Clerk of Court sent Petitioner a letter, by certified mail-return receipt requested, requesting that she comply with the Order within ten days. On June 3, 2005, the Clerk of Court sent Petitioner a letter advising that if the affidavit and certificate were not received within ten days the

Order accepting her resignation would be set aside and she would be placed back on suspended status.[1] Petitioner has also failed to respond to telephone inquiries by the Office of the Clerk on June 17 and June 21, 2005.

Since Petitioner has failed to file the affidavit and certificate, the Order of April 7, 2005, is vacated, and petitioner is returned to her status as a suspended, inactive member of the South Carolina Bar. Further, she is hereby suspended by this Court pursuant to Rule 419(e), SCACR. If not reinstated within three years of the date of this order, petitioner's membership in the South Carolina Bar will be automatically terminated under Rule 419(g), SCACR.

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

July 21, 2005

[1] Petitioner was automatically suspended from the practice of law on January 31, 2005, when she failed by pay her bar license fees. Rule 419(b), SCACR.

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30

July 25, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cheryl Howard Craig, Respondent,

v.

William Rhett Craig, III, Petitioner.

ORDER

Respondent (Wife) filed a petition for rehearing in which she asked the Court to clarify whether retroactive alimony was to be awarded. Petitioner (Husband) did not file a return in opposition.

We grant the petition for rehearing, withdraw the former opinion, and substitute the attached opinion.

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.

IT IS SO ORDERED.

July 25, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cheryl Howard Craig, Respondent,

v.

William Rhett Craig, III, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal from Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 25970
Submitted February 16, 2005 - Filed April 11, 2005
Refiled July 25, 2005

AFFIRMED

T. Preston Reid, of Howard, Howard, Francis & Reid, of Greenville, for Petitioner.

Jean Perrin Derrick, of Lexington; and Stuart G. Anderson, Jr., of Anderson, Fayssoux & Chasteen, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Respondent, Cheryl Howard Craig (Wife), brought the underlying divorce against Petitioner, William Rhett Craig, III (Husband), seeking custody of the couple's youngest child, division of the marital property, alimony, child support, and attorney's fees.

FACTUAL / PROCEDURAL BACKGROUND

Husband and wife were married in 1974. In January 2000, Husband told Wife that he wanted to end the marriage and that he had engaged in five affairs over the course of their twenty-five-year marriage. Husband denied that he was having an affair and claimed the last affair he had was two-and-a-half years earlier. The couple decided to separate. In August 2000, Wife filed for divorce. After filing for divorce, Wife learned that Husband was engaged in a pre-separation affair. Husband denied this allegation, but before the case went to trial, Husband admitted the extra marital affair in a sworn affidavit submitted to the court. As a result, Wife established pre-separation adultery and was granted a divorce *a vinculo matrimonii*.

The couple has three children. The oldest child was living in the marital home at the time of the divorce. The oldest child suffers from injuries sustained in a childhood bicycle incident, but is able to care for himself financially because of a settlement relating to the injuries he suffered as a child. The second child is a college graduate who, at the time of divorce, also lived in the marital home while searching for employment. The third and youngest child was a junior in high school and lived in the home.

Wife has a master's degree in nursing and has been employed as a critical care nurse. Husband is a doctor and is a partner in a medical group that specializes in internal medicine. The couple has significant marital assets. The total value of the marital estate was determined to be $2,473,430.10. The marital property includes, but is not limited to, a home in Greenville, a significant 401(k) account, and other financial investment accounts.

The family court awarded custody of the youngest child to Wife. In addition, the family court found Wife had a special equity in non-marital

property owned by the husband.[1] The remaining marital assets, including Husband's retirement account, were divided equally. Moreover, the court ordered that, after the graduation of the youngest child from high school, the marital home was to be sold and the proceeds from the sale divided equally. In addition, the family court judge awarded Wife $500 per month in permanent periodic alimony and contribution toward her attorney's fees and costs.

Following the court's ruling, Wife filed a motion to alter or amend the judgment. The judge granted the motion and amended the order to grant Wife transitional monthly alimony of $3,000, until the sale of the marital home, at which time the amount of permanent periodic alimony would be set at $875 per month.

Despite the increase in alimony, Wife appealed and the court of appeals held that the family court erred in requiring the sale of the marital home and awarded Wife the home. *Craig v. Craig*, 358 S.C. 548, 558-59, 595 S.E.2d 837, 843 (Ct. App. 2004). The court of appeals then divided the remaining assets of the total marital estate equally, awarding both parties $1,236,715.05. Because the court awarded Wife the home, the court awarded Husband more of his retirement account to arrive at an even division of the assets and account for his equity in the home. Further, the court awarded Wife permanent periodic alimony of $3,000 per month.

This Court granted Husband's petition for certiorari, and the following issues have been raised for review:

I. Did the court of appeals err in reversing the family court's order to sell the marital home and equally divide the proceeds between Husband and Wife?

II. Did the court of appeals err in increasing the award of permanent periodic alimony to $3,000 per month?

[1] Husband owns an interest in several other properties that the family court determined to be non-marital property. The court found that Wife had a special equity in the properties because she contributed to their improvement.

LAW / ANALYSIS

I. Marital Residence

Husband contends that the court of appeals erred in reversing the family court's decision to sell the marital home and equally divide the proceeds between Husband and Wife. We disagree.

The division of marital property is within the discretion of the family court judge and the judge's decision will not be disturbed on appeal absent an abuse of discretion. *Morris v. Morris*, 295 S.C. 37, 39, 367 S.E.2d 24, 24 (1988). In order to effect an equitable division of property, the family court may require the sale of marital home. *Donahue v. Donahue*, 299 S.C. 353, 360, 384 S.E.2d 741, 745 (1989). Before ordering marital property be sold, the court should first try to make an "in-kind" distribution of the marital assets. *Id.* However, a family court may grant a spouse title to the marital home as part of the equitable distribution. *Id.* When distributing marital property, the family court should consider all fifteen factors set forth in the Code. S.C. Code Ann. § 20-7-472 (Supp. 2003). The family court considers the desirability to award the family home as part of the equitable distribution and any non-marital assets owned by either party. S.C. Code Ann. § 20-7-472(7) and (10) (Supp. 2003).

In the present case, the court of appeals correctly awarded sole possession of the marital home to Wife. The award of the marital home was part of the equitable distribution of the marital estate, not an award incident to support.

It is well established that family courts are empowered to include in an order for support that a party be provided with necessary shelter. S.C. Code Ann. § 20-7-420(15) (1976). A party who is granted possession of the marital home as an incident to support does not obtain a vested right to stay in the home for his lifetime; rather, changed circumstances may necessitate later modifying the possession. *Whitfield v. Hanks*, 278 S.C. 165, 166, 293 S.E.2d 314, 315 (1982). An award of the marital home incident to support requires a showing that compelling interests exist, such as (1) the need for adequate shelter for minors; (2) the occupying spouse has a special need for

the house because of a handicap or other infirmity; (3) the inability of the occupying spouse to otherwise obtain adequate housing; or (4) other special circumstances exist. *Thompson v. Brunson*, 283 S.C. 221, 226-27, 321 S.E.2d 622, 625 (Ct. App. 1984).

But if the house is awarded to a spouse as part of the equitable distribution of the marital estate, then no showing of special circumstances need be shown. *Donahue*, 299 S.C. at 360, 384 S.E.2d at 745. The marital home is merely a share of the total marital estate. *Id.* The party either gets the house or the value of his share of the equity in the house.

In the present case, the home was ordered to be sold as a part of the equitable distribution of the marital property. As a result, Wife does not need to demonstrate that special circumstances exist. However, the family court erred in making its equitable distribution of the assets.

In distributing the marital property, the family court did not apply the factors outlined in section 20-7-472. The family court failed to consider the desirability to maintain the marital home or consider the nonmarital property owned by Husband.

As to the desirability to maintain the marital home, Wife testified she had lived in the marital home longer than she had lived in any home. Further, Wife testified that she feels safe in the home because it is in a gated neighborhood. In addition, the children, even though emancipated, maintain rooms in the marital home. These factors weigh heavily in favor of awarding Wife the marital home as part of the equitable distribution of the estate.

In awarding the home as part of the distribution of the estate, the family court also overlooked the abundance of property owned by Husband. The record indicates that Husband owns an interest in at least three other properties either with his son or with other family members.

Therefore, we hold that the family court erred in not considering these factors when it apportioned the marital estate. Accordingly, the court of appeals correctly awarded Wife the marital home in the distribution of the estate.

II. Alimony

Husband contends the court of appeals erred by reversing the family court's decision to award permanent periodic alimony and by increasing the amount of the award. We disagree.

An award of alimony rests within the sound discretion of family court and will not be disturbed absent an abuse of discretion. *Dearybury v. Dearybury*, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). Alimony is a substitute for the support which is normally incident to the marital relationship. *Spence v. Spence*, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973). Generally, alimony should place the supported spouse, as nearly as practical, in the same position as enjoyed during the marriage. *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

When awarding alimony, the family court considers the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonable anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other relevant factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2003); *Patel v. Patel*, 347 S.C. 281, 290, 555 S.E.2d 386, 391 (2001) (holding that the court is required to consider all relevant factors in determining alimony).

In the present case, the family court abused its discretion by not addressing the standard of living established by the couple during the marriage. Husband and Wife established a very high standard of living for themselves. The couple has a very nice home in a very nice neighborhood. Wife drives a nice car. These are things Wife has grown accustomed to during the marriage. But for the infidelities of Husband, Wife would continue to enjoy the life that she had during the marriage.

Therefore, we hold that the court of appeals correctly awarded Wife an increase in alimony. Accordingly, we direct that the increase in periodic alimony begins from the time the family court issued its order. *See Christy v. Christy*, 317 S.C. 146, 152, 452 S.E.2d 1, 5 (Ct. App. 1994) (holding that modification of alimony applies retroactively only if ordered by the appellate court).

CONCLUSION

Based on the reasoning outlined above, we affirm the court of appeals.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sam Stevens, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 26013
Submitted June 2, 2005 - Filed July 25, 2005

REVERSED AND REMANDED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Molly R. Crum, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Sam Stevens (Petitioner) was charged with eighteen counts of receiving stolen goods and one count of obtaining property

by false pretenses. Petitioner pled guilty to all nineteen charges. He subsequently filed an application for post-conviction relief (PCR), contending that he unknowingly and involuntarily pled guilty to eighteen separate counts of receiving stolen goods. The PCR court denied relief. After granting certiorari, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

At the plea hearing, the State explained that Petitioner was part of a criminal enterprise, in which he would drive to various out-of-state locations to pick up stolen motorized equipment, such as tractors, lawnmowers, and four-wheelers. He then delivered the equipment to a location in South Carolina where the equipment was stored. He was eventually arrested at the storage location in South Carolina.

After describing Petitioner's criminal activity, the State read each indictment into the record, identifying the company from which the equipment was stolen, the type of equipment, and its value. The State did not, however, present any evidence as to when, where, or how many times Petitioner actually received stolen equipment.

Petitioner was charged with eighteen counts of receiving stolen goods[1] and one count of obtaining property by false pretenses. Petitioner pled guilty to all charges against him. He was sentenced to ten-years imprisonment on one receiving charge; ten-years imprisonment, suspended to five-years imprisonment and five-years probation, on a second receiving charge, to be served consecutively; and five years each on all other charges, to be served concurrently. In addition, Petitioner was ordered to pay restitution. He did not file a direct appeal.

Petitioner filed an application for post-conviction relief (PCR), contending that he unknowingly and involuntarily pled guilty to eighteen

[1] Thirteen counts were for receiving stolen goods valued at more than $5000; four counts for receiving stolen goods valued between $1000 and $5000; and one count for receiving stolen goods valued at less than $1000.

separate counts of receiving stolen goods. After a hearing, the PCR judge denied relief.

This Court granted certiorari to review the following issue:

> Did the PCR court err in denying relief, finding that Petitioner knowingly and voluntarily pled guilty to all eighteen counts of receiving stolen goods?

LAW/ANALYSIS

Standard of Review

A defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea by showing that (1) counsel was ineffective and that (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

Discussion

Petitioner contends that the PCR court erred in finding that he knowingly and voluntarily pled guilty to all charges against him. We agree.

S.C. Code Ann. § 16-13-180 (1976) establishes the offense of receiving stolen goods and explains the various penalties associated with the crime.[2] In

[2] The statute provides as follows:

> It is unlawful for a person to buy, receive, or possess stolen goods, chattels, or other property if the person knows or has reason to believe the goods, chattels, or property is stolen. A person is guilty of this offense whether or not anyone is

addition, the statute provides the following: "For the purposes of this section, the receipt of multiple items in a single transaction or event constitutes a single offense."

At the PCR hearing, Petitioner's plea counsel testified that he explained the offense of receiving stolen goods to Petitioner, but he did not research or consider whether Petitioner should have been indicted for eighteen separate counts. He admitted that he should have looked more closely at whether several instances should have been treated as a single transaction or event.

We find that the plea attorney's failure to consider whether Petitioner was properly charged with eighteen separate counts of receiving stolen goods constituted ineffective assistance of counsel. The plain meaning of the statute should have alerted counsel to the possibility that the number of indictments did not correspond to the number of offenses. At the very least,

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> convicted of the theft of the property. A person who violates the provisions of this section is guilty of a:
>
> (1) misdemeanor triable in magistrate's court if the value of the property is one thousand dollars or less. Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment by the grand jury;
>
> (2) felony and, upon conviction, must be fined not less than one thousand dollars or imprisoned not more than five years if the value of the property is more than one thousand dollars but less than five thousand dollars;
>
> (3) felony and, upon conviction, must be fined not less than two thousand dollars or imprisoned not more than ten years if the value of the property is five thousand dollars or more.
>
> *For the purposes of this section, the receipt of multiple items in a single transaction or event constitutes a single offense.*

(emphasis supplied).

counsel should have questioned the State's lack of evidence as to when and how the goods were actually received.

In addition, there is a reasonable probability that, had counsel informed Petitioner that he should not have been charged with eighteen counts of receiving stolen goods, Petitioner would not have pled guilty to each and every charge. Moreover, Petitioner may have received a lighter sentence had the judge known that Petitioner faced four or five counts instead of eighteen. Therefore, the PCR court's decision should be reversed and the case remanded for trial or a new plea proceeding.

CONCLUSION

Because we find no evidence to support the PCR court's finding that Petitioner knowingly and voluntarily pled guilty to all charges, we reverse the PCR court's decision and remand Petitioner's case for a new plea hearing or trial.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward D. Sloan, Jr., individually and as a Citizen, Resident, Taxpayer, and Registered Elector of the State of South Carolina, and on behalf of all others similarly situated, Petitioner,

v.

The Department of Transportation, an Agency of South Carolina, and the Commission of the Department of Transportation, Robert W. Harrell, John N. Hardee, Eugene Stoddard, F. Hugh Atkins, B. Bayles Mack, L. Morgan Martin, and J. M. Truluck, in their capacities as Commissioners thereof, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26014

Heard April 6, 2005 - Filed July 25, 2005

REVERSED

Jennifer J. Miller and James G. Carpenter, both of The Carpenter Law Firm, PC, of Greenville, for Petitioner.

Franklin J. Smith, Jr., of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, and William A. Coates, of Roe Cassidy Coates & Price, P.A., of Greenville, for Respondents.

JUSTICE WALLER: We granted a writ of certiorari to review Sloan v. Dep't of Transp., Op. No. 2003-UP-416 (S.C. Ct. App. filed June 19, 2003), in which the Court of Appeals found appellant Edward Sloan (Sloan) lacked standing to bring these actions challenging the procurement procedure used by the Department of Transportation (DOT) to award construction contracts. We reverse the Court of Appeals on the standing issue and the circuit court on the merits.

FACTS

Sloan, a resident of Greenville County, brought these three separate actions, which were consolidated for trial, challenging the procurement procedures used in the construction of: the Carolina Bays Parkway in Horry County, the Cooper River Bridge, and Highway 170 in Beaufort County. [1] Sloan alleges the DOT violated statutory bidding requirements because these

[1] Sloan also sought to enjoin the procurement of the Cooper River Bridge project. At the time of the hearing, construction had begun on the Carolina Parkways and Highway 170 and final funding was in the process of being secured for the Cooper River Bridge. The respondents represented that the Cooper River Bridge project would be similarly procured and it was.

construction projects were procured by Requests for Proposals ("RFPs") rather than competitive sealed bids.[2]

Both parties moved for summary judgment. The circuit court found Sloan did not have taxpayer standing or a particularized interest in the controversy. However, the court found standing because the issues involved "great public importance" and the same procedure would be used in the future. The court then granted the DOT summary judgment on the merits.[3] Alternatively, it found laches barred the actions regarding Carolina Bays Parkway and Highway 170.

The Court of Appeals reversed in part and affirmed in part. The Court of Appeals affirmed the circuit court's ruling that Sloan did not have taxpayer standing or a particularized interest in the controversy. The Court of Appeals, however, reversed the circuit court's finding that Sloan had standing and did not address the merits of the case or whether laches barred any of the actions.

ISSUES

1) Is this case moot?
2) Does Sloan have standing?
3) Did the circuit court err in granting the DOT summary judgment?

DISCUSSION

1) Mootness[4]

[2]The Court has ruled that the bonding issue raised in the trial court is not properly before it. (Order filed Sept. 22, 2004.)

[3]The parties agreed that there were no factual determinations for the circuit court to make.

[4]After oral argument in this case, the DOT filed a motion to dismiss on the ground that an opinion is now moot because of the enactment of recent legislation which allows the DOT to award construction contracts using a design/build procedure. The legislation became effective June 14, 2005. We denied the motion to dismiss. This opinion is not moot as there may be other contracts which were awarded by the DOT prior to the enactment of this legislation.

The DOT contends this case should be dismissed as moot because the construction contracts have been awarded and fully performed. We disagree.

"[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). Additionally, "if a decision by the trial court may affect future events, . . . an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." Id. Clearly, this issue is capable of repetition, yet will usually evade review. Accordingly, despite mootness, we will address the merits.

2) Standing

The circuit court found the issues raised by Sloan were of such public importance that standing should be conferred upon him. The Court of Appeals reversed and held Sloan did not have standing because, even though raising an issue of public importance, he failed to show a nexus between himself and the actions. Sloan contends this was error. We agree.

Under the public importance exception, standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." Baird v. Charleston Cty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). This Court has never held that there must be no other potential plaintiffs with a greater interest in the case or some other nexus, as the respondents now argue.

This Court recently noted that standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005)(holding Sloan had standing to challenge legislative enactment). Additionally, both this Court and the Court of Appeals have found standing in other cases of important public interest without requiring the plaintiff to show he has an interest greater than other potential plaintiffs. See id.; Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004)(holding

standing to challenge governor's commission as officer in Air Force reserve); Sloan v. Greenville Cty., 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct.App. 2003)(holding plaintiff had standing to bring declaratory judgment action alleging county failed to comply with ordinances governing procurement). Furthermore, in an extremely similar case, Sloan v. School Dist. of Greenville Cty., the Court of Appeals held that in addition to Sloan's standing as a taxpayer, Sloan had standing because the "issues involved 'are of such wide concern' that this declaratory judgment action should be decided for future guidance in the expenditure of public funds pursuant to competitive sealed bidding requirements." 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000). None of these cases required the plaintiff show the absence of any other potential plaintiffs with a greater interest or any other nexus. Accordingly, ***despite the mootness in the present case***, we find Sloan has standing ***to raise this issue***.

3) **Merits**

Generally, there are two ways through which a construction contract may be awarded: 1) RFPs or Design/Build process; and 2) Invitation for Bids or Design /Bid/Build process, also referred to as competitive sealed bidding. The Court of Appeals recently addressed the differences between these two processes in Sloan v. Greenville Cty., 356 S.C. 531, 540, 590 S.E.2d 338, 343. In that case, Sloan brought an action against Greenville County alleging it failed to comply with county ordinances governing the procurement of construction services when it awarded contracts for the completion of three public works projects. As explained by the Court of Appeals, contracts awarded by the competitive sealed bidding proceed in multiple stages. Id. An architect or other design professional is hired to prepare initial plans and specifications for the project and after approval of these initial plans, a bid package is developed to publicly solicit bids from contractors to perform the work. The lowest bidder is awarded the project. Id.

However, the RFP or Design/Build procurement method differs from traditional competitive sealed bidding in two important ways. First, under the

Design/Build method, there is only one contract for both the design and construction of the project. Second, the Design/Build method allows for subjective evaluations to be made when awarding the contract. Price does not have be the sole or primary criterion for evaluating the proposals. Id. "It is design-build's lack of objective, bright-line criteria that raises concerns about its use. Critics espouse that design-build vests too much discretion with the governing body regarding when and to whom public contracts are awarded. Because price is not a controlling factor in design-build source selection, the public entity may not always receive the lowest, most competitive price possible." Id. at 541, 590 S.E.2d at 344. Sloan contends that using the Design/Build method also limits the number of potential vendors who can submit proposals because construction companies without design capability cannot make proposals.

The DOT's discretion to use Design/Build method instead of competitive sealed bidding ***was*** limited by S.C. Code § 57-5-1620. This section provides:

> Awards by the department of construction contracts for ten thousand dollars and more shall be made only after the work to be awarded has been advertised for at least two weeks in one or more daily newspapers in this State, but where circumstances warrant, the department may advertise for longer periods of time and in other publication media. Awards of contracts, if made, shall be made in each case to the lowest qualified bidder whose bid shall have been formally submitted in accordance with the requirements of the department. However, in cases of emergencies, as may be determined by the Director of the Department of Transportation, the department, without formalities of advertising, may employ contractors and others to perform construction or repair work or furnish materials and supplies for such construction and repair work, but all such cases of this kind shall be reported in detail and made public at the next succeeding meeting of the commission.

(emphasis added). Sloan contends the respondents violated § 57-5-1620 by awarding the construction contracts to someone other than the lowest qualified bidder (i.e. using the Design/Build process). The respondents contend the DOT had other statutory authority to use the Design/Build procurement methods and, in any event, it does not matter because the DOT awarded the contracts to the lowest bidders complying with § 57-5-1620.

Agreeing with the DOT, the circuit court found it had complied with § 57-5-1620 because each project was ultimately awarded to the lowest bidder. Sloan contends this was error. We agree. The fact that these three contracts were awarded to the lowest bidder is irrelevant. As discussed above, the issue in this specific case is moot because the contracts have been awarded and fully performed. However, as discussed above despite this mootness ***as to these three contracts***, we have determined we should address the issue of whether the DOT ***should have followed § 57-5-1620 in awarding other contracts.***

The DOT cites several statutes which it claims gave it the authority to use the Design/Build process. However, these statutes ***did*** not specifically grant it the authority to use the Design/Build procurement method. Further, ***when these contracts were awarded***, there ***was*** no repeal by implication of § 57-5-1620 nor ***was*** there a conflict between it and the other statutes cited by the respondents. In re Keith Lamont G., 304 S.C. 456, 405 S.E.2d 404 (1991)(holding statutory sections that are part of the same general statutory law must be construed together). While the DOT has determined that the Design/Build method is more desirable, nothing in the statutes it cites requires the DOT to use it. Furthermore, to hold as the respondents argue would render § 57-5-1620 meaningless. Accordingly, we hold the circuit court erred and the DOT ***must have followed § 57-5-1620 in awarding contracts***.

The circuit court judge also determined two of the three actions were barred by laches.[5] The Court of Appeals, after holding Sloan did not have

[5]Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Muir v. C.R.

standing, specifically declined to address the laches issue. On appeal to this Court, Sloan failed to raise the laches issue. The failure to appeal an alternative ground of the judgment below will result in affirmance. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994). See Town of Mt. Pleasant v. Jones, 335 S.C. 295, 516 S.E.2d 468 (Ct.App.1999) (holding an unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct). However, even if laches bars two of Sloan' actions, the third one remains. Accordingly, laches does not prevent this Court from reviewing this issue.

Sloan seeks a remand to the Court of Appeals for a determination regarding the bond issue. This Court entered an order on September 22, 2004, striking from Sloan's brief any argument on the bond issue as procedurally barred because he failed to include the issue in his petitions for rehearing and certiorari citing Rule 226(d)(2), SCACR (only questions raised in Court of Appeals and in petition for rehearing shall be included in petition for writ of certiorari). Accordingly, this issue was not preserved for review. Rule 226(d)(2), SCACR; see also Anonymous v. State Bd. of Med. Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998). We cannot remand an issue not properly before us. Accordingly, we deny Sloan's request for a remand.

REVERSED.

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

Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999). Under laches, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. Id., 519 S.E.2d at 599.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, Sloan lacks standing to bring this action.

As the majority states, this case presents an issue of great public importance. However, "[t]he mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue." Crews v. Beattie, 197 S.C. 32, 49, 14 S.E.2d 351, 358 (1941). I agree with the Court of Appeals that the existence of potential plaintiffs with greater interests, while not determinative in all cases, here weighs heavily against finding standing.

The potential plaintiffs with interests greater than Sloan's are the companies to which the bid was not awarded. Large amounts of money are at stake in bidding competitions, so a losing bidder has a strong incentive to take action if the process appears in violation of the law. That no such bidder is now before the Court does not mean that Sloan automatically has standing. When there exist numerous potential plaintiffs that have been directly and significantly affected, a court should be very reluctant to confer standing upon a member of the general public who can allege no particular harm. Third-party standing is supposed to be the exception, not the rule.

The recent opinions of this Court cited by the majority are distinguishable from the case *sub judice*. Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005); Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004). Neither Wilkins nor Sanford involved potential plaintiffs capable of alleging such direct, distinct harm as that which the losing bidders could allege here.

In my opinion, Sloan lacks standing to bring this action. The Court of Appeals' decision should be affirmed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James F. Johnston, III, Respondent,

v.

South Carolina Department of Labor, Licensing, and Regulation, South Carolina Real Estate Appraisers Board, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26015
Heard June 14, 2005 - Filed July 25, 2005

REVERSED AND REMANDED

Kenneth P. Woodington, of Davidson, Morrison and Lindemann, P.A., of Columbia; and Lynne W. Rogers, of South Carolina Department of Labor, Licensing and Regulation, of Columbia, for petitioner.

John S. Nichols, of Bluestein & Nichols, LLC, of Columbia, for respondent.

JUSTICE MOORE: Following petitioner's (the Board's) issuance of an order fining and suspending respondent, respondent appealed to the Administrative Law Court (ALC). The ALC reversed the Board's order and found the Board's failure to serve written notice within the statutorily-mandated time period divested the Board of subject matter jurisdiction.[1] The circuit court affirmed the ALC and the Court of Appeals affirmed in a 2-1 decision. Johnston v. S.C. Dep't of Labor, Licensing, and Reg., S.C. Real Estate Appraisers Bd., Op. No. 2003-UP-688 (S.C. Ct. App. filed November 24, 2003). We reverse and remand.

FACTS

Respondent was a licensed real estate appraiser. In April 2000, the Board brought charges against respondent alleging he violated the South Carolina Real Estate Appraisers Registration, Licensing and Certification Act, S.C. Code Ann. §§ 40-60-2, *et seq.*, and violated the 1997 Uniform Standards of Professional Appraisal Practice. The allegations stemmed from a complaint regarding a real estate appraisal done by another appraiser, Kyle Smith, which respondent signed as a supervising appraiser.

After an administrative hearing on the matter, the Board found respondent had committed the alleged violations and imposed a one thousand dollar fine and suspended respondent's license for one year. The written decision was issued on October 23, 2000. Pursuant to statute, the Board was required to serve written notice of its decision on respondent within thirty days of issuing a final order. *See* S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004). Two weeks after the Board's written decision was issued, on November 6, 2000, the Board mailed written notice of its decision by certified mail, "Return Receipt Requested," to an address containing an incorrect zip code. An unknown person accepted the letter and signed the name "T. Griffin" to the receipt. This card was returned to the Board with T. Griffin's signature.

[1]Respondent also appealed the Board's order on the merits; however, the ALC did not address those issues after finding the order was a nullity.

On December 7, 2000, respondent learned the Board had posted his name on their website as being under suspension. After respondent's inquiry, a copy of the written decision was given to respondent by a Board employee. While this notice constituted proper service, pursuant to Rule 5(b)(1), SCRCP, on respondent, notice was not served on respondent until two weeks after the statutorily-prescribed time period had expired.

ISSUE

Did the Court of Appeals err by finding the Board's failure to serve notice of its decision within the 30-day time period prescribed in S.C. Code Ann. § 40-60-150(C)(3) (Supp. 2004) deprived the Board of subject matter jurisdiction?

DISCUSSION

The Board argues the Court of Appeals erred by finding that because the Board failed to comply with the time frame required by § 40-60-150(C)(3), its inaction deprived the Board of subject matter jurisdiction.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 442 S.E.2d 177 (1994).

Section 40-60-150(C)(3) provides: "The board shall render a decision and *shall serve* notice, in writing within thirty days, of the board's decision to the . . . appraiser charged. . . ." (Emphasis added). The language of § 40-60-150(C)(3) clearly and unambiguously requires the Board to serve notice of its decision to the appraiser charged within 30 days of its ruling. The term "shall" in a statute means that the action is mandatory. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003); Charleston County Parents for Pub. Schools, Inc. v. Moseley, 343 S.C. 509, 541 S.E.2d 533 (2001).

Although the 30-day time requirement is mandatory, it is not jurisdictional. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, 314 S.C. 235, 442 S.E.2d 598 (1994). The failure to comply with a mandatory time requirement for serving a written decision does not affect the jurisdiction of the Board to determine the real estate appraiser disciplinary matter.[2]

[2]We note that the decisions of South Carolina Dep't of Highways and Pub. Transp. v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986), and Starnes v. South Carolina Dep't of Pub. Safety, 342 S.C. 216, 535 S.E.2d 665 (Ct. App. 2000) are not applicable. Both of these cases involve the failure of the Department to hold a hearing within the statutorily-prescribed time period following the suspension of a driver's license for driving while intoxicated. In these cases, both this Court and the Court of Appeals determined that the failure to hold the requested hearing deprived the Department of jurisdiction to hold the hearing.

Subsequently, in the case of *In re* Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001), *cert. denied*, 535 U.S. 1062 (2002), we held the failure of the State to conduct a trial to determine whether a person is a sexually violent predator or seek a continuance within the statutorily-required sixty days did *not* divest the court of jurisdiction. We stated that Matthews should have filed a motion to dismiss when the State failed to bring the case to trial within the mandatory sixty days; further, because Matthews did not file the motion to dismiss, he had waived his right to challenge the State's failure to comply with the requisite time period.

Matthews is in line with our strict view of subject matter jurisdiction. *See, e.g.*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (finding challenge to sufficiency of indictment does not involve subject matter jurisdiction); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) (clarifying the difference between venue and subject matter jurisdiction). Our decision in this case reflects that strict view.

The failure of the Board to meet the deadline does not render the order a nullity. We conclude the order is valid, but *ineffective*, until it is served upon the appraiser.

There is no indication the Legislature intended for the time limit to prevent the Board from having the ability to discipline an errant appraiser if the Board fails to serve notice of the written decision within the prescribed time period. Instead, the Legislature intended to speed the resolution of appraiser disciplinary cases for the benefit of all parties involved. *See, e.g.*, *In re* Martino, 644 A.2d 546 (N.H. 1994) (thirty-day time limit intended to speed resolution of workers' compensation cases for benefit of all parties involved; statute's purpose would be frustrated if time limitation was interpreted as jurisdictional requirement).

We note that, although the thirty-day time limit is mandatory, the Legislature has not provided how that mandate is to be enforced. There is no language regarding the consequences if the Board misses the deadline for serving written notice of its decision on the appraiser. Accordingly, we will not assume the Legislature intended the Board to lose its power to act for failing to comply with the statutory time limit. *See* Brock v. Pierce County, 476 U.S. 253 (1986) (courts should not assume Congress intended agency to lose its power to act; agency does not lose jurisdiction for failing to comply with statutory time limit unless statute expressly sets time limit *and* specifies a consequence).

CONCLUSION

Because the thirty-day time limit for serving notice of the Board's decision is mandatory, but not jurisdictional, we reverse and remand to the ALC for a ruling on the merits of respondent's claims.[3]

[3]Once respondent brought the failure of service to the Board's attention, the Board promptly gave respondent a copy of the Board's written decision. We find respondent was not prejudiced by the Board's failure to complete service within thirty days of the Board's issuance of its decision.

REVERSED AND REMANDED.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lewie K. Harrell, III, Respondent.

Opinion No. 26016
Submitted June 3, 2005 - Filed July 25, 2005

PUBLIC REPRIMAND

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

Desa Ballard, of West Columbia, for respondent.

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

FACTS

Matter I

Respondent was retained to perform the real estate closing for property to be purchased by his client. The closing was held on July 13, 1999. Respondent did not attend the closing; he sent a paralegal in his place.

Matter II

On or about April 2001, respondent was retained to handle a real estate closing for property to be purchased by his client. The closing took place on May 31, 2001. Respondent was present at the closing. Although the client and the seller had contracted for the purchase of one lot, the closing documents identified two parcels of land to be sold.

On June 1, 2001, respondent filed a Deed to Real Estate with the Newb erry County Clerk of Court. The deed referenced both parcels of land. The deed, dated May 31, 2001, contained the signatures of respondent, his paralegal, and the seller.

Subsequent to the filing of the deed, a dispute arose concerning the sale of both lots. Respondent represents he instructed his paralegal to verify with the client that only one lot was to be purchased. No contemporaneous documentation memorializing this conversation exists. Respondent represents he instructed his paralegal to prepare a corrective deed to remedy the error with the second lot.

On July 9, 2001, a Corrective Deed to real estate was filed by respondent's office. This deed referenced the sale of only one lot. However, attached to the deed was the same signature page executed by the parties on May 31, 2001.

Respondent acknowledges he failed to provide his paralegal with specific instructions how to prepare the new deed and that he failed to properly supervise the paralegal's work. He further acknowledges he failed to review the Corrective Deed before it was filed with the Clerk's Office.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule

407, SCACR: Rule 5.3 (lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure the person's conduct is compatible with the professional obligation of the lawyer); Rule 5.5 (lawyer shall not assist a person in the performance of activity which constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

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

IN STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Marvin P. Jackson, Respondent.

Opinion No. 26017
Submitted June 7, 2005 - Filed July 25, 2005

PUBLIC REPRIMAND

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

Marvin P. Jackson, of Florence, pro se.

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

FACTS

On October 23, 2001, respondent was issued a letter of caution with a finding of minor misconduct by the Commission on Lawyer Conduct. That letter of caution arose from a finding respondent failed to timely pay a court reporter.

On November 15, 2002, respondent received an admonition from the Commission on Lawyer Conduct. That admonition arose from an Agreement for Discipline by Consent in which respondent admitted failing to timely pay invoices to a second court reporter. In the Agreement for Discipline by Consent, respondent admitted his conduct violated the Rules of Professional Conduct.

The complainant in the current matter is also a court reporter. This court reporter was hired by respondent's opposing counsel to attend and transcribe respondent's client's deposition. At respondent's request, the complainant provided him with a copy of the transcript. The complainant sent the transcript to respondent in April 2004, along with her invoice of $126.50. Respondent's client did not waive reading and signing at her deposition. The client verified the accuracy of the transcript in May 2004.

Respondent was provided with a final copy of the transcript in June 2004. The complainant alleges she sent respondent another copy of the invoice with her mailing in June 2004. She further alleges she sent a past due notice in August 2004.

Respondent does not recall receiving the past due notice. He does admit receiving a letter demanding payment in October 2004. Respondent paid the complainant's invoice on November 17, 2004, after receiving notice of her complaint.

LAW

Respondent acknowledges that failure to timely pay a court reporter constitutes grounds for attorney discipline. See In the Matter of O'Day, 351 S.C. 221, 569 S.E.2d 337 (2002); In the Matter of Gaines, 348 S.C. 208, 558 S.E.2d 577 (2002); In the Matter of Thornton, 342 S.C. 440, 538 S.E.2d 4 (2000); In the Matter of Ballard, 318 S.C. 507, 458 S.E.2d 545 (1995). Respondent admits that by his misconduct he has violated the Rules of Professional Conduct, Rule 407, SCACR. See Rule 1.15 (lawyer shall promptly deliver funds to

which a third party is entitled) and Rule 8.4 (a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct) of Rule 407, SCACR. In addition, respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to bring legal profession into disrepute).

CONCLUSION

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

PUBLIC REPRIMAND.

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

IN STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jerry M. Screen, Respondent.

Opinion No. 26018
Submitted June 7, 2005 - Filed July 25, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Office of Disciplinary Counsel.

I.S. Leevy Johnson, of Columbia, for respondent.

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

FACTS

Matter I

Respondent did not timely issue a refund of attorney's fees which had been award by the Fee Disputes Board to respondent's former client.

Matter II

Respondent's client gave him two checks drawn on the account of third parties and made payable to respondent. Respondent's client stated the funds were to cover fees owed by one of the third parties to the client. The memorandum line on one check, however, referred to a matter unrelated to the client or his business.

At the request of his client, respondent deposited the checks into his escrow account. In accordance with the client's instructions, respondent disbursed the funds to his client and his client's company.

The third parties filed a complaint with ODC. They claimed the funds were to be used for a different legal matter for which respondent was to act as their attorney. Nevertheless, the third parties had not communicated with respondent and had not obtained his agreement to represent them.

Matter III

Respondent's client was stationed out of the country on military duty. Although he tried to contact the client, respondent admits he did not take sufficient steps to reach the client. As a result of respondent's failure to communicate with his client, the client did not attend a hearing in his divorce case. Failure to attend the hearing resulted in adverse consequences to the client. Respondent represents he refunded his fees to the client.

Matter IV

Respondent's client's case was scheduled for trial. Respondent failed to appear for jury selection and the jury trial. Respondent had a trial in another county at the time of the jury selection, but acknowledges he should have requested a continuance. Respondent admits he failed to adequately communicate with this client.

Matter V

This matter involves two complaints filed against respondent.[1] Respondent failed to adequately communicate with his client's parents about the status of her criminal case. He also failed to serve and file a notice of appeal from a client's conviction and failed to continue to represent the client until relieved by the Court. In one matter, respondent failed to respond in a timely and adequate manner to inquiries from ODC.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (lawyer shall keep client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.5(a) (lawyer's fee shall be reasonable); Rule 1.15(b) (lawyer shall promptly notify third persons of receipt of funds in which the third persons have an interest); Rule 3.4(c) (lawyer shall not disobey obligation of a tribunal); and Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct). Respondent further admits his conduct violated Rule 417(a)(4), SCACR (lawyer shall maintain records of accountings which show disbursements of

[1] It is unclear whether these complaints were filed by the same client or by different clients.

funds to third persons). Respondent acknowledges his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically 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).

CONCLUSION

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT- North America, Appellant.

Opinion No. 4015
Heard June 16, 2005 – Filed July 18, 2005

AFFIRMED

Appeal From Horry County
John L. Breeden, Circuit Court Judge

R. Wayne Byrd, Wilson S. Sheldon, and R. Heath Atkinson, all of Florence and Ronald E. Boston, of Columbia, for Appellant.

James B. Van Osdell, Charles B. Jordan, Jr., and Cynthia Graham Howe, all of Myrtle Beach, James R. Gilreath, of Greenville and Scott M. Mongillo, of Summerville, for Respondent.

ANDERSON, J.: The Horry County Clerk of Court issued a Transcript of Judgment, and subsequently an Amended Transcript of Judgment, in furtherance of Collins Music Co., Inc.'s (Collins) right to enforce in Nevada a judgment obtained against IGT. IGT appeals from the trial court's order denying its Rule 60(a), SCRCP motion to vacate the Amended Transcript of Judgment on the ground it improperly provides for post-judgment interest at the rate of fourteen percent (14%). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Collins originally brought suit in 1994 against IGT asserting multiple causes of action arising from a contractual dispute. A jury returned a verdict of $15,000,000 in actual damages in favor of Collins. This Court dismissed IGT's appeal as untimely. See Collins Music Co., Inc. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002).

Collins sought to enforce the judgment in Nevada pursuant to the Uniform Enforcement of Foreign Judgments Act, Nev. Rev. Stat. § 17.330-17.400. On January 14, 2002, the Horry County Clerk of Court issued a Transcript of Judgment. It provided for interest accruing at the rate of twelve percent (12%) per year. Thereafter, upon request by Collins, the Clerk of Court issued an Amended Transcript of Judgment. The amended transcript provided:

> Interest accrues on South Carolina judgments (from causes of action arising prior [sic] January 1, 2001) at the rate of **14% per annum**. S.C. Code Ann. § 34-31-20(B) (2002 Cum. Supp.) **This cause of action was filed in 1994 so the 14% interest rate applies.**

(Emphasis in original.)

Collins filed the Amended Transcript of Judgment with the Nevada court on August 14, 2003, along with a supporting affidavit from Collins' counsel. A copy of the amended transcript was sent to IGT's Nevada counsel.

In September 2003, IGT filed and served its Rule 60(a), SCRCP motion seeking an order withdrawing and vacating the Amended Transcript of Judgment. The court denied the motion on February 20, 2004, and IGT appealed on March 18, 2004.

On March 24, 2004, IGT filed its motion for Leave to Deposit Money with Court in the Nevada action. IGT deposited the money with the Nevada court on April 2, 2004, and the Nevada court issued an Order for Disbursement of Funds in Satisfaction of Judgment on April 5. IGT did not appeal this order, and the funds were subsequently paid to Collins.

LAW/ANALYSIS

IGT contends the trial court erred in failing to vacate and withdraw the Amended Transcript of Judgment. IGT asserts section 34-31-20 of the South Carolina Code, as amended by 2000 Act No. 344, does not allow for the collection of interest where a cause of action arose prior to January 2001, but final judgment was not rendered until after January 2001. In the alternative, IGT maintains the appropriate statutory interest is twelve percent (12%) and not fourteen percent (14%). We disagree.

I. Mootness

First, Collins contends the issue is moot and not available for review on appeal because IGT made the payment to the Nevada court prior to this appeal. We disagree.

A matter becomes moot "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual

relief." Curtis v. State, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (alteration in original) (quoting Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)), cert. denied, 535 U.S. 926 (2002). In civil cases, there are three exceptions to the mootness doctrine: (1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review, (2) an appellate court can decide cases of urgency to establish a rule for future conduct in matters of important public interest, and (3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction. Curtis at 568, 549 S.E.2d at 596.

In the instant case, the third exception to the mootness doctrine is applicable. If IGT failed to make payment, the amount of interest charged against IGT would continue to increase. It would be nonsensical to require IGT to incur an ever-increasing amount of post-judgment interest in order to bring an appeal. As a result, we find this Court retains jurisdiction to hear this case and to decide the issue regarding post-judgment interest.

II. Statutory Construction

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct. App. 2001). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # jm2uf1132n0294812), 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court

has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The 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. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "Our goal in construing statutes is to prevent an interpretation that would lead to a result that is plainly absurd." In re Timothy C.M., 348 S.C. 653, 655-56, 560 S.E.2d 452, 453 (Ct. App. 2002) (citing Florence County v. Moore, 344 S.C. 596, 601, 545 S.E.2d 507, 509 (2001)); Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Lic., & Reg., 337 S.C. 476, 492, 523 S.E.2d 795, 803 (Ct. App. 1999).

The legislature has sought to ensure amended statutes are not read in a way that leads to an absurd result. Section 2-7-50 of the South Carolina Code provides:

> Whenever, in any act, reference is made to this Code for the purpose of altering, amending, adding to or repealing any part thereof, such reference, alteration, amendment, addition or repeal shall be construed to apply to the original law purporting to be revised in such revision as fully and specifically as though such original laws were mentioned in the act containing such reference, alteration, amendment, addition or repeal.

S.C. Code Ann. § 2-7-50 (1976).

A brief but relevant look at the history of the right to interest on judgments is edifying for the instant case.

> According to the common law the execution could only issue for the precise sum adjudged to be due to the plaintiff, however long the enforcement of it might be postponed, although in a new action he might recover the interest. The act of 1815 was intended to remedy this evil; it provides, "that in all judgments and decrees of the courts of law and equity hereafter to be obtained and rendered on any judgment, bond, bill or promissory

> note, or other cause of action bearing interest, the principal sum of the judgment, bond" &c. "shall continue to bear the same interest as the original cause of action did bear before the entry of judgment thereon," and that execution should issue therefor.

Richardson v. Richardson, 16 S.C.Eq. (McMul.Eq.) 103 (1841); see also Sears v. Fowler, 293 S.C. 43, 45, 358 S.E.2d 574, 575 (1987) (noting that at common law, judgments did not bear interest) (citing Annot., 15 A.L.R.3d 411, 414 (1967)). Interest is generally allowable pursuant to statutory enactments. Sears, 293 S.C. at 45, 358 S.E.2d at 575.

Section 34-31-20(B)'s predecessor provided: "all money decrees and judgments of courts enrolled or entered . . . shall draw interest according to law, the legal interest shall be at the rate of six percent per annum." S.C. Code § 8-2 (1962). The six percent (6%) rate was carried over into the 1976 Code, and in 1979, the rate was changed to eight and three-fourths percent (8.75%). See 1979 Act No. 159. Effective June 9, 1982, the rate was increased to fourteen percent (14%). 1982 Act No. 445; see also Southeastern Freight Lines v. Michelin Tire Corp., 279 S.C. 174, 175, 303 S.E.2d 860, 861 (1983). The 1982 Act included a statement regarding the effective date: "This act shall take effect upon approval by the Governor." 1982 Act No. 445, § 2.

In Southeastern Freight Lines, the South Carolina Supreme Court considered the impact of the 1982 Act on a judgment entered before the effective date, but not satisfied until after the date of the changed interest rate. Southeastern Freight Lines v. Michelin Tire Corp., 279 S.C. 174, 175, 303 S.E.2d 860, 861 (1983). Finding the change in interest rate applied to all judgments, even those entered before the effective date but not yet satisfied, the court determined interest would be charged at eight and three-fourths percent (8.75%) before June 9 and fourteen percent (14%) after June 9, 1982. Id. at 175-76, 303 S.E.2d at 861-62.

At issue in the instant case are the changes to the interest rate made effective by 2000 Act No. 344. Section 34-31-20(B), prior to January 2001, provided: "All money decrees and judgments of courts enrolled or entered

shall draw interest according to law. The legal interest shall be at the rate of fourteen percent per annum." S.C. Code Ann. § 34-31-20(B) (Supp. 1999). Between January 1, 2001 and March 21, 2005, section 34-31-20(B) read: "All money decrees and judgments of courts enrolled or entered shall draw interest according to law. The legal interest is at the rate of twelve percent a year." S.C. Code Ann. § 34-31-20(B) (Supp. 2004). Indubitably, the only change to the law was the certain rate allowed for interest.

The 2000 Act provided the following effective date: "This act takes effect January 1, 2001, and applies with respect to interest calculated pursuant to causes of action arising or accruing on or after that date." 2000 Act No. 344, § 4. The question before this Court is whether this provision requires a finding that a litigant in a case in which the cause of action arose before the effective date of January 1, 2001, but where judgment was not rendered until after that date, must forfeit the right to post-judgment interest.

Reading section 2-7-50 in conjunction with the 2000 Act and section 34-31-20, it is apodictic that the legislature intended there to be continuity in the charge of interest to judgments. Nothing in the 2000 Act indicates the legislature sought to create an aperture in coverage, thus eliminating from entitlement to interest litigants in cases accruing before January 1, 2001 but pending final judgment until after January 1, 2001. For this Court to construe the effective date section of the 2000 Act as eliminating interest based solely on what date a final judgment is rendered would constitute an absurd result.

Collins' cause of action arose prior to January 1, 2001. Under the clear, unambiguous wording of the 2000 Act's effective date section, the new interest rate does not apply. The version of section 34-31-20(B) that existed prior to the 2000 Act remained in effect and was not repealed by the passage of the 2000 amendment. We refuse to arbitrarily deny interest to Collins because of the date its judgment was entered. Concomitantly, Collins is entitled to receive interest of its judgment against IGT.

In the instant case, unlike the Southeastern Freight Lines case, the 2000 Act included a statement denoting which judgments were affected by the new interest rate. The effective date provision clearly indicates it applies only to

causes of action arising or accruing on or after January 1, 2001. Thus, the fourteen percent (14%) rate under the pre-2000 Act statute applies to Collins' judgment, and the amount does not change as a result of the 2000 Act.

Finally, we note that in the 2005 session, the legislature again amended section 34-31-20(B). However, the 2005 amendment has no bearing on the disposition of this case. Section 34-31-20(B) now reads:

> A money decree or judgment of a court enrolled or entered must draw interest according to law. The legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.

2005 Act No. 27.

CONCLUSION

We rule the fourteen percent (14%) rate applies to all causes of action arising between June 9, 1982 and December 31, 2000, whether or not a final judgment was entered prior to January 1, 2001. The order of the trial court is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

University of Southern California, **Appellant,**

v.

Robert J. Moran, Jr., Personal Representative of the Estate of Alexia Lee Anderson, and Trustee of the Anderson Revocable Trust of 1990, dated the 15th day of September, 1991, Louis A. Chubiz and Michael J. Chubiz, **Respondents.**

In Re:

Louis A. Chubiz and Michael J. Chubiz, **Petitioners,**

v.

Robert J. Moran, Jr., Personal Representative of the Estate of Alexia Lee Anderson, and Trustee of the Anderson Revocable Trust of 1990, dated the 15th day of September, 1991, **Respondent.**

Appeal From Georgetown County
James E. Lockemy, Circuit Court Judge

Opinion No. 4016
Heard June 15, 2005 – Filed July 18, 2005

AFFIRMED

Robert M. Kunes, of Charleston, for Appellant.

James B. Drennan, III, of Spartanburg, and Ronald Stewart Gaynor, of Pawley's Island, for Respondents.

ANDERSON, J.: Robert Moran, as trustee of the Anderson Trust, entered into a compromise agreement with Louis and Michael Chubiz, which was approved by the probate court. On appeal from the probate court, the circuit court affirmed. The University of Southern California, as a beneficiary of the Anderson Trust, appeals the order of the circuit court. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

As part of their estate plan, Alexia Anderson and her husband, Thomas Anderson, executed pour-over wills and created a joint revocable trust, referred to by the parties as the "Anderson Trust." The Andersons left their entire estates, other than tangible personal property, to the Anderson Trust. The provisions of the trust agreement provided upon the death of the first

spouse, all property would remain in trust for the benefit of the surviving spouse. Upon the death of the surviving spouse, the trustee would make nine cash distributions from the trust—$50,000 to be held in trust for the care of the couple's dog and $10,000 to each of their eight named nieces and nephews. Under the trust agreement, the remaining amount in the trust was to be distributed to the University of Southern California (the University).

Mrs. Anderson died shortly after her husband's death, leaving approximately $4,436,000 to be distributed through the trust. Robert Moran, an attorney, was appointed as the personal representative of both estates and the successor trustee of the Anderson Trust. After his appointment, Moran flew to Minnesota for the Andersons' memorial service. While in Minnesota, Moran informed the Andersons' nieces and nephews, including Louis Chubiz and Michael Chubiz, that they would receive $10,000 distributions from the Anderson Trust.

The Chubizes threatened to contest Mrs. Anderson's will and the Anderson Trust on the ground that the documents were the product of undue influence. Based on this threat, Moran and the Chubizes negotiated a compromise agreement in which Mrs. Anderson's estate agreed to pay both of the Chubizes $175,000. Moran signed the agreement in his capacity as trustee of the Anderson Trust, but refused to sign it as personal representative of Mrs. Anderson's estate unless the probate court approved the agreement. The Chubizes filed a petition in the probate court seeking approval of the compromise agreement pursuant to sections 62-3-1101 and -1102 of the South Carolina Code (1987 & Supp. 2004). The University received notice of the proposed compromise agreement and filed a motion opposing it.

The probate court heard the University's motion and issued an order finding the requirements of section 62-3-1102 had been met. The probate court ruled: (1) the agreement was the result of a good-faith controversy; and (2) Moran as trustee, not the University, was the holder of the beneficial interest affected by the compromise agreement.

The University appealed the probate court's order to the circuit court, arguing the probate court erred in finding both a good-faith controversy

existed and the University was not a holder of a beneficial interest. The University maintained its signature was required for judicial approval of the compromise agreement. Following a hearing, the circuit court issued an order affirming the probate court. The University appeals only the issue of whether it was a holder of a beneficial interest.

STANDARD OF REVIEW

"Appeal from the probate court is governed by the provisions of the Probate Code." In re Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993). The Probate Code requires appeals from the probate court be to the circuit court. S.C. Code Ann. § 62-1-308 (Supp. 2004). The Probate Code further instructs the circuit court to "hear and determine the appeal according to the rules of law." S.C. Code Ann. § 62-1-308(d) (Supp. 2004). "As used in this statute, the phrase 'according to the rules of law' means according to the rules governing appeals." In re Howard, 315 S.C. at 360, 434 S.E.2d at 257. "[I]f there is neither a statute nor a rule of court expressly prescribing a different standard of review, the circuit court must apply the same standard that [the appellate court] would apply were the appeal taken directly to either [the supreme court or court of appeals]." Id. at 361, 434 S.E.2d at 257.

The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity. In re Estate of Hyman, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004); In re Thames, 344 S.C. 564, 568, 544 S.E.2d 854, 856 (Ct. App. 2001). An issue regarding statutory interpretation is a question of law. Wimberly v. Barr, 359 S.C. 414, 597 S.E.2d 853 (Ct. App. 2004). Thus, "the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." In re Howard, 315 S.C. at 361, 434 S.E.2d at 257; see also In re Estate of Pallister, 363 S.C. 437, ___, 611 S.E.2d 250, 256 (2005) ("If the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them."). The standard of review at law is the same whether the facts are found by a jury or

the judge sitting without a jury. In re Howard, 315 S.C. at 361, 434 S.E.2d at 257.

LAW/ANALYSIS

The University argues the probate court and the circuit court erred in finding the compromise agreement entered into by Moran, as trustee, and the Chubizes met the requirements of sections 62-3-1101 and -1102 of the South Carolina Code. Specifically, the University contends it held a beneficial interest in Mrs. Anderson's estate. Therefore, the University asserts its signature was necessary to meet the requirements set forth in section 62-3-1102 for court approval of a compromise of a controversy regarding a decedent's estate. We disagree.

I. Rules of Statutory Construction

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, Op. No. 3996 (S.C. Ct. App. filed June 6, 2005) (Shearouse Adv. Sh. No. 24 at 42); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002); Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998).

The legislature's intent should be ascertained primarily from the plain language of the statute. Bass v. Isochem, Op. No. 3996 (S.C. Ct. App. filed June 6, 2005) (Shearouse Adv. Sh. No. 24 at 42); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The language must also be read in a sense which harmonizes with its subject matter and accords with its general

purpose. Mun. Ass'n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

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

Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, ___, 611 S.E.2d 297, 303 (Ct. App. 2005); see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998); Brassell, 326 S.C. at 561, 486 S.E.2d at 495. In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002); Adams v. Texfi Indus., 320 S.C. 213, 464 S.E.2d 109 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494.

When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000); Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); see also Santee Cooper Resort v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation."). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." Hinton v. S.C. Dep't of Prob., Parole and Pardon Servs., 357 S.C. 327, 332-33, 592 S.E.2d 335, 338 (Ct. App. 2004), cert. dismissed (June 6, 2005) (citing S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)).

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co., 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579

S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992).

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Liberty Mut. Ins. Co., 336 S.C. at ___, 611 S.E.2d at 302; see also Mid-State Auto Auction v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996) (stating that in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole).

II. Sections 62-3-1101 and 62-3-1102

Section 62-3-1101 of the South Carolina Code, addressing court approval of agreements involving estates, provides:

> A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of a probated will, the rights or interests in the estate of the decedent, of a successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. A compromise approved pursuant to this section

is not a settlement of a claim subject to the provisions of Section 62-5-433.

S.C. Code Ann. § 62-3-1101 (Supp. 2004) (emphasis added). Section 62-3-1102 of the South Carolina Code states:

> The procedure for securing court approval of a compromise is as follows:
>
> > (1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.
> >
> > (2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.
> >
> > (3) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their

> parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

S.C. Code Ann. § 62-3-1102 (1987) (emphasis added). The Reporter's Comments to this section provide: "The agreement must be signed by all persons having a beneficial interest in or claim against the estate, whose interest or claim is affected by the agreement. If an interested party is a minor, the agreement may be executed on his behalf by his parent." S.C. Code Ann. § 62-3-1102 Reporter's Comments (1987) (emphasis added).

Section 62-3-1102 allows competent persons having beneficial interests to enter into a written, court-approved settlement. The settlement, or compromise, is valid and binding where the court finds (1) the controversy is in good faith, and (2) the agreement's effect is just and reasonable. S.C. Code Ann. § 62-3-1102(3) (1987). The issue in the instant case does not pertain to these two statutory requirements, but rather to the prerequisite mandate that the written agreement be executed by all competent persons having a beneficial interest.

The term "beneficial interest" is not defined in the Probate Code. Section 62-1-201(2) defines "beneficiary" as follows: "'Beneficiary', as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust." This definition, as indicated, only defines the term to the extent it relates to trust beneficiaries and does not address "beneficiaries" of a decedent's estate.

In the context of section 62-3-1102, "competent persons . . . having beneficial interests" refers to a beneficial interest in the decedent's estate. Therefore, the central question here is not who holds the beneficial interest in

the Anderson Trust, but who has the beneficial interest in Mrs. Anderson's estate.

Several provisions of the Probate Code support the Chubizes' reading of section 62-3-1102 that the trust holds the beneficial interest in Mrs. Anderson's estate. Section 62-1-201(8) defines "devisee" as "any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees." S.C. Code Ann. § 62-1-201(8) (1987) (emphasis added). Section 62-1-403 provides that, absent a conflict of interest, "orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties[.]" S.C. Code Ann. § 62-1-403(2)(ii) (1987).

That the trust is an entity and not an individual is of no concern as the Probate Code defines "person" as "an individual, a corporation, an organization or other legal entity." S.C. Code Ann. § 62-1-201(29) (1987). Moran signed the compromise agreement in his capacity as trustee of the Anderson Trust.

Policy considerations weigh in favor of ruling the trust is the person having the beneficial interest in Mrs. Anderson's estate. "[F]amily settlements are favored by the courts[.]" Dibble v. Dibble, 248 S.C. 165, 171, 149 S.E.2d 355, 358 (1966). Our reading of section 62-3-1102 allows the trustee to resolve a dispute and thereby avoid a will contest that would significantly alter the deceased's stated intent. Under the University's interpretation of section 62-3-1102, one of many trust beneficiaries could exercise veto power over an attempted compromise under section 62-3-1102. By failing to consent as a signatory of a settlement, trust beneficiaries would encourage litigation rather than settlement. The better approach is to vest the trustee, who has a fiduciary obligation to administer the trust in the best interests of the trust beneficiaries, with the power to enter into the compromise on behalf of the trust.

Indeed, both the Anderson Trust and the Probate Code give the trustee the power to enter into settlements. The trust agreement enumerates various powers of the trustee. Included in these powers is: (1) the power to "abandon, compromise, arbitrate or otherwise deal with and settle claims in favor of or against our estate and any trust created hereunder as may be deemed advisable by our trustee" and (2) the discretionary power to "do all such acts and exercise all such rights and privileges, although not specifically listed hereunder, which our trustee deems necessary or advisable for the proper and advantageous management, investment and distribution of the trust created hereunder, and to make, sign and deliver any instruments or agreements binding this trust."

In addition to the powers specified in the trust agreement, the agreement provides the trustee "shall have all the powers provided in the statutes." Section 62-7-704(c)(19) of the South Carolina Probate Code (Supp. 2004), imparts powers to a trustee, including the power "to pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise[.]" Thus, the trust agreement and the statutory authority give Moran the power to compromise a claim on behalf of the trust.

Finally, the University, as a beneficiary under the trust, does have the ability to influence the court's decision whether to approve the compromise agreement. Section 62-1-201(20) of the Probate Code provides the following definition for "interested person:"

> "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

S.C. Code Ann. § 62-1-201(20) (1987).

Under this statute, we find the University is an interested person. Section 62-3-1102(3) of the Probate Code states interested persons are entitled to receive notification prior to a court's decision to approve a compromise agreement. The University did in fact receive such notice in this case. Upon receipt of notification, the University objected to the compromise agreement and was given an opportunity to voice its objection to the probate court prior to the court's decision on whether or not to approve the compromise agreement. Section 62-3-1102 of the South Carolina Probate Code, however, does not require interested persons execute the compromise agreement in order for a court to approve the agreement. Thus, the University, as an interested party, is entitled to receive notice of a proposed compromise, but its signature is not required for court approval of the agreement.

CONCLUSION

We hold the Anderson Trust is the beneficiary of Mrs. Anderson's estate, and Moran, as trustee, is the person required to execute the compromise agreement. Because only the trust, as holder of the beneficial interest, must sign the compromise agreement, the circuit court did not err in concluding the requirements of section 62-3-1102 were met. Section 62-3-1102(3) mandates that an interested person receive notice of a proposed compromise, and allows the interested person to participate in the proceedings, including objecting to any compromise agreement. Accordingly, the order of the circuit court is

AFFIRMED.

STILWELL and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Primerica Life Insurance Company, Respondent,

v.

Ray K. Ingram, Sr., Appellant.

Appeal From Sumter County
Clifton Newman, Circuit Court Judge

Opinion No. 4017
Heard June 16, 2005 – Filed July 18, 2005

REVERSED AND REMANDED

Michael M. Jordan, of Sumter, for Appellant.

Robert H. Hood, Mary Agnes Hood Craig, D. Nathan Hughey, and Deborah H. Sheffield, all of Charleston, for Respondent.

STILWELL, J.: Primerica Insurance Company, Inc. filed this action against Ray K. Ingram, Sr. seeking rescission of a life insurance policy and policy rider. Ingram counterclaimed for breach of contract and bad faith

refusal to pay insurance proceeds. The trial court granted summary judgment to Primerica. Ingram appeals. We reverse and remand.

FACTS

Ray Ingram and his wife, Rachel, applied for and procured life insurance on each of their lives: a policy on Ingram's life in the amount of $223,000, and a policy rider on Rachel's life providing for a $104,000 death benefit. At the time of the application, Rachel had been diagnosed with and was being treated for cardiomyopathy. Less than two months after the policy and rider were issued, Rachel died from cardiac arrhythmia associated with cardiomyopathy. Ingram made a claim under the policy rider for the death benefit. Primerica denied Ingram's claim based on the failure to disclose Rachel's diagnosis and treatment for a heart condition.

Ingram and Rachel met with two agents of Primerica Life Insurance Company to complete the application. One of the agents filled out the application while questioning the Ingrams. The application included the following instruction:

> The following questions must be answered for Primary, and if applicable, Spouse and Child(ren):
>
> In the past 10 years have you been treated for or had any indication of:
>
> 2A. Chest pain, angina, heart murmur, heart attack, stroke, or other disorder of the heart or blood vessels?

To the right of the question, the application provided "yes" and "no" boxes for the applicant to check under two different columns—one labeled "Primary" and the other labeled "Spouse and/or Child." On the application, the "yes" box was checked under both the "Primary" column and the "Spouse and/or Child" column.

The application also requested "Details of Medical Questions 1 through 7." Under the details section, the application indicated Ingram suffered from chest pain and had been treated at Tuomey Hospital. In addition, the application indicated Aaron, the Ingrams' son, was born with a heart murmur. There were no details provided regarding Rachel.

Another section of the application contained the following questions:

> In the past 3 years other than as answered above, have you:
>
> Had any checkup or examination or been a patient in a hospital, clinic or other medial facility?
>
> Had any electrocardiogram, x-ray or diagnostic test?
>
> Been advised to have any diagnostic test, hospitalization or surgery which has not yet been done?

Again, to the right of each question, the application contained "yes" and "no" boxes under the headings of Primary and Spouse and/or Child. All three boxes under Primary were checked yes and all three boxes under Spouse and/or Child were checked no. The application also provided a space below for "Details of Medical Questions 8 through 10." Information regarding various procedures performed on Ingram's heart was provided. No information on Rachel was provided.

Ingram does not dispute the existence of his wife's heart condition at the time the couple executed the application. Nor does he dispute the absence of this information in the application. Additionally, Ingram admits that if this information had been disclosed, it would have been material to the risk to the insurer. However, Ingram argues he and Rachel disclosed this information to Primerica's agents, and the agents failed to include it in the application. Thus, he contends he did not intend to defraud Primerica.

Ingram testified in his deposition:

> I brought up the heart condition, the micro, whatever the situation is. I still can't pronounce it. But I think she told them about, also, she had, in the past, [been] diagnosed with a lump in her breast.
>
> * * *
>
> We went so far dealing with the heart micro prolapse, or whatever the name of the thing is, until she got up to went to try - - she went and got her medicine bottle, the pills that she was taking.

In addition, Ingram testified his wife told the agents about her dizziness, the blurring in her eyes, and the heaviness she felt in her chest. Ingram stated his wife also told the agents about her recent doctors' appointments and her doctor's name. Furthermore, Ingram and Rachel signed authorizations to obtain medical records.

The agent who took the information from the Ingrams testified in his deposition that Rachel did not inform him of her heart condition or related symptoms or treatment. However, he recalled Rachel bringing a pill bottle or prescription bottle into the room.

Ingram reviewed the application after the agents filled it in. In his testimony regarding whether he actually read the application prior to signing it, Ingram stated he did not read the application word-for-word. Rather, he "looked at the 'yes' or 'no' answers and kind of like just glanced across everything else and then we signed it." In regard to information about his wife on the application, Ingram testified:

> That particular part, I reviewed and when I reviewed, I reviewed the question and when I saw the 'yes' checked where it asked the question on 2A, I think it was, about the chest pains and whatever and the heart

> murmur and whatnot, when I looked under for spouse and/or children[,] when it [sic] saw it checked 'yes' I didn't observe the documentation that [the agent] wrote down on that. I was comfortable when I saw the 'yes' checked and that at that moment that we disclosed everything we needed to.

Primerica brought this action against Ingram seeking to have the policy and rider rescinded. Ingram answered and counterclaimed, alleging breach of contract and bad faith by Primerica. Primerica filed a motion for summary judgment on Ingram's bad faith claim and on its rescission claim. The trial court, in two separate orders, granted both of Primerica's motions. Ingram appeals the trial court's order awarding summary judgment on the rescission claim.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." White v. J.M. Brown Amusement Co., 360 S.C. 366, 370, 601 S.E.2d 342, 344 (2004). Pursuant to Rule 56(c), SCRCP, summary judgment is appropriate when no genuine issue of material fact exists entitling the moving party to judgment as a matter of law. Id. In determining whether a genuine issue of material fact exists, the trial court must view all evidence and inferences in the light most favorable to the non-moving party. Id. at 370-71, 601 S.E.2d at 344.

LAW/ANALYSIS

Ingram argues the trial court erred in granting Primerica summary judgment on its rescission claim because the record contains evidence creating a genuine issue of material fact as to whether he and Rachel made a false statement with the intent to defraud Primerica. We agree.

In order to rescind an insurance policy on the ground of fraudulent misrepresentation, the insurer must show by clear and convincing evidence:

(1) the statement was false; (2) the falsity was known to the applicant; (3) the statement was material to the risk; (4) **the statement was made with the intent to defraud the insurer**; and (5) the insurer relied on the statement when issuing the policy. Strickland v. Prudential Ins. Co. of Am., 278 S.C. 82, 86-87, 292 S.E.2d 301, 304 (1982).

We find a genuine issue exists as to the Ingrams' intent to defraud Primerica. In Lanham v. Blue Cross & Blue Shield of South Carolina, Inc., 349 S.C. 356, 563 S.E.2d 331 (2002), the South Carolina Supreme Court reviewed a trial court's grant of summary judgment in favor of an insurer on a claim for rescission. The court in Lanham considered the issue of whether a material question of fact existed as to the insured's intent to defraud the insurer. Id. The court determined: "Viewing the evidence in the light most favorable to Lanham, it cannot be said, as a matter of law, that he made a false statement in his application with the actual intent to deceive." Id. at 365, 563 S.E.2d at 335. The court stated that "whether [Lanham] made a false representation with the actual intent to deceive presents a jury question." Id.

Viewing the evidence in the light most favorable to Ingram, we likewise find a question of fact exists in this case as to whether Ingram and Rachel intended to defraud Primerica. Thus, the trial court erred in granting Primerica summary judgment on its claim for rescission. Accordingly, the decision of the trial court is

REVERSED and REMANDED.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wellman, Inc., a Delaware Corporation,Plaintiff,

v.

Square D Company, a Delaware Corporation, R. D. H. Consultants, Inc., a North Carolina Corporation, Cameron & Barkley Company, a Delaware Corporation, Zimmer A.G. a division of MG Technologies AG, a German Corporation, individually and as co-venturer in the Zimmer/Raytheon Consortium, Fluor Enterprises, Inc., a Calfornia Corporation, and Fluor Facility & Plant Services, Inc., a South Carolina Corporation and Washington Group International, Inc., Ohio Corporation, successor to Raytheon Engineers & Constructors, Inc., Defendants,

of whom

Washington Group International, Inc., an Ohio Corporation, successor to Raytheon Engineers & Constructors, Inc., and Zimmer/Raytheon Consortium are the Appellants,

and

Wellman, Inc., a Delaware Corporation, and Zimmer A.G., a Division of MG Technologies, a German Corporation, Individually are the Respondents.

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

Opinion No. 4018
Heard May 11, 2005 – Filed July 25, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Henry P. Wall and Wesley D. Peel, both of Columbia, for Appellants.

Alan M. Warshauer, of New York; Elizabeth Van Doren Gray, A. Jackson Barnes, and J. Calhoun, all of Columbia; Mark W. Buyck, Jr. and Marian H. Lee,

both of Florence; Thomas A. McDonald, Mark D. Howard, and David S. Allen, all of Chicago; and Thomas A. Smith, of Chicago, for Respondents.

HUFF, J.: Washington Group International, Inc., the successor to Raytheon Engineers and Constructors, Inc. (Raytheon/Washington), appeals the trial court's denial of its motion to compel arbitration on behalf of itself and the Zimmer/Raytheon Consortium. We affirm in part and reverse in part.

FACTS

Raytheon Engineers and Constructors, Inc. and Zimmer AG entered into a written agreement to form Zimmer/Raytheon Consortium for the purpose of constructing a manufacturing facility for Wellman, Inc. The Consortium agreement provides: "Zimmer shall act as the CONSORTUIM LEADER for the term of this AGREEMENT." In addition, the agreement contains the following arbitration provision:

> 10.9.1 Claims between the MEMBERS regarding their respective rights and obligations under this AGREEMENT and/or under the CONTRACT shall be first addressed by the Management Committee. If the Management Committee is unable to unanimously settle such claims within thirty (30) days, its settlement shall be determined according to Articles 10.9.2 through 10.9.4 below.
>
> 10.9.2 Not later than ninety (90) days after the end of said thirty day period either party may appeal its claim to non-binding mediation to the American Arbitration Association to be held in the City of

> Columbia, South Carolina, under its then effective rules and regulations.
>
> 10.9.3 Within thirty (30) days of the MEMBER'S failure to reach agreement under such mediation and declaring an impasse or the conclusion of the mediation, either MEMBER may submit the claim to binding arbitration in accordance with the South Carolina Uniform Arbitration Act (S.C. Code § 15-48-10 et seq.) to be held in the City of Columbia, South Carolina.
>
> . . . .
>
> 10.9.4 If and only if after all said measures have been undertaken by either MEMBER submit the claim to a Court of Competent Jurisdiction and then only to enforce such decision on its own terms or have it voided as arbitrary and capricious.

The agreement also contains an ipso facto provision stating, among other things, if a member of the Consortium becomes insolvent and commences a bankruptcy proceeding, the "Insolvent MEMBER (and/or receiver, trustee, liquidator or custodian) shall cease to have any further decision-making authority or vote under this AGREEMENT and the CONSORTIUM shall not require the vote, approval or authority of the Insolvent MEMBER as otherwise may have been required under this AGREEMENT."

The Consortium entered into a contract with Wellman for the construction of the facility. This agreement also contained a provision subjecting "[a]ny controversy or claim arising out of or relating to this CONTRACT or any breach thereof" to "binding arbitration in accordance with the South Carolina Uniform Arbitration Act (S.C. Code § 15-48-10 et seq.)."

Subsequent to the construction of the facility, an issue arose about payments due to Raytheon and Zimmer from Wellman and other issues. As Raytheon and Zimmer disagreed as to how to handle these closeout issues, they entered into a settlement agreement to resolve the dispute. The settlement agreement contained the following provision regarding the leadership of the Consortium:

> 4. Raytheon as Leader of Remaining Consortium Activities
>
> (a) The rights and obligations of Raytheon and Zimmer under the Consortium Agreement are deemed completed and discharged in all respects and are of no further force or effect, except (i) for the sole and exclusive purpose of serving as the vehicle for Raytheon to assert claims against Wellman and recover damages thereby as contemplated by this Agreement (and to defend any claims which may be asserted by Wellman in connection therewith), and (ii) as otherwise specifically provided herein.
>
> (b) Raytheon shall hereafter become the Consortium "Leader" pursuant to Article 4 of the Consortium Agreement for the purposes described in paragraph (a) of this Section, specifically including the unilateral right to conduct negotiations with Wellman, to settle and resolve all claims and disputes

> with Wellman on behalf of the Consortium, but solely for the benefit of Raytheon, excluding, however, only those claims and disputes excepted from the application of Section 12 herein.

The settlement agreement also contained the following arbitration provision:

> 16. Arbitration
>
> Any dispute or controversy between the parties arising out of or relating to this Agreement which cannot be settled amicably shall be resolved by arbitration in the manner provided for in Article 10.9 of the Consortium Agreement, the provisions of which are incorporated herein by reference as if set forth at length herein.

After Raytheon submitted its claim to Wellman, an electric malfunction occurred in the facility, and Wellman suffered damages in excess of eight million dollars. Subsequently, Raytheon filed for bankruptcy pursuant to chapter 11 of the United States Bankruptcy Code. Washington Group International, Inc. acquired assets of Raytheon, including the division responsible for the Wellman project. Wellman ultimately filed suit against Raytheon/Washington and Zimmer, individually and as Consortium members, for damages associated with the electrical malfunction. Zimmer filed cross-claims against Raytheon/Washington for equitable and contractual indemnity.

Raytheon/Washington filed a motion to stay Wellman's claims against it and to compel arbitration based on the arbitration provision in the Consortium's agreement with Wellman. Zimmer opposed Raytheon/Washington's motion, asserting that it had the authority to speak for the Consortium and it preferred to resolve the suit in litigation.

Raytheon/Washington also filed a motion to stay Zimmer's cross-claim and to compel arbitration.

After reviewing the memoranda submitted by all the parties, the trial court denied Raytheon/Washington's motions to compel arbitration. The trial court found, pursuant to the ipso facto provision in the Consortium agreement, Raytheon lost its decision making authority regarding Consortium matters due to its insolvency and thus Raytheon did not have the right to demand arbitration in this matter when that action was contrary to the desires of Zimmer. In addition, the court found "that the interests of the parties and the court are best served by resolution of all related claims in one judicial forum." Thus it held all of the claims by Wellman should be litigated in court. Raytheon/Washington appeals the trial court's order.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to de novo review. Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 206, 588 S.E.2d 136, 138 (Ct. App. 2003). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings." Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

I. Intertwining doctrine

Raytheon/Washington argues the trial court erred in denying its motions to compel arbitration based on its finding that "the interests of the parties and the courts are best served by resolution of all related claims in one judicial forum." We agree.

Wellman urges this court to adopt the intertwining doctrine. The Colorado Supreme Court explained the purpose of this doctrine is to prevent inconsistent determinations by different forums. City & County of Denver v.

District Court In & For City & County of Denver, 939 P.2d 1353, 1369 (Colo. 1997). The court elucidated:

> [The application of this doctrine] involves an analysis of the legal and factual issues relative to each of the factual allegations in the complaint. The court will consider whether the arbitrator would be required to "review the same facts needed to establish the . . . [non-arbitrable claim]" . . . . If the factual determinations and legal conclusions are inextricably intertwined, then the court must not sever the action. To hold otherwise would risk inconsistent determinations and could result in the arbitrator's infringing upon the court's duty to decide the [non-arbitrable claim]. . . .

Id. (quoting Lawrence St. Partners, Ltd. v. Lawrence St. Venturers, 786 P.2d 508, 511 (Colo. Ct. App. 1989)).

The United States Supreme Court expressly rejected the intertwining doctrine in Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985). The court held the Federal Arbitration Act (FAA)[1] requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. Id. at 217. The FAA provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1999). Considering this provision, the Supreme Court found:

> By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§ 3, 4. Thus, insofar as the language of the [FAA] guides

[1] 9 U.S.C.A. §1 et seq. (1999).

> our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.

Dean Witter Reynolds, 470 U.S. at 218.

Similarly, the Arizona Court of Appeals rejected the intertwining doctrine as being inconsistent with its state arbitration act. Hallmark Indus., L.L.C. v. First Systech Int'l, 52 P.3d 812 (Ariz. Ct. App. 2002). The Arizona Arbitration Act contains identical language to our Arbitration Act, providing:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

S.C. Code Ann. § 15-48-10(a) (2005); A.R.S. § 12-1501 (West 2003).

The Arizona Court of Appeals found, like the Supreme Court in Dean Witter Reynolds, that "this language does not confer discretion on a trial court to ignore a valid arbitration agreement merely because a case involves related arbitrable and non-arbitrable claims, even if the claims are factually related and difficult to separate." Hallmark, 52 P.3d at 814.

The South Carolina Arbitration Act, like the Arizona Arbitration Act, sets forth the procedure for when a case involves arbitrable and non-arbitrable issues. S.C. Code Ann. § 15-48-20(d) (2005); A.R.S. 12-1502(D) (West 2003). These identical sections provide:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be

> with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Id.

As the Arizona court noted, there is no language in this section authorizing a trial court to refuse to enforce an arbitration agreement. See Hallmark, 52 P.3d at 815. Instead, the trial court must stay the entire action or if the issues are severable, order the non-arbitratable issues to proceed with only the arbitrable issues being stayed.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The words of a statute "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). Looking to the language of the Arbitration Act, we find no indication the legislature intended for the courts to be able to ignore an otherwise valid arbitration provision for the sake of judicial economy. The Arbitration Act clearly provides the trial court must enforce an arbitration provision unless grounds "exist at law or in equity for the revocation of any contract." Thus, we find the intertwining doctrine is inconsistent with the intention of our legislature and decline to adopt it.

Furthermore, we find the intertwining doctrine is in conflict with South Carolina's judicial policy of favoring arbitration. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)(stating South Carolina's policy is to favor the arbitration of disputes). We recognize that having litigation and arbitration of intertwined issues may be inefficient and lead to inconsistent results. However as the Arizona Court of Appeals recognized: "Any inefficiency or risk of inconsistent results is a consequence of the parties' bargaining." Hallmark, 52 P.3d at 815. The court must enforce an unambiguous contract according to its terms, regardless of the wisdom or folly or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Furthermore, "[i]f arbitration defenses could be foreclosed simply by adding as a defendant a

person not a party to an arbitration agreement, the utility of such agreements would be seriously compromised." Paine, Webber, Jackson, & Curtis, Inc. v. McNeal, 239 S.E.2d 401, 404 (Ga. Ct. App. 1977) (quoting Hilti, Inc. v. Oldach, 392 F.2d 368, 369 n.2 (1st Cir. 1968)).

We conclude a trial court may not refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy. Accordingly, we hold the trial court erred in denying Raytheon/Washington's motion to avoid "unnecessarily duplicate proceedings."

II. Novation

Raytheon/Washington also argues the trial court erred in denying its motion to compel arbitration because the settlement agreement acted as a novation of the Consortium agreement, and therefore, the provision in the settlement agreement assigning Raytheon as leader superseded the ipso facto provision contained in the Consortium agreement. Thus, Raytheon/Washington asserts it controlled the Consortium and had the authority to decide whether to enforce the arbitration provision in the Consortium's agreement with Wellman.

We first question whether this issue is preserved for our review. Although Raytheon/Washington argued to the trial court that under the revised agreement, Raytheon/Washington was granted leadership in the Consortium and thus had authority to demand arbitration on behalf of the Consortium, it did not specifically argue that the Settlement Agreement constituted a novation of the Consortium agreement. Furthermore, the trial court did not address the effect of the settlement agreement on the leadership of the Consortium, and Raytheon/Washington failed to request a ruling on the issue in a Rule 59, SCRCP, motion. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Summer v. Carpenter, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997) (where trial judge did not rule on issue at trial and party did not make a Rule 59, SCRCP, motion for a ruling, issue is not preserved for appellate review).

However, even on the merits, we find no error. "A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation. The burden of proving novation is on the party asserting it." Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990) (citation omitted). "The circumstances attending the transaction alleged to be a novation must show the intention to substitute a new obligation in place of the existing one." Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973).

Based on the language of the settlement agreement and a letter written to Wellman from the members of the Consortium, we find the parties did not intend for the settlement agreement to act as a novation of the Consortium agreement. First, in our review of the settlement agreement, we find its purpose was only to deal with closeout issues with Wellman. The agreement provides:

> WHEREAS Zimmer and Raytheon desire to resolve amicably their various disputes and controversies relating to the claims raised by Wellman and to the claims between each other resulting from the execution of the Contract and the Consortium Agreement, with, among other things, Zimmer waiving and providing a full release to Raytheon of any and all claims which Zimmer may have against Raytheon and assigning to Raytheon its claims against Wellman in exchange for Raytheon waiving and providing a full release to Zimmer of any and all claims which Raytheon may have against Zimmer, all and to the extent as more fully set forth below.

Also, numerous provisions in the settlement agreement incorporate by reference the terms of the Consortium agreement. One example of this is the arbitration provision, which refers to the Consortium agreement for the procedures a party must follow in seeking to arbitrate a claim. In addition,

Zimmer and Raytheon's intent upon entering into the settlement agreement is evidenced by a letter to Wellman from the Consortium notifying Wellman of the settlement agreement. This letter states, in part:

> This letter is to inform Wellman that from now on Raytheon will serve as Leader of the Consortium on the H-12 Project to address financial closeout-related issues. These closeout issues specifically include the defense of liquidated damages and backcharges assessed against the Consortium by Wellman, the recovery of unpaid Contract balances and the pursuit of affirmative claims by Raytheon against Wellman (hereinafter "closeout issues").

Therefore, we find the parties intended to modify, but not nullify, the initial Consortium agreement by executing the settlement agreement.

III. Enforceability of ipso facto provision

Raytheon/Washington further argues that even if the settlement agreement was not a novation, the ipso facto provision should not deprive it of its right to compel arbitration. It contends it emerged from bankruptcy prior to the filing of Wellman's action; thus, given the policy favoring arbitration, the trial court should have interpreted the ipso facto provision as inapplicable to resolve the matter in favor of arbitration. Second, Raytheon/Washington argues the United States Bankruptcy Code invalidated the ipso facto provision contained in the Consortium agreement. The section upon which Raytheon/Washington relies prohibits the termination or modification of an executory contract, in which the debtor is a party, upon the commencement of a bankruptcy proceeding based on the debtor insolvency. 11 U.S.C.A. § 365(e)(1) (West 2004).

Raytheon/Washington did not raise to the trial court any argument concerning the inapplicability the ipso facto provision or the validity of the provision under the bankruptcy code. Additionally, the trial court's order denying Raytheon/Washington's motions does not specifically rule on these

issues. Therefore, we find these arguments are not preserved for our review. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Summer, 328 S.C. at 43, 492 S.E.2d at 58 (where trial judge did not rule on issue at trial and party did not make a Rule 59, SCRCP, motion for a ruling, issue is not preserved for appellate review).

II. Preemption of Right to Arbitrate

Finally, Raytheon/Washington argues that given the public policy favoring arbitration, its right to arbitration should not be impaired by it filing for bankruptcy.

Based on our reading of the trial court's order, we find this argument misplaced. The trial court's order provides in pertinent part:

> This Court finds that under the Consortium Agreement, due to the undisputed insolvency of Raytheon, Raytheon does not have the right to demand arbitration in this matter when that action is contrary to the desires of Zimmer. This result follows from Raytheon's insolvency and consequential loss of decision making authority regarding Consortium matters.

Based on the trial court's order, it did not determine Raytheon/Washington's bankruptcy preempted its right to arbitration. Rather, the trial court interpreted the provisions of the Consortium agreement and determined pursuant to that agreement, Raytheon/Washington did not have the right to make decisions for the Consortium, including the decision to enforce the arbitration provision under its agreement with Wellman. Accordingly, we find no merit to this argument.

CONCLUSION

We find no merit in Raytheon/Washington's argument that the settlement agreement constituted a novation. Furthermore, we find Raytheon/Washington's remaining arguments concerning the applicability and validity of the ipso facto provision are not preserved for our review. We also find Raytheon/Washington's argument the trial court's decision was in error because a party's right to arbitrate cannot be impaired by filing bankruptcy, is without merit. Accordingly, we find no error in the trial court's decision that Zimmer, rather than Raytheon/Washington, has the right to decide whether to arbitrate Wellman's claims against the Consortium. However, we find the trial court did err in holding that all claims must be resolved in one forum out of the interest of judicial economy. Thus, we affirm the trial court's denial of Raytheon/Washington's motion to compel arbitration only as it concerns Wellman's claims against the Consortium. As to any other claims, the trial court's order is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and STILWELL, JJ., concur.