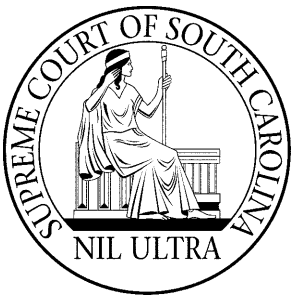

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 19, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Kenneth Navy, Jr., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26759
Heard April 22, 2009 – Filed January 11, 2010

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Assistant Attorney General Michelle J. Parsons, and Warren Blair Giese, all of Columbia, for Petitioner.

Acting Chief Appellate Defender Robert M. Dudek, of Columbia, for Respondent.

JUSTICE PLEICONES: Respondent was convicted of homicide by child abuse in the suffocation death of his almost two year old son and received a twenty year sentence. On appeal, the Court of Appeals reversed, holding "the trial court erred in admitting [respondent's] voluntary oral statement and the second and third written statements." State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (Ct. App. 2006). We granted the State's petition for certiorari, and now affirm the decision to the extent it holds the second and third written statements are inadmissible under Missouri v. Seibert, 542 U.S. 600 (2004), but reverse the holding that the first oral statement was erroneously admitted.

FACTS

At approximately 4 pm on Sunday, February 9, 2003, EMS responded to a 911 call placed from a residence. When they arrived, respondent was administering CPR to his son. The child had no heartbeat or respiration, and attempts to resuscitate him in the ambulance and at the hospital were unsuccessful. The child was pronounced dead at 4:58 pm.

An autopsy was performed on Monday. The doctor testified there was no medical reason for the child to die, and opined that the death was the result of suffocation. He also found that the child had four older healing rib fractures in his back, fractures which had occurred at different times.

Respondent gave a statement at the hospital on Sunday night, but because he was so upset and distraught it was thought to be incomplete. On Wednesday morning, Sgt. Weeks and Investigator Smith went to respondent's residence with the intent of taking him from the home to the sheriff's office to interview him and obtain another statement. The decision to talk with respondent was prompted by a meeting with the autopsy doctor the day before who told the officers that the only way the child could have died was by smothering or suffocation.

When the officers arrived at the home, they told respondent they needed to ask some additional questions. Respondent was very cooperative, stating he wanted answers too, but he was upset and crying at the home and remained upset and crying throughout the entire time period from the time the officers arrived at the home (approximately 9 am) until they obtained the third statement (1 pm). The officers knew that the child's funeral home visitation was scheduled for later that Wednesday, and told respondent and his family that they would have respondent back in time for the service.

Respondent's first statement was given at the station at 9:50 am. In this oral statement, respondent maintained that he was watching TV on the first floor while the two younger children (the victim and a four year old daughter) napped upstairs. He told the officers:

1) The victim awoke crying as if from a nightmare;

2) Respondent comforted him, putting him back in the crib, and patting him on his back;

3) Respondent went downstairs to get a bottle: upon returning upstairs he noticed the child was having breathing problems;[1]

4) Respondent "panicked" and went up and down stairs several times until he "figured out" what was going on and returned upstairs bringing with him his friend Terry who was visiting;

5) He picked the "lifeless" child up, and told Terry to take the other child downstairs and keep her from seeing what was going on;

[1] The child, who was born prematurely, had lung issues and was being weaned off a nebulizer and Albuterol. The mother was primarily involved in the child's medical treatments.

6) Respondent took the lifeless child downstairs, put him on the floor, and performed CPR three times[2] before calling 911;

7) Respondent continued CPR until EMS arrived.

This statement is largely consistent with the statement respondent gave at the hospital after the child died.

At the Sheriff's Department respondent was given cigarettes and permitted to take escorted smoking breaks. The investigator testified respondent was not in custody or under arrest, and agreed that respondent was free to tell the officers to take him home anytime he wanted.

After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. At this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation. In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

After eliciting the answers in which respondent admitting hitting the child and interfering with the child's breathing, the officers allowed him another smoke break. Investigator Smith insisted at trial that respondent was still free to leave, but also testified that he "perceived that the line of questioning may move further into what he had just told us." Smith decided

[2] There was evidence that a child should be placed on a hard surface such as a floor when CPR is to be administered.

it was now appropriate to give respondent *Miranda* warnings and administered them to respondent at 11:35 am.

Following the *Miranda* warnings, respondent gave his second statement, this one in writing, at 11:40 am. Significantly, in this second statement, respondent described the events as "the same as in his first statement," except that:

1) He could not get the child to be quiet, and while the crying child was sitting up in the crib, respondent put his hand over the child's mouth, but did not hold it there.

2) Respondent then laid the child on his stomach in the crib and "popped" him in the middle of the back, causing the child to cry "one time real loud." Respondent then put his hand over the child's mouth again to try to stop the crying, then noticed the child could not get his breath, perhaps as the result of the pop on the back.

3) Respondent, thinking he had knocked the child's breath out, went downstairs and returned with a bottle.

4) The child was still "making that noise" "like he was still trying to catch his breath" and respondent panicked. As the child quit and then resumed breathing, respondent went downstairs and got Terry.

5) When respondent and Terry got back upstairs, the child was not breathing.

6) In response to the question: "When you placed your hand over [the child's] mouth, is it possible that your

hand covered his nose area as well," respondent answered "It could have been."

Q. When you popped him in the back, did you have your fist balled up?

A. No sir. It was my flat hand.

Q. How hard did you pop him?

A. Not like trying to kill him or nothing. I just popped him.

…

Q. Why did you pop [him] in the back Sunday?

A. I was frustrated because he was crying.

Following this second statement, which was reduced to writing, Sgt. Weeks contacted the pathologist who had conducted the autopsy to ask whether the actions respondent admitted committing in his second statement "could have caused" the child's death. The pathologist said no, and told the officer that the hand would have had to cover the child's nose and mouth for at least a minute. The officers then obtained a third written statement from respondent at 12:25 pm. The brief questions and answers are:

Q. [Respondent], is it possible that you held your hand over [the child's] mouth and nose for a longer period of time then you first related to us that you did?

A. Yeah, it could have been longer.

Q. How long do you think it could have been?

A. I don't know.

Q. Can you give us any idea at all how long you might have held your hand over his nose and mouth?

A. A minute, not more than two minutes.

Q. When you removed your hand the last time was [the child] breathing?

A. He was gasping for breath.

Respondent moved to suppress all three statements, but particularly the written second and third statements. He argued that the statements were not voluntary, in that he was distraught, sleep-deprived, and shocked by the information that his child had been suffocated and had rib injuries. Specifically, respondent argued that the second and third statements were unconstitutionally obtained since the officers conducted unwarned custodial interrogation after he gave the first oral statement, obtained incriminating evidence, and only then *Mirandized* him and took the official second and third statements.

The trial court admitted all three statements, finding that respondent was not in custody, was not significantly deprived of his freedom, and that the first statement was voluntary and no *Miranda* warning rights were required. As to the second and third statements, he made the finding the statements were *Mirandized* and freely and voluntarily given. On appeal, the Court of Appeals reversed, finding none of the three statements should have been admitted.

ISSUE

Whether the Court of Appeals erred in reversing the trial court's decision to admit respondent's three statements?

ANALYSIS

A. First Statement

On appeal, the Court of Appeals, citing State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), held the first statement should have been suppressed primarily because respondent was in custody at the time of the statement. The State contends the Court of Appeals erred in reaching this result. We agree with the State that the Court of Appeals erred in reversing the trial judge's ruling admitting respondent's oral statement.

Whether a suspect is in custody is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning. It is an objective determination, that is, would a reasonable person have believed he was in custody. State v. Evans, *supra*. On appeal, the trial court's findings as to custody must be upheld where they are supported by the record. Id.

In our opinion, it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record. State v. Evans, *supra*. In light of this, the Court of Appeals erred in finding the first statement should have been suppressed.

B. Second and Third Statements

The Court of Appeals held that respondent's second and third statements should have been suppressed because they were obtained in violation of the rule announced in Missouri v. Seibert, 542 U.S. 600 (2004).[3] We agree.

[3] Seibert was filed eight days after respondent's trial ended.

In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:

1) the completeness and detail of the question and answers in the first round of interrogation;

2) the timing and setting of the first questioning and the second;

3) the continuity of police personnel; and

4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Justice Kennedy wrote separately, stating that while he agreed with much of the plurality opinion, he wished to emphasize that not every *Miranda* violation would require suppression. He explained that an exception should be made where the officer may not have realized that a suspect is in custody and therefore a warning was required, or where the officer did not plan to question the suspect at that juncture. Justice Kennedy noted that in Seibert, the two-step technique was used to deliberately avoid *Miranda*, using a strategy based on the assumption that *Miranda* warnings will mean less when given after an incriminating statement has already been made. Under these circumstances, Justice Kennedy agreed the statements must be suppressed unless "curative measures" were taken. As examples of curative actions, Justice Kennedy suggested a substantial break in time and circumstances between the pre-warning statement and the warned, or an additional warning before questioning resumes that the pre-warned statement is not admissible.

In our opinion, the Court of Appeals correctly concluded the officers' actions here violated Seibert and therefore the second and third written statements must be suppressed. The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. Once those incriminating answers were given – i.e. after respondent admitted he had popped the child on the back and "patted" his mouth – respondent was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in Seibert were met here. Moreover, none of the curative measures suggested by Justice Kennedy, i.e. an additional warning that the answers given after the first statement but before the administration of *Miranda* warnings may not be admissible,[4] a substantial break in time, or change of circumstances, occurred here.

The State would characterize the failure to initially administer warnings was merely one of "good faith," relying on Oregon v. Elstad, 470 U.S. 298 (1985). In Elstad, the officer asked a few questions of the suspect at the suspect's home before transporting him to the police station for questioning. Here, in contrast, the officers questioned respondent at headquarters for almost three hours before giving the warning. Moreover, after the first round of detailed questioning resulted in the first statement, respondent was confronted with the autopsy results which stated that the cause of death was suffocation, and that there was evidence of old bone breaks, followed by more detailed questioning. In our opinion, the Court of Appeals correctly held that the rule in Seibert applies here to bar admission of the second and third statements.

[4] The dissent focuses on the fact the first statement was admissible, while our focus is on the police actions and interrogation after that statement had been given.

The State also argues that this case differs from Seibert in that there was evidence in Seibert of a deliberate police practice, the "question first" strategy. In our view, that deliberate practice was not determinative in Seibert. Moreover, since Seibert had not been decided before respondent's trial, it is not surprising that defense counsel did not specifically question Investigator Smith whether he was using this strategy. Finally, the Seibert Court acknowledged that it was unlikely that law enforcement would admit it was using the "question first" technique, and thus evidence that officers were following this protocol was not necessary in order for a *Miranda* violation to be found. Seibert at footnote 6.

CONCLUSION

We affirm the Court of Appeals' decision to the extent it held that the second and third statements should have been suppressed, but reverse the decision holding that the first statement was unlawfully obtained.

AFFIRMED IN PART; REVERSED IN PART.

WALLER, J., and Acting Justice James R. Barber, III, concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs except for the finding that the third statement was obtained in a non-custodial setting.

CHIEF JUSTICE TOAL: I respectfully dissent from Part B of the majority opinion, and would reverse the court of appeals' decision finding the second and third written statements were inadmissible.

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court addressed the police practice of conducting a custodial interrogation in which no *Miranda* warnings were given until the interrogation produced a confession. *Seibert*, 542 U.S. at 604. The interrogating officers would follow the inadmissible statement with *Miranda* warnings, and then lead the suspect over the same ground a second time. *Id.* The Court concluded, "Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible." *Id.* The *Seibert* Court elaborated:

> For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 612. In describing why the *Miranda* warnings were ineffective in *Seibert*, the Court stated, "[T]he police did not advise that her prior statement could not be used." *Id.* at 616. Thus, for *Seibert* to apply, the first unwarned custodial statement must be inadmissible. This is in part because the Court was concerned that the later interrogation was a mere continuation of the earlier unwarned and inadmissible custodial interrogation. *See id.* at 616-17.

In this matter, the majority's reliance on *Seibert* is misplaced. *Seibert* applies when police conduct an initial custodial interrogation without giving *Miranda* warnings, elicit a confession, and then give *Miranda* warnings before finally eliciting the same confession a second time. *See id.* at 604. In such circumstances, the first unwarned statement is inadmissible because it violates *Miranda*'s warning requirements. *See id.*

In the present case, I agree with the majority that the first statement was admissible because Respondent was not in custody when it was given. Because there was no custodial interrogation regarding the first statement, there was no need for *Miranda* warnings. The majority states that the interrogation status changed from noncustodial to custodial when the police asked Respondent how he comforted the child. However, merely asking questions that result in inculpatory responses does not change a noncustodial interrogation into a custodial interrogation. If this were so, the nature of police investigation would be forever altered. There is no evidence in the record to suggest the circumstances of questioning changed such that a custodial interrogation resulted when the police began to elicit inculpatory information. Hence, because there was no custodial interrogation, *Seibert* does not apply.

The mere giving of *Miranda* warnings does not convert an otherwise noncustodial situation into a custodial interrogation. *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). In this case, the second and third statements were obtained after *Miranda* warnings were given. However, giving *Miranda* warnings did not convert the noncustodial interrogation into a custodial interrogation. Because the second and third statements were obtained in a noncustodial setting, I would hold the second and third statements were admissible. Thus, I would reverse the court of appeals' decision and hold the trial court correctly allowed all three statements.

KITTREDGE, J., concurs except for the finding that the third statement was obtained in a non-custodial setting.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RV Resort and Yacht Club Owners Association, Inc., Jean Littell, Kathy Fudge, Dwight Blakeslee, Herb Hook, Stan Bronson, Peg Bender, and Claudette Delpesco, on behalf of all members of the Association similarly situated Individually, Respondents,

v.

BillyBob's Marina, Inc., d/b/a Outdoor RV Resort and Yacht Club, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Thomas Kemmerlin, Special Referee

Opinion No. 26760
Heard November 18, 2009 - Filed January 19, 2010

REVERSED

James B. Richardson, Jr., of Columbia, for Petitioner.

John R. C. Bowen, of Laughlin & Bowen, of Hilton Head Island, and Stephen Spitz, of Charleston, for Respondents.

JUSTICE BEATTY: This matter concerns a fee dispute between the RV Resort and Yacht Owners Association (the Association), which operated a resort for recreational vehicle (RV) travelers, and BillyBob's Marina, Inc. (BillyBob), the successor to the resort's developer. We granted BillyBob's petition for a writ of certiorari to review the decision of the Court of Appeals, which held BillyBob had breached provisions governing the condominium regime by failing to collect and/or to remit in full three fees imposed for road maintenance, electricity, and telephone service. RV Resort & Yacht Owners Ass'n v. BillyBob's Marina, Inc., Op. No. 2007-UP-556 (S.C. Ct. App. filed Dec. 14, 2007). We reverse.

FACTS

In 1981, the RV Resort and Yacht Club (the Resort) was established as a condominium regime on Hilton Head Island in Beaufort County by Outdoor Resorts, RV Resort and Yacht Club, a South Carolina General Partnership (the developer). Covenants[1] governing the Resort and the Association were recorded in June 1981.

By-laws for the Association were instituted in a separate document that was incorporated by reference into the Covenants. The developer created the Association, a nonprofit corporation, to be responsible for operating the

[1] "Declaration of Covenants and Restrictions for Outdoor Resorts, R.V. Resort and Yacht Club AND Provisions for the R.V. Resort and Yacht Club, Owners' Association, Inc."

property and maintaining the common areas. Membership in the Association is limited to lot owners.

The Resort consists of a subdivision of approximately 200 lots on which travelers can park RVs. There is also a marina and other amenities. The developer retained sole ownership of the marina.

The lots are individually owned as part of the regime, and the lot owners have an undivided interest in the common areas, which include the water, sewer, and electrical distribution systems, the roads within the property, the parking area, and the swimming pool, bath houses, and other facilities. The Association, through its Board of Directors, has the power under Article VI of the Covenants to impose on the lot owners assessments necessary for the upkeep and maintenance of the common areas.

When the lots are not being used by the lot owner, they are available for rent to the public. Under Article VII of the Covenants, entitled Rental of Lots, the developer has "the exclusive right" to rent the lots when the lot owners are absent "at scheduled rates promulgated from time to time by the Developer." For its services, the developer was authorized to retain 50% of the gross rental amount collected on any lot, with the remaining 50% to be paid to the lot owner.

Although there was no specific provision in the Covenants, the original developer began collecting as part of the rent $2.00 per day for electricity[2], which the developer paid to the lot owners. On April 27, 1999, Dwight Blakeslee, President of the Association, wrote to the developer (as of this point, Sanwater Resorts, Inc. had taken over as the developer) to request that the developer increase the daily rental rate by $1.00, which the Association could then "siphon off" to go into a fund to finance road resurfacing; the Association also requested an increase in the electric allotment to the lot

[2] Each lot was separately metered and the utility billed the individual lot owners each month for service. There is no provision in the Covenants that requires lot owners to provide electricity or telephone service to lot renters.

owner from $2.00 to $3.00 per night due to the larger size of the vehicles utilizing the resort:

> As you know the Developer sets the rental rates for this Resort. The Board of Directors [of the Association] has two concerns that would require an increase in rates. First, we would like to be able to siphon off the rental rate one dollar per rental night to put into road resurfacing, and second, with the increase in size and technology in the rigs now renting here, we would like to increase the electric allotment to the lot owner to three dollars per rental night. This could be accomplished by raising the nightly rental rate by two dollars per night. (Emphasis added.)

The developer did not immediately respond to the Association's request for an increase in the rental rates, and the rates remained unchanged. In May 1999, the developer entered into a contract to sell its interests in the Resort (and the marina) to Robert and Arleen Stelmack, who owned BillyBob.

Thereafter, by letter of June 23, 1999, the developer agreed to the Association's request "for a $2.00 increase in the nightly rental," i.e., $1.00 for the new road fee (to be paid to the Association) and an additional $1.00 for electricity ($3.00 per night instead of $2.00, to be paid to the lot owner). In July 1999, it was agreed that the changes in the rental rates would not be effective until the next operating quarter, set to begin September 15, 1999.[3]

Following these negotiations, the developer finalized a sale of its interests to BillyBob in late August 1999, officially making BillyBob the successor to the developer at that time. After the sale, BillyBob collected the daily electricity fee of $3.00 as part of the rental charges and remitted it to the lot owners. In addition, BillyBob collected the newly-implemented road fee and remitted it to the Association.

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[3] Whether or not the developer's letter constitutes a binding amendment to the Covenants was not raised and we offer no opinion as to its efficacy.

BillyBob also initiated a higher rental charge of $2.00 extra per night for lots with telephone service, of which BillyBob paid the lot owners 50%, or an additional $1.00 per night, in accordance with Article VII of the Covenants, which required the developer to split all gross rental proceeds equally with the lot owners.

By letter dated October 17, 1999, BillyBob's president, Robert Stelmack, formally advised the Association that, although it had been temporarily collecting a "pass-through charge" of $3.00 per day for electricity from renters, effective November 1, 1999, it would raise the daily rental charge and simultaneously cancel the separate electricity pass-through charge of $3.00 per night, so that the net amount to the lot owners would remain the same.

In a second letter to the Association also dated October 17, 2009, BillyBob's president stated that, regarding the $1.00 road fee, "[i]n consideration for BillyBob's collection of this fee, it is requested that the Association pass a resolution or amendment committing the Association to maintain/repair the roads that are the property of the 'Developer' in the same manner and state of repair as the roads that are the property of the Association."

The Association rejected BillyBob's request to undertake maintenance and repairs of BillyBob's roads, and it objected to BillyBob's decision to cancel the separate electricity fee. The Association also objected to BillyBob's handling of the increased rental proceeds from lots with telephone service, asserting all of the extra rental proceeds, not just 50%, should be remitted to the lot owners because the lot owners separately paid for their telephone charges on the lots.

On November 1, 1999, BillyBob ceased collection of both the separate electricity fee and the road fee pursuant to its earlier notifications. BillyBob sent a letter to lot owners on November 7, 1999 regarding the changes. BillyBob explained that renters were confused by, and objected to, separate charges for electricity on their bills. Under the new rate structure, there

would be no separate collection for electricity charges and, in the future, any increases in the rental rates would be equally divided between the developer and the lot owners as provided by the Covenants, thus eliminating pass-through charges.

The Association (and its Board of Directors)[4] filed the current action against BillyBob alleging several of BillyBob's actions as the successor developer had violated the Covenants and other provisions. The matter was referred to a special referee, who issued an initial order dated March 19, 2004, addressing numerous matters (some of which are no longer in dispute) and ordering an accounting. As relevant here, the referee found BillyBob had violated the Covenants[5] by (1) "[r]efusing to collect and remit to [the Association] a reasonable charge imposed for use of [the Association's] roads" and (2) "[f]ailing to remit to [M]embers [members of the Association, i.e., the lot owners] 100% of monies collected from renters by BillyBob for use of Members' electricity and telephone service."

The referee further found that, under the Covenants, the Association had the exclusive right to, and had adopted with the developer's approval, certain rules and regulations, and that the Association had imposed the following charge: "The Developer is required to pay to [the Association] the sum of $1.00 per rental night for each lot rented for the road fund." The referee stated BillyBob did not have the authority to rescind the Association's rules and regulations. The referee additionally found BillyBob had departed from the course of dealing between the developer and the lot owners since 1981 by declining to collect and remit the road fee and by remitting only 50% of the electrical charges collected by it to the lot owners.

By final order filed June 30, 2006, the referee found the Association was entitled to damages of $48,447.50 for monies that BillyBob should have collected and turned over to the Association for the road fund, and that the Association was further due $145,831.50 for electricity charges and

[4] References to the Association shall include the board where appropriate.

[5] The referee found that certain amendments to the Covenants were invalid and that the applicable version was the original, 1981 version. No challenge is made to this finding.

$1,048.50 for telephone service (with the Association responsible for disbursing the electricity and telephone charges to the appropriate lot owners), for a total judgment of $195,327.50, plus attorney's fees and costs. In this final order, the referee additionally found the collection of the electricity fee "was mandated under rules adopted by the [A]ssociation under the Covenants and with the approval of the developer."

The Court of Appeals affirmed the rulings regarding the three fees, as well as another issue that is no longer in dispute, but reversed the award of attorney's fees. RV Resort & Yacht Owners Ass'n v. BillyBob's Marina, Inc., Op. No. 2007-UP-556 (S.C. Ct. App. filed Dec. 14, 2007). In affirming, the Court of Appeals stated: "The Covenants grant the Association the right to promulgate rules and regulations without BillyBob's permission. We find BillyBob was required to collect the charges on behalf of the Association and therefore affirm the referee's findings on this issue." Id. at 6-7. We granted BillyBob's petition for a writ of certiorari.

LAW/ANALYSIS

BillyBob argues the Court of Appeals erred in its decision concerning the three fees. We agree.

"Restrictive covenants are contractual in nature." Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." Id. "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998) (quoting Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (1985)).

An action for a breach of restrictive covenants that seeks monetary damages is an action at law, and we will not disturb the trial court's findings unless they are unsupported by the evidence. O'Shea v. Lesser, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (citing Townes Assocs. v. City of Greenville, 266

S.C. 81, 221 S.E.2d 773 (1976)). In contrast, an action to enforce restrictive covenants by means of injunctive relief is an action in equity, and we may find the facts in accordance with our own view of the evidence. Cedar Cove Homeowners Ass'n v. DiPietro, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). In this case, the referee expressly ordered a monetary judgment, which is legal in nature.

I. Road Maintenance Fee.

The referee and the Court of Appeals appear to hold the road fee was justified under Article VIII of the Covenants because it was implemented as the result of an unspecified regulation passed by the Association.[6] Article VIII of the Covenants, entitled Use and Occupancy, provides in section 8.11 that the Association may make and amend from time to time, without the prior written consent of the developer, "[o]ther reasonable rules and regulations governing use and occupancy . . . which do not alter or are not in contravention of any of the foregoing provisions . . . ." (Emphasis added.)

After reviewing the record, we conclude the referee and the Court of Appeals erred in finding the Association had passed some form of regulation instituting a road maintenance fee in this case. The only regulations in the record and appendix in this case -- "Basic Rules and Regulations, RV Resort & Yacht Club Owner's Association" dated May 10, 1996 and amended February 1999 -- do not contain any provision for a road fee. The Rules and Regulations concern such matters as the prohibition of clothes lines, campfires, and patio lights, as well as rules regarding pets, the use of the pool, and the use of the tennis courts. There is no formal regulation listed in this regard. Rather, the road fee was approved as an addition to the rental charge by the prior developer.

Article VIII, section 8.11, is not applicable here because there is no evidence that the road fee was established by means of a rule or regulation set by the Association governing use and occupancy.

[6] The Court of Appeals did not rely on the theory, recited by the referee, that the road fee was also justified based on a "course of dealing" that was binding on BillyBob.

The Association alternatively asserts the road fee was justifiable under Article XI of the Covenants. The Court of Appeals did not rule on this contention and it is without merit, in any event. Article XI, entitled Developer's Retention of Interest, clearly pertains to the developer's obligation to pay reasonable charges for the developer's use of water, electricity, sewage service, and other facilities on the property it retained in the Resort and its right to use the common roads without charge. These circumstances are not present here.

II. Electricity Fee.

BillyBob next challenges the ruling of the Court of Appeals that it owed sums to the Association for fees it should have collected for electricity and phone service. Specifically, the referee found BillyBob had violated unspecified provisions in the Covenants by "[f]ailing to remit to [M]embers [members of the Association, i.e., the lot owners] 100% of monies collected from renters by BillyBob for use of Members' electricity and telephone service." The referee found the Covenants permitted the Association to develop rules and regulations and that the electricity fee was enacted under these rules and regulations.

The Court of Appeals concluded "[t]he Covenants grant the Association the right to promulgate rules and regulations without BillyBob's permission. We find BillyBob was required to collect the charges on behalf of the Association and therefore affirm the referee's findings on this issue." The Court of Appeals did not expressly state, however, that the Association had implemented any particular rules or regulations bearing on this matter.

As for the electricity fee, the record does not contain a rule or regulation passed by the Association that requires the collection of an electricity fee. BillyBob was not obligated to continue the collection of a separate charge for electricity. An electricity fee of $2.00 per night was first implemented by the original developer, which collected it as part of the rental fee imposed on those renting lots at the Resort. However, all parties

understood it to be a separate and distinct charge from the lot rent. As BillyBob notes, the original developer, in its discretion, decided to add the $2.00 amount. Association board members Jean Littell and Dwight Blakeslee agree that the original developer had the right to cancel the electricity fee at any time, as would a subsequent developer. Dwight Blakeslee, who has been involved in the Resort since its inception, stated in a letter to Association members that the electricity pass-through charge "has always been a management policy set by ORA in all their RV Resorts." He also acknowledged that "[t]here is nothing in the condo document regarding this."

Prior to its departure, the developer (then Sanwater) agreed to increase the electricity fee charged to renters from $2.00 to $3.00, to take effect with the next quarter, which turned out to be after the sale of the Resort to BillyBob had been completed. BillyBob collected the fee when it first purchased the developer's interests, and then chose to eliminate the separate electricity charge.

The Court of Appeals declared, however, that the electricity fee was not part of the rental charge (and thus not under the developer's control) because it was not divided equally between the developer and the lot owners as was the remaining rental amount. Rather, it was "passed through" directly to the lot owners. While we agree with the Court of Appeals that the electricity fee was not controlled by the developer, the treatment of this fee by the prior developer is not dispositive of this issue. The prior developer voluntarily treated the electricity fee as a separate charge distinguishable from the lot rent and collected it as an unitemized portion of the rent and remitted it to the lot owners. Conversely, BillyBob ceased collecting an electricity fee altogether; therefore, there was no money to remit to the lot owners.

The record in this case does not contain a regulation passed by the Association concerning the electricity fee. Likewise, there is no regulation or covenant that requires lot owners to provide electricity to renters. Moreover,

there is no covenant that specifically requires BillyBob[7] to collect an electricity fee. Rather, it is clear from the record that the original developer implemented this charge in its discretion, and the Association later requested an increase in this amount (to be paid to the lot owners).

III. Telephone Service Charge.

BillyBob lastly challenges the finding of the Court of Appeals that it was delinquent for failing to pay over the full amount collected for telephone service to the Association.

After its purchase and assumption of the interests of the developer, BillyBob installed telephone service on three lots that it owned in the Resort and sent a letter to all lot owners encouraging them to do the same. Approximately a dozen lot owners installed telephone service on their lots. BillyBob initiated an increase of $2.00 in the nightly rental charge for lots with telephone service. BillyBob split the extra proceeds equally with the lot owners, per the Covenant provision calling for an equal division of all gross rental proceeds.

BillyBob argues the Court of Appeals erred by lumping the telephone charge in with the other issues and finding it had breached the Covenants by remitting 50%, rather than all, of the extra $2.00 rental charge collected on lots with telephone service to the lot owners. BillyBob asserts the Covenants require an equal division of the gross rental proceeds between the developer and the lot owner, which is what it did. Not many of the lots had telephone service, and BillyBob stated those that did had more rental value. BillyBob notes that to the extent the Association relies upon Article XI of the Covenants as authority for the proceeds going to the Association, this

[7] However, Article VII states "[a]s partial consideration" for the right to rent the lots the developer agrees to undertake certain advertisement obligations; no other consideration is mentioned. It is arguable that the other unspoken consideration was the requirement that the developer act in the best interest of the owners and comply with reasonable requests. This is not an issue raised to this Court, though, and we offer no opinion as to it.

provision applies to utilities and facilities used by the developer on property it has retained, not to facilities used by the renters who are staying on the lots. Thus, the Association has shown no entitlement to receive (on behalf of the lot owners) the extra rental charge for lots with telephone service.

As currently written, the Covenants require an equal sharing of all gross rental proceeds. BillyBob does not charge a separate fee for telephone service. The lots with telephone service were considered more desirable by renters and commanded a higher rental rate, just as waterfront lots, which cost the lot owners more to acquire, commanded higher rates. Consequently, BillyBob does not owe the Association additional amounts for the rental charges it collected on lots with telephone service.[8]

CONCLUSION

Based on the foregoing, the decision of the Court of Appeals regarding the three fees is

REVERSED.[9]

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

[8] The developer has the exclusive right to provide rental services of the lots. The Covenants define a lot as a "plot of land" and make no reference to the provision of electricity or telephone service as a part thereof. Moreover, there is no requirement that renters be provided electricity or telephone service. The lot owners are free to terminate electricity and telephone service at any time.

[9] The other issues determined by the Court of Appeals are not challenged here and we express no opinion in this regard.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William and Elena Tobias, Respondents,

v.

Ruby Rice, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26761
Heard November 5, 2009 – Filed January 19, 2010

REVERSED

J. Falkner Wilkes, of Greenville, for Petitioner.

Adam Fisher, Jr., of Greenville, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Tobias v. Rice, 379 S.C. 357, 665 S.E.2d 216 (Ct. App. 2008). The Court of Appeals affirmed a circuit court order refusing to set aside a $211,000 judgment entered against Petitioner, Ruby Rice. We reverse.

FACTS

William and Elena Tobias (the Tobiases) filed suit alleging they had contracted with Rice in May 2001 to lease a number of residential apartment units in Greenville. Pursuant to the lease, the Tobiases were to manage and maintain the apartments and, in exchange, they were authorized to sublet them at a higher rate than they paid to Rice, keeping the profit. According to their complaint, the Tobiases subsequently orally contracted with Rice to purchase the units in two separate buildings, for a total purchase price of $432,000.00. However, on April 1, 2004, Rice reclaimed possession of the apartments and caused trespass warrants to be issued against the Tobiases. Rice also directed the tenants to make all future payments directly to her. The Tobiases filed this suit alleging breach of contract, unjust enrichment, and conversion; they sought specific performance to enforce the alleged oral contract.

Rice hired attorney Rodman Tullis to defend her. Tullis filed an answer and counterclaim on her behalf. When Tullis did not reply to discovery requests, the Tobiases filed motions to compel. A hearing was held before Judge Hill on April 14, 2005, at which neither Tullis nor Rice appeared. Judge Hill issued an order compelling discovery; upon being advised that the Tobiases had been unable to contact attorney Tullis, the court required the Tobiases to serve both Tullis and Rice with the order. Judge Hill ordered Rice to respond to discovery within thirty days or her answer and counterclaim would be stricken. However, her answer was not stricken in compliance with this order, and the Tobiases did not seek a default judgment on this basis.

Unbeknownst to Rice at this time, and presumably to the Tobiases and their attorney as well, on April 12, 2005, attorney Tullis was suspended from the practice of law by this Court prior to the Tobiases' motion to compel discovery. See Order, Shearouse Adv. Sh. No. 17 (filed April 12, 2005).[1]

[1] Tullis was suspended for failing to comply with the mandatory reporting requirements of SCACR Rule 419 (b). Tullis was subsequently disbarred. In re Tullis, 375 S.C. 190, 191, 652 S.E.2d 395, 395 (2007).

Unfortunately, however, Rice had no means of knowing of the suspension, and Tullis was prohibited thereby from taking any action on her behalf.

After being served with Judge Hill's order, Rice attempted, to no avail, to contact attorney Tullis. Unable to reach Tullis, Rice contacted another attorney, Patricia Anderson who, on June 6, 2005, requested a thirty day extension to answer the complaint. The Tobiases' attorney denied the request, advising the time to answer had lapsed. Anderson took no further action on Rice's behalf.

On October 24, 2005, a Non-Jury Trial Notice was sent **to Tullis** advising the case was set to be called for trial the week of November 7, 2005. When the original notice was returned by the U.S. Postal Service, the Tobiases faxed and re-mailed the notice **to Tullis** on Nov. 2, 2005. No notice of the hearing was sent to Rice personally, and it is undisputed Rice never received any notice of the final hearing, which was held on November 8, 2005 before Judge Few.

At the November 8, 2005 hearing, neither Tullis nor Rice appeared. After Mr. Tobiases' very brief testimony, the trial judge held Rice in breach of the lease agreements and ordered judgment against her in the amount of $211,700.00. The court also ordered specific performance, requiring Rice to sell the two properties to the Tobiases for the agreed upon sales price of $432,000.00.[2] Counsel for the Tobiases served the final order of judgment on both Tullis and Rice.

Rice filed a *pro se* motion to reconsider on December 9, 2005, contending attorney Tullis failed to advise her of the November 8, 2005 hearing date and that she should be afforded an opportunity to be heard. Thereafter, on January 26, 2006, attorney Michael Talley filed, on Rice's behalf, a Motion to Vacate and/or Set Aside the Judgment pursuant to Rule 55(c) and Rule 60(b). Judge Few denied attorney Talley's motion in a form order dated January 11, 2007; the court did not rule on Rice's *pro se* motion to reconsider. The Court of Appeals affirmed the trial court's order.

[2] The sales price was to be offset by the Tobiases' judgment against Rice.

ISSUE

Did the Court of Appeals err in affirming the trial court's denial of Rice's post-trial motions to set aside the judgment?

DISCUSSION

The Court of Appeals found that because Rice had been personally served with Judge Hill's April 2005 order requiring her to comply with discovery, she had a duty to monitor the proceedings such that there was no excusable neglect which would warrant setting aside the judgment.[3] The Court of Appeals noted:

> We do find the overall situation troubling, especially as it pertains to the adequacy of trial notice given to Rice. As evidenced by the record, Rice's counsel of record, Mr. Tullis, was mailed and faxed notice of the mandatory roster meeting, thereby providing adequate notice of trial. On the other hand, **it is undisputed that Mr. Tullis was providing inadequate representation to Rice throughout the circuit court proceeding**s. Mr. Tullis had some disciplinary history which ultimately culminated in his disbarment in 2007 and included a suspension in 2005 for failure to comply with CLE requirements and failure to pay bar dues.

379 S.C. at 364, 665 S.E.2d at 220. (emphasis supplied). The Court of Appeals nonetheless went on to hold:

> [T]he decision of the trial court is supported by the fact that Rice was on notice of the problems she was facing with her counsel of record in June 2005 at the latest, when she was served with Judge

[3] See Rule 60(B), SCRCP (to warrant relief from judgment, Rule 60(b), SCRCP requires a particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party). Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 601 S.E.2d 885 (2009).

> Hill's order. . . For almost six months she never contacted the clerk to ensure that she was served with all relevant notices, never obtained new counsel, nor moved to relieve counsel.

Id. at 365, 665 S.E.2d at 221. We find the Court of Appeals placed an undue burden upon Rice. Rice repeatedly attempted to contact Tullis who, unbeknownst to her, was suspended. When she received the order from Judge Hill, she again attempted to contact Tullis. Receiving no answer, she attempted to hire a new attorney. She received no further communication until such time as she was served with the order issuing judgment against her.

Because of Tullis' suspension, Rice found herself in a classic *Catch 22*[4] situation which she could find no redress. When she filed a *pro se* motion to reconsider the judgment, alleging Tullis' had abandoned her, the trial court declined to rule on it, treating her as though she were represented by counsel. The Court of Appeals, however, treated her as a *pro se* litigant, with a duty to monitor her own proceedings.

If, as found by the trial court, Rice was represented by counsel, then counsel was required to notify her of the date and time of the hearing and, contrary to the Court of Appeals' opinion, it was not incumbent upon Rice to monitor the status of her proceedings.[5]

If, on the other hand, as implied by the Court of Appeals, Rice was deemed *pro se* by her attorney's suspension, then she was entitled to due process and notice of the final hearing. Accordingly, absent notice of the proceedings, Rice is entitled to relief from judgment. Accord Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process

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[4] Joseph Heller, Catch -22 (1961).

[5] The Court of Appeals relied upon Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001), for the proposition that a party has a duty to monitor the progress of his case. However, Hill involved a *pro se* litigant, not one who was represented by counsel. Further, the rule that an attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment does not prevail where, as here, the attorney abandons or withdraws from the case. Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978), citing 46 Am.Jur.2d Judgments § 737 (1969).

requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). We reverse the Court of Appeals' opinion, set aside the judgment, and remand the matter to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BEATTY, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in a separate opinion. KITTREDGE, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I concur in the result reached by the majority because I find that Rice, as a *pro se* litigant, was entitled to notice of the November 8, 2005 hearing. From the moment that attorney Tullis was suspended by this Court, Rice acted *pro se*.[6] See Rule 30(a), Rules for Lawyer Disciplinary Enforcement, Rule 413, South Carolina Appellate Court Rules (recognizing a suspended lawyer's "inability to act as an attorney"). As a *pro se* litigant, Rice was entitled by procedural due process to notice of the November 8, 2005 hearing before Judge Few. See Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008). Rice argued in both her Motion for Reconsideration and appellate briefs that she was personally entitled to notice based on due process. Rice was not afforded such notice and, consequently, the Court of Appeals erred in affirming the trial court's denial of the Motion for Reconsideration. Because Rice was not represented by Tullis at the time notice was provided by the Respondents, I would find the discussion in the Court of Appeals opinion as to whether Tullis's negligence should be imputed to Rice irrelevant.[7] Accordingly, I concur in the result reached by the majority.

[6] This Court may take judicial notice of the fact that Tullis remained suspended until he was disbarred in 2007.

[7] Moreover, in my view, Tullis's actions in this matter go well beyond mere negligence.

JUSTICE KITTREDGE: I respectfully dissent. The majority relies on an unpreserved issue to reverse the court of appeals. As noted by the court of appeals:

> Notwithstanding, Rice did not move to vacate the judgment based on excusable neglect by arguing that the negligence of her counsel should not be imputed to her due to his willful abandonment of her case, nor does she attempt to raise this ground on appeal. While arguably one could assert that this ground was raised in Rice's pro se motion to reconsider, that motion was never ruled on by the trial court and the issue was never raised on appeal. In order for an issue to be properly presented for appeal, Rice's brief must set forth the issue in the statement of issues on appeal. *See* Rule 208(b)(1)(B), SCACR; *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001). Further, it is error for the appellate court to consider issues not properly raised to it. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating appellant must provide authority and supporting arguments for his issue to be considered raised on appeal). Accordingly, we may not consider this issue.

Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008).

I vote to affirm the court of appeals.