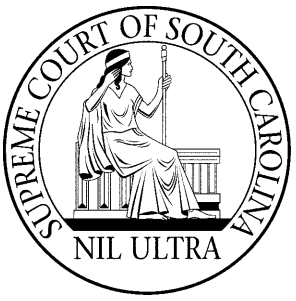

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 18, 2003

ADVANCE SHEET NO. 31

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

	Page
25508 -Order (Refiled) - John Doe, Alias v. Henry D. McMaster, Attorney General for the State of South Carolina, et al.	12
25701 - Benjamin Burrus Anthony Camburn and Bethanne Camburn v. Susan Lynn Smith, et al.	24
Order - In the Matter of Kenneth L. Edwards	31
Order - In the Matter of Joseph Wendell Arsi	33
Order- Rule 402-SCACR	36

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

2003-OR-550 - Collins Music v. IGT	Pending
25585 - State v. Regina McKnight	Pending
25642 - Sam B. McQueen v. SC Coastal Council	Pending

PETITIONS FOR REHEARING

25650 - Emma Hessenthaler v. Tri-County Sister Help	Pending
25678 - David Jackson, Jr. v. State	Pending
25681 - In the Matter of the Case and Treatment of Peter E.J. Harvey	Pending
25688 - Pamela Curcio v. Caterpillar, Inc.	Pending
2003-MO-049 - Ronald Eugene Bogan v. State	Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

	Page
3670-Sue Tennis d/b/a Carousel of Learning v. S.C. Dep't of Social Services	51
3671-Anthony White v. Medical University of South Carolina and State Accident Fund	60
3672-Patsy Ann Gilbert v. Marvin Miller and Toya Abbatiello	67

UNPUBLISHED OPINIONS

2003-UP-481-M. Kenneth Branch and Island Waterfront Flats, individually v. Island Sub-Division Water and Sewer Co., Inc. (Clarendon, Judge Clifton Newman)

2003-UP-482-American Amicable Life Ins. Co. of Texas, Inc. v. Dorothy C. Bennett and Raychelle Bennett (Charleston, Judge Diane Schafer Goodstein)

PETITIONS FOR REHEARING

3602-The State v. Al-Amin	Pending
3634-Murray v. Bank of America	Pending
3635-The State v. LaQuinces Davis	Pending
3640-The State v. Adams	Pending
3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart	Pending
3646-O'Neal v. Intermedical	Pending
3647-The State v. Andre Tufts	Pending

3648-Walsh v. Woods	Pending
3649-The State v. Chisolm	Pending
3650-Cole et al. v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-The State v. Uuno Mattias Baum	Pending
3654-John Miles v. Rachel Miles	Pending
3655-Kibby Daves v. Jim R. Cleary	Pending
3656-The State v. Carlos Gill	Pending
3658-Swindler v. Swindler	Pending
3660-Venture Engineering v. Tishman	Pending
3661-Neely v. Thomasson	Pending
3663-The State v. Rudd	Pending
3664-Lighthouse Tennis v. South Island Public Service Dt.	Pending
3667-Overcash v. SCE&G	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-317-State v. Jimmy Jones	Pending
2003-UP-324-McIntire v. Columbia	Pending
2003-UP-328-The State v.Tuck	Pending
2003-UP-335-State v. Rogers	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-The State v. Holman	Pending

2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-366-King v. Poston	Pending
2003-UP-368-State v. Walker	Pending
2003-UP-376-Heavener v. Walker	Pending
2003-UP-381-Dickey v. Holloway	Pending
2003-UP-394-Windham v. McLeod	Pending
2003-UP-396-Coaxum v. William Washington	Pending
2003-UP-397-BB&T v. Chewning	Pending
2003-UP-404-Thurmond Guess v. Benedict College	Pending
2003-UP-409-The State v. Legette	Pending
2003-UP-412-McCormick v. McCormick	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Carol Bates v. William Fender	Pending
2003-UP-433-State v. Eugene Kearns	Pending
2003-UP-437-Shirley Jones v. Denmark Police Dept.	Pending
2003-UP-439-Belton v. Jordan	Pending
2003-UP-444-The State v. Donald Roberts	Pending
2003-UP-447-Samantha Crooks v. Richard Crooks	Pending
2003-UP-451-The State v. Shantone D. Curry	Pending
2003-UP-453-Elizabeth Way v. Three Rivers Apartments	Pending

2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-The State v. Anthony Nellis, Jr.	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-469-Adams v. Cook	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-472-Proctor v. SCDHEC	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3518-Chambers v. Pingree	Pending
3551-Stokes v. Metropolitan	Pending
3563-The State v. Missouri	Pending
3565-Ronald Clark v. SCDPS	Pending
3580-FOC Lawshe v. International Paper	Pending
3585-The State v. Murray Roger Adkins, III	Pending
3588-In the Interest of Jeremiah W.	Pending
3592-Gattis v. Murrells	Pending
3597-Anderson v. Augusta Chronicle	Pending
3598-Belton v. Cincinnati	Pending

3599-The State v. Grubbs	Pending
3600-State v. Lewis	Pending
3604-State v. White	Pending
3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending
3608-The State v. Padgett	Pending
3610-Wooten v. Wooten	Pending
3614-Hurd v. Williamsburg	Pending
3623-Fields v. Regional Medical Center	Pending
3626-Nelson v. QHG of S.C. Inc.	Pending
3627-Pendergast v. Pendergast	Pending
3629-Redwend Ltd. v. William Edwards et al.	Pending
3631-The State v. Dunbar	Pending
3633-Murphy v. NationsBank, N.A.	Pending
3638-The State v. Smalls	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3641-The State v. Dudley	Pending
2002-UP-220-The State v. Hallums	Pending
2002-UP-368-Roy Moran v. Werber Co.	Pending
2002-UP-489-Fickling v. Taylor	Pending
2002-UP-514-McCleer v. City of Greer	Pending

2002-UP-537-Walters v. Austen	Pending
2002-UP-538-The State v. Richard Ezell	Pending
2002-UP-586-Ross v. University of S.C.	Pending
2002-UP-598-Sloan v. Greenville	Pending
2002-UP-656-SCDOT v. DDD (2)	Pending
2002-UP-662-State v. Morgan	Pending
2002-UP-715-Brown v. Zamias	Pending
2002-UP-734-SCDOT v. Jordan	Pending
2002-UP-749-The State v. Keenon	Pending
2002-UP-753-Hubbard v. Pearson	Pending
2002-UP-760-State v. Hill	Pending
2002-UP-785-The State v. Lucas	Pending
2002-UP-788-City of Columbia v. Jeremy Neil Floyd	Pending
2002-UP-794-Jones v. Rentz	Pending
2002-UP-800-Crowley v. NationsCredit	Pending
2003-UP-014-The State v. Lucas	Pending
2003-UP-019-The State v. Wigfall	Pending
2003-UP-029-SCDOR v. Springs	Pending
2003-UP-032-Pharr v. Pharr	Pending
2003-UP-033-Kenner v. USAA	Pending
2003-UP-036-The State v. Traylor	Pending
2003-UP-062-Lucas v. Rawl	Pending

2003-UP-087-The State v. Major	Pending
2003-UP-088-The State v. Murphy	Pending
2003-UP-098-The State v. Dean	Pending
2003-UP-101-Nardone v. Davis	Pending
2003-UP-111-The State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-113-Piedmont Cedar v. Southern Original	Pending
2003-UP-116-Rouse v. Town of Bishopville	Pending
2003-UP-125-Carolina Travel v. Milliken	Pending
2003-UP-126-Brown v. Spartanburg County	Pending
2003-UP-127-City of Florence v. Tanner	Pending
2003-UP-143-The State v. Patterson	Pending
2003-UP-144-The State v. Morris	Pending
2003-UP-148-The State v. Billy Ray Smith	Pending
2003-UP-150-Wilkinson v. Wilkinson	Pending
2003-UP-161-White v. J. M Brown Amusement	Pending
2003-UP-163-Manal Project v. Good	Pending
2003-UP-165-The State v. Sparkman	Pending
2003-UP-171-H2O Leasing v. H2O Parasail	Pending
2003-UP-175-BB&T v. Koutsogiannis	Pending
2003-UP-179-State v. Brown	Pending
2003-UP-180-State v. Sims	Pending

2003-UP-184-Tucker v. Kenyon	Pending
2003-UP-188-State v. Johnson	Pending
2003-UP-190-Henfield v. Taylor	Pending
2003-UP-196-T.S. Martin Homes v. Cornerstone	Pending
2003-UP-205-The State v. Bohannan	Pending
2003-UP-228-Pearman v. Sutton Builders	Pending
2003-UP-244-The State v. Tyronne Edward Fowler	Pending
2003-UP-245-Bonte v. Greenbrier Restoration	Pending
2003-UP-255-BB&T of South Carolina v. Fleming	Pending
2003-UP-269-Golf Restaurants v. Tilghman Ins. Agency	Pending
2003-UP-270-Guess v. Benedict College	Pending
2003-UP-271-Bombardier Capital v. Green	Pending
2003-UP-274-The State v. Robert Brown	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Panther v. Catto Enterprises	Pending
2003-UP-294-Langley v. Bowers	Pending
2003-UP-308-Ahmad v. Davis	Pending
2003-UP-325-Miller v. Miller (6)	Pending
2003-UP-348-The State v. Battle	Pending
0000-00-000-Dreher v. Dreher	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

The Supreme Court of South Carolina

John Doe, Alias, Petitioner,

v.

Henry D. McMaster, Attorney General for the State of South Carolina, Respondent,

And

South Carolina Bankers Association and South Carolina Bar, Intervenors.

ORDER WITHDRAWING ORIGINAL OPINION AND SUBSTITUTING SUBSEQUENT OPINION ON REHEARING

PER CURIAM: Opinion No. 25508, filed August 5, 2002, is hereby withdrawn and the following opinion substituted.

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

August 18, 2003

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Alias, Petitioner,

v.

Henry D. McMaster,
Attorney General for the
State of South Carolina, Respondent,

And

South Carolina Bankers
Association and South
Carolina Bar, Intervenors.

IN THE ORIGINAL JURISDICTION

Opinion No. 25508
Reheard April 2, 2003 - Refiled August 18, 2003

David A. Wilson, of Horton, Drawdy, Ward & Jenkins, of Greenville, for petitioner.

Attorney General Henry D. McMaster, Deputy Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for respondent.

John T. Moore, C. Mitchell Brown and B. Rush

Smith, III, all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Intervenor South Carolina Bankers Association.

John S. Nichols, of Bluestein & Nichols, of Columbia; and F. Earl Ellis, Jr., of Ellis, Lawhorne & Sims, of Columbia, for Intervenor South Carolina Bar.

Edward G. Menzie and Brian C. Bonner, both of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for Amicus Curiae American Financial Services Associates.

JUSTICE BURNETT: John Doe ("Doe"), a lawyer, petitioned this Court in its original jurisdiction to determine whether his business association with a lender bank ("Lender") and a title insurance company ("Title Company") constitutes the unauthorized practice of law in violation of Rule 5.5 (b), of Rule 407 SCACR.[1] This Court granted the petition to provide declaratory judgment and appointed the Honorable Edward B. Cottingham as referee. We conclude Doe's business association, when conducted as herein below prescribed, is proper.

FACTS

The parties have stipulated Lender contacted Doe to supervise the execution and recordation of loan documents under the following scenario:

1. Borrower contracts with Lender to **refinance** an existing first mortgage loan previously obtained from the same

[1] Rule 5.5 (b), SCACR prohibits an attorney from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

Lender.

2. Lender notifies Title Insurance Company of refinance transaction and provides relevant Borrower information.

3. Out of state office of Title Insurance Company licensed to do business in South Carolina orders title search from an independent contractor of its choosing.

4. Upon receipt of title search, Title Insurance Company prepares a title commitment for the benefit of the Lender.

5. Title Insurance Company orders pay-off of existing mortgage.

6. Title Insurance Company orders endorsement for Borrower's existing homeowners insurance policy, if requested by Lender.

7. Lender prepares loan documents including a set of instructions, a note and mortgage, Truth-in-Lending Statement, HUD-1 settlement statement, miscellaneous affidavits regarding employment and other forms and forwards to Attorney.

8. Attorney reviews loan documents and title commitment and performs any necessary curative work on the loan documents or regarding the title.

9. Attorney meets with Borrower to explain legal ramifications of loan documents and answer any questions Borrower may have regarding the documents or the refinancing process.

10. Attorney supervises execution of loan documents.

11. Attorney forwards properly executed loan documents to Title Insurance Company with specific instructions regarding how, when and where to satisfy the existing first mortgage and to record the new mortgage and any assignments, if applicable. Attorney also authorizes the disbursement of funds if the Borrower does not rescind during the three-day period set forth in the Truth-In-Lending Act, 15 U.S.C. § 1601, et seq. (1997).

12. In accordance with the Attorney's instructions, Title Insurance Company satisfies the existing first mortgage and transmits for recording the new mortgage and any assignments, if applicable, and disburses funds pursuant to the HUD-1 settlement statement.

13. The Lender or, in accordance with the Attorney's instructions, the Title Insurance Company transmits documents evidencing the satisfaction of the paid-off mortgage to the appropriate Register of Deeds for recording.

14. Title Insurance Company issues final title insurance policy to Lender.

15. For representing the Borrower, Attorney receives a fee consistent with the fee typically charged in a South Carolina refinance transaction.[2]

---

[2] Due to the nature and procedural posture of this case, this opinion is limited to the stipulated facts outlined above. See In re Unauthorized Practice of Law Rules, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

DISCUSSION

The issue of unauthorized practice of law in the area of real estate closings is a prolonged legal issue assuming growing national prominence.[3] The South Carolina Constitution provides the Supreme Court with the duty to regulate the practice of law in the state. See S.C. Const. art. V, § 4; In re Unauthorized Practice of Law Rules, supra; see also S.C. Code Ann. § 40-5-10 (1986).

"The generally understood definition of the practice of law 'embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.'" State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). The practice of law, however, "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability." State v. Buyers Service Co., Inc.,

---

[3] Disputes between attorneys and real estate service providers consistently appear in cases since 1917. See, e.g., Title Guar. & Trust Co. v. Maloney, 165 N.Y.S. 280 (N.Y. Sup. Ct. 1917); see generally Joyce Palomar, The War Between Attorneys and Lay Conveyancers Empirical Evidence Says "Cease Fire!", 31 Conn. L. Rev. 423, 471-74 (1999). The issue is attracting attention from the Federal Trade Commission and the Anti-Trust Division of the United States Department of Justice. The FTC and USDOJ have taken a greater interest in the monopolistic effects of state's unauthorized practice of law rules in the real estate context. See John Gibeaut, Real Estate Closing Tussle in Tarheel State, 1 No. 3 ABA J. E-Report 7 (2002). However, state limitations in the area are exempt from federal antitrust liability under the Sherman Act's state action exception. See Lender's Serv., Inc. v. Dayton Bar Ass'n, 758 F. Supp. 429, 434-41 (S.D. Ohio 1991). Further, this Court grounds its unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities for lawyers. See In re Unauthorized Practice of Law Rules, supra.

292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). For this reason, this Court has consistently refrained from adopting a specific rule to define the practice of law. In re Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124 (stating "it is neither practicable nor wise" to formulate a comprehensive definition of what the practice of law is). Instead, the definition of what constitutes the practice of law turns on the facts of each specific case. Id.

This Court last addressed the unauthorized practice of law in the context of real estate closings in State v. Buyers Service Co., Inc., supra. Buyers Service divided the purchase of residential real estate into four steps: 1) title search; 2) preparation of loan documents; 3) closing; and 4) recording title and mortgage.

Initially, Doe suggests the present case is different from Buyers Service because the buyer and Lender are attempting to refinance an existing mortgage and not to purchase new property. This distinction is without significance.

In refinancing a real estate mortgage the four steps in the initial purchase situations still exist. A title examination is conducted to determine the current status of the title and any new encumbrances; new loan documents and instruments must be crafted to ensure buyer obtains funds to pay off an existing mortgage and Lender receives a mortgage to protect its interest; buyer and Lender must close on the loan; and the settlement of the old mortgage and recordation of the new mortgage must be perfected. In sum, refinancing affects identical legal rights of the buyer and Lender as initial financing and protection of these rights is the crux of the practice of law.

A. Title Search

The title search portion of the present case encompasses stipulated facts 2 through 6. Doe asserts Title Company has a right to furnish title because it is incidental to its business.

In Buyers Service, this Court addressed a commercial title company's preparation of title abstracts for persons other than attorneys or themselves. The State in the case argued the buyer relies on the title search to determine if he receives good, marketable title. We agreed and rejected the title company's argument that it did not need attorney supervision because the title search was merely incidental to their own business. Instead, we found the title search company could conduct title examinations only under the supervision of a licensed attorney because the "examination of titles requires expert legal knowledge and skill" and the search affected the rights of buyers. Id. at 432, 357 S.E.2d at 18.

According to the stipulated facts it appears Title Company conducts a title search and prepares a commitment, for the benefit of the Lender, without supervision by a licensed attorney. While Doe notes the Title Company is licensed to do business in South Carolina, we rejected the incidental-to-business approach in Buyers Service.

Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.

B. Preparation of Loan Documents

Stipulated facts 7 and 8 concern Lender's preparation of loan documents as well as the attorney's review of the documents and subsequent curative work, if needed. Doe argues the preparation of real estate documents constitutes the practice of law, but Lender has a *pro se* right to prepare documents where it is a party. We disagree.

South Carolina law recognizes an individual's ability to appear *pro se* with leave of the court. See S.C. Code Ann. § 40-5-80 (Supp. 2002). Corporations, which are artificial creatures of state law, do not have a right to

appear *pro se* in all instances. See S.C. Code Ann. § 40-5-320 (1986). We granted corporations the ability to appear *pro se*, with leave of the court, in civil magistrate's court. See In re Unauthorized Practice of Law, supra. We explicitly rejected a corporation's ability to appear *pro se* in a state circuit or appellate court. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999).

The right of a corporation to practice law by completing real estate loan documents is not co-extensive with an individual's right. Doe's citation to this Court's previous holdings to suggest otherwise is misplaced.[4] In Buyers Service we specifically held the preparation of real estate instruments by lay persons constituted the unauthorized practice of law. See Buyers Service, 292 S.C. at 430-31, 357 S.E.2d at 17-18. Without the presence of Doe, acting as an independent supervising attorney, Lender could not prepare such instruments.

Doe correctly differentiates this case from Buyers Service because an independent attorney will review the documents and correct them, if needed. Lender may prepare legal documents for use in refinancing a loan for real property as long as an independent attorney reviews and corrects, if needed, the documents to ensure their compliance with law.

---

[4] Doe cites to In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995) (holding that the preparation of legal documents for others to present in family court constitutes the practice of law). Doe argues these cases imply a corporation engages in unauthorized practice of law **only** where it seeks to act on behalf of others and not solely itself. We disagree.

In re Easler and State v. Despain concerned an individual attempting to provide legal advice or services to other individuals. The fact-specific holdings involved individuals providing legal services to others for a fee, therefore, the individual was not acting within the *pro se* exception. As previously stated, the *pro se* exception for corporations is strictly limited.

C. Closing

Stipulated facts 9 and 10 describe the closing process. We held in Buyers Service "real estate and mortgage loan closings should be conducted only under the supervision of attorneys." Id. at 434, 357 S.E.2d at 19.

Doe differentiates the present case from Buyers Service because an attorney is actively involved in the closing and answers any questions the buyer may have. The purchaser in Buyers Service never spoke with an attorney and any questions were answered by non-attorney employees of the title company. Additionally, in Buyers Service the title company employed attorneys to review the closing documents. Yet, we concluded the presence of attorneys, acting as employees, did not save the company from unauthorized practice of law. This Court cited to an Arizona case[5] and approved its rationale that "adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party." Id. at 431-32, 357 S.E.2d at 18.

Here Borrower employs Doe as an attorney to supervise the preparation of legal documents, then supervise the loan's closing and provide legal advice to the buyer. Doe is an independent attorney unlike the attorneys in Buyers Service who were employees of the title company. Doe's activities may still pose an ethical dilemma, however, because a lawyer may not represent a client whose interests may be adverse to another client unless the lawyer believes the representation will not adversely affect the relationship with the other client and the client consents after consultation.[6] See Rule

[5] State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1, reheard, 91 Ariz. 293, 371 P.2d 1020 (1962).

[6] These ethical concerns are only applicable when there is a business relationship between Lender and the attorney. At oral argument, Doe made clear that there is no formal business arrangement between Lender and him. Doe is chosen, as is often the case, by Borrower from a list of attorneys provided by Lender. Doe affirmed Lender informs Borrower of her right to employ an attorney not on the list.

407, SCACR (Rule 1.7 Conflict of Interest).

Under the stipulated facts Lender retains Doe to supervise its own legal work as well as provide advice to the buyer at closing. Although the Lender and Buyer have adverse interests, there is no consultation with the buyer to waive any potential conflict. Because real estate closings present a unique situation regarding dual representation we do not believe it to be in the public's interest to create a *per se* rule barring an attorney under the stipulated facts from representing Lender and borrower. Instead, Doe may participate in the closing after giving full disclosure of his role to both parties and obtaining consent from both parties to continue.

D. Recording Instruments

The final phase of the real estate loan process is recordation of the new mortgage and related documents, shown in stipulated facts 11 through 13. Buyers Service clarified the mailing of documents to the courthouse occurs as part of a real estate transfer, which is an aspect of conveyancing affecting legal rights, is the practice of law. We held "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording, if given by a lay person for the benefit of another, must be given under the supervision of an attorney." Buyers Service, 292 S.C. at 434, 357 S.E.2d at 19.

The recordation process in the stipulation of facts establishes attorney supervision of the process. As such, Doe's supervisory activities do not constitute the unauthorized practice of law.

CONCLUSION

We conclude Doe's association as discussed is not violative of the proscription against the unauthorized practice of law, as long as the association is conducted as herein prescribed.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Benjamin Burrus Anthony Camburn and Bethanne Camburn, Respondents,

v.

Susan Lynn Smith, Stephen Biebel, Terry Smith, and David Markley,

Of whom

Susan Lynn Smith and Terry Smith are Appellants.

In re: Laura Biebel a/k/a Laura Biebel-Smith, Kacie Smith, and David Markley, minor children.

Appeal from Horry County
H.T. Abbott, III, Family Court Judge

Opinion No. 25701
Heard June 12, 2003 - Filed August 18, 2003

REVERSED

Irby E. Walker, Jr., of Conway, for appellant.

Anita R. Floyd, of Conway, for respondent.

Deborah B. Dantzler, of Conway, guardian ad litem for minors Laura Biebel and Kacie Smith.

Randall K. Mullins, of N. Myrtle Beach, guardian ad litem for minor David Markley.

ACTING CHIEF JUSTICE MOORE: Appellants (Mother and Husband) appeal the family court's order allowing respondents (Grandparents) visitation with Mother's three children pursuant to S.C. Code Ann. § 20-7-420(33) (Supp. 2002). Appellants contend the statute was unconstitutionally applied. We agree and reverse.

FACTS

Grandparents, who are Mother's parents, brought this action in January 2001 seeking visitation with their grandchildren – Laura (age 13), Kacie (age 11), and David (age 2). Laura was born while Mother was married to Stephen Biebel whose whereabouts are now unknown. After her brief marriage to Biebel, Mother married Husband, to whom she is still married, and gave birth to Kacie. During a period of separation from Husband, Mother conceived and gave birth to her son, David, by David Markley. All three children reside with Mother and Husband, who is a long-distance trucker and comes home only on weekends. Markley is incarcerated and Mother brings David to visit him on weekends.

Mother, Husband, and Markley contested Grandparents' visitation. Mother testified she did not want her children visiting Grandparents because she felt it was not a "healthy environment." She objects that Grandfather drinks, uses abusive language, and denigrates the children's fathers. Because Grandfather was physically and mentally abusive to her when she was a child, she does not consider

him her father. Husband and Markley concurred in Mother's reasons for denying visitation. Grandfather did not testify.

On March 12, 2002, the family court entered its final order allowing Grandparents weekend visitation with the children every fourth weekend, one full week of visitation in the summer, reasonable telephone contact, and daytime visitation on December 27 each year. The family court also ordered the payment of guardian ad litem and attorney's fees. Mother and Husband appeal.

ISSUES

1. Does the application of § 20-70-420(33) in this case violate due process?

2. Should the award of attorney's fees and guardian ad litem fees be reversed?

DISCUSSION

1. Due Process Clause

Section 20-7-420(33) provides:

> **The family court shall have exclusive jurisdiction:**
>
> . . .
>
> (33) To order periods of visitation for the grandparents of a minor child where either or both parents of the minor child is or are deceased, or are divorced, or are living separate and apart in different habitats[1] regardless of the existence

[1]The family court found Husband "stays at [Mother's] home on those weekends he is in town" but concluded Mother and Husband were separated as required under § 20-7-420(33). There has been no appeal from the finding of separation.

> of a court order or agreement, and upon a written finding that the visitation rights would be in the best interests of the child and would not interfere with the parent/child relationship.[2] In determining whether to order visitation for the grandparents, the court shall consider the nature of the relationship between the child and his grandparents prior to the filing of the petition or complaint.

In applying this statute, the family court found there was no evidence to "justify" appellants' decision denying visitation and visitation was in the children's best interest. Appellants contend this application of § 20-7-420(33) violates their due process rights.

It is well-settled that parents have a protected liberty interest in the care, custody, and control of their children. This is a fundamental right protected by the Due Process Clause. Troxel v. Granville, 530 U.S. 57, 65-66 (2000).

Under Troxel, the court must give "special weight" to a fit parent's decision regarding visitation. 530 U.S. at 69-70. A court considering grandparents' visitation over a parent's objection must allow a presumption that a fit parent's decision is in the child's best interest:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for

---

[2]We note the family court failed to find that the ordered weekend visitation will not interfere with Husband's relationship with Kacie or with Markley's relationship with his son David. Husband testified his job prevents him from being home except on weekends and visitation with Grandparents would interfere with his time with Kacie. Markley testified weekend visitation would interfere with his relationship with David since Mother brings the child to visit him on weekends. There has been no appeal, however, from the family court's failure to make the requisite findings.

> the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 520 U.S. at 68-69 (parenthetical in original). Parental unfitness must be shown by clear and convincing evidence. Greenville County Dept. of Soc. Servs. v. Bowes, 313 S.C. 188, 437 S.E.2d 107 (1993); *see also* Roth v. Weston, 789 A.2d 431 (Conn. 2002).

The presumption that a fit parent's decision is in the best interest of the child may be overcome only by showing compelling circumstances, such as significant harm to the child, if visitation is not granted. *See* Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002); Stacy v. Ross, 798 So.2d 1275 (Miss. 2001). The fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision. *See* Glidden v. Conley, 820 A.2d 197 (Vt. 2003).

In sum, parents and grandparents are not on an equal footing in a contest over visitation. Before visitation may be awarded over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.

Turning to the facts here, there has been no finding of parental unfitness or, more particularly, that Mother, the parent to all three children, is unfit. The family court concluded visitation would be in the children's best interest as a stabilizing factor in their lives in light of Mother's perceived instability. The court noted the following: Mother had a child with Markley while she was married to Husband; she took the children to Maryland with Markley when Markley fled there to avoid arrest and during this time their whereabouts were unknown to Husband; the children were not enrolled in school for the few months

they lived in Maryland;[3] and Mother was involuntarily committed to psychiatric care by Grandmother upon her return from Maryland.

It is uncontested, however, that the children are well-cared for by both Mother and Husband. Husband has been a father not only to his own daughter, Kacie, but to Mother's older daughter, Laura, as well. Regarding all three children, Husband testified he "has been in their life" although he acknowledges that David is Markley's biological son.

There is no clear and convincing evidence here that Mother or Husband is unfit, nor did the family court make any such finding. Further, there are no compelling circumstances to overcome the presumption that this decision by fit parents is in the children's best interest. In applying § 20-7-420(33), the court erroneously required these parents to "justify" their decision and found those reasons unsatisfactory. Because the family court's application of § 20-7-420(33) unduly interfered with appellants' parental rights in the care, custody, and control of their own children, we reverse the order allowing Grandparents visitation.

2. Guardian ad litem and attorney's fees.

The family court ordered Mother to pay $3,500 in attorney's fees and ordered both Mother and Husband to pay a certain percentage of fees for each of the two guardians ad litem. Appellants contend they should not have to pay these fees if the order granting visitation is reversed. We agree.

An award of attorney's fees will be reversed where the substantive results achieved by counsel are reversed on appeal. Sexton v. Sexton, 310 S.C. 501, 427 S.E.2d 665 (1993). Similarly, where guardian ad litem fees are incurred in an action that is found meritless on appeal, the party instigating the action should pay. *See* Hucks v.

[3]Mother testified the children were home-schooled during this time.

Dolan, 288 S.C. 468, 343 S.E.2d 613 (1986); Schwartz v. Schwartz, 311 S.C. 303, 428 S.E.2d 748 (Ct. App. 1993). Accordingly, we reverse the order assessing attorney's fees and guardian ad litem fees against Mother and Husband.

REVERSED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice C. Victor Pyle, Jr., concur.

The Supreme Court of South Carolina

In the Matter of Kenneth
L. Edwards, Petitioner.

ORDER

On August 4, 1997, petitioner was suspended for eighteen months from the practice of law in this state. In the Matter of Edwards, 327 S.C. 148, 488 S.E.2d 864 (1997). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted, subject to the following conditions:

1. After reinstatement, petitioner must attend anger management training and provide evidence of the completion of the classes.

2. Petitioner must practice under the supervision of a mentor for the first full year after he returns to the practice of law.

We grant the petition, subject to the conditions set forth by the Committee on Character and Fitness, and reinstate petitioner to the practice of law in South Carolina. Evidence of petitioner's completion of anger

management training should be provided to the Office of Disciplinary Counsel. In addition, petitioner shall submit to the Office of Disciplinary Counsel for approval the name of an attorney to serve as a mentor. The attorney who serves as petitioner's mentor shall file a written report with the Office of Disciplinary Counsel every six months during the one year period following petitioner's return to the practice of law.

IT IS SO ORDERED.

s/Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina

August 15, 2003

The Supreme Court of South Carolina

In the Matter of Joseph Wendell Arsi, Esq., Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, and seeks the appointment of an attorney to protect respondent's client's interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension and to the appointment of an attorney to protect his clients.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17(b), RLDE, Rule 413, SCACR, from the practice of law in this State until further order of this Court.

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Albert John Dooley, Jr., Esquire, has been duly appointed by this Court and has the authority to

receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Dooley's office.

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

IT IS SO ORDERED.

s/Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
August 19, 2003

The Supreme Court of South Carolina

RE: Rule 402, SCACR

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402, SCACR, is amended to read as shown in the attachment to this order. This amendment shall be effective September 1, 2003, and shall apply to all bar admissions matters on or after that date with the following exceptions:

(1) The application filing periods and application fees under the current rule shall apply to the February 2004 Bar Examination.

(2) For applicants who have failed the Bar Examination five or more times on the effective date of this amendment, the two-year waiting period to re-take the Bar Examination

under Section (j)(2) shall not apply until the applicant fails a Bar Examination given on or after July 2003.

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

August 13, 2003

RULE 402
ADMISSION TO PRACTICE LAW

(a) Board of Law Examiners.

(1) Members. The Board of Law Examiners shall consist of seven (7) members of the South Carolina Bar who are actively engaged in the practice of law in South Carolina and who have been active members of the South Carolina Bar for at least seven (7) years. The Board members shall be appointed by the Supreme Court for three (3) year terms and shall be eligible for reappointment. At least one member shall be appointed from each Congressional District. In case of a vacancy on the Board, the Supreme Court shall appoint a member of the South Carolina Bar to serve the remainder of the unexpired term.

(2) Associate Members. The Supreme Court may appoint associate members to assist the members of the Board. These associate members must be members of the South Carolina Bar who are actively engaged in the practice of law in South Carolina and who have been active members of the South Carolina Bar for at least five (5) years. These associate members shall assist the members of the Board in preparing the essay Examinations and model answers, administering the Bar Examination, and grading the Examination, and shall have such additional duties as may be determined by the members of the Board. While the Supreme Court shall not be limited in whom it appoints, the members of the Board shall nominate persons to serve as associate members.

(3) Chair; Secretary. The Supreme Court shall appoint a chair from among the members of the Board. The Clerk of the Supreme Court shall serve as secretary of the Board ex officio.

(4) Duties. The Board of Law Examiners shall determine whether applicants for admission to the practice of law in South Carolina possess the necessary legal knowledge for admission. The members of the Board are authorized to make rules and regulations for conducting the Examination, including a list of the subjects upon which applicants may be tested and

regulations providing for the accommodation of disabled applicants. These rules and regulations shall not become effective until at least ninety (90) days after they are approved by the Supreme Court.

(b) Committee on Character and Fitness.

(1) Members. The Committee on Character and Fitness shall consist of five (5) members of the South Carolina Bar who shall be appointed by the Supreme Court for five (5) year terms. In case of a vacancy on the Committee, the Supreme Court shall appoint a member of the Bar to serve the remainder of the unexpired term.

(2) Chair; Secretary. The Supreme Court shall appoint a chair and a secretary of the Committee from among the Committee's membership.

(3) Duties. The Committee on Character and Fitness shall investigate and determine whether an applicant for admission to the Bar possesses the qualifications prescribed by this Rule as to age, legal education, and character. The applicant must establish to the reasonable satisfaction of a majority of the Committee that the applicant is qualified. In conducting investigations, the Committee may take and hear testimony, compel by subpoena the attendance of witnesses, and require the applicant to appear for a personal interview. Any member of the Committee may administer oaths and issue subpoenas. The Committee may adopt rules that shall become effective upon approval by the Supreme Court. In addition, the Committee shall perform the duties specified by Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, and any other duties as directed by the Supreme Court.

(c) Qualifications for Admission. No person shall be admitted to the practice of law in South Carolina unless the person:

(1) is at least twenty-one (21) years of age;

(2) is of good moral character;

(3) has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar

Association at the time the degree was conferred. An approved law school includes a school that is provisionally approved by the Council;

(4) has been found qualified by the Committee on Character and Fitness;

(5) has passed the Bar Examination given by the Board of Law Examiners;

(6) has received a scaled score of at least seventy-seven (77) on the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners. If the score was obtained prior to the filing of the application, the MPRE must have been taken within four (4) years of the date on which the application is filed;

(7) is not disbarred, suspended from the practice of law, or the subject of any pending disciplinary proceeding in another jurisdiction;

(8) has successfully completed the Bridge the Gap Program sponsored by the South Carolina Bar; and

(9) has paid the fees and taken the oath or affirmation specified by this rule.

(d) Application to Take the Bar Examination.

(1) Filing Application; Fees. Any person desiring to take the Bar Examination shall file an application, in duplicate, with the Clerk of the Supreme Court. The application form shall be approved by the Committee on Character and Fitness. Applications shall be accepted from December 1 to January 31 for the July Examination and from August 1 to September 30 for the February Examination. The non-refundable application fee shall be:

(i) $400 for applications filed from December 1 to December 31 or from August 1 to August 31.

(ii) $750 for applications filed during the remainder of the application periods.

If the applicant has been admitted to practice law for more than one (1) year in another state or the District of Columbia at the time the application is filed, the applicant shall file one (1) additional copy of the application along with an additional fee of $500. A portion of this fee will be used to obtain a character report from the National Conference of Bar Examiners.

An application will not be considered filed until both the fully completed application and fee(s) are received by the Clerk of the Supreme Court. The application fee(s) shall be made payable to the Clerk of the Supreme Court of South Carolina, and the application and fee(s) shall be sent to the Clerk, Supreme Court of South Carolina, Post Office Box 11330, Columbia, South Carolina 29211. An applicant who withdraws or fails to sit for an Examination shall not be entitled to a refund of the application fee(s) or to have the application fee(s) credited to a later Examination. An applicant who has failed the Examination must comply with the requirements of section (i) below.

For the purpose of this rule, filing means: (1) delivering the document to the Clerk of the Supreme Court; or (2) depositing the document in the U.S. mail, properly addressed to the Clerk of the Supreme Court, with sufficient first class postage attached. The date of filing shall be the date of delivery or the date of mailing.

(2) Duty to Keep Application Current. Until they have been admitted, applicants are under a continuing obligation to keep their applications current and must update responses whenever there is an addition to or a change to information previously filed with the Clerk. These updates must be made in writing and must include all relevant documentation.

(3) Special Accommodations for Disabled Applicants. An applicant needing special accommodations for the Bar Examination due to a disability shall submit a written request for such accommodations to the Board of Law Examiners. The procedure and forms to be used in making a written request shall be specified in the Rules of the Board of Law Examiners. Unless the chair of the Board determines there is good cause to allow a late request, written requests for special accommodations must be

submitted by November 1 for the February Examination and April 1 for the July Examination.

(e) Determination by Committee On Character and Fitness. The Committee on Character and Fitness shall consider the application and any further information it deems relevant to determine if the applicant has the requisite qualifications and character to be admitted to practice law in this state. The Committee shall notify the Clerk of the Supreme Court whether it finds the applicant qualified or unqualified and, if found to be unqualified, the Clerk shall send the applicant a letter notifying the applicant of this finding. An applicant found to be unqualified shall not be allowed to sit for the Examination. If the Committee has not made a determination of the applicant's qualification by July 1 for the July Examination or February 1 for the February Examination, the applicant shall be allowed to sit for the Examination, and the Committee shall make its determination after the Examination is administered.

(f) Determination of Fitness of Certain Law Students. A student enrolled in a law school approved or provisionally approved by the Council of Legal Education of the American Bar Association who has a character problem that might disqualify the student from being admitted to practice law may have the matter resolved by filing a provisional application. The application shall be made on a form approved by the Committee on Character and Fitness and shall be filed in duplicate with the Clerk of the Supreme Court. Each request must be accompanied by a non-refundable fee of $100. The Committee may begin an immediate investigation of the individual's character and shall promptly notify the individual of its determination. No adverse inference concerning an applicant's character and fitness shall be drawn because the applicant filed a provisional application, nor does the filing of a provisional application relieve an applicant from fully complying with the normal application process.

(g) Review by Supreme Court of Fitness Determination; Re-application. Any applicant dissatisfied with the determination of the Committee on Character and Fitness may petition the Supreme Court for review within fifteen (15) days of the date of the letter notifying the applicant of the Committee's determination. The petition shall comply with the requirements of Rule 224, SCACR, to include the filing fee required by that

rule. An applicant who is found not to be qualified by the Committee or whose petition for review of the Committee's determination has been denied may not reapply for admission until two (2) years after the date of the letter notifying the applicant of the Committee's determination.

(h) False and Misleading Information by Applicants. An applicant who knowingly provides false or misleading information in an application (to include any attachments to the application), document, or statement submitted or made to the Committee on Character and Fitness, the Board of Law Examiners, or the staff of the Court shall be guilty of contempt of the Supreme Court of South Carolina and may be punished accordingly. In addition, if it is determined that an applicant has knowingly submitted false or misleading information, the Court may bar the applicant from reapplying for up to five years. Further, if the applicant has already been admitted, the Court may vacate the admission or discipline the lawyer under Rule 413, SCACR. For the purpose of this rule, false or misleading information shall also include the knowing omission of material information by an applicant in the application (to include any attachments to the application) or in response to an inquiry by the Committee, Board or staff of the Court.

(i) Bar Examination.

(1) When Given. The Bar Examination shall be conducted twice each year on the last consecutive Monday, Tuesday, and Wednesday in February and July.

(2) Content; Grading; Passing. The Bar Examination shall consist of seven (7) sections. Six (6) of these sections shall be composed of essay questions prepared by the Board of Law Examiners. The Chair of the Board shall assign a member of the Board to prepare and grade or supervise the preparation and grading of each essay section. The Multistate Bar Examination shall be the seventh (7^{th}) section. To pass the Multistate portion of the Examination, an applicant must attain a scaled score of at least 125. To pass an essay section, the applicant must obtain a score of seventy (70). Once an applicant reaches seventy (70) points on an essay section, that section will receive a passing grade and will not be graded further. An applicant must pass six (6) of the seven (7) sections to pass the Bar Examination; provided, however, that an applicant who receives a scaled

score of 110 or less on the Mulitstate Bar Examination shall fail the Bar Examination without any grading of the essay questions. The Board shall notify the Clerk of the Supreme Court of the results of the essay sections.

(3) Anonymous Grading; Prohibited Comments in Answer Sheets and Booklets. Applicants taking the Bar Examination shall be assigned an identification number that shall be used for the purposes of taking and grading the Examination. Except for the identification number and any other information the applicant may be directed to provide by those administering the Examination, answer sheets or booklets for the Examination shall contain no other information revealing the identity of the applicant. Any reference to the applicant's economic status, social standing, employment, personal hardship or other extraneous information in the answer sheets or booklets is prohibited.

(4) Notification of Results. The Clerk of the Supreme Court shall send a letter to each applicant advising the applicant whether the applicant passed or failed the Bar Examination. Additionally, the names of those passing the Examination and the identification numbers of those failing the Examination shall be posted on the South Carolina Judicial Department Website.

(**5) Review of Failed Essay Sections.** Within fifteen (15) days of the date of the letter of notification, an applicant failing the Examination may, in writing, request permission to review the essay questions, model answers, and the applicant's answers for each essay section that the applicant failed. The request shall be accompanied by a filing fee of $25. The review shall be conducted in the Bar Admissions Office in Columbia, South Carolina, and the applicant will be notified of the date and time when the review will be conducted. No review or inspection of the Multistate Bar Examination will be permitted nor will the applicant be allowed to copy or remove the essay questions, the model answers, or the applicant's answers. An applicant who receives 110 or less on the Multistate Bar Examination shall not be allowed any review of the essay questions, model answers or the applicant's answers.

(6) Re-grading. After reviewing an essay section, an applicant who feels an error has been made in grading may petition the Supreme Court

to have the section re-graded. An original and two (2) copies of the petition, accompanied by a filing fee of $50, must be filed with the Clerk of the Supreme Court within ten (10) days of the applicant's review of the essay section and must enumerate the alleged errors in grading. No briefing or argument is permitted. The only identifying mark to be placed on the petition is the identification number previously assigned to the applicant. Any reference to the applicant's other scores, economic status, social standing, employment, personal hardship, or other extraneous information is prohibited. If the petition is granted, the section shall be re-graded by the member or associate member assigned to grade that section, and the Clerk shall notify the applicant of the results of the re-grading.

(7) Request for Verification of Multistate Bar Examination. While no review or inspection of the Multistate Bar Examination (MBE) will be permitted, an applicant may request a hand grading of the MBE. Any such request must be filed with the Clerk of the Supreme Court along with the applicable fee[1] within fifteen days of the date of the letter of notification in (4) above.

(8) Prohibited Contacts. An applicant shall not, either directly or through an agent, contact any member or associate member of the Board of Law Examiners or any member of the Supreme Court regarding the questions on any section of the Bar Examination, grading procedures, an applicant's answers, or review or re-grading of any Examination. This provision does not prohibit an applicant from seeking a review, re-grading or verification in the manner provided by (5), (6) or (7) above.

(9) Cheating on the Bar Examination. An applicant who cheats, aids or assists another applicant in cheating on the Bar Examination, or attempts to cheat or aid or assist another in cheating, shall be guilty of contempt of the Supreme Court of South Carolina and may be punished accordingly. In addition, if it is determined that an applicant has cheated or aided or assisted another in cheating, the applicant shall fail the examination and the Court may prohibit the applicant from reapplying for up to five years. Further, if the applicant has already been admitted, the Court may vacate the admission or discipline the lawyer under Rule 413, SCACR.

---

[1] This fee is currently seven dollars ($7) and should be paid by check payable to "ACT."

(j) Re-Examination.

(1) Application and Filing Fees. Any applicant who has failed to pass the Bar Examination may apply to be re-examined. The application shall be made on a form approved by the Committee on Character and Fitness. The filing periods and filing fee(s) applicable to initial applications shall be applicable to applications for re-examination. Any request for special accommodations on the Examination must be submitted in the manner provided by section (d)(3) above.

(2) Special Requirements for Applicants Who Have Failed the Bar Examination Three or More Times. An applicant who has failed the Examination three or four times shall not be eligible to sit for a Bar Examination until at least one year following the administration of the last failed Examination. An applicant who has failed the Examination five or more times shall not be eligible to sit for the Bar Examination until at least two years following the administration of the last failed Bar Examination. Further, any applicant who has failed the Bar Examination three or more times must complete a course of study before being eligible to retake the Bar Examination. A new course of study must be completed after each subsequent failure. The course of study shall consist of one of the following:

(i) at least twelve (12) semester hours, or its equivalent, of classes at a law school approved or provisionally approved by the Council of Legal Education of the American Bar Association. The courses must be related to the subjects that are tested on the Bar Examination, and the applicant must complete all course requirements that would be required of a law student including a passing grade for the course. The supplemental application shall include certification from the law school that the applicant has completed the required number of hours, or if the course of study has not been completed at the time the supplemental application is filed, certification from the law school that the applicant is currently enrolled in courses which will give the applicant sufficient hours to complete the course of study before the Examination. The law school must provide certification that the required number of hours have been completed before the applicant will be re-examined.

(ii) study under the direct supervision of an attorney for at least twenty (20) hours per week for at least six months immediately preceding the Examination. The supervising attorney must be an active member of the South Carolina Bar who has been admitted to practice for at least five (5) years and is engaged in the active practice of law in South Carolina. The proposed course of study must specify the topics to be covered, the books and materials to be used, and the dates and locations of study, and must be submitted by the supervising attorney to the Board of Law Examiners for its approval. For the July Examination, the proposed course of study must be submitted not later than December 15. For the February Examination, the proposed course of study must be submitted not later than July 15. The Board of Law Examiners may approve, disapprove or modify the proposed course of study to include increasing the number of hours required. The supplemental application shall include certification from the supervising attorney that the applicant is current on the approved course of study. The supervising lawyer must provide certification that the applicant has completed the course of study before the applicant will be re-examined.

(k) Admission. An applicant who has completed all of the requirements of (c) above may be admitted to practice law by paying $50 and taking and subscribing to the following oath or affirmation:

I do solemnly swear (or affirm) that:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect and defend the Constitution of this State and of the United States;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defenses except those I believe to be

honestly debatable under the law of the land; but this obligation shall not prevent me from defending a person charged with crime;

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor, and will never seek to mislead the judge or jury by an artifice or false statement of fact or law;

I will respect the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval;

I will abstain from all offensive personalities, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice;

[So help me God.]

The oath or affirmation shall be administered in open Court and all persons admitted to the Bar shall sign their names in a book, kept for that purpose, in the office of the Clerk of the Supreme Court. Applicants shall be notified of the date and time when they are to take the oath or affirmation.

(l) Failure to be Admitted.

(1) More than One (1) Year. An applicant who is not admitted within one (1) year of the date of the letter advising the applicant that the applicant has passed the Bar Examination must file a supplemental application with the Clerk of the Supreme Court. The supplemental application shall be on a form prescribed by the Committee on Character and Fitness, and the applicant may not be admitted to the South Carolina Bar unless the Committee makes a re-determination that the applicant is qualified. The filing shall be accompanied by a fee of $100.

(**2**) **More than Two (2) Years.** An applicant who is not admitted within two (2) years of the date of the letter advising the applicant that the applicant has passed the Bar Examination may not be admitted without retaking the Bar Examination. The applicant must file a new application and pay the application fee(s) specified in section (d) above. On motion based on extraordinary circumstances, the Court may allow the applicant to be admitted without retaking the Bar Examination. The motion shall comply with the requirements of Rule 224, SCACR, to include the filing fee specified by that rule. If the applicant is granted permission to be admitted without retaking the Examination, the applicant shall pay a fee of $100.

(m) Admission of Certain Law Professors. A person serving as the Dean or as a tenured professor of the University of South Carolina School of Law may be admitted to practice law in this State without taking the Bar Examination (section (c)(5) above), the Multistate Professional Responsibility Examination (section (c)(6) above), or the Bridge the Gap Program (section (c)(8) above) if the Dean or professor:

(1) has been admitted to practice law in the highest court of another state or the District of Columbia for at least five (5) years;

(2) has been a full-time and continuous member of the faculty of the Law School with the rank of assistant professor of law or higher for the previous three (3) or more complete academic years; and

(3) has been recommended for admission by the Dean of the Law School, or in the case of the Dean, by the President of the University of South Carolina.

The application for admission shall be made on a form prescribed by the Committee on Character and Fitness, and shall be filed in triplicate with the Clerk of the Supreme Court. The application shall be accompanied by a non-refundable application fee of $400. A portion of this fee will be used to obtain a character report from the National Conference of Bar Examiners. The Dean or professor must comply with all other requirements of section (c) above. If found qualified by the Committee on Character and Fitness, the

Dean or professor shall be admitted upon taking the oath and paying the fee specified by section (k) above.

(n) Confidentiality. The files and records maintained by the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to Bar applications, Examinations (including review and re-grading), and admissions shall be confidential, and shall not be disclosed except as necessary for the Board, the Committee or the Clerk to carry out their responsibilities. The Board of Law Examiners, the Committee on Character and Fitness, and the Clerk may disclose information to the National Conference of Bar Examiners and to the Bar admission authorities in other jurisdictions, and may disclose the names of those persons who have passed the Bar Examination or those who are or will be admitted. The Supreme Court may authorize the release of confidential information to other persons or agencies.

(o) Immunity.

(1) The Board of Law Examiners, the Committee on Character and Fitness, and the members, associate members, employees, and agents of the Board or Committee, are absolutely immune from all civil liability for conduct and communications occurring in the performance of their official duties relating to the Examination, character and fitness qualification, and licensing of persons seeking to be admitted, readmitted or reinstated to the practice of law.

(2) Records, statements of opinion, testimony and other information regarding an applicant for admission, readmission or reinstatement to the Bar communicated by any entity, including any person, firm, or institution, to the Board of Law Examiners, the Committee on Character and Fitness, or to the members, associate members, employees or agents of the Board or Committee, are absolutely privileged, and civil suits predicated thereon may not be instituted.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sue Tennis d/b/a Carousel of Learning, Appellant,

v.

South Carolina Department of Social Services, Respondent.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3670
Heard June 11, 2003 – Filed August 11, 2003

REVERSED and REMANDED

Rodney F. Pillsbury, Yacobi & Pillsbury, LLC, of Greenville, for Appellant.

Rose Mary McGregor, S.C. Dept. of Social Services, of Columbia, for Respondent.

HEARN, C.J.: Sue Tennis appeals from an order of the circuit court affirming the Department of Social Services' (DSS) denial of her application to renew her license to operate a day care facility. We reverse and remand.

FACTS

Sue Tennis's history with DSS dates back to 1986. In that year, DSS "indicated a case" against Tennis for sexual abuse; that case was ultimately dismissed. In 1991, Tennis applied to DSS for a day care license, which DSS denied. This denial was overturned by the family court in 1992 in an order that stated: "DSS did not produce one shred of credible evidence as to why Tennis's application should be denied." Since that order, Tennis has operated the Carousel of Learning day care facility under a provisional license issued by DSS. Until this action, her provisional license has been renewed each time it expired.

Tennis changed the location of her day care in 1995. When she moved, her previous landlord filed charges against her because she removed playground equipment and left behind about a dozen holes on the property. Tennis pled guilty to malicious injury to property by a tenant, which is a misdemeanor. See S.C. Code Ann. §16-11-570 (stating that the injury or destruction of buildings or crops by a tenant is a misdemeanor).

DSS made unannounced visits to Carousel of Learning on June 4, August 5, and October 9, 1997. No deficiencies were found on any of these visits. On October 13, 1997, DSS sent Tennis a notice, which stated: "The Division of Child Day Care Licensing and Regulatory Services has been notified by the South Carolina Law Enforcement Division that you . . . have been convicted of a crime which prevents employment in a child day care facility." DSS was mistaken, however, because the crime to which Tennis pled guilty was a misdemeanor and as such, did not prevent her from employment in a day care facility.[1]

[1] Section 20-7-2725(A) of the South Carolina Code states:

In December of 1997, DSS visited Carousel of Learning in response to an anonymous complaint. The complaint was not substantiated and no deficiencies were noted. Another unannounced visit was made on February 2, 1998. Again, no deficiencies were found.

On May 21, 1998, DSS visited the facility and cited it for three violations: (1) having only one caregiver on the premises with 15 children; (2) not designating a director; and (3) failing to meet the fire codes because four infants were in a room not designated for infants. At the time of this visit, DSS was operating under the false assumption that Tennis was a convicted felon who could not work at a day care facility. Thus, even when Tennis was at the facility, she was not counted as a supervisor or counted in the child-to-staff ratios. If Tennis had been present on May 21, the only deficiency would have been the four infants in a non-designated room.

Again on June 23, 1998, DSS made an unannounced visit and found inappropriate ratios. However, Tennis was at the facility that day and was not counted toward these ratios.

On July 24, 1998, Tennis initiated a meeting with DSS in order to clear up the confusion regarding her guilty plea. She brought in papers that

---

> No day care center . . . may employ a person or engage the services of a caregiver . . . who has been convicted of (1) a crime listed in Chapter 3 of Title 16, Offenses Against the Person; (2) a crime listed in Chapter 15 of Title 16, Offenses Against Morality and Decency; (3) the crime of contributing to the delinquency of a minor contained in Section 16-17-490; (4) the felonies classified in Section 16-1-10(A) . . . ; (5) the offenses enumerated in Section 16-1-10(D); or (6) a criminal offense similar in nature to the crimes listed in this subsection committed in other jurisdiction or under federal law.

listed S.C. Code Ann. § 16-11-570 as the statute under which she pled guilty. That statute explicitly states that malicious injury to property by a tenant is a misdemeanor. Despite this meeting, DSS maintained its position that Tennis's criminal background prevented her from being employed at the day care.

From August of 1998 until November of 1999, DSS made numerous unannounced visits to Tennis's day care. DSS found no deficiencies on five of those visits.[2] On four of the visits in which deficiencies were found, there would have been no deficiency if DSS had counted Tennis toward the child-to-staff ratios.[3] On two visits, however, there were confirmed violations regardless of whether Tennis was counted. These violations occurred on July 15 and July 30, 1999.

During the July 15, 1999 visit, DSS found two caregivers in one room with twenty-four children. The room was designated for only twelve children. Tennis admitted the violation but explained that her facility was short-handed because an employee had quit unexpectedly. On July 30, 1999, DSS found violations because there were fourteen children in a room designated for twelve, a caregiver did not have her fingerprints on file, no menu was posted, and the sleeping mats were not labeled. DSS also found that there was no designated director and there were inadequate child-to-staff ratios; however, it is unclear whether these violations would have existed had Tennis been counted. In regards to the missing fingerprints, Tennis explained the employee in violation was a recent high school graduate who was enrolled in early childhood development classes at the local community college. To be enrolled in these classes, students needed to submit their fingerprints to SLED, and Tennis assumed that the employee had already been fingerprinted. The employee eventually did submit her fingerprints, and she had no criminal history.

---

[2] The dates of the visits with no deficiencies are: 9/1/98, 10/11/98, 5/12/99, 6/2/99, and 6/23/99.

[3] The dates where there would have been no deficiency if Tennis had been counted are: 9/17/98, 4/12/99, 5/4/99, and 7/20/99.

In November of 1999, DSS sent Tennis a letter denying Tennis's application for renewal of her day care license. The letter listed the following as the basis for denial:

> 1. Ms. Sue Tennis, owner of the facility, continues to provide direct care for children after having been notified by certified mail on October 3, 1997 (sic) and August 17, 1998, that she had been convicted of a crime which prevented her from employment in a child day care facility per Section 20-7-2725 of the 1976 Code of Laws of South Carolina as amended.
>
> 2. The facility has continued to employ a caregiver, Ms. Wendy Wilson, in direct care of children who failed to undergo a State and Federal fingerprint review in violation of Section 20-7-2740 (F) of the South Carolina Day Care Licensing Law.
>
> 3. The operator has failed to correct deficiencies within the time frames prescribed by the Department after being given timely notice per Section 20-7-2750 (D) of the South Carolina Day Care Licensing Law. Inadequate supervision was found on visits by Department staff on February 12, 1997, May 23, 1997, May 21, 1998, June 23, 1998, August 18, 1998, April 12, 1999, July 15, 1999, July 20, 1999, and July 30, 1999.

After sending this letter, DSS made two additional unannounced visits in March and April of 2000, and found no violations on either visit. Finally, on August 16, 2000, a hearing was held.

In the Final Administrative Order, the State Director of DSS found that DSS properly denied the renewal based on the violations from July 15, 1999 and July 30, 1999. The director found the health and safety of the

children in the day care were placed in jeopardy by the failure to maintain adequate staffing ratios and the failure to have a caregiver submit to a fingerprint check.

The circuit court reviewed the case and found that the decision to deny the renewal was based upon "inadequate ratios and other regulatory non-compliance issues as noted in the Final Administrative Order. On the two dates in question, severe ratio deficiencies were found." The court acknowledged that DSS had improperly excluded Tennis when calculating supervision ratios but concluded the "agency's determination was not tainted by any error of law, was not clearly erroneous in view of the reliable and substantial evidence presented, and was not arbitrary, capricious or an abuse of discretion." This appeal follows.

STANDARD OF REVIEW

Under the APA, "[t]his court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Leventis v. South Carolina Dep't of Health & Envtl. Control, 340 S.C. 118, 130, 530 S.E.2d 643, 649-50 (Ct. App. 2000) (quoting Ballenger v. South Carolina Dep't of Health and Envtl. Control, 331 S.C. 247, 251, 500 S.E.2d 183, 185 (Ct. App. 1998); S.C. Code Ann. § 1-23-380 (Supp. 2002)).

> We will not overrule an agency's decision unless:
>
> substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;

> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Leventis, 340 S.C. at 130, 530 S.E.2d at 650 (citing S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2002); Ballenger, 331 S.C. at 251, 500 S.E.2d at 185).

"Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." Waters v. South Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (quoting Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). "The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence." Id. "Furthermore, the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." Id. (citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1990)).

LAW/ANALYSIS

I. Denial of Tennis's Day Care License Renewal

Tennis maintains there was not substantial evidence to support the director's decision not to renew her license. She contends the decision was arbitrary and based upon DSS's incorrect assumption that she was convicted of a felony. We agree.

Looking at the record as a whole, the overwhelming evidence indicates DSS repeatedly cited Tennis for violations that were not truly

violations. Nearly every month for two years, DSS made unannounced visits to the day care center, and several months, DSS visited more than one time. These visits were often predicated on DSS's incorrect assessment that child-to-staff ratios at the facility were inadequate when in fact, if DSS had counted Tennis toward those ratios, there would have been no violation. In light of that error and considering Tennis's history with DSS, the evidence on the whole record reflects a history of DSS's bias against Tennis.

In its letter to Tennis notifying her of its decision to deny the renewal of her license, DSS lists Tennis's status as a felon as its first reason for non-renewal. The record, however, clearly indicates that Tennis was not a felon.

The next reason for denial listed in the letter is the "continued [employment of] a caregiver . . . in direct care of children who failed to undergo a State and Federal fingerprint review . . . ." At the hearing, Tennis admitted this violation, explained how it happened, and presented evidence that the caregiver was fingerprinted after she had been cited for this violation. The fingerprinting results revealed the caregiver had no criminal record.

Finally, the letter refers to dates upon which DSS made visits and found violations. At least one date listed was not even a day upon which a visit was made,[4] and a majority of the dates listed would not have been violations if DSS had counted Tennis in its child-to-staff ratios.

Upon consideration of the entire record, we hold the decision of DSS to deny Tennis's renewal of her day care license was clearly erroneous in light of the reliable, probative, and substantial evidence. In 1992, the family court found DSS presented "not one shred" of evidence supporting the denial of Tennis's license. Since then, it appears DSS has attempted to

[4] In its letter denying Tennis's license renewal, DSS listed May 23, 1997 as a day upon which a violation was found; however, no visit was made on that date. Instead, DSS received an anonymous complaint on May 23rd, and when DSS followed-up the complaint with a visit on June 4, 1997, no deficiencies were found.

bolster its case against Tennis by making frequent unannounced visits and repeatedly citing her for violations that did not exist. Based on this history, we do not believe the violations on July 15th and July 30th amount to "substantial" or "reliable" evidence.

II. Attorney's Fees

Tennis next argues that if the circuit court's decision is reversed, she is entitled to attorney's fees pursuant to S.C. Ann. § 15-77-300 (Supp. 2002). Under that statute, a party defending an action brought by the State may recover attorney's fees and costs if three prerequisites are met: first, the contesting party must be the prevailing party; second, the court must find that the agency acted without substantial justification in pressing its claim against the party; and third, the court must find that there are no special circumstances that would make the award of attorney's fees unjust. Richland County v. Kaiser, 351 S.C. 89, 96, 567 S.E.2d 260, 264 (Ct. App. 2002). Based on our decision to reverse the denial of Tennis's day care license and there being no evidence that makes the award of attorney's fees unjust, we find Tennis is entitled to attorney's fees incurred during the litigation pursuant to § 15-77-300. See McDowell v. South Carolina Dep't of Soc. Servs., 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (finding that although § 15-77-300 entitled appellant to attorney's fees for the action for judicial review in circuit court, appellant was not entitled to attorney's fees for the hearing before DSS because "the agency was not 'pressing its claim' in litigation against appellant but was merely functioning as an administrative decision-maker").

Accordingly, the decision of the circuit court is **REVERSED,** and we **REMAND** the case to the circuit court to determine the amount of attorney's fees owed.

REVERSED and REMANDED.

CONNOR and STILWELL, J.J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anthony White, Employee, Respondent,

v.

Medical University of South Carolina, Employer, and State Accident Fund, Carrier, Appellant.

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

Opinion No. 3671
Heard June 25, 2003 – Filed August 11, 2003

AFFIRMED

Cynthia B. Polk, of Columbia, for Appellant.

E. Courtney Gruber and R. Walter Hundely, both of Charleston, for Respondent.

HEARN, C.J.: In this workers' compensation case, the commission found that Anthony White's claim was barred by the applicable statute of limitations. White appealed to the circuit court, which reversed the commission, finding White's claim was not barred by the statute of limitations, and awarded benefits. White's employer, the Medical University of South Carolina (MUSC) appeals, arguing the circuit court erred in (1) not dismissing the claim for White's failure to set forth sufficient grounds for appeal in his petition for judicial review; (2) finding the commission's decision was not supported by substantial evidence; and (3) determining that MUSC was estopped from asserting the statute of limitations as a defense. We affirm.

FACTS/PROCEDURAL HISTORY

White worked at MUSC as an operating room technician/nursing assistant. His job duties included removing trash bins from the operating room, moving equipment, lifting patients, and transporting patients to and from other rooms. Larger patients were transported by way of a 1500- pound bed called a "big-boy" bed.

In 1997, White complained to his supervisor that he had hurt himself, and he sought medical treatment from Dr. G.T. Little, complaining primarily of poor circulation in his legs. Dr. Little's notes from that day indicated that White also complained of severe lower back pain; however, the notes further stated that White "had no injuries to the back that [White] is aware of." The injury did not prevent White from returning to work, nor was White put on any light duty restrictions or work restrictions.

The record indicates White went to his family physician, Dr. F.C. Walker, on February 2, 1999. Dr. Walker treated White for flu symptoms and noted that White complained "of some back pain in the lower thorax." White again saw Dr. Walker on February 26, 1999, and Dr. Walker's notes indicated that White was experiencing some back pain at that time. White also saw Dr. Walker on November 1, 1999, and on that date he complained of muscular thoracic pain.

On April 12, 2000, White saw Dr. Elizabeth Rittenberg for low back pain radiating into both legs. In her report, Dr. Rittenberg noted that White had had low back pain for several years but it had gotten worse in the three weeks prior to his visit. In her notes from a visit on April 24, 2000, Dr. Rittenberg stated that an MRI scan of White showed a small midline L4, 5 disc herniation.

White filed a Form 50 seeking workers' compensation benefits on December 6, 2000. The single commissioner denied the claim, finding it was barred by the two-year statute of limitations. S.C. Code Ann. § 42-15-40 (Supp. 2002). The full commission affirmed. White appealed to the circuit court, which reversed and remanded the matter back to the commission. The circuit court found a reasonable person would not have been on notice that he suffered a work-related claim prior to April 2000. Because it found the statute of limitations did not begin to run until that date, the circuit court found White's claim was not barred. The court also found that substantial evidence existed to support White's position that he suffered a disc herniation as a result of repetitive trauma. MUSC appeals.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002) (citing Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999)). "In an appeal from the Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Corbin, 351 S.C. at 617, 571 S.E.2d at 95 (citing Hamilton, 336 S.C. at 76, 518 S.E.2d at 601). "The appellate court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Id. "The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Id. (citing Hicks v. Piedmont Cold Storage, 335 S.C.

46, 515 S.E.2d 532 (1999); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999)).

LAW/ANALYSIS

I. Sufficiency of White's Notice of Appeal

MUSC first argues White's appeal should have been dismissed by the circuit court for failure to set forth sufficient grounds for appeal in his petition for review. We disagree.

The commission adopted the single commissioner's order, which concluded as a matter of law that White had not met the two-year statute of limitations. The commission thus denied the claim. In his notice of appeal, White stated the following exception to the ruling: "The Full Commission erred in finding as a fact and concluding as a matter of law that the Claimant was not entitled to benefits under the South Carolina Workers' Compensation Act."

Section 42-17-60 of the South Carolina Code (1985) states that "[n]otice of appeal [to the circuit court from the commission] must state the grounds of the appeal or the alleged errors of law." In Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (Ct. App. 1992), an injured worker's exception that "the facts found by the commission were not supported by credible evidence" was specific enough to satisfy the notice requirements of section 42-17-60.[1] White's exception, attacking the commission's findings of fact and conclusions of law, is substantially similar to the one upheld in Solomon.

[1] Solomon's other two exceptions, that the "decision of the commission failed to address all the exceptions and points of law brought before the commission" and "upon such further exception as will hereafter be served," were not sufficient to satisfy the notice requirements of section 42-17-60. Solomon, 307 S.C. at 522, 415 S.E.2d at 844.

In White's case, the commission's findings of fact and conclusions of law only addressed the statute of limitations issue; thus, White's notice of appeal was sufficient to direct the circuit court to the error complained of and allow the court to determine whether the ruling was erroneous. Both the court and MUSC were on notice that White believed the commission erred in finding he was not entitled to benefits. Thus, we find no error.

II. Statute of Limitations

MUSC next argues the circuit court erred in finding the commission's decision was not supported by substantial evidence. We disagree.

The commission found that White's claim was barred by the statute of limitations because White "either knew or should have known that repetitive lifting of patients and gurneys was causing injury to his back as far back as 1997." In reversing the commission, the circuit court found, *inter alia*, there was substantial evidence to support White's position that he suffered disc herniation as a result of repetitive trauma.

A repetitive trauma injury has a "gradual onset caused by the cumulative effect of repetitive traumatic events or 'mini-accidents.'" Schulknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002). In Schulknight, a firefighter sought workers' compensation benefits for hearing loss he suffered from sitting next to the fire siren and air horn while he rode in the fire truck. The firefighter had a hearing test in April of 1995, which indicated he had suffered noise-induced hearing loss. Despite this hearing loss, the doctor administering the test concluded the firefighter could still perform his job. Over the next two years, the firefighter was diagnosed with bilateral hearing loss from noise exposure and was told that in approximately ten years, he would need hearing aids. Id. at 176, 574 S.E.2d at 194-195. The firefighter left the fire department in August of 1997, and in May of 1998, he filed a workers' compensation claim. The full commission found the two-year statute of limitations had run because the firefighter knew he had work-induced hearing loss since May of 1995. Id. at 177, 574 S.E.2d

at 195. The supreme court reversed, finding the firefighter's injury was caused by repetitive trauma. The court noted that "it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." Id. The court went on to "hold the last day of exposure is the date from which the statute of limitations begins to run in a repetitive trauma case." Id. at 179, 574 S.E.2d at 196.

In the present case, although White complained of back pain in 1997, his injury was not severe enough at that time to warrant any change to his duties at work. As White continued to lift heavy equipment and patients at work, his back pain worsened, and eventually, he was diagnosed with a disc herniation and ordered not to lift heavy objects. [2] Thus, even if substantial evidence supported the commission's determination that White knew since 1997 that his back pain was work-related, the statute of limitations did not begin to run until the last day of exposure - White's last day of work in April of 2000. Id.

We agree with the circuit court that substantial evidence supports the finding that White's injury was the result of repetitive trauma, which arose out of and in the course of White's employment. Thus, the circuit court correctly found that the statute of limitations had not run and White is entitled to workers' compensation benefits.[3] See also Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (stating that the policy in South Carolina is to liberally construe the Workers' Compensation Act in favor of coverage); Gattis v. Chavez, 413 F. Supp. 33, 39 (D.S.C. 1976) ("Statutes of limitation which are susceptible to judicial construction should not be applied mechanically but rather construed in the manner most consistent with both their underlying purposes and the requirements of substantial justice for all parties involved.")

---

[2] According to Dr. Rittenberg, "within a reasonable degree of medical certainty . . . [White's] job duties [were] of such a nature that they could have aggravated or exacerbated his pre-existing chronic back pain [from 1997], ultimately resulting in disc herniation."

[3] Because we find the statute of limitations has not run, we need not address the issue of estoppel.

Accordingly, based on the foregoing reasons, the decision of the circuit court is

AFFIRMED.

CURETON and STILWELL, J.J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patsy Ann Gilbert, Appellant,

v.

Marvin Miller and Toya Abbatiello, Defendants,

Of whom Toya Abbatiello is Respondent.

Appeal From Greenville County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 3672
Submitted April 7, 2003 – Filed August 18, 2004

AFFIRMED

James H. Price, III, and H.W. Pat Paschal, Jr., both of Greenville, for Appellant.

Matthew K. Johnson, of Greenville, for Respondent.

CONNOR, J.: Patsy Ann Gilbert filed suit against Marvin Miller and Miller's landlord, Toya Abbatiello, to recover for personal injuries sustained by Gilbert after being bitten by Miller's dog. Abbatiello filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. The trial court granted Abbatiello's motion. We affirm.

FACTS

Miller resides with his dog at an apartment complex owned by Abbatiello. Miller's dog attacked Gilbert while she was visiting at another tenant's apartment.[1]

Gilbert filed suit against Miller and Abbatiello. Gilbert alleged in her complaint that Abbatiello was negligent in "allowing Miller to keep a vicious dog on her premises despite . . . a policy of no dogs kept by tenants except for small dogs." The complaint did not refer to any lease agreement and did not allege any duty on the part of Abbatiello.

[1] The record is unclear concerning whether Gilbert is also a tenant at the apartment complex. Patsy Chambers, whose mother lives in the complex, stated in her affidavit that Gilbert "came to my mother's house to pick up" her child. Gilbert's affidavit merely states she was attacked "while at the home of Patsy Chambers' mother." Furthermore, Gilbert's brief states the issue on appeal is whether a landlord can be liable for an injury to a "guest" inflicted by a tenant's dog. However, Gilbert's complaint states she was "talking with a neighbor" when she was attacked by Miller's dog. Abbatiello admitted the facts as stated in Gilbert's complaint for the purposes of her motion to dismiss. Given our standard of review and Abbatiello's admission, we resolve this ambiguity against Abbatiello and will assume the attack occurred while Gilbert, a tenant, was a guest at another tenant's apartment.

Abbatiello moved to dismiss the complaint against her based on Gilbert's failure to state facts sufficient to constitute a cause of action upon which relief can be granted. Rule 12(b)(6), SCRCP. The trial court granted Abbatiello's motion. This appeal follows.

STANDARD OF REVIEW

Gilbert correctly asserts the trial court converted Abbatiello's Rule 12(b)(6) motion into a motion for summary judgment by reviewing matters outside of the pleadings. The trial court's order referred to Abbatiello's motion as a motion to dismiss pursuant Rule 12(b)(6), SCRCP. A Rule 12(b)(6) motion is converted to a Rule 56, SCRCP, motion for summary judgment if "matters outside the pleading are presented to and not excluded by the Court . . . ." Rule 12(b), SCRCP.

Gilbert submitted affidavits, photographs, and a copy of the lease agreement in her response to Abbatiello's motion. Abbatiello did not object to their inclusion and the trial court specifically mentioned the lease agreement and Patsy Chambers' affidavit in its order. Therefore, Abbatiello's Rule 12(b)(6) motion was converted to a motion for summary judgment. See Benson v. United Guar. Residential Ins. of Iowa, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994) (finding where the trial court considers matters outside the pleadings the motion to dismiss is converted to one for summary judgment).

When reviewing a dismissal of an action under Rule 56, SCRCP, an appellate court applies the same standard of review implemented by the trial court. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). A trial court's decision to grant a motion for summary judgment is appropriate only when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. Id. All ambiguities, conclusions, and inferences arising from the evidence must be construed against the movant. Id.

LAW/ANALYSIS

A.

Gilbert argues the trial court erred by dismissing her complaint on the basis that a landlord is not liable for injuries caused by a tenant's dog kept on leased premises.

In Mitchell v. Bazzle, 304 S.C. 402, 404 S.E.2d 910 (Ct. App. 1991), we first addressed a landlord's liability for injuries inflicted by a tenant's dog. The "clear question" presented in Mitchell was whether South Carolina law "imposed a duty on [landlord] to [plaintiff] to terminate [tenant]'s month-to-month lease in order to remove [tenant]'s dog from the land." Id. at 404, 404 S.E.2d at 911. We held a landlord could not be vicariously liable under the common law for the actions of a tenant's dog even where the landlord knew of the animal's vicious propensities and could have foreseen the injury, had adequate time to terminate a month-to-month tenancy, and failed to terminate the lease. Id. at 404-05, 404 S.E.2d at 911-12.[2]

In Fair v. United States, 334 S.C. 321, 513 S.E.2d 616 (1999), our Supreme Court analyzed the question of whether the South Carolina Residential Landlord and Tenant Act (RLTA)[3] altered the common law rule espoused in Mitchell. The Court held that under the RLTA a landlord is liable only for defects relating to the inherent

---

[2] But see Cronin v. Chrosniak, 536 N.Y.S.2d 287 (N.Y. App. Div. 1988) (finding summary judgment improperly granted to landlord where landlord knew of dog's vicious propensities and had capability to remove dog by terminating month-to-month lease); Vasques v. Lopez, 509 So. 2d 1241 (Fla. Dist. Ct. App. 1987) (reversing a grant of directed verdict for defendant landlord where the jury could have inferred actual knowledge of the dog's vicious propensities and the landlord's control over the premises based on the landlord's right to terminate a week-to-week tenancy and evict the tenant).

[3] S.C. Code Ann. §§ 27-40-10 to -940 (1991 & Supp. 2002).

physical state of the leased premises. Fair, 334 S.C. at 323-24, 513 S.E.2d at 617. Therefore, the RTLA "does not alter the common law rule that a landlord is not liable to a tenant's invitee for injury caused by a tenant's dog." Id.; see Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000) (recognizing and reaffirming the principle of law stated in Fair and Mitchell).

Since there is no dispute over any material facts, the trial court did not err in granting summary judgment. Abbatiello was entitled to judgment as a matter of law because South Carolina law does not recognize holding a landlord vicariously liable for the actions of a tenant's dog.

B.

However, this does not end the inquiry. Gilbert also contends the trial court erred in granting summary judgment for Abbatiello because the lease agreement between Abbatiello and Miller created a duty of care for the landlord to prevent harm by a tenant's dog. See Miller v. City of Camden, 317 S.C. 28, 451 S.E.2d 401 (Ct. App. 1994), aff'd as modified, 329 S.C. 310, 494 S.E.2d 813 (1997) (stating an affirmative legal duty to act can exist if created by contract). The lease provided:

> Pets must meet the approval of the landlord and appropriate additional deposits may be required. Dogs will not be allowed in multifamily units. Continuous disturbances or complaints, such as odors, fleas or messes caused by the pet, will result in the deposit being forfeited along with additional monies to correct the problems and the animal must leave the premises. If it is necessary to hire a pest eradicator because of a flea problem the tenant will pay the cost. The tenant will also be responsible for any damage caused by the pet and must be in full control of the pet at all times.

Initially, Gilbert did not allege, and there is no evidence in the record, she entered into a lease agreement like the one between Abbatiello and Miller. Thus, in the absence of any allegation that Gilbert entered into an identical lease, it is impossible to say, as Gilbert claims in her brief, the "lease could be relied upon by other tenants in entering their lease as assurance that their premises (and guests) would be free of the presence of" a vicious dog. See Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) (stating a third person not in privity of contract with the contracting parties generally may not enforce the provisions of a contract unless it is entered into for the benefit of the third person).

This Court dealt with the creation of a duty by a lease in Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997). Goode was attacked while visiting a friend at an apartment complex. One of his attackers resided at the apartment complex.

Goode sued the landlord (St. Stephens) asserting St. Stephens was negligent in failing to provide security. Goode alleged he was a third party beneficiary under the lease agreement in which tenants agreed not to engage in unlawful conduct on the grounds of the apartment complex. Thus, Goode argued the lease created a duty for St. Stephens to protect him from attack by third parties. Id. at 445, 494 S.E.2d at 833.

Upon examination of the lease provision, we concluded St. Stephens did not owe a duty of care to Goode because he was not a third party beneficiary under the contract. We concluded that if St. Stephens did not "covenant to prevent or to protect *tenants* from the violent acts of other tenants or third parties" it surely "could not have intended to create such a benefit directly in favor of Goode." Id. at 446, 494 S.E.2d at 833.

The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the lease. United Dominion Realty Trust, Inc. v. Wal-Mart Stores,

Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). If a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement. Smith-Cooper v. Cooper, 344 S.C. 289, 543 S.E.2d 271 (Ct. App. 2001). A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense. Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993).

It is clear the language of the lease did not intend to make Gilbert, as either a tenant or a guest, a third party beneficiary by imposing a duty in tort on the landlord to prevent a tenant's dog from injuring another. The lease provision cannot be construed as being for the protection of other tenants or guests. A review of the lease provision shows its primary purpose was to prevent damage to the property or disruption of the physical habitability of the apartment complex by a tenant's pet. This is evident from the provision's use of the general term "pets" rather than "dogs."[4] This provision could refer to any pet, not only dogs, and demonstrates Abbatiello did not contract to protect others from dogs on the premises.

The lease provision's concern rested in ensuring any tenant who kept a pet would be responsible for any mess or sanitary problems

[4] Dogs are referred to only in relation to their prohibition in multifamily units. We construe this prohibition to be only for the benefit of the landlord and the prevention of a nuisance, such as a dog barking or pet odors, to the adjoining lessee in a multifamily unit because the next sentence of the lease provision addresses "continuous disturbances or complaints, such as odors, fleas or messes caused by the pet . . . ." See O'Cain v. O'Cain, 322 S.C. 551, 473 S.E.2d 460 (Ct. App. 1996) (stating a private nuisance is an unreasonable interference with the plaintiff's use and enjoyment of the land). Further support for this is found in another paragraph of the lease mandating that "multifamily units must maintain lower noise levels after 11:00 PM so as not to disturb other tenants."

caused by the animal. Importantly, the lease explicitly made the control of the pet the sole responsibility of the tenant, not the landlord. See Braun v. York Props., Inc., 583 N.W.2d 503 (Mich. Ct. App. 1998) (finding landlord had no duty to protect others from attack by a tenant's dog even where landlord had promulgated rules and regulations governing tenants' possession of dogs; the primary purpose of the rules was to protect against harm to the premises); cf. Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986) (finding landlord had undertaken a specific duty to protect others from tenant's vicious dog and could be found liable where lease specifically prohibited tenants from keeping "vicious dogs").

The landlord here has not contracted to remove pets unless there have been continuous disturbances or complaints. Abbatiello had not received any complaints about Miller's dog other than her own observation "a couple of days" before the attack of the dog "raging and rearing up." The lease provision prohibiting pets in multifamily units was not equivalent to a promise creating a duty on the part of Abbatiello to keep the premises free from pets or vicious dogs. Moreover, there is no evidence Abbatiello permitted Miller to keep the dog in the multifamily unit, or knew of any intention by Miller to keep a pet at his unit, at the time the lease was entered into.[5]

[5] In this case, the only evidence of Abbatiello's knowledge of the dog indicates she learned of the dog "a couple of days" before the attack. This limited time period would have been insufficient for Abbatiello to have evicted Miller and abated any hazard, given the record does not specify the term of the lease. A landlord's power to evict a tenant is restrained by the statutory termination notice period. See S.C. Code Ann. § 27-40-770 (1991) (providing for the termination of periodic tenancies by the landlord after giving written notice to the tenant); see also Feister v. Bosack, 497 N.W.2d 522, 525-26 (Mich. Ct. App. 1993) ("If a third party is injured before the landlord lawfully could have evicted the tenant, the landlord cannot be liable, even if he knew about the dog's vicious nature.").

Our opinion in Mitchell is also instructive in determining whether the lease created a duty of care for Abbatiello to prevent harm by a tenant's dog. Mitchell, 304 S.C. at 404-05, 404 S.E.2d at 911-12. In holding that the law did not impose a duty on the landlord based on the circumstances present in Mitchell, we clearly implied that a landlord is not liable even where a landlord has some form of control, *i.e.*, termination of the lease, over a tenant's dog. But see FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 414, 574 S.E.2d 228, 231 (Ct. App. 2002) ("In Mitchell, this court found that even though the landlord knew of the dog's viciousness, had adequate time to terminate the tenant's lease, and failed to terminate the tenant's lease, the landlord was not liable for the acts of the tenant's dog *over which the landlord had no control*.") (emphasis added).

The trial court did not err in finding the lease did not alter the common law rule that a landlord is not liable to a third party for injuries caused by a tenant's dog.

CONCLUSION

Based on the foregoing analysis, the order of the trial court granting summary judgment is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.